

Living with Dignity

Sexual Orientation and Gender Identity- Based Human Rights Violations in Housing, Work, and Public Spaces in India

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PREFACE

As both an ICJ Commissioner, and as the former Chief Justice of the Delhi High Court, I am proud to introduce this ICJ report.

It not only documents the legal obstacles faced by the LGBTQ community in accessing justice for violations of their rights, it also takes a proactive and forward looking approach by offering a set of recommendations to the government and other actors to better protect the rights of LGBTQ persons - particularly their vital access to housing, work and public spaces. I trust that it will not only be used as a tool by lawyers, human rights defenders and policy-makers, but that it will contribute to enhancing public discourse on LGBTQ rights, as well as broader issues of discrimination and the rule of law in India.

This report is built upon, and should be read and understood alongside, the recent jurisprudence of the Indian courts that has developed in the wake of the Supreme Court's pronouncement in *Navtej Singh v. Union of India* that read down Section 377, which had criminalized same-sex relations. That decision, and subsequent jurisprudence, drew heavily upon international human rights law and standards in progressive and innovative ways that can act as a model for the region - indeed, the world. This ICJ report rightly celebrates these jurisprudential developments, and documents positive steps taken by the government in the wake of these decisions, but also identifies the substantial obstacles that have prevented its full implementation.

Indeed, while Section 377 can no longer be used to perpetuate and foster discrimination and violence, the abolition of that provision is only one part of a much larger and more challenging effort to ensure that the national and international legal framework adequately protects every person's right to equality, non-discrimination and dignity - regardless of their gender identity and sexual orientation. In order to make the promises of *Navtej* a reality, India needs to make its broader law and policy frameworks more inclusive of, and responsive to the concerns of, LGBTQ persons and communities. This will require an overhaul of some systems and re-development of commonly accessed institutions and spaces, including schools, workplaces, families, public transport and even streets. Human rights and rule of law principles need to be at the center of these efforts if they are to succeed.

Jawaharlal Nehru said in his speech in 1959 at an International Commission of Jurists gathering, "Rule of Law, which is so important, must run closely to the Rule of Life... It has to deal with today's problems. And yet law, by the very fact that it represents something basic and fundamental, has a tendency to be static. That is the difficulty. It has to maintain that basic and fundamental character but it must not be static, as nothing can be static in a changing world".

I find that this report makes a contribution to this effort to maintain this connection between the Rule of Law and the Rule of Life. It presents a legal analysis at the ICJ's usual high standards, but in a way that is built upon, and prioritizes the voices of the people most affected by current injustices perpetuated by discriminatory law, policy and practices. The first-person narratives in the report give life to the legal analysis. The analysis and recommendations, we hope, will make a contribution to improving the lives of affected individuals and communities.

The progress that has been made in India on LGBTQ rights and in the protection of economic, social and cultural rights more generally, is evidence both of the changing world of which Nehru spoke, as well as the law's capacity to evolve and improve - however belatedly and imperfectly. I trust that this report and its recommendations will serve as an important resource for policymakers, civil society and lawyers who are seeking to support and build upon that progress.

- Justice Ajit Prakash Shah
2nd June 2019

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EXECUTIVE SUMMARY

In a series of historic judgments, the Supreme Court of India has definitively pronounced that the rights of lesbian, gay, bisexual, transgender and queer (LGBTQ) persons are fully protected by the Indian Constitution, in recognition of the discrimination faced by individuals due to their real or perceived sexual orientation, gender identity and gender expression (SOGIE). The Court grounded its decisions in the experiences of LGBTQ persons and drew extensively on international human rights law. These judgments have been celebrated in India and around the world, and have formed the foundation of a developing jurisprudence protecting LGBTQ rights.

In the first of these judgments, *National Legal Services Authority v. Union of India (NALSA)*, the Supreme Court held that rights guaranteed in Articles 14 (equal protection of the law), 15 (non-discrimination based on sex), 16 (equality of opportunity), 19 (privacy, self-identity, autonomy and personal integrity) and 21 (the right to life with dignity) apply without exception to transgender persons. Building upon *NALSA*, in *Navtej Singh v. Union Of India (Navtej)*, the Court went a step further and ruled that Section 377 of the Indian Penal Code, 1860 (IPC), interpreted to prohibit consensual same-sex relations, was unconstitutional. The Court found that the prohibition violated the rights to equality, privacy, and the 'right to life and liberty with dignity'.

In both cases, the Court underscored the contravention of international law and standards on equality, privacy, non-discrimination and dignity guaranteed in international human rights treaties including the International Covenant Civil and Political Rights (ICCPR) and International Covenant on Economic Social and Cultural Rights (ICESCR). The Court also relied upon the Yogyakarta Principles, which address sexual orientation and gender identity in international law.

This jurisprudence establishes a foundation upon which the Government of India can, indeed *must*, introduce stronger and more sustainable policies to protect LGBTQ rights, as well as prevent SOGIE-based discrimination. It is crucial now that the Government embrace its obligations as set out by the Court and under international law to ensure the proper implementation of the decisions. This is not an easy task, and requires more than a financial commitment. It requires the adoption of a human rights and accountability-based framework for the protection of the full range of civil, cultural, economic, political and social rights. It will call for the strengthening of existing rule of law institutions and policies, and the establishment of new ones. Good faith efforts to implement these decisions will strengthen rights protections for everyone in India, and provide an opportunity for India to play a role as a global leader.

This report seeks to identify obstacles and issues that are preventing effective implementation, and contribute a set of recommendations to overcome and address them. In service of this goal, the report documents the experiences of LGBTQ persons in India seeking to live a dignified and fulfilling life at home, work and in public spaces, as well as the obstacles they face when they seek effective remedies for violations of their rights. It follows the lead of India's Supreme Court in acknowledging that the effect of a history of non-recognition and criminalization of LGBTQ identities, due to discrimination based on real or perceived SOGIE, has been the deprivation of civil, cultural, economic, political, and social rights. It also highlights the need for rights protections to be enforced

in relation to both private and public spaces if such individuals are to effectively enjoy the full range of rights protected under Indian and international law.

The research revealed that LGBTQ persons typically face SOGIE-based discrimination that affects their ability to fully enjoy their civil, cultural, economic, political, and social rights. The research documented a particularly large number of cases of discrimination and violence perpetrated against persons whose real or perceived gender expression is not in conformity with their sex assigned at birth.

The interviews documented rights violations and abuses spanning a wide range of rights protected in Indian and international human rights law. Notably recurrent were complaints about violations of the rights to housing and work, as well as difficulty in securing equal and effective access to public spaces and facilities. Such facilities included public services, which are themselves rights, such as water, sanitation and transport. These violations emanate from the conduct of State actors including State administrators and the police, as well as non-state actors.

The report has two main aims: (i) to assess the extent to which Government of India has succeeded or failed to meet its obligations under Indian and international human rights law; and (ii) to offer a set of law and policy recommendations to improve human rights protections for LGBTQ persons, and to strengthen the institutions that are responsible for safeguarding those rights.

The report divides its findings into three chapters on violations emanating from: 1) **housing** and the home environment; 2) the **workplace** and employment environment; and 3) **public spaces** or spaces generally open to the public.

Housing

LGBTQ persons often face extensive rights violations within the domain of housing and the home. This includes discrimination in the rental market; denial of housing; segregation into poorly resourced neighbourhoods; violence and harassment (from landlords, neighbours, family and police); and homelessness.

Safety and Security. LGBTQ persons frequently encounter threats to their personal safety and security from family members, landlords and neighbours. Violence in the family can take the form of physical force (including honour killings), sexual violence, wrongful confinement, forced marriage, and involuntary institutionalization (which may include the use of “corrective therapies”). In some cases, these abuses amount to torture or cruel, inhuman or degrading treatment under international law.

Discrimination. As a result of systemic discrimination by landlords, transgender persons are often effectively segregated into localities that lack basic amenities, even when they have the economic capacity to afford better housing. These locations can be distant from public transport, sanitation, running water, healthcare, and employment opportunities. Landlords who do agree to rent to LGBTQ persons often discriminate against them by charging higher rentals than other tenants.

Lack of Security of Tenure and Forced Evictions. Property owners and landlords often discriminate against LGBTQ persons, particularly transgender persons, by assuming that they are involved in illegal activities – such as sex

work. Prejudice against LGBTQ persons frequently results in denial of rental accommodation, and targeted harassment and abuse resulting in voluntary or forced eviction from their homes and accommodation. LGBTQ activists have been evicted at times in retaliation for their activism.

Homelessness. LGBTQ persons are vulnerable to homelessness as they are often forced to leave their family homes due to conflict within the family, violence or threats of violence, or are pushed out due to abuse. The precarious economic and physical conditions that often affect homeless persons may also lead LGBTQ individuals to choose sex work and begging, despite the risk of criminal prosecution, as a means to meet their basic needs. This further exposes them to hostility and abuse from police and municipal authorities and makes it difficult to access government services.

Work

LGBTQ persons experience discrimination and human rights abuses at all stages of the employment process. This includes unequal access to educational opportunities, discrimination during the recruitment process, discriminatory and gendered working conditions, and a lack of job security.

Pre-employment. Educational and training opportunities are often denied to LGBTQ persons due to harassment, bullying, and violence. School uniforms, dress codes, limitations on participation in sports, a lack of access to toilets, and even seating arrangements are often gendered in a male-female binary without appropriate accommodation for transgender persons. Difficulties in obtaining accurate gender identity documents, including school records, adversely affect employment prospects.

Recruitment. Discriminatory eligibility requirements place gender restrictions on some jobs, which effectively exclude transgender and gender non-binary persons. Invasive medical tests are sometimes imposed during recruitment processes leading to further discrimination, including the “outing” of LGBTQ persons without their consent. This discrimination is further compounded by the difficulty of obtaining required identity documents that are consistent with and match their gender identity. Documents are often refused to LGBTQ individuals by State institutions such as universities. Due to the difficulties in accessing work in the formal sector, transgender and gender non-binary persons often take up work in precarious employment spaces in the informal sector, or work as sex workers and resort to begging thereby further exposing themselves to human rights abuses.

Conditions of Work. Public and private workspaces are often gendered within a binary of male-female with resulting discriminatory effects, including the imposition of restrictive and discriminatory dress codes and standards of appearance. Where LGBTQ persons’ identities are presumed or known in the workplace, they sometimes experience discrimination and harassment including bullying, sexual harassment, assault and mis-gendering. Those who undergo transitions or sex reassignment surgery sometimes have their pre-transition work records disregarded.

Job Security. LGBTQ persons suffer impediments to job security as a result of workplace discrimination. This includes harassment, threats of harassment, and

arbitrary and/or discriminatory dismissal from work. Some areas of livelihood engaged in by some transgender persons are subject to outright criminalization.

Public Spaces

LGBTQ persons face discrimination, including harassment and physical and verbal assault, when seeking to access public spaces that are essential to the enjoyment of human rights living a fulfilling and dignified life. This discrimination affects LGBTQ persons' ability to exercise a range of human rights.

Streets and Parks. LGBTQ persons are vulnerable to gender-based violence and harassment by both State (especially police) and non-state actors in streets and parks. They are targeted and harassed by the selective application of laws that criminalize sex work, begging, and public nuisance. LGBTQ individuals are sometimes targeted even when they are not engaged in criminalized conduct.

Public Toilets. Access to public sanitation facilities and toilets in India is already problematic and discriminatory on the basis of gender for women and girls. LGBTQ persons have particular difficulties in accessing sanitation facilities in public spaces, including public transport. They are often denied access to toilets corresponding to their self-identified gender. This impacts LGBTQ persons' rights to water and to freedom of movement, which in turn adversely impacts LGBTQ persons' access to work, education and cultural spaces and public events.

Public Transport. LGBTQ access to public transport is affected by discrimination based on real or perceived gender identity and expression. Access points for travel (including ticket booking forms, security screening and toilets) are often gendered. LGBTQ persons are sometimes forced to engage in a public negotiation of their gender identity when questioned about their self-identified gender. Public transport is also a site of gender-based violence, harassment and verbal abuse.

Cultural Places and Events. LGBTQ persons experience exclusion from cultural places and events, which constitutes an impairment of their enjoyment of a range of rights. They are denied entry and equal participation, and face harassment or abuse because of their real or perceived gender identity and expression.

Private spaces generally open to public. LGBTQ persons experience discrimination in gaining access to privately-owned places that are generally open to the public in shopping malls, hotels, restaurants, privately owned transport and other private businesses. This discrimination includes outright denial of entry; refusal to provide services; invasive surveillance; and discriminatory pricing.

Recommendations

The ICJ makes the following general recommendations. A more detailed list of recommendations is also included at the end of each chapter of the report, with a specific set of law and policy recommendations affecting the exercise of rights in the domains of housing, work and in relation to accessing public spaces.

To the Parliament of India

- Enact a comprehensive anti-discrimination law, based on nationwide consultations with the aim of prohibiting discrimination on protected grounds including SOGIE, and incidental grounds such as marital status, in line with international law and standards.
- Elaborate a comprehensive Transgender Persons (Protection of Rights) Act that guarantees equal rights and non-discrimination to transgender persons, in accordance with international law and standards, based on consultation with the community, consistent with India's international human rights obligations, and in line with *National Legal Services Authority. v. Union of India*.
- Accede to the Convention Against Torture in line with recommendations of the Law Commission of India Report No.273 "Implementation of 'United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment' through Legislation October, 2017"; adopt anti-torture legislation faithfully incorporating its provisions; and ratify the Optional Protocol to the Convention against torture to provide for preventive mechanisms.
- Ratify the Optional Protocol to the ICESCR, which establishes the communication and inquiry mechanisms for the ICESCR, as well as the Optional Protocols for other international conventions including the ICCPR, CRC, CEDAW and CRPD.
- Amend the provisions in the Indian Penal Code, 1860 on sexual assault, sexual harassment, disrobing, voyeurism, stalking, rape and gang rape (Sections 354,354A, 354B, 354C, 354D, 375, 376, 376A, 376B, 376C, 376D, 509) to introduce gender-neutrality for victims in conformity with international law standards, and the recommendations made by Justice Verma Committee, in 2013.
- Repeal or amend Section 377, IPC in line with *Navtej Singh Johar & others. v. Union of India* and India's international law obligations.

To the Central Government of India

- Develop a uniform, accessible and understandable process for identity documentation for changing gender markers, in consultation with LGBTQ persons, consistent with the Supreme Court's judgment in *NALSA* and international obligations under UDHR, ICESCR among others.

To the State and Central Governments

- Ensure that all administrative bodies set up under the central

government and state governments provide critical documents including birth certificates, graduation certificates, marksheets, passports, among others in preferred name and gender, without need for proof of medical intervention, through a simple and accessible process.

- Undertake awareness-raising campaigns with the help of media outlets and civil society regarding SOGIE-based discrimination, access to justice and remedies, and State accountability.
- Implement training of all public services officers, including the police on SOGIE concerns and identification of appropriate responses from the police in consultation with LGBTQ persons.

INTRODUCTION

On September 6, 2018, the Supreme Court of India issued an historic ruling in *Navtej Singh* in which it found that Section 377 of the Indian Penal Code (IPC), which had been interpreted to prohibit consensual same-sex relations, violated the Indian Constitution and was in breach of India's obligations under international law.¹ The Supreme Court found that LGBTQ persons were entitled to the "full range of constitutional rights," and that "[e]quality does not only imply recognition of individual dignity but... equal opportunity to advance and develop their human potential and social, economic and legal interests...."²

The *Navtej Singh* decision built upon a body of past human rights jurisprudence, and in particular the language used by the Supreme Court in its August 2017 *Puttaswamy* judgment. In declaring the right to privacy to be an intrinsic part of the right to life and liberty under Article 21 of the Constitution, the Court noted that Section 377 posed "a grave danger to the unhindered fulfillment of one's sexual orientation, as an element of privacy and dignity."³ That decision, in turn, built upon the Court's April 2014 *NALSA* ruling in which it recognized the right of every individual to self-identify their gender.⁴

Notably, the Court's decisions have referred extensively to international law and standards. In *Navtej*, the Court drew widely upon international sources, including the ICCPR, the ICESCR, and complimentary standards such as the Yogyakarta Principles.⁵ In reaching its decision in *NALSA*, the Court also explained that international law and standards serve to "enlarge the meaning and content" of the fundamental rights provisions of the Indian Constitution.⁶ These decisions have bolstered efforts to ensure that LGBTQ persons have access to the full range of human rights, including both civil and political, and economic, social and cultural rights, without discrimination on the basis of their real or perceived sexual orientation, gender identity and gender expression (SOGIE).

¹ Supreme Court of India, *Navtej Singh Johar & others. v. Union of India*, (2018) 10 SCC 1, (Navtej Singh).

² *Navtej Singh*, at para. 104; also see, International Commission of Jurists, "ICJ: Briefing Paper on Navtej Singh Johar et al v. Union of India and Others", available at <https://www.icj.org/wp-content/uploads/2018/07/India-Briefing-Paper-Navtej-Advocacy-Analysis-2018-Eng.pdf> (Accessed on 8 April 2019).

³ Supreme Court of India, *KS Puttaswamy et al v. Union of India and others*, (2017) 10 SCC 1, para. 128, (Puttaswamy).

⁴ Supreme Court of India, *National Legal Services Authority. v. Union of India*, (2014) Writ Petition (C.) No. 604/2013, (NALSA); also see, International Commission of Jurists, "ICJ: Briefing Paper - Implementation of the NALSA Decision", available at <https://www.icj.org/wp-content/uploads/2016/04/India-QA-NALSA-Advocacy-Analysis-brief-2016-ENG.pdf> (Accessed on 8 April, 2019).

⁵ International Commission of Jurists, *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity, 2007*, (Yogyakarta Principles) available at <https://www.icj.org/wp-content/uploads/2012/08/Yogyakarta-Principles-publication-2007-eng.pdf> (Accessed 9 April 2019); International Commission of Jurists, *Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles, 2017* (Yogyakarta Principles plus 10), available at http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf (Accessed on 9 April, 2019)

⁶ *NALSA*, para. 53.

Indeed, in the months leading up to the publication of this report, LGBTQ activists and individuals have drawn on the precedent set by these cases to seek the enforcement of their rights to equality and non-discrimination in different spheres of life. As examples, in February 2019, a transgender woman filed a public interest litigation seeking application of reservations in admissions into educational institutions and public appointment to transgender persons in Tamil Nadu.⁷ In April 2019, the High Court of Madras recognized the right of transgender women to be married under Hindu Marriage Act, 1956.⁸

This report draws its inspiration from the words and approach of the Supreme Court in *Navtej*, and the ways that the LGBTQ community and its allies have sought to translate those words into meaningful change in peoples' lives. It builds upon the ICJ's February 2017 report "*Unnatural Offences*": *Obstacles to Justice in India Based on Sexual Orientation and Gender Identity*.⁹ That report documented the challenges that LGBTQ persons faced while seeking a remedy for human rights violations alleged to have been committed against them by police and other State actors. It focused on police harassment, violence and abuse, as well as the broader impacts of laws – particularly Section 377 of the IPC – that criminalized LGBTQ persons for their real or imputed sexual orientation and gender identity.

The current report goes beyond the human rights violations documented in that report. Following *Navtej*, NALSA and the lead of the LGBTQ community and partners, it seeks to contribute in a small way to the documentation of the obstacles that LGBTQ, and particularly transgender, persons face when they seek to protect and advance their "human potential and social, economic and legal interests". Specifically, it focuses on the domains of housing, work and access to public spaces, and the international law and standards most relevant to them.

This report includes many testimonies highlighting the multiple and compounding forms of discrimination and the denial of equal protection typically faced by LGBTQ persons due to SOGIE-based discrimination. Notwithstanding the inspiring words of the Supreme Court, LGBTQ persons continue to face discrimination, harassment and violence as a consequence of the enforcement of discriminatory laws.

Such discrimination emanates frequently from both State and non-state actors and highlights the indivisibility and interdependence of these rights in individuals' lives. This is further compounded by the fact that LGBTQ persons are often members of other marginalized groups, including those based on caste, class, socio-economic status, religion, ethnicity, disability status, migration status, age, and occupation.

⁷ High Court of Madras, *Grace Banu Ganesan v. State of Tamil Nadu & Ors.* (2019) Writ Petition No. 6052/2019 (PIL).

⁸ High Court of Madras, *Arunkumar and Sreeja v. Inspector General of Registration* (2019) Writ Petition (MD) No.4125 of 2019 and Writ Petition (MD)No.3220 of 2019.

⁹ International Commission of Jurists, "*Unnatural Offences*": *Obstacles to Justice in India Based on Sexual Orientation and Gender Identity* (February 2017), <https://www.icj.org/wp-content/uploads/2017/02/India-SOGI-report-Publications-Reports-Thematic-report-2017-ENG.pdf> (Accessed on 8 April 2019).

Thus, despite positive developments in India's law and jurisprudence, LGBTQ persons in India remain a long way from enjoying the "full range of constitutional rights" guaranteed in the Constitution.

OBJECTIVE, SCOPE AND STRUCTURE OF THE REPORT

It is in this context that frames the current report, which focuses on the discrimination, violence and a lack of equal protection under the law faced by LGBTQ persons in their exercise of human rights, including economic, social and cultural rights. It identifies the obstacles that LGBTQ persons face in accessing justice and effective remedies for rights violations and abuses and offers recommendations for preventing further discrimination and instituting positive measures so that LGBTQ persons can exercise the full range of rights protected under the Indian Constitution and international law.

The testimonies contained in this report seek to reflect the experiences of LGBTQ persons across India. These experiences may vary considerably across socio-economic class, caste, religious and regional lines. However, common experiences of stigma, discrimination, harassment and violence based on SOGIE, in private and in public spaces, emerge from across the sites of research.

This report highlights rights violation in three specific areas: housing, work, and access to public spaces. It documents the experiences of LGBTQ persons, identifies violations of international and national law, and examines the extent to which the domestic legal framework protects internationally recognized human rights.

Chapter II sets out the relevant international and domestic legal frameworks, including State obligations with regard to the rights of LGBTQ persons.

Chapter III analyzes the cycle of discrimination and violence faced by LGBTQ persons in the home environment including access to adequate housing, family violence, corrective therapy, house arrest, homelessness, discrimination in the rental housing market, violence from neighbours and property owners, and forced eviction.

Chapter IV explores the discrimination faced by LGBTQ persons at work, and in accessing work opportunities. It identifies rights violations in a number of areas including work-related educational opportunities, recruitment processes, workplace conditions, and job security.

Chapter V examines discrimination affecting access to and enjoyment of public spaces. The report focuses on public spaces that were most frequently cited as sites of violence and discrimination, including streets and parks, public transport (such as buses, trains, metro, railways, and airways), gendered public spaces (such as toilets, or security queues), and shopping centres. Some of the spaces discussed are privately owned spaces generally open to the public.

RESEARCH METHODOLOGY

The ICJ conducted qualitative research interviews between July and December 2018, following a desk review of existing literature. The primary source for the testimony and case studies that appear in the report are from personal or group interviews conducted by ICJ staff and consultants in a private and secure environment, accompanied by a social worker or activist familiar to the interviewee. This interview data has been supported by secondary research including media reports, legal treatises and research studies, as well as information obtained through the filing of Right to Information (RTI) applications.

PRIMARY RESEARCH INTERVIEWS

The report derives its findings from a series of qualitative interviews conducted across six states in India – Delhi, Gujarat, Manipur, Tamil Nadu, Kerala and Karnataka – that were selected to capture diversity in terms of geography, progress made by the legislature and the judiciary, and civil society engagement in advocacy and crisis intervention. In all six states where the research was conducted, the ICJ met with activists and human rights lawyers engaged in documentation, advocacy, crisis intervention and litigation for LGBTQ persons.

A total of 65 interviews were conducted, including nine in New Delhi, National Capital Territory (NCT); seven in Baroda, Gujarat; 15 in Imphal, Manipur; 13 in Chennai, Tamil Nadu; nine in Kochi, Kerala; and 12 in Bangalore, Karnataka. Interviews were conducted with individuals who identified as lesbian, gay, bisexual and transgender – including transgender men and transgender women, *hijra*, *nupi manbi*, and *nupa manba*.

The report does not purport to represent the full range of human rights violations faced by LGBTQ persons in the domains of housing, work and public spaces. A preponderance of the interviewees identified as transgender persons. This is in part a consequence of the substantive focus of the research on access to housing, work and public spaces. These are domains in which discrimination often takes place based on real or perceived gender expression when it is at variance with the sex assigned at birth. In many, though not all cases, acts of discrimination documented during the research process related more to real or perceived gender expression, as opposed to sexual orientation.¹⁰

While interviewees usually stated a primary identity for the purposes of research, it should be noted that sexual orientation and gender identities are often multiple and overlapping. Intersex persons were not represented in the research, as none of the individuals interviewed identified as intersex for the purposes of this report.

¹⁰ The Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity has also highlighted discrimination and violence against LGBTQ persons based on gender expression outside of the “binary understanding of what constitutes a male and a female”. Viti Muntarbhorn, Independent Expert on sexual orientation and gender identity, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, UN Doc. A/HRC/35/36, (2017), para. 16.

Interviews were conducted on an individual basis, and sometimes with a group of two or three or more persons. The interviews were primarily conducted in English or Hindi. When interviewees spoke other languages, interpreters from the LGBTQ community provided interpretation service. None of those interviewed, except for lawyers representing LGBTQ clients, have been identified by their real name out of concern for their confidentiality and safety.

SECONDARY SOURCES

In addition to the research with directly affected persons, interviews were conducted with lawyers and human rights defenders, some of whom identified as LGBTQ. Names and identifying details (e.g. location or organizational affiliation) of the human rights defenders have been withheld to maintain confidentiality.

The report also draws upon a range of secondary sources, including treatises on international and Indian law, the General Comments and jurisprudence of the United Nations Committee on Economic, Social, and Cultural Rights (ESCR Committee), the ICJ's Practitioners' Guides,¹¹ United Nations and World Bank reports, and research conducted by LGBTQ, and other, civil society organizations.

RIGHT TO INFORMATION REQUESTS

In 2005, the Indian legislature enacted the *Right to Information Act, 2005* (RTI Act) pursuant to which any Indian citizen can seek information found in public records from government authorities at the state and national levels and across all branches of government (executive, legislative and judiciary).¹²

According to the Act, the authorities must respond within thirty days to a request for information. Although the Act has become an important tool for lawyers, civil society and policy-makers, government compliance has been mixed at best, and cases of retaliation against human rights defenders for utilizing the Act have been documented.¹³

As part of this research, the ICJ filed 60 Right to Information (RTI) applications requesting information from government departments at the national and state level. These requests most often sought to seek information about the implementation of government programs aimed at the LGBTQ community.

Specifically, RTI applications were filed to obtain information relating to:

- Transgender welfare boards and schemes;
- Reservations for transgender persons in public institutions;
- Government-run shelter homes for transgender persons;
- Construction of separate toilets for transgender persons, including at airports, railway stations and metro stations; and

¹¹ International Commission of Jurists. "Archive: Practitioners' Guides series"

<https://www.icj.org/category/publications/practitioners-guides-series/> (Accessed on 8 April 2019).

¹² Right to Information Act, 2005.

¹³ The Commonwealth Human Rights Initiative has documented cases of retaliation, and published documents setting out the procedures set out under the Right to Information Act, see Commonwealth Human Rights Initiative, "Your Guide to Using the Right to Information Act, 2005," 2018,

<http://www.humanrightsinitiative.org/download/1554354610RTI%20User%20Guide%20December%202018.pdf> (Accessed 12 May 2019).

- Legal gender identification for transgender persons.

The ICJ filed 60 applications including to the following government entities:

- Public authorities responsible for issuing identity documents such as the Election Commission of India (re: Voter ID);
- Unique Identification Authority of India (re: Aadhar card);
- Public authorities responsible for developing policies on reservations including the Ministry of Human Resources and Development (education);
- Department of Personnel and Training (public employment);
- Public authorities such as the Social Welfare Departments and Women and Child Development Departments of various states responsible for maintaining shelter homes and “rehabilitative” and “protection” homes under the Immoral Traffic Prevention Act, 1956;
- Ministry of Drinking Water and Sanitation, Union of India, which is responsible for policy, planning and implementation of government program for sanitation in the country;
- Public authorities responsible for maintenance of airports (Airport Authority of India), railway stations (Ministry of Railways, Union of India), and metro stations (metro corporations in various cities); and
- Public authorities responsible for issuing and implementing schemes for the welfare of transgender persons.

Of 60 applications filed, the ICJ received responses to 49. However, the responses that were received generally lacked specific information about what was requested. In some cases, the responses claimed that no information regarding the question asked was maintained or held by that public authority in question. In others, it was simply stated that the public information officers were not required to respond to “hypothetical questions”. Further examples of responses simply stated “nil”, and failed to clarify whether the requested information was unavailable or whether the public authority had failed to take steps towards the implementation of a policy. Sadly, this pattern of response is consistent with other research on using RTI applications as a tool of research and advocacy in following up on the Supreme Court’s judgment in *NALSA*.¹⁴

Despite these challenges, in several instances the RTI requests produced useful information, which, where relevant, are included and referenced in the findings of this report. As examples:

- The response from Delhi Metro Rail Corporation revealed that the Corporation had dealt with the issue of security screening of transgender persons but had failed to develop a comprehensive policy to allow transgender persons to use the security queue of their choice; and
- The states of Karnataka and Kerala provided useful information on the status of implementation of state specific schemes for the welfare of transgender persons.

A complete list of the applications and responses can be found in Annexure II.

¹⁴ Dipika Jain *et al*, “Bureaucratization of Transgender Rights: Perspective from the ground,” *Socio-Legal Review*, Vol. 14(1), 2018, <http://www.sociolegalreview.com/wp-content/uploads/2018/05/Bureaucratization-of-Transgender-Rights%E2%80%A8Perspective-from-the-ground.pdf> (Accessed on 8 April 2019).

GENERAL LEGAL FRAMEWORK

Under international law, States have an obligation to protect all human rights including civil, cultural, economic, political, and social, economic rights. The following section briefly sets out the international human rights law framework that will be applied in the body of the report. It then surveys the applicable Indian law and jurisprudence affecting the incorporation and the application of international human rights principles in India.

While the report is framed around domains often associated with economic, social and cultural rights, such as housing and work, each chapter also addresses certain civil and political rights that are necessarily inter-related. The analysis has also been shaped by the nature of the testimonies shared during the research. For instance, in discussion of access to housing, many interviewees raised issues of physical violence and abuse, including sexual violence, which may have led to their departure from their homes or eviction from their places of residence. Likewise, in discussing access to work, issues of harassment and denial of due process inevitably arose – particularly in the context of the criminalization of sex work and its consequences.

For that reason, in addition to setting out the overall contours of the international legal framework that has emerged in respect of economic and social rights, it touches upon applicable international law and standards governing civil and political rights such as the right to life, right to liberty and security of person, right to privacy, right to freedom from torture and cruel, inhuman or degrading treatment, including sexual harassment and violence, and the right to legal gender recognition.

THE INDIVISIBILITY OF HUMAN RIGHTS

Economic, social and cultural rights (ESCR) have been historically distinguished from civil and political rights in international human rights law due in large measure to the geo-political factors that resulted in the division of human rights into two different treaties: the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). In 1993, all States of the world famously declared in the Vienna Declaration that “All human rights are universal, indivisible and interdependent and interrelated”.¹⁵ As is now well accepted, the rigid conceptual distinction between these categories of rights is inconsistent with the notion of rights as indivisible, interdependent and interrelated. In that connection the UN Office of the High Commissioner of Human Rights has called making such distinctions “artificial and even self-defeating.”¹⁶

There has nonetheless been a tendency for certain governments and other actors to treat ESCR more like development goals than enforceable rights, and

¹⁵ Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx> (Accessed 21 May 2019).

¹⁶ Office of the High Commissioner of Human Rights, Fact-Sheet 33: “Frequently Asked Questions on Economic, Social and Cultural Rights,” <https://www.ohchr.org/Documents/Publications/FactSheet33en.pdf> (Accessed 8 April 2019), pp. 8-10.

to view their fulfillment as aspirational rather than as obligatory, sometimes in defiance of what they commit to in inter-governmental forums.

The United Nations Special Rapporteur on extreme poverty and human rights put it succinctly in stating the importance of treating ESCR, such as the right to work and housing, as subject to the same regimes of accountability as civil and political rights, such as the right to be free from torture. He stated that viewing ESCR as rights and not long-term goals is crucial because such an understanding:

“recognizes and insists on the dignity and agency of all individuals... and is intentionally empowering. Whether in the home, village, school or workplace or in the political marketplace of ideas, it makes a difference if one is calling for the realization of collectively agreed and internationally recognized and defined rights to housing or education, rather than merely making a general request or demand... *the legal conception of human rights presupposes and demands accountability*, whereas characterizing economic and social rights in terms of desirable goals or development challenges leaves them hostage to a great many other considerations (emphasis added).”¹⁷

Although on balance, the report focuses on rights that are grouped as ESCR, such as the rights to housing and work, the ICJ seeks to maintain this broader frame and treat those rights with the same legal tools that it has applied to civil and political rights (such as in its analysis of CPR violations in its *Unnatural Offences* report).

STATE OBLIGATIONS TO REALIZE HUMAN RIGHTS

Economic, social and cultural Rights¹⁸ commonly refer to a collection of rights including: the right to work and rights at work; the right to social security; family rights; the right to an adequate standard of living (including water, sanitation, housing, food and clothing); the right to health (physical, mental and environmental); the right to education (primary, secondary and tertiary); and certain cultural rights (relating to cultural life, scientific progress, literary and artistic production).¹⁹

Many of these rights, established in ICESCR, are also protected in other international treaties including, for example, the Convention on the Rights of the Child (CRC), Convention on the Rights of Persons with Disabilities (CRPD) and the Convention on the Elimination of Discrimination Against Women (CEDAW).

States have an obligation to respect, protect and fulfill all human rights, including ESCR. In general, the obligations to respect and protect ESCR are of immediate effect for all States. However, under the ICESCR, in fulfilling these

¹⁷ Philip Alston, Report of the Special Rapporteur on extreme poverty and human rights, UN Doc. A/HRC/32/31, (2016), para. 8. Emphasis Added.

¹⁸ For a fuller treatment of economic, social and cultural rights (ESCR), see the ICJ’s Practitioners Guide on Adjudicating Economic, Social and Cultural Rights at National Level which provides a more detailed analysis of ESCR under international human rights law and applied in specific domestic contexts. International Commission of Jurists, “Practitioners Guide 8: Adjudicating Economic, Social and Cultural Rights at the National Level: A Practitioner’s Guide” (2014), <https://www.icj.org/wp-content/uploads/2015/07/Universal-ESCR-PG-no-8-Publications-Practitioners-guide-2014-eng.pdf> (Accessed 8 April 2019), (ICJ Practitioners’ Guide 8).

¹⁹ ICESCR, articles 9-15.

rights a State must “take steps” within “the maximum of its available resources” in order to achieve “progressively the full realization” of ESCR “by all appropriate means” and to do so “without discrimination of any kind.”²⁰ As with all human rights, States are required to take action to ensure the realization of ESCR and prevent their violation. These include legislative, judicial, executive, administrative, financial, educational, social and other measures.²¹

The obligation of States to realize human rights has been generally conceptualized as involving three types of duties: to respect, protect and fulfill.²²

The **duty to respect** requires the State to “refrain from itself interfering with the existing enjoyment of a right by rights-holders”,²³ for example through forced housing evictions or obstructing the operation of medical clinics. Such interference can be “direct” or “indirect”.²⁴ The duty to respect will also often require positive measures to prevent interference with ESCR. This may include, for example: the establishment of appropriate institutions to ensure the respect of ESCR; the provision for an effective system of administration of justice to conduct proper investigations into violations of ESCR; and the provision for effective remedy and reparation.²⁵

Under international human rights law generally, States have a **duty to protect** rights including from interference by third parties such as business enterprises and other private actors.²⁶ In this respect, international law requires States to take measures that prevent third parties from interfering with ESCR.²⁷

The **duty to fulfill**, at the most basic level, “involves establishment by a State of institutional machinery essential for the realization of rights”.²⁸ This includes measures, as examples, to “[e]nable and assist individuals to enjoy the right to work and to implement technical and vocational education plans to facilitate access to employment...”;²⁹ to “enjoy the right to social security”;³⁰ to “enjoy the right to health”;³¹ and “strengthen people’s access to and utilization of resources and means to ensure their livelihood, including food security.”³²

²⁰ ICESCR, article 2(1); ICESCR, article 2(2).

²¹ ICJ Practitioners Guide 8, *supra* note 18, at pp. 37-38.

²² See, e.g., ESCR Committee General Comment 12: The right to adequate food, UN Doc. E/C.12/1999/5; General Comment 13: The right to education, UN Doc. E/C.12/1999/10, pp. 14-20; Office of the High Commissioner of Human Rights, Principles and guidelines for a human rights approach to poverty reduction strategies, UN Doc. HR/PUB/06/12 (2005), paras. 47-48.

²³ See sources cited in the ICJ’s Practitioners Guide 8, *supra* note 18, p. 57.

²⁴ *Id.* See also, Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, 2013, <https://www.icj.org/wp-content/uploads/2012/12/Maastricht-ETO-Principles-ENG-booklet.pdf> (Accessed April 8, 2019), paras. 20-1, and sources cited to the Commentary to the Maastricht Principles, 34 Human Rights Quarterly 1084 (2012), at 1126-1133.

²⁵ ICJ’s Practitioners Guide 8, *supra* note 18, pp. 5-6.

²⁶ ICJ’s Practitioners Guide 8, *supra* note 18, pp. 59-60.

²⁷ ICJ’s Practitioners Guide 8, *supra* note 18.

²⁸ ICJ’s Practitioners Guide 8, *supra* note 18, p. 61.

²⁹ ESCR Committee, General comment No. 18: The right to work, UN Doc. E/C.12/GC/18, (2006).

³⁰ ESCR Committee, General comment No. 19: The right to social security, UN Doc. E/C.12/GC/19, (2008).

³¹ ESCR Committee, General comment No. 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4, (2000), para. 37.

³² ESCR Committee, General comment No. 12: The right to adequate food, UN Doc. E/C.12/1999/5, (1999), para. 15.

While some of these obligations are subject to progressive realization, under the ICESCR, States also have obligations that must be undertaken immediately. Such “immediate obligations” include obligations to: 1) “take steps” towards the full realization of ESCR; 2) to abstain from taking “retrogressive steps” which decrease enjoyment of ESCR; 3) to “prevent discrimination” in the enjoyment of ESCR; and 4) to ensure compliance with “minimum core obligations” relating to specific ESCR.³³

THE RIGHT TO REMEDIES FOR VIOLATIONS

As a general principle existing across all legal systems and enshrined in article 8 of the Universal Declaration of Human Rights (UDHR), every right must be accompanied by the availability of an effective remedy.

In 2005, the United Nations General Assembly (UN General Assembly) by consensus of all States affirmed unequivocally that States have a duty to provide equal and effective access to justice and effective remedies to all those who claim to be victims of a human rights violation.³⁴ As affirmed repeatedly by the ESCR Committee, the right to an effective remedy for violations of ESC rights may be satisfied by administrative or judicial remedies, though “whenever a Covenant right cannot be made fully effective without some role of the judiciary, judicial remedies are necessary.”³⁵

A range of international and domestic remedies must be made available, as appropriate to those individuals whose ESCR are violated. These obligations are detailed in the ICJ’s Practitioner’s Guide on *Adjudicating Economic, Social and Cultural Rights at National Level*³⁶ and its Practitioner’s Guide on *The Right to a Remedy and Reparation for Gross Human Rights Violations*.³⁷

In international law, civil and political rights (CPR) are protected under a number of international human rights treaties, including the ICCPR, ICESCR, CEDAW, International Convention on the Elimination of All Forms of Racial Discrimination (CERD), CRPD, CRC and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture). The obligation to provide a right to a remedy similarly applies to these rights.

³³ Office of the High Commissioner of Human Rights, Fact-Sheet 33: “Frequently Asked Questions on Economic, Social and Cultural Rights,” <https://www.ohchr.org/Documents/Publications/FactSheet33en.pdf> (Accessed 8 April 2019), pp. 15-17.

³⁴ UN General Assembly, Resolution adopted by the General Assembly: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147, (2005).

³⁵ ESCR Committee, General Comment 9: The domestic application of the Covenant, UN Doc. E/C.12/1998/24, para. 9.

³⁶ ICJ Practitioners Guide 8, *supra* note 18, pp. 214-223.

³⁷ International Commission of Jurists, “Practitioners Guide 2: The Right to a Remedy and Reparation for Gross Human Rights Violations: A Practitioner’s Guide” (Revised edition, 2018), <https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf> (Accessed on 8 April 2019).

PROTECTION OF LGBTQ RIGHTS UNDER INTERNATIONAL LAW

Under international human rights law, "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."³⁸ Such grounds include sexual orientation and gender identity or expression.³⁹

Article 26 of the ICCPR provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination on prohibited grounds. The Human Rights Committee explains that all States are required to ensure that every domestic law is in compliance with this prohibition against discrimination.⁴⁰ This includes an obligation not to discriminate against people on prohibited grounds such as "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*". "Other status" has been interpreted by the Committee to include sexual orientation and gender identity.⁴¹

As with other human rights treaties, ICESCR article 2(2) requires States to guarantee that the rights enunciated in the Covenant will be exercised without discrimination of any kind based on any status. The Committee on Economic, Social and Cultural Rights, in its General Comment No. 20 on non-discrimination in economic, social and cultural Rights, has made it clear that discrimination based on "sexual orientation" and "gender identity" is included in such status grounds.⁴² In its decisions, the ESCR Committee has also applied this principle to discrimination in access to housing.⁴³

APPLICATION OF INTERNATIONAL LAW IN INDIA

Economic, social, and cultural rights, even though not expressly protected in the Indian Constitution, have been considered by the Supreme Court of India to be fully justiciable in its interpretation of Article 21 of the Constitution in line with the Constitution's Directive Principles.⁴⁴ Indeed, India's constitutional jurisprudence is often regarded as a pioneering and leading example of the full justiciability and enforcement of ESCR.

³⁸ ICCPR, article 26.

³⁹ OHCHR, Discrimination and violence against individuals based on their sexual orientation and gender identity, UN Doc. A/HRC/29/23, (2015), para. 16.

⁴⁰ Human Rights Committee, General comment No. 18: Non-discrimination, (1989), para. 13.

⁴¹ Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 2.

⁴² ESCR Committee, General comment No. 20: Non-discrimination in economic, social, and cultural rights, UN Doc. E/C.12/GC/20, (2009), para. 32: "States parties should ensure that a person's sexual orientation is not a barrier to realizing Covenant rights... gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the work place."

⁴³ *Mohamed Ben Djazia and Naouel Bellili v. Spain*, ESCR Committee, Views of 20 June 2017, UN Doc. E/C.12/61/D/5/2015 (2017).

⁴⁴ Article 21, Constitution of India, states "No person shall be deprived of his life or personal liberty except according to procedure established by law".

Fundamental Rights and Directive Principles

The Indian Constitution includes strong and explicit human rights protections, including the right to equality before the law and equal protection of laws (Article 14), the right to non-discrimination on the basis of prohibited markers of identity (Article 15), and the right to personal life and liberty (Article 21).

Economic, social and cultural rights appear as *Directive Principles of State Policy* in the Indian Constitution (Articles 36-51). Although not directly enforceable by the courts under the terms of Article 37, the government is duty-bound to apply them in the legislating and implementation of the law. The Directive Principles relevant to this report include principles relevant to general social and economic welfare (Article 38(1)), the elimination of inequalities in status, facilities and opportunities (Article 38(2)) the right to work and make a living (Articles 39 and 41-43), the right to education (Article 45-46) and the improvement of public health (Article 47).

Notwithstanding the explicit language in Article 37 of the Constitution indicating that these directive principles are “not enforceable by any court”, the Supreme Court of India has interpreted the directive principles as informing the content of Article 21 of the Constitution. The result has been that a full range of internationally recognized economic, social and cultural rights are judicially recognized and enforceable in India.

In this regard, the Supreme Court has, in various cases, as examples, held that the right to live with dignity includes rights to housing, education, health, food and work.⁴⁵ Examples of such decisions most relevant to the analysis of LGBTQ rights in the home, at work and in public spaces will be discussed, where appropriate, throughout the report.

Prohibition Against Discrimination

Article 15’s prohibition on discrimination also extends broadly to include protections on grounds not specifically enumerated in the Indian Constitution. While Article 15(1) expressly prohibits the State from discriminating only on the grounds of “sex, race, caste, religion, place of birth”, in *NALSA*, the Supreme Court clearly affirmed that these non-discrimination protections extend necessarily both to sexual orientation and gender identity.⁴⁶ Article 15 has also

⁴⁵ See Supreme Court of India, *Francis Coralie Mullin v. Union Territory of Delhi*, (1981)SCC(Cri)212 (where the Court held that adequate nutrition, shelter, and clothing to be necessary for realizing the right to live with dignity); Supreme Court of India, *People’s Union for Democratic Reform v. Union of India*, (1982)3SCC235 (where the Court held the payment of wages less than the statutorily mandated minimum wage to be a violation of the fundamental right against forced labour); Supreme Court of India, *Chameli Singh v. State of U.P.*, (1996)2SCC549 (where the Court held the right to live with dignity to encompass the right to shelter); Supreme Court of India, *Swaraj Abhiyan v. Union of India*, (2016)7SCC498 (where the Court recognized right to live with dignity to be inclusive of the right to food).

⁴⁶ *NALSA*, para 59 states: “Articles 15 and 16 sought to prohibit discrimination on the basis of sex, recognizing that sex discrimination is a historical fact and needs to be addressed. Constitution makers, it can be gathered, gave emphasis to the fundamental right against sex discrimination so as to prevent the direct or indirect attitude to treat people differently, for the reason of not being in conformity with stereotypical generalizations of binary genders. Both gender and biological attributes constitute distinct components of sex. Biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes include one’s self image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of ‘sex’ under Articles 15 and 16, therefore, includes discrimination

been interpreted by the Court in *Anuj Garg v. UOI* to prohibit State action based on stereotypes about protected classes of persons.⁴⁷ In *Navtej Singh*, the Court directly addressed the impermissible use of stereotyping in the context of sexual orientation and gender identity.⁴⁸ The Court highlighted the consequences of stereotyping for realization of economic, social and cultural rights, underscoring that Section 377 resulted in “verbal harassment, familial fear, restricted access to public spaces and the lack of safe spaces”. Another consequence, according to the Court, was that “[i]dentities are obliterated, denying [to LGBTQ persons] the entitlement to equal participation and dignity under the Constitution. Section 377 deprives them of an equal citizenship.”⁴⁹

Discrimination within the meaning of the Constitution includes both direct and indirect discrimination.⁵⁰ *Direct discrimination* occurs when laws or policies discriminate against or favor a certain group, based on constitutionally prohibited grounds. *Indirect discrimination* occurs when laws and policies that are facially neutral are in practice discriminatory in their impact on certain individuals. In a recent case in which the Northern Railways had denied the wife and the unmarried daughter of a Railway employee access to medical privileges, the High Court of Delhi observed that “[e]ven a facially neutral decision can have disproportionate impact on a constitutionally protected class.”⁵¹

This distinction between direct and indirect discrimination is often particularly pertinent to the analysis of the discrimination faced by LGBTQ persons seeking to access rental accommodation, employment and public services. Facially neutral laws and regulations often have a disproportionately severe impact on LGBTQ persons.

on the ground of gender identity;” *Navtej Singh*, para. 393 states, “A provision challenged as being ultra vires the prohibition of discrimination on the grounds only of sex Under Article 15(1) is to be assessed not by the objects of the state in enacting it, but by the effect that the provision has on affected individuals and on their fundamental rights. Any ground of discrimination, direct or indirect, which is founded on a particular understanding of the role of the sex, would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex.”

⁴⁷ Supreme Court of India, *Anuj Garg and Others v. Hotel Association of India and Others*, 06/12/2007, Appeal (Civil) 5657 of 2007, para. 53. In this case the constitutional validity of the Punjab Excise Act was struck down by the High Court of Delhi and was being appealed by the Delhi Government. The law prohibited employment of women in premises in which liquor was being consumed and therefore was questioned based on a claim of violation of Articles 14, 15, and 19. The Court held that each person had a right to be considered for employment, and if there was discrimination, it must be on constitutionally permissible grounds. The end result of the law “[was] an invidious discrimination perpetrating sexual differences”, and “suffer[ed] from incurable fixations of stereotype morality and conception of sexual role,” (*Anuj Garg*).

⁴⁸ *Navtej Singh*, para 403. J. Dr. Chandrachud said, “The stereotypes fostered by Section 377 have an impact on how other individuals and non-state institutions treat the community. While this behaviour is not sanctioned by Section 377, the existence of the provision nonetheless facilitates it by perpetuating homophobic attitudes and making it almost impossible for victims of abuse to access justice ...”

⁴⁹ *Navtej Singh*, para. 403.

⁵⁰ *Navtej Singh*, para 394-5 (The Court found that Section 377 of the IPC was indirectly discriminatory as it had a disparate impact on one group of individuals despite being facially neutral); High Court of Delhi, *Madhu v. Northern Railways*, 247(2018)DLT198 (The Court held that the rules of the Northern Railways that govern medical insurance for the families of its employees have a disparate impact on separated or abandoned wives, and are thus, discriminatory); High Court of Delhi, *Ravina v. Union of India*, MANU/DE/3946/2015 (the Court held that bypassing the promotion of a female employee due to her inability to attend a promotional course on account of her pregnancy was indirectly discriminatory).

⁵¹ High Court of Delhi, *Madhu v. Northern Railways*, 247(2018) DLT198, para 17.

Recognition of International Law and Standards

India follows a dualist approach, which requires that for international law to have a binding effect in Indian domestic law, it must be incorporated into domestic legislation.⁵² However, the Supreme Court has, in practice shifted away from a strictly dualist approach, and has held that international treaties which are not inconsistent with the domestic law must be construed to “enlarge the meaning and content” of domestic law “and to promote the object of constitutional guarantee”.⁵³

Indeed, international law and standards have played an important role in many of the decisions issued by Indian courts. The Supreme Court has acknowledged that India has “a constitutional duty to honour ... internationally recognized rules and principles”, including those relating to ESCR and those relating to LGBTQ rights.⁵⁴ In so doing, the Court has noted that Article 51 of the Constitution requires India to “foster respect for international law and treaty obligations in the dealings of organised peoples with one another”.⁵⁵ For instance, in reaching its decision in *NALSA*, the Supreme Court drew upon both binding (such as ICESCR’s provisions) and declaratory international standards (such as the Yogyakarta Principles).

In this respect, international law must be taken into account in interpreting the Constitution and legislation. And as a matter of international law, India remains bound to uphold its international human rights law obligations, whether or not it takes the necessary steps to give effect to these obligations in domestic law. The Vienna Convention on the Law of Treaties makes clear, States “may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”⁵⁶ This principle is applicable to all the human rights treaties to which India is a Party including the ICCPR and the ICESCR.

⁵² Article 253 of the Indian Constitution states that the Parliament has the “power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body”. Constitution of India, Article 253.

⁵³ *NALSA*, para 53;

⁵⁴ *Navtej*, para. 451.

⁵⁵ *Id*; Constitution of India, Article 51.

⁵⁶ Article 31 of the Vienna Convention on the Law of Treaties, United Nations, Treaty Series, vol. 1155, p. 331, 1969, available at <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf> (Accessed on 8 April 2019).

Table: Treaties Signed or Ratified by India⁵⁷

S. No.	Treaty	Signed	Ratified
1.	International Covenant on Economic, Social, and Cultural Rights	Yes	10 April 1979
2.	Optional protocol to the International Covenant on Economic, Social and Cultural Rights	No	
3.	International Covenant on Civil and Political Rights	Yes	10 April 1979
4.	Optional Protocol to the International Covenant on Civil and Political Rights	No	
5.	Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty	No	
6.	Convention on the Elimination of All forms of Discrimination Against Women	30 July 1980	9 July 1993
7.	Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women	No	
8.	International Convention on the Elimination of All Forms of Racial Discrimination	2 March 1967	3 December 1968
9.	Convention on the Rights of Persons with Disabilities	30 March 2007	01 October 2007
10.	Optional protocol to the Convention on the Rights of Persons with Disabilities	No	
11.	Convention on the Rights of the Child	Yes	11 December 1992
12.	Optional Protocol to the Convention on the Rights of the Child	No	
13.	Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	14 November 2004	30 November 2005
14.	Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography	15 November 2004	16 August 2005
15.	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	14 October 1997	No
16.	Optional Protocol of the Convention against Torture	No	

⁵⁷ OHCHR. "Ratification Status for India".

https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=79&Lang=EN

HOUSING

Access to housing and a safe and secure living space is an indispensable aspect of living with dignity. In the words of Abhina Aher, a transgender woman and a renowned activist from Delhi, who shared her experiences with the ICJ, “any aspiration for an individual starts from four walls, it starts from their own house.”⁵⁸

The lack of adequate housing is widespread in India and is both caused by and contributes to inequality and discrimination. Upon visiting India in 2016, the United Nations Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context (UN Special Rapporteur on Adequate Housing) stressed that she was “extremely concerned for the millions of people who experience exclusion, discrimination, evictions, insecure tenure, homelessness and who lack hope of accessing affordable and adequate housing in their lifetimes.”⁵⁹ The UN Special Rapporteur on Adequate Housing identified those who are marginalized based on LGBTQ identities as being at a greater risk of homelessness.⁶⁰

LGBTQ persons are at risk of a range of human rights violations while seeking adequate housing including violence from family members, confinement in the house, and involuntary institutionalization by family members into pseudo medical institutions for “corrective therapy”. In addition, LGBTQ persons face discrimination in the rental market, which can include SOGIE-based denial of rental housing or being segregated into poorly resourced neighbourhoods, violence from landlords and neighbours, as well as vulnerability to homelessness.

This following chapter sets out the international and domestic legal standards applicable to the discrimination and violence faced by LGBTQ persons in the domain of housing. It focuses on (i) violence faced in family homes; (ii) wrongful confinement in family homes and involuntary institutionalization, including the use of ‘corrective therapies’; (iii) segregation and denial of housing to LGBTQ persons seeking rental accommodation; (iv) lack of tenure and forced eviction; and (v) homelessness.

Situated within the overarching framework of the right to housing, this chapter will examine the multiplicity of affected rights and violations. It also considers the implications of this situation from an access to justice perspective, including identifying the obstacles to seeking an effective remedy for violations.

⁵⁸ ICJ interview recorded on video, Delhi, April 2019.

⁵⁹ UN News. 2016. “Right to adequate housing in India a matter of ‘urgency’ – UN expert.” <https://news.un.org/en/story/2016/04/527482-right-adequate-housing-india-matter-urgency-un-expert> (Accessed 9 April 2019); See also OHCHR. 2016. “*Press statement by Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context Ms Leilani Farha.*” <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=19861&LangID=E> (Accessed 9 April 2019).

⁶⁰ Leilani Farha, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, UN Doc. A/HRC/31/54, (2015), para. 39.

LEGAL FRAMEWORK RELATED TO HOUSING

Discrimination and abuse faced by LGBTQ persons seeking access to housing has an adverse impact on the enjoyment of other rights such as the right to live free from torture, and cruel, inhuman, or degrading treatment, and the rights to health, liberty and personal security. These rights violations, in turn, increase LGBTQ persons' vulnerability to homelessness. This vulnerability is sometimes exacerbated by the conduct of family members, landlords and neighbours, as well as State officials, such as the police. It is made worse by the deficient legal and policy framework, and poor implementation of these laws and policies.

In this section, with the right to adequate housing serving as the overarching frame, other affected rights including the right to liberty and security of the person, freedom from torture and cruel, inhuman, or degrading treatment, and the right to privacy – are addressed. Following the guidance of the UN Special Rapporteur on Adequate Housing, the ICJ views non-discrimination and security of tenure as being "at the core" of the right to housing, and central to its analysis.⁶¹

Right to Adequate Housing in International Law

The right to adequate housing is protected under international law and Indian law.⁶² The right is entrenched in the ICESCR, as an element of the right to adequate standard of living, which also encompasses food, clothing, housing and the "continuous improvement of living conditions."⁶³ It is also recognized in the UDHR.⁶⁴ The ESCR Committee has clarified that the right to adequate housing is not merely a right to basic shelter but a "right to live somewhere in security, peace and dignity."⁶⁵ The right of LGBTQ persons to adequate housing, and to effective remedies for violation of this right, has also been affirmed in the Yogyakarta Principles.⁶⁶

⁶¹ Miloon Kothari, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, UN Doc. E/CN.4/2006/41 (2006), para. 9.

⁶² For a list of major international standards in respect of the right to adequate housing, see OHCHR. International Standards – Adequate Housing. <https://www.ohchr.org/EN/Issues/Housing/Pages/InternationalStandards.aspx> (Accessed 12 May 2019).

⁶³ ICESCR, article 11(1).

⁶⁴ UDHR, article 25(1) states "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

⁶⁵ ESCR Committee, General Comment No. 4: The right to adequate housing (article 11(1) of the Covenant), UN Doc. E/1992/23, (1991), para. 7.

⁶⁶ Yogyakarta Principles. principle 15. Principle 15 states "Everyone has the right to adequate housing, including protection from eviction, without discrimination and that States shall: a) take all necessary legislative, administrative and other measures to ensure security of tenure and access to affordable, habitable, accessible, culturally appropriate and safe housing, not including shelters and other emergency accommodation, without discrimination on the basis of sexual orientation, gender identity or material or family status; b) take all necessary legislative, administrative and other measures to prohibit the execution of evictions that are not in conformity with their international human rights obligations, and ensure that adequate and effective legal or other appropriate remedies are available to any person claiming that a right to protection against forced evictions has been violated or is under threat of violation, including the right to resettlement,

The ESCR Committee identifies the following components of the right to adequate housing:

- **Legal security of tenure**, which entails legal protections against forced evictions, harassment and other threats by State and non-state actors. LGBTQ persons lack security of tenure due to harassment and forced evictions, typically by non-state actors.
- **Availability of services, materials, facilities and infrastructure**, including anything that is essential for the health, security, comfort, and nutrition of a tenant. LGBTQ persons are often forced to stay in housing that lacks basic amenities and infrastructure.
- **Affordability of housing**, which is particularly relevant when tenants access housing through private markets. LGBTQ persons are often required to pay higher rent by landlords.
- **Habitability**, including safety, space, protection from disease and weather variations. Transgender and gender non-conforming persons are often forced to stay in poor housing. LGBTQ persons are exposed to violence not only in rental housing but often, in family homes.⁶⁷
- **Accessibility of housing**, without being subject to discrimination. LGBTQ persons, and others who are particularly vulnerable to discrimination, should be accorded priority in accessing housing.
- **Location**, including consideration of access to employment, healthcare, public transport and other facilities. LGBTQ persons, particularly transgender persons, are often forced to live in remote locations without access to employment or healthcare.
- **Cultural adequacy** requires housing to be culturally acceptable and facilitate cultural identity and diversity of housing needs.⁶⁸

The UN Special Rapporteur on Adequate Housing has also indicated that “security of the home” must form part of adequate housing which would include “privacy and security; participation in decision-making; freedom from violence; and access to remedies for any violations suffered.”⁶⁹

Article 11 of the ICESCR obliges States to respect, protect and fulfill individuals’ right to adequate housing, and provides for progressive realization taking into account resource constraints and other factors. However, ICESCR imposes an obligation on States to take certain immediate steps. These include an immediate obligation for States to demonstrate that they are utilizing the maximum available resources to realize every individual’s right⁷⁰ to at least

which includes the right to alternative land of better or equal quality and to adequate housing, without discrimination.”

⁶⁷ Juan E. Méndez, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/HRC/31/57, (2016), paras. 51 and 59 (Juan Juan E. Méndez, Report of the Special Rapporteur); CEDAW, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, UN Doc. CEDAW/C/GC/35, (2017), para. 12 states “...discrimination against women is inextricably linked to other factors that affect their lives. The Committee’s jurisprudence highlights that these may include... being lesbian, bisexual, transgender or intersex...”

⁶⁸ ESCR Committee, General Comment 4 on Right to Adequate Housing (article 11(1)) of the Covenant, UN Doc. E/1992/23, (1991), para. 8.

⁶⁹ Miloon Kothari, Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, implementation of General Assembly Resolution 60/251 of 15 March 2006, entitled “Human Rights Council,” UN Doc. A/HRC/4/18 (2007), p. 23.

⁷⁰ ICESCR, article 2(1) uses “all appropriate means.”

minimum essential levels of adequate housing.⁷¹ The minimum core obligation of the right to adequate housing includes the right to shelter.

The State also has an immediate obligation to protect individuals' right to equality in "all policies related to access, availability and affordability of housing and related-services"⁷² without discrimination based on sexual orientation and gender identity.⁷³ This includes taking legislative and other measures to prevent human rights abuses, including discrimination, by private actors.⁷⁴ The ESCR Committee has further clarified that priority should be given to disadvantaged groups, including LGBTQ persons, who are disproportionately affected by inadequate housing and homelessness, as part of the duty to provide adequate housing for all.⁷⁵

States have an immediate obligation to protect security of tenure, which includes protection from forced evictions.⁷⁶ This right is applicable to a continuum of land rights irrespective of individual legal title, and therefore protects against eviction from informal settlements.⁷⁷

For an eviction to be considered permissible, it needs to fulfill certain requirements:

- Genuine consultation with those affected;
- Adequate and reasonable notice prior to the scheduled date;
- Information on the eviction, including about proposed use of the property;
- Presence of government officials or their representatives, properly identified;
- Conducted during the day and good weather; and

⁷¹ ESCR Committee, General Comment No. 3: Nature of State Parties' Obligations, UN Doc. E/1991/23, (1990), para 10 states that States have a "minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights" and says "a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant."

⁷² Leilani Farha, Report Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, UN Doc. A/70/270, (2015), para. 21.

⁷³ ICESCR, article 2(2) read with article 11(1); ESCR Committee, General comment No. 20: Non-discrimination in economic, social, and cultural rights, UN Doc. E/C.12/GC/20, (2009), para. 11 states that "Discrimination is frequently encountered in families, workplaces, and other sectors of society. For example, actors in the private housing sector (e.g. private landlords, credit providers and public housing providers) may directly or indirectly deny access to housing or mortgages on the basis of ethnicity, marital status, disability or sexual orientation while some families may refuse to send girl children to school. States parties must therefore adopt measures, which should include legislation, to ensure that individuals and entities in the private sphere do not discriminate on prohibited grounds."

⁷⁴ *Id.*

⁷⁵ Leilani Farha, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, UN Doc. A/HRC/31/54 (2015), paras. 44 and 87.

⁷⁶ A "forced eviction" is the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.

⁷⁷ OHCHR, Fact Sheet No. 21/ Rev.1: The Human Right to Adequate Housing, (2008), p. 8. Also see, Raquel Rolnik, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, 'Guiding Principles on Security of Tenure for the Urban Poor', UN Doc. A/HRC/25/54,(2013), pp. 3-6.

- Provision of legal remedies, and legal aid.⁷⁸

If the above requirements are not met, the eviction should be treated as a forced eviction. Forced evictions from homes often result in violations of civil and political rights such as right to life, right to security of person, right to privacy, right to freedom from cruel, inhuman and degrading treatment and right to freedom of movement, among others.⁷⁹ This is particularly relevant for LGBTQ persons forced to live in informal settlements due to an inability to access housing.

The Human Rights Committee, in describing the obligation to protect the right to life under article 6 of the ICCPR, has affirmed that States must take appropriate measures to address general conditions in society such as homelessness in order to ensure the conditions necessary for a dignified life.⁸⁰

The ESCR Committee has emphasized that a State Party in whose jurisdiction “any significant number of individuals is deprived of ... basic shelter and housing... is failing to discharge its obligations under the Covenant”.⁸¹ It has clarified the positive obligations of States to prevent and address homelessness. These include an obligation to assess the extent of homelessness and inadequate housing and to prioritize those who are disadvantaged.⁸² The UN Special Rapporteur on Adequate Housing has set out the obligations in regard to homelessness as follows:

- a) States are required to show that they are using a maximum of their resources, as a matter of priority, to combat homelessness;
- b) States have an immediate obligation to strategize to end homelessness;
- c) States are required to combat the discrimination faced by homeless persons and to provide legal protections against such discrimination;
- d) States are prohibited from evicting people when it leads to homelessness. This prohibition is immediate, absolute and not subject to resource availability;
- e) All eviction must be in full consultation with those affected by it;
- f) States have an immediate obligation to ensure that their decisions are consistent with the goal of ending homelessness;
- g) States are obligated to regulate and engage with non-state actors to ensure that their actions are in accordance with person’s right to adequate housing;
- h) States must provide access to effective remedies for homelessness.⁸³

Finally, the ESCR Committee emphasizes that ESCR are interdependent, and the realization of the right to adequate housing requires that other rights be

⁷⁸ ESCR Committee, General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions, UN Doc. E/1998/22, (1997), para. 15.

⁷⁹ ESCR Committee, General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions, UN Doc. E/1998/22, (1997), para. 4; Miloon Kothari, Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Implementation of General Assembly Resolution 60/251 of 15 March 2006, entitled “Human Rights Council,” UN Doc. A/HRC/4/18, (2007), p. 13 “Annex I: Basic Principles and Guidelines on Development based Evictions and Displacement, at paras 6-7.

⁸⁰ Human Rights Committee, General Comment No. 36 on the Right to Life, UN Doc. CCPR/C/GC/36, (2018), para. 26.

⁸¹ ESCR Committee, General Comment No. 3: Nature of State Parties’ Obligations, UN Doc. E/1991/23, (1990), para. 10.

⁸² ESCR Committee, General Comment 4 on Right to Adequate Housing (article 11(1)) of the Covenant, UN Doc. E/1992/23, (1991), paras. 8(e) and 13.

⁸³ Leilani Farha, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, UN Doc. A/HRC/31/54 (2015), para. 49.

adequately protected, including the rights to privacy of self, home and family.⁸⁴ This becomes relevant for LGBTQ persons if they are denied the right to express themselves in their homes and are at risk of discrimination and abuse.

Right to Adequate Housing in Indian Law

The right to adequate housing is not expressly recognized in the Indian Constitution or codified through legislation at the national level. However, in its jurisprudence, the Supreme Court has affirmed that the Constitution implicitly protects a *right to shelter*, defined its scope broadly, and held national and state governmental authorities responsible for taking proactive steps to address homelessness, with special attention to disadvantaged populations. Although described as a right to shelter, the Court's approach to the content of this right suggests that it should be understood consistently with the right to adequate housing as protected under the ICESCR.

In the *Chameli Singh* case (1995), the Court identified the right to shelter as a fundamental right as a component of the right to life for all persons, which includes life with dignity (Article 21), and the right of all citizens to decide their place of residence and settle in any part of the country (Art. 19(1)(e)).⁸⁵

This principle has been reinforced in subsequent judicial decisions. In the *Shantistar Builders Case*, the Court held that food, clothing and shelter constituted "basic needs of man" and were therefore integral to the right to life under Article 21.⁸⁶ In *Francis Coralie Mullin*, the Court identified the State's obligation to provide "the basic necessities of life" required for the "minimum expression of the human-self," and ruled that denial of this minimum obligation is a violation of the right to life.⁸⁷

In *Olga Tellis*, the Court has also emphasized that *shelter* broadly includes "adequate living space, safe and decent structure, clean and decent surroundings, sufficient light, pure air and water, electricity, sanitation and other civic amenities like roads etc."⁸⁸ Both the reference to adequacy and the incorporation of content surpassing basic shelter means there is a convergence of the right to shelter in Indian law and the right to adequate housing under the ICESCR.

Furthermore, in *Olga Tellis*, the Court held that people living on pavements cannot be evicted without prior notice and availability of alternative accommodation, stating that "[t]he eviction of the pavement or the slum dweller not only means his removal from the house but the destruction of the house itself. And the destruction of a dwelling house is the end of all that one holds dear in life."⁸⁹ This finding has clear parallels to the ESCR Committee's

⁸⁴ ESCR Committee, General Comment 4 on Right to Adequate Housing (article 11(1)) of the Covenant, UN Doc. E/1992/23, (1991), at para 9.

⁸⁵ Supreme Court of India, *Chameli Singh v. Union of India*, (1996)2SCC549, (Chameli Singh) para. 4- 8.

⁸⁶ Supreme Court of India, *Shantistar Builders v. Narayan Khimalal Totame*, (1990) 1 SCC 520, (Shantisar Builders) at para 9.

⁸⁷ Supreme Court of India, *Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Ors.* 1980 SCC (2) 275, para. 8.

⁸⁸ *Chameli Singh*, para. 8 (emphasis added); Supreme Court of India, *Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan*, (1997)11SCC121, para. 12.

⁸⁹ Supreme Court of India, *Olga Tellis v. Bombay Municipal Corporation*, (1985)3SCC545, para 46.

requirement that adequate housing includes security of tenure and protection against forced evictions.

In *People's Union for Civil Liberties v. Union of India and Others*, the Court ordered state governments to construct permanent homeless shelters and provide information about their availability and occupancy rates.⁹⁰ The Court has also found that disadvantaged groups should be given priority access to housing schemes, and has upheld land acquisitions made for the purpose of providing free or subsidised housing to marginalized communities.⁹¹ For instance, in *Ajay Maken*, the High Court of Delhi held that "[p]rioritising the housing needs of [marginalized populations] should be imperative for a state committed to social welfare and to its obligations flowing from the ICESCR and the Indian Constitution."⁹²

The courts have not yet expressly addressed the rights of LGBTQ persons to be accorded priority in housing, but in light of *NALSA* and *Navtej* it is clear that LGBTQ persons are considered by the Supreme Court to be a vulnerable and marginalized group in need of appropriate prioritization and protection. Moreover, both judgments on LGBTQ rights and the right to shelter make reference to the ICESCR and the ESCR Committee's jurisprudence. Overall, it is clear from *NALSA* and *Navtej* that any discrimination against LGBTQ persons, including in access to housing, is prohibited by the Indian Constitution.

Other Rights Affected by a lack of Access to Housing

As set out above, a lack of access to adequate housing makes a person vulnerable to other human rights violations. In a March 2019 decision, the High Court of Delhi recognized this fact, affirming that housing is "not limited to a bare shelter over one's head, but includes the right to livelihood, right to health, right to education and right to food, including right to clean drinking water, sewerage and transport facilities."⁹³

The Right to Health

It is easy to see how the right to housing impacts, and is impacted, by the right to health protections. The ESCR Committee has affirmed the interdependency of right to health with other rights including the right to adequate housing.⁹⁴ LGBTQ persons' right to health will be violated in case of involuntary institutionalization into medical institutions by family members, as well as upon other forms of abuse faced in the family including physical, sexual and verbal abuse.

⁹⁰ Supreme Court orders dated 20 January 2010, 5 May, 2010, 19 April, 2011, 18 July, 2011, 20 September, 2011, 12 December, 2011, and February 27, 2012 in *Peoples Union for Civil Liberties v. Union of India*, W.P. (C) 196/2001.

⁹¹ *Shantistar Builders*, para. 21; High Court of Delhi, *Ajay Maken v. Union of India*, W.P.(C) 11616/2015.

⁹² High Court of Delhi, *Ajay Maken v Union of India*, W.P.(C) 11616/2015; Also, see, Housing and Land Rights Network, "Adjudicating the Human Right to Adequate Housing: Analysis of Important Judgments from Indian High Courts," (2019), https://www.hlrn.org.in/documents/Housing_Judgments_India.pdf (Accessed 12 May 2019).

⁹³ High Court of Delhi, *Ajay Maken v. Union of India*, W.P.(C) 11616/2015, para 141.

⁹⁴ ESCR Committee, General Comment No. 14: The right to highest attainable standard of health, UN Doc. E/C.12/2000/4 (2000), para. 3.

Article 12 of ICESCR provides that “[e]veryone has the right to enjoy the highest attainable standard of physical and mental health” and illustrates the steps that needs to be taken for the State to fulfill its obligations of ensuring right to health.

The ESCR Committee has emphasized that protection of the right to health, engages underlying determinants of health including safe and potable water, adequate sanitation, and healthy occupational and environmental conditions.⁹⁵

The following elements comprise the right to health:

- **Availability** of healthcare facilities, goods and services in sufficient quantity, as well as underlying determinants of health including safe and potable drinking water, adequate sanitation, and access to hospitals and clinics;
- **Accessibility** of healthcare facilities including non-discrimination on prohibited grounds including SOGIE, affordability, and access to information;
- **Acceptability** requires that all health facilities be respectful of the culture of minorities, sensitive to gender, and respect confidentiality;
- **Quality** of health facilities including that they be scientifically and medically appropriate, and of good quality.

The State has an immediate obligation to ensure that there is no discrimination in accessing healthcare as well as in accessing the underlying determinants of health on the basis of sexual orientation and gender identity, as well as other prohibited grounds of discrimination. Among the State’s core obligations is the obligation to ensure the minimum essential levels of the right to health which includes among others the obligation to “ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water.”⁹⁶

Pursuant to its obligation to protect, the State is obliged to “take measures to protect all vulnerable or marginalized groups of society...”⁹⁷ The failure of the State to take the necessary safeguards to protect persons from infringement of their right to health by third parties, includes the failure to “protect women” including LGBTQ women from violence as well as the failure to “discourage [] harmful traditional medical or cultural practices” such as corrective therapies and amounts to a violation of the State’s obligation to protect persons’ right to health.

Right to Liberty and Security of Person

Article 9 of the ICCPR provides that “[e]veryone has the right to liberty and security of person.” The Human Rights Committee has affirmed that article 9 of the ICCPR on security of person encompasses “freedom from injury to the body and the mind, or bodily and mental integrity”.⁹⁸ A lack of access to adequate housing has immediate implications for the safety and security of the person.

⁹⁵ ESCR Committee, General Comment No. 14: The right to highest attainable standard of health, UN Doc. E/C.12/2000/4 (2000), para 11.

⁹⁶ ESCR Committee, General Comment No. 14: The right to highest attainable standard of health, UN Doc. E/C.12/2000/4 (2000), para. 43.

⁹⁷ ESCR Committee, General Comment No. 14: The right to highest attainable standard of health, UN Doc. E/C.12/2000/4 (2000), para 35.

⁹⁸ Human Rights Committee, General Comment No. 35: Liberty and Security of Person (Art. 9), UN Doc. CCPR/C/GC/35, para 3.

Any arrest or detention undertaken solely to prevent or in reprisal for the exercise of a protected fundamental freedom, such as freedom of expression, freedom of assembly, freedom of association, right to privacy; or any arrest or detention based on prohibited grounds of discrimination is an arbitrary and therefore unlawful deprivation of liberty. States have a duty to protect against breach of person's liberty by third parties. Those who are arbitrarily detained are at increased risk of torture and ill-treatment.⁹⁹

Right to freedom from Torture and Cruel, Inhuman or Degrading Treatment

The UN Convention against Torture and article 7 of ICCPR guarantees everyone's right to freedom from torture and cruel, inhuman, or degrading treatment and this guarantee may not be limited or derogated from for any reason.¹⁰⁰ The Yogyakarta Principles also affirms everyone's right to freedom from torture and from cruel, inhuman, or degrading treatment for reasons related to SOGIESC.¹⁰¹

The right to be free from torture and cruel, inhuman or degrading treatment is also important for determining violations of the right to housing in the context of LGBTQ persons being confined to the home against their will, being subject to threats and harassment, being forcefully institutionalized, or subject to invasive and unnecessary medical examinations or procedures without their consent.

The Convention Against Torture includes within the definition of torture "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person",¹⁰² and defines cruel, inhuman, or degrading treatment (CIDT) as other acts that do not amount to torture.¹⁰³ States are held responsible for a failure to protect against torture and CIDT committed by third parties, including private individuals. States must exercise due diligence in stopping, preventing and sanctioning private actors.¹⁰⁴

The United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (UN Special Rapporteur on Torture) has stressed that LGBTQ persons are "disproportionately subjected to practices that amount to torture and ill-treatment for not conforming to socially constructed gender expectations", and that they risk "brutal acts, often resulting in murder."¹⁰⁵ Moreover, the UN Special Rapporteur on Torture has clarified that torture and ill-treatment meted out to LGBTQ persons is often downplayed and not recognized due to gender stereotypes.¹⁰⁶

The Committee Against Torture has clarified that States have an obligation to protect vulnerable and marginalized individuals from torture by fully prosecuting

⁹⁹ Human Rights Committee, General comment No. 27: Freedom of movement (Art. 12), UN Doc. CCPR/C/21/Rev.1/Add.9, (1999), para. 7; *Fongum Gorji-Dinka v. Cameroon*, Human Rights Committee Communication No. 1134/2002, Views of 17 March 2005, UN Doc. CCPR/C/83/D/1134/2002, para. 5.4–5.5 (house arrest); *Mpandanjila et al. v. Zaire*, Human Rights Committee Communication No. 138/1983, Views adopted on 26 March 1983, UN Doc. CCPR/C/27/D/138/1983, paras. 8 and 10.

¹⁰⁰ ICCPR, article 7.

¹⁰¹ Yogyakarta Principles, principle 15; Yogyakarta Principles plus 10, principle 35.

¹⁰² Convention Against Torture, article 1.

¹⁰³ CAT, article 16.

¹⁰⁴ CAT, General Comment No. 2: Implementation of article 2 by States parties, UN Doc. CAT/C/GC/2, (2008).

¹⁰⁵ Juan E. Méndez, Report of the Special Rapporteur (2016), *supra* note 67 at para. 57.

¹⁰⁶ Juan E. Méndez, Report of the Special Rapporteur (2016), *supra* note 67 at, paras 7 and 9.

and punishing all acts of violence and abuse against these individuals, in addition to measures of prevention and protection and to ensure that they are provided reparations. Moreover, it recognizes the importance of monitoring conditions to prevent torture and ill-treatment by private actors.¹⁰⁷

The Yogyakarta Principles Plus 10 also recognize the right to State protection from violence, discrimination and other harm by State and non-state actors.¹⁰⁸

FAILURE TO ENSURE THE RIGHT TO ADEQUATE HOUSING OF LGBTQ PERSONS IN INDIA

LGBTQ persons in India typically face serious difficulties in seeking access to rental accommodation, adverse consequences of a lack of security of tenure, and vulnerability to homelessness. This includes discrimination and sometimes violence committed against LGBTQ persons by landlords and property owners, as well as by family members in their own homes – violence that often forces them to leave the house.

Safety and Security: Violence and Harassment in the Home

It is often physical violence or its threat, and abuse that leads to LGBTQ persons leaving their family homes in the first place. It is the fear of violence that often prevents their return, or creates barriers to seeking redress for violations of their rights by landlords and property owners, or by family members themselves.

As set out above, safety and physical security are recognized as an essential part of the *habitability* component of the right to adequate housing identified by the ESCR Committee, but they are also essential to all human rights – above all the right to life, and the right to be free from torture and cruel, inhuman or degrading punishment.¹⁰⁹

Under the Convention Against Torture and the ICCPR, the State is obligated to stop, prevent, and sanction family members that commit torture or other ill-treatment and is further obligated to protect marginalized individuals, which

¹⁰⁷ CAT, General Comment No. 2: Implementation of article 2 by States parties, UN Doc. CAT/C/GC/2, (2008), para. 25.

¹⁰⁸ Yogyakarta Principles, principles 5 and 7; Yogyakarta Principles plus 10, principle 30.

¹⁰⁹ ICCPR, article 9 protects the “right to life, liberty and security of person,” ICCPR, article 7 and the Convention against Torture guarantees everyone’s right to freedom from torture and cruel, inhuman, or degrading treatment. CEDAW, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, CEDAW/C/GC/35, (2017), para 12 states “...discrimination against women is inextricably linked to other factors that affect their lives. The Committee’s jurisprudence highlights that these may include... being lesbian, bisexual, transgender or intersex...”. Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 8 states “ States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3. The Covenant itself envisages in some articles certain areas where there are positive obligations on States Parties to address the activities of private persons or entities. For example, the privacy-related guarantees of article 17 must be protected by law. It is also implicit in article 7 that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power. In fields affecting basic aspects of ordinary life such as work or housing, individuals are to be protected from discrimination within the meaning of article 26.”

includes LGBTQ persons, from torture and ill-treatment. The lack of appropriate measures by the State to provide specific protections to LGBTQ persons despite a recognized pattern of violence is itself a violation of LGBTQ persons' rights to life, liberty, security, and freedom from ill-treatment.¹¹⁰

Interviewees reported being subject to many different forms of violence, including: physical violence (often sexual violence including rape); psychological abuse (including verbal and emotional attacks); economic abuses (including extortion and deprivation of basic necessities); forced confinement; participation in "corrective therapies"; and involuntary admission to mental health institutions.

The following section will present testimony describing these experiences in three main areas: (i) physical and psychological abuse; (ii) wrongful confinement; and (iii) violence and harassment by landlords.

Physical and Sexual Violence by Family Members

Violence by family members or others in the familial household is destructive physically and emotionally, and is often a reason that LGBTQ persons leave their family homes in the first place.

LGBTQ persons of all ages are vulnerable to physical and sexual violence in their homes. When young LGBTQ persons come out to their families, they are often subjected to emotional, verbal, physical and even sexual abuse.

B, a transgender man from Chennai talked about the violence he faced when he started expressing his gender identity:

"At the age of 17, everybody at home hit me a lot and tried to break my knee. They wanted to break my knee so I can't go out. They would take an iron rod and hit my knee. But I went out of the home. After that they caught me and brought me back home. They removed all my clothes except for one *baniyan* [innerwear/vest] and scratched my body with a knife. My whole body was bleeding and it was happening in front of everyone in the family: uncle, sister, mother, brother, everybody. Nobody tried to stop the violence, and everybody wanted to hit me. They hit me a lot, but I said to myself that as a male I could not cry and I have to be very strong. I laughed at them. They said: 'you laugh at us, it very shameful of you', but I responded, 'it's shameful of you. it is not shameful for me. I will laugh with my body bleeding'."¹¹¹

C, a transgender woman and activist from Chennai said that while growing up she faced humiliation, violence and harassment at home when she started expressing her gender around the age of 15. She said:

"I was about 15 years old. My uncle was a police constable and wanted me to join the police force as well. He kept telling me to be a man and behave like a man. One day, in order to punish me for trying to express my gender (by wearing lipstick and having a feminine gait) he hung me upside down from the fan and beat me harshly. My father told me to leave home

¹¹⁰ Human Rights Committee, General Comment 35: Article 9 (Liberty and Security of person), UN Doc. CCPR/C/GC/35, (2014), para. 3; See also ESCR Committee, General Comment No. 3: Nature of State Parties' Obligations, UN Doc. E/1991/23, (1990).

¹¹¹ ICJ interview, Chennai, August 2018.

because my sister was getting married and me being a transgender at home was an issue.”¹¹²

D, a transgender man and activist from Delhi, recounted the following:

“I used to get beaten up by my father who was very violent and wanted to ‘correct’ me. Once when I was 23, he was so violent that I had to lock myself in a room because I thought he would kill me if I stepped out. Then I called the police and filed a [domestic violence] case against him. That’s when he stopped the violence. I made sure I stayed in that house because I saw that as my right. I continue to stay with my father in Delhi. We have faced difficulties in finding a house because of our Muslim identity.”¹¹³

R, who eloped with her partner Q, a transman, described how they had to keep shifting houses for months while being chased by family members and police.

“The environment had become very hostile and unsafe, so we decided to go far away to a village where it was difficult to track us. I come from the caste where honor killings are common, and prestige is a very big thing. I feel that if my parents find us, they will kill us. For a very long time, people from my village, around 150 men, were roaming around with swords looking for us at all of the railway stations.”¹¹⁴

LGBTQ persons face other forms of violence from their family members in addition to physical violence, such as being forced to conform with heteronormative familial and social expectations. E, a transgender man and activist from Imphal said:

“When I was in class nine, my brother told me to grow my hair. I refused and went to my home with short hair. My brother told me that he’d auction me off in public since I didn’t listen to him... He then shaved off my head completely. I locked myself for 2 days in my room and cried.... I was very depressed; I was feeling suicidal. He continued to harass me for years... During my father’s funeral, my family told me to wear the traditional female dress. I refused and told them that I’d only wear the male dress. I said that God has seen my inner feelings, and my father must also have seen, so it shouldn’t matter what I wear. All my family members and neighbours started shouting at me.”¹¹⁵

State obligations to prevent physical violence in the home

Violence against LGBTQ persons that takes place in the home is most often hidden from the public. This invisibility makes it particularly pernicious and difficult to address. As seen in the testimonies above, many of those subject to violence are reluctant to take their concerns to the police or seek a remedy in the judiciary. Justice sector actors, for their part, often fail to act or take actions that are prejudiced by their own views on SOGIE.¹¹⁶

States have an obligation to address violence that takes place in the home. States have an obligation to take measures to protect against private persons and entities from inflicting torture and other forms of ill-treatment. A failure to do so, including ensuring that adequate criminal provisions are in place to prosecute these violations, is itself a breach of the obligation to protect against

¹¹² ICJ interview, Chennai, August 2018.

¹¹³ ICJ interview, Delhi, August 2018.

¹¹⁴ ICJ interview, Baroda, December 2018.

¹¹⁵ ICJ interview, Imphal, October 2018.

¹¹⁶ See ICJ Unnatural Offences report (2017), *supra* note 9.

torture and cruel, inhuman or degrading treatment, guaranteed in the ICCPR (article 7 and 10), and other international law and standards.

The Human Rights Committee has made clear that this applies to acts of ill-treatment as between private individuals.¹¹⁷ CEDAW has also affirmed that protection from violence, particularly sexual violence and rape, committed by private actors, requires the State to exercise due diligence to prevent, investigate and prosecute. A failure to do so is a violation of the right not to be subjected to torture and ill-treatment and for this, the State needs to be held responsible.¹¹⁸ Protections against violence set out in the CEDAW also extend to women who are lesbian, bisexual or transgender.¹¹⁹ The UN Special Rapporteur on Torture has also stressed that LGBTQ persons are “disproportionately subjected to practices that amount to torture and ill-treatment for not conforming to socially constructed gender expectations.”¹²⁰

Legal Remedies for Sexual Violence in India

The only available remedies in Indian criminal law are for general offences of physical violence and sexual offences such as: assault;¹²¹ sexual harassment;¹²² assault or criminal force with intent to outrage modesty;¹²³ assault with intent to disrobe;¹²⁴ and rape.¹²⁵

However, in practice, it is usually very difficult to register a criminal complaint against family members because victims are unwilling to file criminal complaints due to pressure from the family and from the police to “settle”.¹²⁶ It is not surprising that most of the interviewees who reported being subject to physical and sexual violence expressed reluctance to take their cases to the criminal justice system.

¹¹⁷ The obligation of States to protect persons from conduct by private persons that would impair the enjoyment of human rights is part of general international human rights law. In regard to the ICCPR, the Human Rights Committee has affirmed “the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.” It is “implicit in article 7 that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power.” Human Rights Committee, General Comment No 31, “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant”, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para. 8.

¹¹⁸ *Vertido v Philippines*, Communication No 18/2008, Views of 16 July 2010, UN Doc. CEDAW/C/46/D/18/2008 (2010).

¹¹⁹ CEDAW, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, CEDAW/C/GC/35, (2017), para 12 states “...discrimination against women is inextricably linked to other factors that affect their lives. The Committee’s jurisprudence highlights that these may include... being lesbian, bisexual, transgender or intersex...”.

¹²⁰ Juan E. Méndez, Report of the Special Rapporteur (2016), *supra* note 67 at para 57.

¹²¹ IPC, Section 351, (IPC).

¹²² IPC, Section 354A.

¹²³ IPC, Section 354.

¹²⁴ IPC, Section 354B.

¹²⁵ IPC, Section 376.

¹²⁶ See Partners for Law in Development, “A Study of Pre-Trial and Trial Stages of Rape Prosecutions in Delhi” (2014-15), https://www.academia.edu/34262450/A_STUDY_OF_PRE-TRIAL_AND_TRIAL_STAGES_OF_RAPE_PROSECUTIONS_IN_DELHI_2014-15_ (Accessed 12 May 2019), pp. 16 and 17.

Moreover, criminal laws on rape and sexual harassment only recognize women as potential victims of sexual offences.¹²⁷ Cis-gendered gay men are not covered by specific laws relating to sexual offences.

According to the law, transgender persons with a government approved female identity document can access remedies under criminal law. At present, the police and the courts have rejected claims by transgender persons.¹²⁸ The transgender welfare policies of Kerala and Karnataka have identified the need to make laws on sexual assault, sexual harassment and domestic violence inclusive of transgender persons.¹²⁹ Justice Verma Committee, a government established advisory body, and non-governmental organizations have both advocated for gender-neutral law for victims of sexual violence.¹³⁰ However, the legislature and the judiciary have repeatedly rejected the recommendations.

A number of cases have been brought by transgender women seeking to register criminal complaints. While these remains exceptions, they serve as helpful examples of initiative taken by lawyers and judges in favor of LGBTQ persons.¹³¹

¹²⁷ IPC, Sections 354B, 354C, 354D, 375, 376, 376A, 376B, 376C, 376D, 509.

¹²⁸ A. Chatterjee, "Loopholes in third gender law aid 4 rapists to get bail" Pune Mirror, 8 August, 2017, https://punemirror.indiatimes.com/pune/civic/loopholes-in-third-gender-law-aid-4-rapists-to-get-bail/articleshow/59960595.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst; "Uttarakhand HC Seeks Reply From Police On Transgender's Plea Against Refusal Of FIR On Rape Complaint", Press Trust of India, 9 January, 2019, <https://www.livelaw.in/news-updates/uttarakhand-hc-police-transgenders-plea-refusal-fir-rape-complaint-141982> (Accessed 12 May 2019).

¹²⁹ Karnataka, India. 2017. *State Policy on Transgenders*. Government of Karnataka. <http://www.khpt.org/wp-content/uploads/2018/01/TG-policy-1.pdf> (Accessed 12 May 2019), p. 12; Kerala, India. 2015. *State Policy for Transgenders in Kerala*. Government of Kerala. <https://kerala.gov.in/documents/10180/46696/State%20Policy%20for%20Transgenders%20in%20Kerala%202015> (Accessed 12 May 2019), p. 10.

¹³⁰ The Justice Verma Committee, set up to recommend amendments to the Indian criminal law to the Government in 2012, urged that sexual offence laws be gender-neutral with respect to victims. Report of the Committee on Amendments to Criminal Law (2013), <https://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20commite%20report.pdf> (Accessed 12 May 2019). Many Indian lawyers and civil society organizations including the Lawyers Collective, Partners in Law and Development and People's Union for Civil Liberties have recommended a gender-neutral law for victims of sexual offence laws, largely in recognition of sexual violence faced by LGBTQ persons. See Lawyers Collective, "Submissions to Justice Verma Committee by Lawyers Collective", (2013), <http://feministlawarchives.pldindia.org/wp-content/uploads/submissions-by-lawyers-collective.pdf>; and Partners for Law in Development, "Submission to the Committee headed by Justice J.S. Verma on Amendment of Laws Relating to Rape and Sexual Assault", (2013), <http://pldindia.org/wp-content/uploads/2013/04/Submission-by-PLD-to-Justice-Verma-Committee.pdf>. See also Peoples Union for Civil Liberties-Karnataka, "Human Rights Violations Against the Transgender Community", (2003) <http://ai.eecs.umich.edu/people/conway/TS/PUCL/PUCL%20Report.html> (Accessed 12 May 2019), p. 29; and Partners for Law in Development and SAMA Resource Group for Women and Health, "Status of Human Rights in the Context of Sexual Health and Reproductive Health Rights in India", (2018), http://nhrc.nic.in/sites/default/files/sexual_health_reproductive_health_rights_SAMA_PLD_2018_0102019_0.pdf (Accessed 12 May 2019), p. 142.

¹³¹ High Court of Delhi, *Anamika v. Union of India*, W.P. (CrI) 2537/2018; IPC, Section 354A states "Sexual Harassment and Punishment for Sexual Harassment: 1. A man committing any of the following acts—i)physical contact and advances involving unwelcome and explicit sexual overtures; or ii)a demand or request for sexual favours; or iii)showing pornography against the will of a woman; or iv)making sexually coloured remarks, shall be guilty of the offence of sexual harassment..."

According to media accounts, in one ongoing case, the High Court of Uttarakhand has questioned the police's unwillingness to register an alleged case of rape of a transgender woman under Section 376 (punishment for rape) and registering the case under Section 377 (unnatural offences) given the *NALSA* decision. The Court had reportedly asked the government to respond within 4 weeks on January 7, 2019,¹³² and on April 30, 2019 repeated its request for a government response about the lack of implementation of *NALSA*.¹³³

In another case before the High Court of Delhi, a transgender woman, with a male legal identity document, has sought to access criminal legal remedies for sexual assault by a classmate. In this case, the police agreed to register the case under Section 354A(i)(ii)(iv) IPC, as these provisions are technically gender-neutral provisions with regard to the victim. Such provisions could be interpreted in light of *Navtej* and *NALSA* to apply to all persons irrespective of their gender and sexual orientation.

Lesbian and bisexual cis-gendered women and transgender persons with a government approved female identity document can also access civil remedies under the domestic violence law, the Protection of Women from Domestic Violence Act, 2005 (PWDVA).¹³⁴ However, the ICJ has not identified any cases in which LGBTQ women have sought a remedy pursuant to the PWDVA.¹³⁵ In light of the *NALSA* decision, in which the Supreme Court upheld the right of transgender persons to self-identify as male, female or transgender,¹³⁶ LGBTQ women could lawfully seek remedies under the Act including: (i) the right to reside in a shared household (regardless of legal title or beneficial interest); (ii) protection orders; and (iii) compensation for domestic violence.¹³⁷

The Indian Government has an obligation to take effective measures, including legislative measures, to prevent and protect LGBTQ persons from all forms of

¹³² "Uttarakhand HC Seeks reply from Police on Transgender's Plea against refusal of FIR on Rape Complaint", Press Trust of India, 9 January, 2019, <https://www.livelaw.in/news-updates/uttarakhand-hc-police-transgenders-plea-refusal-fir-rape-complaint-141982> (Accessed 12 May 2019).

¹³³ "HC asks why case of transgender's rape not lodged as rape", The Pioneer, April 30, 2019, http://www.pioneeredge.in/hc-asks-why-case-of-transgenders-rape-not-lodged-as-rape/?fbclid=IwAR3xrtw3ToD5wpziwjfDt2MVFzIvbUcmNIVFJdIm_wLVakobIqIIiLI6qTs (Accessed 12 May 2019).

¹³⁴ PWDVA is a female victim-centered federal civil law which provides a gamut of civil remedies to women victims of domestic violence. It has a wide ambit, covering a broad range of abuses or threats of abuse – physical, sexual, verbal, economic and emotional. PWDVA, Sections 2 and 3; Pursuant to the PWDVA, perpetrators of domestic violence may include any person the female victim is related to by "consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family."

¹³⁵ Sunil Mohan, a transgender queer rights activist in Bangalore, told the ICJ that the PWDVA is invoked by LBT women in negotiations with their family members (often in the presence of police) in the initial stages of a case of domestic violence. This helps in informally resolving the case. ICJ interview, Bangalore, September 2018.

¹³⁶ The Supreme Court in *NALSA v. Union of India* in 2014 has recognized the right of the transgender community to self-identify their gender and affirmed their right to equality, stipulating protection and welfare by state including through affirmative action (as part of constitutionally recognized Other Backward Classes). Further, it required the Government to implement the decision through law and policy to address the problems that transgender persons face such as "fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma" through among others, public awareness schemes, social welfare schemes, medical care facilities among others.

¹³⁷ PWDVA, Sections 18, 19, 20.

violence, as well as provide a remedy and reparation for acts of violence and abuse.

Wrongful Confinement

Some of the most egregious abuses inflicted upon LGBTQ persons, often with the complicity of family members, involve being forcibly confined to their households or placed in institutional settings against their will.

Notably, in its "Report of the Expert Committee on Issues relating to Transgender Persons, 2014", the Expert Committee, set up by the Ministry of Social Justice and Empowerment found that:

"[a]nother example of violence inflicted by family members, especially among middle class urban families is seeking services of quacks and mental health professionals to force cure on their child. Transgender and gender non-conforming youth are sometimes expelled from the family, or run away unable to bear the taunts and violence."¹³⁸

LGBTQ persons may suffer abuses amounting to denial of the rights to liberty, freedom of movement, and cruel inhuman or degrading treatment when they are forcibly confined to their homes by a partner or family member, often with the complicity or cooperation of the police, medical professionals or other actors.

H, a transgender man from Imphal reported that he faced wrongful confinement at home under threat of physical violence upon expressing his gender identity and refusing to wear feminine clothing.

"I was locked in a dark room by my father and was thrashed till the stick broke and even after that my father used to hit me with his hands and feet."¹³⁹

In another case, I, a transgender woman from Kochi reported that when her mother found feminine clothing in her luggage, she locked her in her room and called the police, who took her to the police station and asked her invasive questions.

"I asked [my mother] why she had locked me inside and she told me that she locked me in mistakenly. But in reality, the family had trapped me in the room so that they could call the police home."¹⁴⁰

The police and her parents then took her to a psychiatric hospital, where she was locked in a room, and kept for the two months.¹⁴¹

¹³⁸ See Ministry of Social Justice and Empowerment, "Report of The Expert Committee on Issues relating to Transgender Persons", (2014), <http://www.socialjustice.nic.in/writereaddata/UploadFile/Binder2.pdf> (Accessed 12 May 2019), pp. 43 – 47. The Expert Committee was set up by the Ministry of Social Justice and Empowerment to "study the problems of the Transgender Community and suggest suitable measures to address them." The Committee included representatives from the transgender community, representatives from state governments, among others.

¹³⁹ ICJ interview, Imphal, October 2018.

¹⁴⁰ ICJ interview, Kochi, October 2018.

¹⁴¹ After she was brought back home, she finally managed to escape but her parents filed a *habeas corpus* petition to force her to appear in court. The High Court of Kerala however, rejected the parents' *habeas corpus* petition. High Court of Kerala, *Tessy James v. The Director General of Police, Thiruvananthapuram and Ors.*, WP(CrI.) No. 215 of 2018.

International Law and Indian Law on Wrongful Confinement

Wrongful confinement may engage the State responsible for a number of rights protected under the ICCPR, including the right to liberty (article 9), freedom from torture or cruel, inhuman or degrading treatment (article 7), and, most often, freedom of movement (article 12 (1)). Article 12(1) in particular states that: "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence".

Where the basis for limiting or restricting a person's freedom of movement or right to liberty is a prohibited ground of discrimination, such restriction or deprivation of liberty will be unlawful and arbitrary. In that connection, the Working Group on Arbitrary Detention has clarified that detaining persons on the basis of their SOGIE is a violation of their right against arbitrary detention under ICCPR.¹⁴²

Under India's domestic law, forced detention in one's home or in a medical center is a violation of an individual's right to life and liberty guaranteed under Article 21. Moreover, it amounts to offences of wrongful restraint and wrongful confinement as per the IPC, which carries sentences of up to three years under certain circumstances.¹⁴³

The High Court of Delhi has held that forcible confinement of an adult daughter by parents in a mental health institution is a violation of her fundamental rights in *Dr. Sangamitra Acharya & Anr. v. State*. In that case, the Court held that, as an adult, the woman had the right to determine where and with whom she wanted to live, and her parents could not interfere with her right to personal autonomy. The Court ordered the parents and the State to compensate the woman for her wrongful confinement.¹⁴⁴ In light of *NALSA*, given the equal constitutional protection and recognition of LGBTQ rights, this precedent should be applied to cases of LGBTQ persons who are wrongfully confined or forced into institutions against their will.¹⁴⁵

In the case of *Shivani Bhatt v. State of NCT of Delhi* (High Court of Delhi),¹⁴⁶ Shivy, a 19-year-old transman was brought to India from the United States where he was studying at a university, because his parents wanted him to be "fixed". They took away his phone and travel documents, after which Shivy contacted activists in Delhi seeking legal aid. When his family filed a kidnapping case against the activists, Shivy went to the High Court of Delhi with a writ petition. Shivy's parents ultimately withdrew the criminal complaint and agreed to return his documents. The Court recorded this settlement and directed the police to refrain from such conduct in the future.

¹⁴² UNCHR, Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/2003/8, (2002), paras. 68-70.

¹⁴³ IPC, Sections 339-348.

¹⁴⁴ High Court of Delhi, *Dr. Sangamitra Acharya and Anr. v. State (NCT of Delhi) and Others*, W.P. (CRL.) 1804/2017 & CM No. 9963/2017.

¹⁴⁵ Several other recent decisions of the Supreme Court have reiterated the importance of respecting personal liberty of adults, especially adult women, and their right to choose partners. These include Supreme Court, *Soni Gerry v. Gerry Douglas*, CONMT. PET. (C) 1606/2017, Supreme Court of India, *Shafin Jahan v. Asokan*, Crl.A.366/2018, and Supreme Court of India, *Common Cause v. Union of India*, WRIT PETITION (CIVIL) NO. 215 OF 2005.

¹⁴⁶ High Court of Delhi, *Shivani Bhat vs. State of NCT of Delhi and Ors.*, 223(2015)DLT391.

In India, the writ of *habeas corpus* can be used not only in respect of detention by State authorities, but also against non-state actors such as family members. When family members hold an LGBTQ identifying family member against their will, the partner of the LGBTQ person or a civil society organization sometimes files a *habeas corpus* petition stating that the individual has been unlawfully detained, asking the court and police to intervene and to produce the person in court.

Since *Navtej* the courts have enforced *habeas corpus* petitions in favor of LGBTQ persons who have been unlawfully confined by family members. For example, in November 2018, the High Court of Delhi ruled in favour of a married cis-woman, wherein the transman partner had filed a *habeas corpus* petition for the production of the woman stating that she was being kept captive by her parents.¹⁴⁷ The Court found that her choice to live with the petitioner is “within the ambit of inalienable human and fundamental rights.”¹⁴⁸

In an October 2018 case, the High Court of Kerala issued an order in response to a *habeas corpus* petition for the release of a lesbian woman who had been admitted to a mental hospital by her parents.¹⁴⁹

Finally, in a February 2019 case, the High Court of Kolkata issued an order that the individual has a right to live with the person of her choice in response to a *habeas corpus* petition brought by one member of a lesbian live-in couple, who had alleged that her lesbian partner was being confined by her mother and her relatives.¹⁵⁰

The Use of “Corrective Therapy”

LGBTQ persons are sometimes forced to undergo “corrective therapy”. Corrective therapy can include forced counseling, forced hormone treatments, electric shocks,¹⁵¹ and other “treatment” by their family members acting together with medical practitioners and police officials.¹⁵²

These treatments serve no legitimate medicinal purpose, are typically medically and psychologically harmful, and breach standards of professional medical ethics. During the course of administering these therapies, LGBTQ persons are often wrongfully confined in these centers or their homes.¹⁵³ Lesbian women in

¹⁴⁷ High Court of Delhi, *Mann@Manjusha Yadav v. State*, W.P. (Crl.) No. 3451/2018.

¹⁴⁸ High Court of Delhi, *Mann@Manjusha Yadav v. State*, W.P. (Crl.) No. 3451/2018, para. 15.

¹⁴⁹ High Court of Kerala, *Sreeja S. v. Commissioner of Police*, W.P. (Crl.) No. 372/2018.

¹⁵⁰ High Court of Kolkata, *Shampa Singh v. State of West Bengal*, W.P. 23120(W)/2018.

¹⁵¹ S. Sebastian, “Delhi doctors use electric shock to treat homosexuality” *India Today*, 27 May 2015,

<https://www.indiatoday.in/mail-today/story/homosexuality-cure-delhi-doctors-exposed-conversion-therapy-254849-2015-05-27> (Accessed 12 May 2019).

¹⁵² R. Jain, “Parents use ‘corrective rape’ to ‘straight’en gays” *Times of India*, June 1, 2015, <https://timesofindia.indiatimes.com/life-style/relationships/parenting/Parents-use-corrective-rape-to-straighten-gays/articleshow/47489949.cms> (Accessed 12 May 2019); See Sappho For Equality, “Vio Map: Documenting and Mapping Violence and Rights Violation Taking Place in Lives of Sexually Marginalised Women to Chart Out Effective Advocacy Strategies,” (2011), <http://www.sapphokolkata.in/wp-content/themes/responsive/core/images/Vio-Map%20Report.pdf> (Accessed 12 May 2019).

¹⁵³ Deep and Dr. Raman, “Sexual Orientation Change Efforts by Medical Professionals in India”, *Orinam* (2012), <http://orinam.net/sexual-orientation-change-efforts-by-medical-professionals-in-india> (Accessed 12 May 2019).

particular face pressure to marry, as well as risk more extreme violence such as honor killing.¹⁵⁴

In May 2001, the Naz Foundation filed a formal complaint with the National Human Rights Commission of India (NHRC) about a reported case of psychological abuse of a boy in his early twenties. He was forced by his parents to undergo nearly four years of “conversion therapy” for gay persons at the All India Institute of Medical Sciences (AIIMS), established by the State and the largest hospital in the National Capital Territory of Delhi.¹⁵⁵ However, the NHRC rejected the complaint on the grounds that “Section 377 outlawed homosexuality and therefore the conversion treatment was not against the law.”¹⁵⁶

I, a transgender woman from Kochi reported that when her mother found female clothing in her bags one day that I used when she performed as a singer, her mother filed a police complaint against her. The police and the parents then forced her to stay in a mental health institution for two months and undergo corrective therapy.

“I had to stay in the institution. I had no mode of communication with the outside world. Since I started getting the injections, I started having emotional troubles as well. I felt very drowsy. I had an individual room, but there was no clock there. I had no idea regarding what was happening outside. But once a day around 5 PM, we were allowed to go outside. Initially, I was in such a situation that the room was always locked from outside. But there was no lock inside the room, so I had no privacy....

When I asked the [nurse] why the injections were needed, I was told that it was to make me proper, to make me behave in the society, to reduce my faults. They said I should take the injection to become a proper and normal person...the nurse told me that it was an injection for hormone variation, for the body to become normal. The nurse said that she couldn't tell me more because that might affect her job...

My voice was naturally female, so they were giving me some extra tablets, which I didn't take. They realized that I was not taking the tablets. So once they came and forcefully held my legs and hands and injected something into me. In 2 months, they did this 18 times. I believe that was some male hormone – testosterone. Now I have [facial] hair and my voice has also changed a little, so I believe it's because of that.”¹⁵⁷

In another case, J, a queer woman from Kochi recounted that she was harassed at home and was forced into a heterosexual marriage, following which she ran away with her partner, who identifies as a transgender man. Her parents filed a missing persons complaint and as a result she was forced to go to Court to testify so that she could stay with her partner without police interference.

¹⁵⁴ R. Karthikeyan, “Lesbian women: The victims of domestic violence we don't want to talk about” 30 June 2016, News Minute, <https://www.thenewsminute.com/article/lesbian-women-victims-domestic-violence-we-dont-want-talk-about-45690> (Accessed 12 May 2019).

¹⁵⁵ Tarunabh Khaitan, “NHRC, the law and the police”, Law and Other Things (2009), <https://lawandotherthings.com/2009/07/naz-foundation-and-nhrc/> (Accessed 12 May 2019); See Arvind Narrain and Vinay Chandran, *Nothing to Fix: Medicalisation of Sexual Orientation and Gender Identity*, Yoda Press, 2016.

¹⁵⁶ Preston G. Johnson, “Lessons for Legalizing Love: A Case Study of the Naz Foundation's Campaign to Decriminalize Homosexuality in India,” Capstone Collection, 2017, <https://digitalcollections.sit.edu/capstones/3063> (Accessed 12 May 2019), pp. 36.

¹⁵⁷ ICJ interview, Bangalore, September 2018.

"We had come to the court to testify and as we came out of the judge's room, my parents surrounded us and took me away by force. They also beat up my partner and accused him of kidnapping me and running a sex racket. They took me to a mental hospital. I was very scared. I spent 15 days there. Other patients would keep asking me why I'm there and I had to make up some fake illness because I couldn't tell them the truth."¹⁵⁸

Bindu Doddhatti, a human rights lawyer from Bangalore told the ICJ of a case where a lesbian woman was forcefully separated from her partner (a transgender man) and admitted to a mental hospital.

"Their neighbours got together and filed a police complaint saying these people are a public nuisance and that they have aggravated mental health issues. Post the complaint, the police came to the house and asked them to come to the police station. They went to the police station and gave a statement. After that day, the woman's parents came with some staff from a mental hospital accompanied by the police. They forcefully dragged the woman. She kept saying she needs a lawyer and that she is not mentally ill. She is almost 40 years old. They took her to the hospital and she was forcefully admitted."¹⁵⁹

Law and Standards on 'Corrective Therapies'

Under international law and standards, medically harmful procedures which are administered without consent on LGBTQ persons in an attempt to "correct" them, impairs enjoyment of their right to health (ICESCR article 12)¹⁶⁰ and constitutes a form of torture or cruel, inhuman or degrading treatment (ICCPR article 7). Such harmful procedures may also violate LGBTQ persons right to privacy (ICCPR article 17). The ESCR Committee expands on the content of right to sexual and reproductive healthcare of LGBTQ persons:

"Non-discrimination, in the context of the right to sexual and reproductive health, also encompasses the right of all persons, including lesbian, gay, bisexual, transgender and intersex persons, to be fully respected for their sexual orientation, gender identity and intersex status... Likewise, regulations requiring that lesbian, gay, bisexual transgender and intersex persons be treated as mental or psychiatric patients, or requiring that they be "cured" by so-called "treatment", are a clear violation of their right to sexual and reproductive health".¹⁶¹

According to the UN Special Rapporteur on Torture, such "corrective" procedures may lead to "severe and life-long physical and mental pain and suffering" and can "amount to torture".¹⁶² The UN Special Rapporteur has therefore called on States to repeal any law that allows for intrusive treatments including

¹⁵⁸ ICJ interview, Kochi, October 2018.

¹⁵⁹ ICJ interview, Bangalore, September 2018.

¹⁶⁰ ESCR Committee, General comment No. 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4, (2000), para. 8.

¹⁶¹ ESCR Committee, General comment No. 22: The right to sexual and reproductive health, UN Doc. E/C.12/GC/22, (2016), para. 23.

¹⁶² Juan E. Méndez, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/HRC/22/53, (2013), para. 48 (Juan E. Méndez, Report of the Special Rapporteur (2013)); Anand Grover, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, UN Doc. A/HRC/14/20, (2010), para. 23.

“reparative therapies or conversion therapies” without consent, and to provide special protections to LGBTQ persons.¹⁶³

Yogyakarta Principle 18 on protection from medical abuses further states that “person's sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed.” The United Nations Special Rapporteur on the right on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (UN Special Rapporteur on the Right to Health) has also criticized reparative therapies as having “potential to cause significant psychological distress and increase stigmatization.”¹⁶⁴

For its part, the Supreme Court of India has clarified that right to life under Article 21 cannot exist without privacy, which includes physical privacy (bodily integrity), informational privacy (confidentiality and data security), and decisional privacy (autonomy and choice in decision-making). All of these are violated in the case of “corrective therapies.”¹⁶⁵ The Supreme Court has also found that sexual orientation is protected under this definition of the right to privacy.¹⁶⁶

The need for free¹⁶⁷ and informed consent¹⁶⁸ of the patient before conducting medical treatment is clearly set out by the Supreme Court and High Court of Karnataka¹⁶⁹ as well in the Indian Medical Council Regulations of 2002, which lays down the code of ethics to which medical professionals must adhere.¹⁷⁰ The Supreme Court and High Court of Karnataka have held that the doctor must obtain the individual's consent before performing any procedure.¹⁷¹ Moreover, it

¹⁶³ Id. Juan E. Méndez, Report of the Special Rapporteur (2013) at para. 88. The United Nations Special Rapporteur calls upon states to “repeal any law allowing intrusive and irreversible treatments, including forced genital-normalizing surgery, involuntary sterilization, unethical experimentation, medical display, “reparative therapies” or “conversion therapies”, when enforced or administered without the free and informed consent of the person concerned.

¹⁶⁴ Anand Grover, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, UN Doc. A/HRC/14/20, (2010), para. 23.

¹⁶⁵ See also High Court of Kerala, *Anees Hameed v. State of Kerala*, WP(Crl.).No. 313/2017(S). In this case, the High Court of Kerala noted the existence of forcible religious reconversion centres for young women who had converted from Hinduism to other religions for the purposes of marriage, and stated that these centers need to be closed “lest they offend constitutional right”. The Court held that women had the right to choice of partner and religion.

¹⁶⁶ *Puttaswamy*, para. 128.

¹⁶⁷ Indian Contract Act 1872, Section 14 says that consent is free when it is not caused by coercion, undue influence, fraud, misinterpretation, or mistake.

¹⁶⁸ Indian Contract Act 1872, Section 11 says that the following persons are competent to contract, and thus can give consent to medical procedures: a) Persons who are of age of majority, i.e., 18 years or older, b) Persons who are of sound mind, c) Persons who are not disqualified from contracting by any applicable law to which they are subject. To note, based on Section 89, IPC, a child above the age of 12 years can give valid consent for physical/medical examinations.

¹⁶⁹ High Court of Karnataka, *Dr. Ramcharan Thiagarajan Facs v. Medical Council of India*, W.P. No. 11207/2013, paras. 4(g)-8; Supreme Court of India, *Samira Kohli v. Dr. Prabha Manchanda & Anr.* Appeal (C) 1949/2004, paras. 14-19.

¹⁷⁰ Indian Medical Council (Professional conduct, Etiquette and Ethics) Regulations, 2002, rule 7.6 states “Before performing an operation the physician should obtain in writing the consent from the husband or wife, parent or guardian in the case of minor, or the patient himself as the case may be. In an operation which may result in sterility the consent of both husband and wife is needed.”

¹⁷¹ High Court of Karnataka, *Dr. Ramcharan Thiagarajan Facs v. Medical Council of India*, W.P. No. 11207/2013, paras. 4(g)-8, Supreme Court of India, *Samira Kohli v. Dr. Prabha Manchanda & Anr.* Appeal (C) 1949/2004, paras. 14-19.

has been clarified that a competent adult has the right to refuse treatment, except in an emergency situation.¹⁷² Violation of consent could expose doctors to liability under tort law for trespass of person, and under criminal law for assault and battery, or medical negligence.¹⁷³

In conclusion, “conversion” or “correction” therapies continue to be administered to LGBTQ persons without consent, with the complicity of family members, police and medical practitioners. By allowing this practice to continue, India is in violation of its obligation to exercise due diligence to prevent, investigate, prosecute and punish acts of torture and ill-treatment, the right to health and the right to privacy.

Violence and Harassment by Landlords

States have an obligation to protect people from ill-treatment and to ensure security of the person. With respect to the right to adequate housing, safety and physical security are an essential part of the *habitability* component of the right to adequate housing. LGBTQ persons in India frequently face risk of violence and harassment by rental property owners and landlords, which threatens the tenant’s ability to access and enjoy adequate housing.

L, a transgender woman and activist from Bangalore, spoke about her experience of being sexually harassed and assaulted by her landlord and raped by her landlord’s son:

“When I shifted there, one night, at around 12, the owner knocked on my door. He asked if he could come in, and upon entry started making small talk and in some time started touching me and then asked me if I wanted to have sex with him. I told him no, I told him that even though he was the owner of the house I have my own consent and that I don’t want to do anything with him. So I just pushed him out and shut the door quickly. The next night his son came and asked me if I wanted to have sex with him. He raped me; he forced himself on me and had sex with me. After six months or something, his wife got to know. So, she said to me ‘you are a bitch, you had sex with my husband, you had sex with my son, get out of the house!’ At midnight, she took all the furniture, vessels everything and threw them out and threw me out of the house.”¹⁷⁴

M, a transgender woman and activist from Bangalore, said that sometimes she was asked by her landlords to have sex with them late at night. As a result, she was scared of sleeping in her own house.¹⁷⁵

Transgender persons are also often expected to meet demands from landlords over and above the rent they pay. N, a transgender woman and an activist from Bangalore, described the unreasonable demands of her landlords:

“[The landlords] also come to our house to drink and play cards as they are not allowed to do this in their houses. They also ask us to bring vegetables and other things for them for free. If we don’t agree to do these things they will ask us to evacuate and tell us that their property value will go down because we’re staying there. During festivals they ask

¹⁷² Supreme Court of India, *Common Cause v. Union of India*, W.P. (C) No. 215/2000.

¹⁷³ IPC, Sections 351, 352, 304A. See O. Nandimath, “Consent and medical treatment: The legal paradigm in India,” *Indian Journal of Urology*, Volume 25(3), 2009, pp. 343–347.

¹⁷⁴ ICJ interview, Bangalore, September 2018.

¹⁷⁵ ICJ interview, Bangalore, September 2018.

us for high donations and if we say no, they will threaten us, tease us and even throw stones at us when we walk back home at night.”¹⁷⁶

Most transgender persons interviewed reported paying higher rents and deposits than their cis-gendered peers for the same accommodation. O, a transgender woman and activist from Chennai for example, reported that:

“They charge more rent for trans people. The house owner says it’s because if he puts us in his house, the neighbours will come and fight with him, and he’ll have to tackle them or talk to them very nicely. He needs more money from us because all those issues are arising because of our gender identity. Therefore, as a transgender, I have to pay more rent than other straight and cis-people.”¹⁷⁷

Violence and harassment aggravate the fear of being “outed”.¹⁷⁸ According to interviewees, this often results in self-policing by LGBTQ persons including changing their attire and manner of expression in their interactions with neighbours.¹⁷⁹ As a result, frequent questions about one’s marital status or future plans of having children can heighten the risk and fear of being “outed”. This causes LGBTQ persons to frequently shift houses or live in constant fear of being evicted. R, a cis-gendered woman and partner of a transgender man, living in Baroda, told the ICJ:

“We live in Baroda and we have told our landlords that we’re a married couple. But the landlord keeps asking us how many years we have been married, why don’t we have children etc. Our neighbours also keep asking absurd questions. Some neighbour came into my house and asked me why I don’t have children. I have to smile and be polite. I can’t express anger because we can’t afford to lose the house.”¹⁸⁰

While legal redress for most forms of violence and harassment is available under the regular provisions of the Indian criminal law, the specific applicability of most of these provisions to LGBTQ, especially transgender, persons is sometimes unclear, and often go unenforced.¹⁸¹ Most state tenancy laws also regulate the inspection of rented premises by the landlord, who is required to give advance notice of such inspections.¹⁸² Entering the rented premises without the knowledge and consent of the tenant would not only be in violation of the tenancy laws, it could also amount to criminal trespass and a violation of the tenant’s right to privacy.

Discrimination Faced by LGBTQ Persons Seeking Housing

LGBTQ persons face multiple challenges in gaining access to rental housing as tenants due to various forms of discrimination. They are often denied accommodation and are segregated into particular localities, which lack basic amenities, and are located at a distance from their workplaces. Many face

¹⁷⁶ ICJ interview, Chennai, August 2018.

¹⁷⁷ ICJ interview, Chennai, August 2018.

¹⁷⁸ “Outing” means exposing someone’s lesbian, gay, bisexual or transgender identity to others without their permission. Outing someone can have serious repercussions on employment, economic stability, personal safety or religious or family situations.

¹⁷⁹ ICJ interview, Bangalore, September 2018.

¹⁸⁰ ICJ interview, Baroda, December 2018.

¹⁸¹ IPC, Sections 354-377; Please refer to pp. 39-41 of this report.

¹⁸² Delhi Rent Act 1995, Section 20(3), (DRA); Punjab Rent Act 1995, Section 18(3) (PRA); Karnataka Rent Act 1999, Section 48(3), (KRA).

unfavorable terms of tenancy such as higher rents, and restrictions on movement, as well as physical, sexual and verbal harassment from neighbours and property owners. Some of those interviewed reported being forced by the property owners to leave their houses without adequate notice or cause.

These conditions result in the denial of the protective elements that form the right to adequate housing set out above, including: a *location* that is close to place of work, healthcare services and other facilities; *habitability* of housing including safety, space; and *availability of services, materials, infrastructure, and facilities* that are essential for health, security, comfort, and nutrition.

Denial of housing and segregation

Property owners often refuse to rent out their property to LGBTQ individuals based on their real or imputed SOGI. When few property owners and landlords are willing to rent property to LGBTQ persons, segregation occurs.¹⁸³ The housing that is available is often in locations that are distant from public transport, sanitation, running water, healthcare, and employment opportunities.¹⁸⁴

This segregation is heightened for those who are members of minority groups based on language, place of birth, caste, class, religion, or occupation. For instance, gay Muslim men have particular difficulty renting homes.¹⁸⁵ Sex workers are also frequently evicted from their homes, or denied housing based on the assumption that the property will be used for sex work.¹⁸⁶

This segregation is compounded by the harassment and violence that LGBTQ persons face in their living spaces, which incentivizes them to seek safe living spaces and communities in which they can find support and acceptance. Living in segregated locations reduces the risk of discrimination and harassment from neighbours and landlords. O, a transgender woman from Chennai reported that neighbours in those communities “are more sensitized” and “easier to engage with.”¹⁸⁷

S, an activist from Bangalore explained that transgender persons are congregated in the least resourced areas. He said:

“if you kind of do a mapping of where trans people are, I think, all these areas... would fall under the poorest areas. We will not get a house in

¹⁸³ ICJ interview, Bangalore, September 2018.

¹⁸⁴ Centre for Equity Studies, “India Exclusion Report 2013-14”, <http://www.indianet.nl/pdf/IndiaExclusionReport2013-2014.pdf> (Accessed 12 May 2019), p. 91 states “The location of the house, directly and indirectly, affects the social and economic lives of individuals, and plays an important role in undermining or enhancing the economic capacities of an individual or a household;” Rozelle Laha, “Hunting for a home not easy for transgenders”, *Hindustan Times*, 14 September 2015, <https://www.hindustantimes.com/real-estate/hunting-for-a-home-not-easy-for-transgenders/story-eKnNNU4ZYdIbCkPt0ZCtRM.html> (Accessed 12 May 2019); Bindisha Sarang, “Why it’s doubly difficult for gay renters to find homes”, *Firstpost*, 12 November 2013, <https://www.firstpost.com/living/why-its-doubly-difficult-for-gay-renters-to-find-homes-1224225.html> (Accessed 12 May 2019).

¹⁸⁵ *Id*, Bindisha Sarang.

¹⁸⁶ United Nations Development Programme, “Sex Work and the Law in Asia and the Pacific”, 2013, <http://www.undp.org/content/undp/en/home/librarypage/hiv-aids/sex-work-and-the-law-in-asia-and-the-pacific.html> (Accessed on 9 April 2019).

¹⁸⁷ ICJ interview, Chennai, August 2018.

Baswangudi or any of these spaces. If we did, [the landlord would] charge 5000 from a corporate worker but will charge transpersons 8000/ 9000.”¹⁸⁸

Segregated housing locations also impede LGBTQ persons’ economic opportunities, as location has a considerable impact on livelihood and employment possibilities, and therefore are consequential for the enjoyment of other human rights.

L, a transgender woman and activist from Bangalore, recounted her experience of finding accommodation with other transgender women in Bangalore, for the first time after she left her natal home:

“... Almost two hours I travelled just one way. When we finally reached the place I realized that I had travelled to a place outside of outskirts of Bangalore. I asked if we’re going to another state and was told we stay here in the outskirts because we don’t get any house in the main city. Nobody gives accommodation to trans people and hence the only option is coming all the way to the outskirts. The rent and the advance are also so high that we won’t be able to stay in the city because they aren’t affordable...

The new house was also full of bushes and open ground and there were just three houses in the whole area... it had no roads and no neighbours; it wasn’t a compound or locality. I was told that places where all those facilities are available aren’t places that will give trans people accommodation. It is out of the area, city, town, and this is the only thing that trans people will get...

I found that house very dirty, it used to stink as there was no water. It was like a tin shed house. It was a rented place with no facilities, just like a store room. The owner didn’t care, his attitude was like this is what it is, so just take it if you want. Given that also there weren’t any other places giving accommodation, trans people had to suffice with this house.”¹⁸⁹

Some LGBTQ persons reported that they are pushed into areas with dilapidated conditions and poor services, despite being able to afford better housing.¹⁹⁰

O, a transgender woman from Chennai, said:

“... with the upcoming monsoons, there will be heavy rains in Chennai and my house will also be flooded, because of which I can’t even invite any of my friends from the community to my home. It’s very difficult for a transgender person to get a house in the city, to make the house-owners understand. Hence, whatever be the issue, I’ll stick with my current house, because there’s some understanding with its owner.”¹⁹¹

A common reason for denial of rental accommodation is that property owners may tend to associate LGBTQ people with illegality. For instance, in the case of transgender women, a property owner will typically engage in stereotyping and assume that they are sex workers, which they believe is an illegal occupation.¹⁹² The prejudice held by many landlords against transgender persons, both in

¹⁸⁸ ICJ interview, Bangalore, September 2018.

¹⁸⁹ ICJ interview, Bangalore, September 2018.

¹⁹⁰ ICJ interviews, Bangalore, September 2018.

¹⁹¹ ICJ interview, Chennai, August 2018.

¹⁹² Even though sex work is not illegal, the Immoral Traffic Prevention Act, 1956 (ITPA) criminalizes activities associated with sex work, such as soliciting for sex work and living off the earnings of sex worker. See “Box 2: Sex Work” on pp. 98-101 of this report.

general and in the assumption that they work as sex workers, therefore results in them denying rental accommodation to transgender persons.

U, a gender-fluid person and activist from Chennai, said:

“Housing is a big issue for everyone. Transgender people are considered sex workers so most of the landlords are afraid of soliciting and sex work happening in their rented home. Beyond that there is also the stigma. There are trans people in different places in Chennai but they are forced to find houses in the same area for concern of safety.”¹⁹³

Legal Obligations in Cases of Discrimination by Property Owners and Landlords

The Indian Government has an immediate obligation to protect every person’s right to adequate housing equally and without discrimination on the basis of protected grounds, including sexual orientation and gender identity.¹⁹⁴ The ICESCR obligates States to implement legislative, administrative and other measures to prevent discrimination on prohibited grounds by private actors, such as landlords and property owners. When violations do occur, individuals must have access to effective legal remedies.¹⁹⁵ This principle was emphasized by the UN Special Rapporteur on Adequate Housing after her visit to India.¹⁹⁶

Housing segregation violates the LGBTQ individual’s rights to adequate housing and right to non-discrimination.¹⁹⁷ India is under an obligation to ensure that housing is adequate in terms of availability of services, as essential amenities are also a component of the right to adequate housing. Thus, housing must contain facilities essential for health, comfort, nutrition, such as safe drinking water, energy for cooking, heating and lighting, and sanitation facilities.¹⁹⁸

In this regard, it should be recalled that the right to health and water and sanitation are also protected ESC rights, and denial of adequacy of these services may in some instances constitute a violation of protected rights. In relation to the obligations of States under article 12 of the ICESCR, the ESCR Committee has said,

“The right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement.

¹⁹³ ICJ interview, Chennai, August 2018.

¹⁹⁴ ICESCR, article 2(2) read with article 11(1); ESCR Committee, General comment No. 20: Non-discrimination in economic, social, and cultural rights, UN Doc. E/C.12/GC/20, (2009), para. 11.

¹⁹⁵ ESCR Committee, General comment No. 20: Non-discrimination in economic, social, and cultural rights, UN Doc. E/C.12/GC/20, (2009), para. 11; See also, Miloon Kothari, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, UN Doc. E/CN.4/2002/59, (2000), paras. 37-48.

¹⁹⁶ Leilani Farha, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, on her mission to India, UN Doc. A/HRC/34/51/Add.1, (2017), para. 44; See also Leilani Farha, Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to nondiscrimination in this context, Access to justice for the right to housing, UN Doc. A/HRC/40/61, (2019).

¹⁹⁷ ICESCR, article 2(2) read with article 11(1); ESCR Committee, General comment No. 20: Non-discrimination in economic, social, and cultural rights, UN Doc. E/C.12/GC/20, (2009), para. 11.

¹⁹⁸ ESCR Committee, General Comment No. 4: The right to adequate housing (article 11(1) of the Covenant), UN Doc. E/1992/23, (1991), para. 8.

These and other rights and freedoms address integral components of the right to health."¹⁹⁹

Segregation and relegation to lower socio-economic areas deprives people of their right to adequate housing.

In addition, property owners who discriminate among tenants based on their SOGIE are interfering with their rights to equality and non-discrimination under Articles 14 and 15(1) of the Indian Constitution. Discrimination based on sexual orientation and gender identity, which have been held to be prohibited categories of discrimination, are also violative of an individual's right to non-discrimination under Article 15(2).²⁰⁰ If a landlord has been found to have discriminated against LGBTQ persons, the government must require the property owner to order the landlord to cease discriminating among tenants based on SOGIE.²⁰¹

The Supreme Court has made clear that invoking one's right to conduct trade or business, or form an association (under Article 19), would not include the right to discriminate in one's business activities.²⁰² This is supported by the High Court of Delhi judgment in *Delhi Dayalbagh Cooperative Housing Building Society v. Registrar*, in which the Court found that restricting an individual's right to transfer property based on religion of the prospective buyer was unconstitutional.²⁰³ Contracts that exclude individuals based on SOGIE are also likely to be void based on Section 23 of the Indian Contract Act, 1872, which clarifies that contracts that have objectives that are unlawful or opposed to public policy, are unlawful.²⁰⁴

For these reasons, in cases of discrimination by property owners, LGBTQ persons should have recourse to seek a judicial remedy for the violation of their right against non-discrimination by private actors under Article 15(2) of the Indian

¹⁹⁹ ESCR Committee, General comment No. 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4, (2000), para. 3.

²⁰⁰ *NALSA*, para. 59. *Navtej Singh*, para. 393.

²⁰¹ Law Commission of India, Report No. 267 "Hate Speech," 2017, <http://lawcommissionofindia.nic.in/reports/Report267.pdf> (Accessed 12 May 2019); The Supreme Court has upheld individual's right to non-discrimination against non-state actors where in *Indian Medical Association v. Union Of India*, the Court held a private non-minority higher educational institution that admits students only based on their entrance score marks violates their right to non-discrimination thereby underscoring that individuals have a right to non-discrimination against non-state actors as well. In this case, the Court allowed the petitioners to get admission into the college by requiring that the college create additional seats for them. Supreme Court of India, *Indian Medical Association v. Union Of India* (2011)7SCC179.

²⁰² Supreme Court of India, *Dharam Dutt v. Union of India*, (2004) 1SCC712, para. 49-50.

²⁰³ High Court of Delhi, *Delhi Dayalbagh Cooperative Housing Building Society Ltd. v. Registrar Cooperative Societies and Ors.*, 195 (2012) DLT 459.

²⁰⁴ Indian Contract Act, 1872, Section 23 states, "The consideration or object of an agreement is lawful, unless—it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies, injury to the person or property of another; or the court regards it as immoral, or opposed to public policy...;" Note that in *Zoroastrian Co-operative Housing Society Limited v. District Registrar Co-operative Societies*, the Supreme Court held that the Society can restrict transfer of property based on prohibited grounds of membership, where the Society per its bye-laws mandated that housing shares could only be transferred to members and restricted membership to Parsi community. The jurisprudence on the right of individuals to restrict transfer of property based on constitutionally prohibited grounds of discrimination is uneven in India. Supreme Court of India, *Zoroastrian Co-operative Housing Society Limited v. District Registrar Co-operative Societies*, Appeal (C) 1551/2000.

Constitution. To date, the ICJ is not aware of any case where LGBTQ persons have brought cases against property owners for discrimination.

Lack of Security of Tenure and Forced Eviction

Security of tenure is a key component of the right to adequate housing under international human rights law. Forced evictions in violation of human rights obligations and therefore violate LGBTQ persons' right to adequate housing.²⁰⁵

LGBTQ persons are often forcefully evicted from rental property or are pushed out of the house through targeted harassment and abuse.

The violence and harassment sometimes begin before the eviction, and the eviction itself is often accompanied by emotional trauma, verbal and physical abuse and the destruction of property.²⁰⁶ W, a genderqueer transgender man and scientist from Delhi reported:

"Once a house I was living in was burned down after a transman who I lived with was shamed and outed in public. I came back home one day and found it burnt. The landlord didn't have any questions etc. and didn't seem shocked or concerned. All our stuff was burnt."²⁰⁷

W was subsequently asked to vacate another accommodation he was living in after a few transwomen visited him:

"Recently, a few *hijras* who were visiting a transwoman staying at my place got into a disagreement and the neighbourhood got worked up upon noticing that there were *hijras* at the house. They complained to the landlady, who asked us to vacate the house or pay higher rent."²⁰⁸

T, a transgender man and activist from Bangalore, said that landlords usually assume that transwomen are sex workers and are therefore unwilling to give them rental accommodation.

"I got a rented house under a female identity. The landlord used to stay upstairs in the same building. I had a lot of male friends come and go, and he thought I was a sex worker and hence he asked me to leave. The landlord's wife was also like that. She directly told me that I am running a brothel and hence I should leave. I left that place immediately and lost Rs. 15000 that I had given them as deposit. I left after only three months."²⁰⁹

In some cases, it appears that evictions were made at least in part in retaliation for LGBTQ activism. For instance, X, a gay man and activist from Kerala, reported that he was forced to shift rental accommodation several times in a short period of time, because of his association with the "Kiss of Love" protest.²¹⁰ After the protest, police went to his house and the landlord allowed them to

²⁰⁵ ESCR Committee, General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions, UN Doc. E/1998/22, (1997).

²⁰⁶ Raquel Rolnik, Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in This Context, UN Doc. A/HRC/19/53, (2011), para. 33.

²⁰⁷ ICJ interview, Delhi, August 2018.

²⁰⁸ ICJ interview, Delhi, August 2018.

²⁰⁹ ICJ interview, Bangalore, September 2018.

²¹⁰ The Kiss of Love protest was first held in Kochi, Kerala in 2014, to protest against moral policing of young couples in public spaces. See *The 'Kiss of Love' Campaign*, Times of India, 11 November 2014, <https://timesofindia.indiatimes.com/the-kiss-of-love-campaign/photostory/45108971.cms> (Accessed 12 May 2019).

search the house in his absence. He was subsequently asked by telephone to vacate the house by the landlord. When he reached the house, he found that the landlord had packed all of his things in a suitcase. He was not allowed to enter his room. He went to complain, but the police were uncooperative allegedly because of his association with the protest. This was not the first time that he had been asked to vacate the house after the landlord came to know about his sexual orientation and LGBTQ rights activism.²¹¹

International and national law on security of tenure, and forced eviction

Legal security of tenure, which provides protection from forced and illegal eviction, harassment, and other threats to enjoyment of this right, is a key component of the right to adequate housing as per the ESCR Committee.²¹² This includes a prohibition against forced evictions.²¹³ For evictions to be permissible, they must follow the ESCR Committee prescriptions set out above, and in case of forced evictions, domestic laws must provide for reparation to those evicted.²¹⁴

The High Court of Delhi has recognized that forced eviction has the effect of violating “the right to livelihood, to shelter, to health, to education, to access to civic amenities and public transport and above all, the right to live with dignity.”²¹⁵ The Supreme Court, for its part, in *Olga Tellis* held that eviction of dwellers from pavements by the State requires that prior notice be given to the dwellers for the eviction process to be deemed lawful. As unlawful evictions may also infringe on the right to life with dignity, the Court has also held that in such circumstances, eviction should only be lawfully granted if alternate accommodation is made available for those evicted.²¹⁶

Notwithstanding these binding judicial rulings, landlords often seek evictions pursuant to vague and poorly enforced rental laws. Forced eviction is common, and the laws have been interpreted to give wide discretion to landlords and property owners. These laws usually allow landlords to seek eviction if the tenant has been convicted of causing a nuisance to someone in the neighbourhood, or for allowing the rental premises to be used for “immoral”

²¹¹ ICJ interview, Kochi, October 2018.

²¹² ESCR Committee, General Comment No. 4: The right to adequate housing (article 11(1) of the Covenant), UN Doc. E/1992/23, (1991), para. 8(a).

²¹³ ESCR Committee, General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions, UN Doc. E/1998/22, (1997), para. 3 defines forced evictions as “the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/ or land which they occupy, without provision of and access to, appropriate forms of legal or other protection.”

²¹⁴ ESCR Committee, General Comment No. 4: The right to adequate housing (article 11(1) of the Covenant), UN Doc. E/1992/23, (1991), para. 17.; See also Housing and Land Rights Network, “Bengaluru’s Continuing Inequity: An Eviction Impact Assessment of Ejipura/Koramangala Four Years After its Demolition,” 2017, https://www.hlrn.org.in/documents/EvIA_Ejipura_Bengaluru.pdf (Accessed 12 May 2019); Housing and Land Rights Network, “From Deprivation to Destitution: The Impact of Forced Eviction in Topsia, Kolkata,” 2015, https://www.hlrn.org.in/documents/Deprivation_to_Destitution_Topsia_Eviction.pdf (Accessed 12 May 2019).

²¹⁵ High Court of Delhi, *Sudama Singh v. Government of Delhi*, WP (C) 7735/2007, WP (C) 7317, 8904 and 9246/2009, para. 44.

²¹⁶ Supreme Court of India, *Olga Tellis v. Bombay Municipal Corporation*, (1985)3SCC545; This was reiterated in *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan*, 11/10/1996 wherein the Supreme Court allowed eviction of pavement dwellers but only on the condition that alternate accommodation may be made available to them under a Scheme of the State Corporation which served to provide housing for weaker sections.

activities – provisions that are interpreted favorably for landlords and property owners.²¹⁷

The provision that rental accommodation is fit for use only by the lease-holder and their family members (related to them by marriage, birth, or adoption) is firmly rooted in the tenancy laws in various parts of the country.²¹⁸ This definition of “family” is limited and frequently excludes LGBTQ persons in alternative family arrangements. Such provisions of law constitute indirect discrimination and are inconsistent with both Indian judicial precedent and international law.

Nonetheless, there are some legal protections available to LGBTQ persons in such circumstances, though they may not always be adequately enforced. Most state laws require rental agreements to be in writing,²¹⁹ and guarantee a minimum notice period for termination of the lease agreement.²²⁰ Landlords are prohibited from using force, such as locking the tenant out of the premises or removing their belongings from the property, or disconnecting essential services.²²¹ To the extent such laws are unenforced in the case of LGBTQ persons, they are in breach of India’s obligation to protect the right to housing and to equal protection and non-discrimination.

Homelessness

Homelessness constitutes a gross violation of the right to housing.²²² According to the UN Special Rapporteur on Adequate Housing, homelessness has multiple dimensions including the “absence of a material aspect of minimally adequate housing”, a social aspect of a “secure place to establish a family or social relationships”, and as a “form of systemic discrimination and social exclusion.”²²³

There is an increased risk of homelessness among LGBTQ persons, on account of sexual and other violence, socio-economic deprivations and religious and cultural

²¹⁷ For example, see DRA, Section 22(m); the DRA explicitly mentions that undertaking an activity prohibited by the ITPA would amount to having caused nuisance on the premises and thus be a valid ground for eviction. See also, KRA, Section 27(m); PRA, Section 20(l); Draft Model Tenancy Act 2015, Section 21(2)(d).

²¹⁸ DRA, Sections 4 and 22; KRA, Section 5; PRA, Section 5.

²¹⁹ DRA, Section 4(1) states “Notwithstanding anything contained in Section 107 of the Transfer of Property Act, 1882 (4 of 1882), no person shall, after the commencement of this Act, let or take on rent any premises except by an agreement in writing;” PRA, Section 4(1); KRA, Section 4(1).

²²⁰ DRA, Section 22(2); KRA, Section 27(2)(a); PRA, Section 20(2)(a).

²²¹ DRA, Section 21(1); KRA, Section 49(1); PRA, Section 19(1).

²²² Leilani Farha, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, on her mission to India, UN Doc. A/HRC/34/51/Add.1, (2017), para. 35 describes homelessness as a “gross violation of the right to adequate housing” and urges the government to address it as a human rights priority with the aim of eliminating homelessness entirely by 2030.

²²³ Leilani Farha, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, UN Doc. A/HRC/34/51, (2017), paras. 17(a) and 17(b).

intolerance from families and communities,²²⁴ and the compounded vulnerability homeless LGBTQ persons face.²²⁵

LGBTQ persons in India are particularly vulnerable to homelessness for multiple reasons. As this report has documented, they are often forced to leave their family homes due to conflict within the family, violence or threats of violence.²²⁶

The precarious economic and physical conditions that often affect homeless persons may also lead LGBTQ individuals to choose sex work and begging, despite the risk of criminal prosecution, as a means to survive and meet their basic needs. These circumstances further expose homeless LGBTQ persons to hostility from police and municipal authorities and makes it difficult to access government services.

LGBTQ Accounts of Homelessness

M, a transgender woman from Bangalore reported that she found herself homeless after leaving her family home. She tried living on the streets in Bangalore but went back to her family after 10 days. Her family told her that they would only let her back in if she stopped behaving like a woman. She recounts the difficulties of living on the streets:

"I was so vulnerable because I was sleeping in the street under the flyover of the market. Thugs would come, pinch your private parts, trouble you to have sex, the whole night police are also there. How do I get a bath? Where do I eat? How do I sleep? Where do I use the restroom? All of these questions I would think about."²²⁷

After leaving his family home, B, a transgender man, found himself homeless. He says of this experience:

"I left the home and there is no shelter for me and there is no space for me and nobody is supporting me, so I am laying down everyday on the street and in the railway station. There is no food for me for several days so I am starving and the one thing in my body is water and I am drinking the water which is freely available in the railway stations."²²⁸

L, a transgender woman from Bangalore, talked about her inability to find a place to live after she ran away from her family home. She recounted having spent several weeks sleeping at Cubbon Park, before joining a group of transwomen who used to solicit at the park. She said:

"One day my mom went out for shopping and she left my door open so I ran out of the house. I told my neighbour that I was going to my grandmother's house but I ran away. I was on the road. I didn't know

²²⁴Leilani Farha, Report Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, UN Doc. A/70/270, (2015), para. 49.

²²⁵ Leilani Farha, Report Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, UN Doc. A/70/270, (2015), para. 50.

²²⁶ See also Aijaz Ahmed Bund, *Hijras of Kashmir: A Marginalized form of Personhood*, Jay Kay Books (2018), p. 161, in which a transgender woman shares her account: "I was disowned by my family and forced to leave the house. I was also denied the property share. Since then I am moving from one place to another in search of shelter. Even if we find a place to live on rent the distress of paying the rent on time haunts."

²²⁷ ICJ interview, Bangalore, September 2018.

²²⁸ ICJ interview, Chennai, August 2018.

where to go. I escaped the cage but didn't know which house to go to or what to do. So I stayed in Cubbon Park since it was familiar for me. I stayed there at night also, I slept in the bushes. But I was there for one day, the whole night I was there was so scary for me, I kept crying all night."²²⁹

State Obligations regarding Homelessness

Homelessness creates a fertile condition for human rights violations, and those who are homeless are likely to experience the denial of many of their human rights in addition to the right to housing.

The UN Special Rapporteur on Adequate Housing has also identified States' minimum obligation to provide safe spaces, with basic amenities of water and sanitation, for people to stay in, when their homes become dangerous.²³⁰ The ESCR Committee has concluded that a State Party in which "any significant number of individuals is deprived of ... basic shelter and housing... is failing to discharge its obligations under the Covenant".²³¹

In India, the link between the right to shelter and the right to live with dignity has been explicitly recognized by the Supreme Court in the case of *People's Union for Civil Liberties v Union of India*,²³² wherein the Court asserted that the State "owes to the homeless people to ensure at least minimum shelter as part of the State obligation under Article 21".²³³ It issued detailed directions for the construction of permanent shelters in adequate number, equipped with basic necessities such as beds and blankets, food, drinking water, sanitation facilities, for homeless persons in several cities across the country.²³⁴

In 2013, the Indian Government also formulated a scheme "Shelters for Urban Homeless,"²³⁵ under the National Urban Livelihoods Mission, presently being monitored by the Supreme Court in *E.R. Kumar v. Union of India*.²³⁶

²²⁹ ICJ interview, Bangalore, September 2018.

²³⁰ Leilani Farha, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, UN Doc. A/HRC/31/54 (2015).

²³¹ ESCR Committee, General Comment No. 3: Nature of State Parties' Obligations, UN Doc. E/1991/23, (1990), para. 10.

²³² See Supreme Court of India, *People's Union for Civil Liberties v. Union of India*, W.P. (C) 196/2001, order dated 27 February, 2012. The issue of homelessness was made part of this case, famously referred to as the "right to food case" in 2010, in response to a submission by activists.

²³² Supreme Court of India, *People's Union for Civil Liberties v. Union of India*, W.P. (C) 196/2001, orders dated 20 January 2010, 5 May, 2010, 19 April, 2011, 18 July, 2011, 20 September, 2011, 12 December, 2011, and February 27, 2012. See Housing and Land Rights Network, "Shelters for the Urban Homeless: A Handbook for Administrators and Policymakers," (2014), https://www.hlrn.org.in/documents/Shelters_Urban_Homeless_Handbook.pdf (Accessed 9 April 2019).

²³³ Supreme Court of India, *People's Union for Civil Liberties v. Union of India*, I.A. Nos.94 & 96 in W.P. (C) 196/2001, order dated 27 January 2010, para. 4.

²³⁴ Supreme Court orders dated 27 January 2010, 5 May, 2010, 19 April, 2011, 18 July, 2011, 20 September, 2011, 12 December, 2011, and February 27, 2012 in *PUCL v. UoI*, WP 196/2001. See *Shelters for the Urban Homeless: A Handbook for Administrators and Policymakers* (2014), available at https://www.hlrn.org.in/documents/Shelters_Urban_Homeless_Handbook.pdf (Accessed 9 April 2019).

²³⁵ Ministry of Housing and Urban Affairs, "Scheme for Shelters for Urban Homeless (Revised Operational Guidelines)," (2018), https://nulm.gov.in/PDF/NULM_Mission/NULM-SUH-Guidelines.pdf (Accessed 9 April 2019).

²³⁶ Supreme Court of India, *E.R. Kumar v Union of India and Ors*, W.P.(C) No. 000055/2003.

However, despite the Supreme Court’s directives and monitoring, research suggests that shelters continue to be inadequate in number and poorly maintained.²³⁷ The Indian State continues to violate its international legal obligations to provide for adequate shelter to homeless persons, including transgender persons, despite the recommendations of its Expert Committee.²³⁸

BOX 1: SHELTER HOMES FOR LGBTQ PERSONS – RTI RESPONSES

The availability and accessibility of shelter homes is a necessary component of the right to housing, and the right to live with dignity of LGBTQ persons, who are at a disproportionately greater risk of harassment, gender-based violence, hate crimes, and violence in public spaces.²³⁹ At present, transgender and gender non-binary persons typically find it difficult to access existing shelter homes – whether maintained by the State or private organizations.²⁴⁰ Often, transgender persons and lesbian women are refused entry to women’s shelter homes, or are at risk of corrective therapy or other forms of discrimination inside the shelter homes.²⁴¹

Y, a queer woman living in a shelter home with her partner Z (who identifies as a transman), described her time there as “mental torture”:

“We stayed in the same clothes for all 15 days. They forced us to wear a female dress even though Z had never worn it in his life and was not comfortable doing the same. The Nari house [women’s shelter home] said that the dress was the only thing they made girls wear. They didn’t allow us to get food from outside. It was mental torture staying in that place...They used to tell me things like ‘Z is not good, she smokes and she drinks’ and then they used to tell Z things about me like ‘Y is a girl who will run away with boys. Y will marry a boy and then you will have nothing’. They wanted us to separate and go back to our respective families. We couldn’t talk to anyone, we couldn’t meet anyone, we couldn’t get anything that was from outside. It was miserable. The only people allowed to visit us were our parents. The mental torture used to happen every day for 15 days.

²³⁷ Housing and Land Rights Network, *Shelters for Homeless Women: Working Paper with a Focus on Delhi*, https://www.hlrn.org.in/documents/Shelters_Homeless_Women.pdf (Accessed 9 April 2019).

²³⁸ Ministry of Social Justice and Empowerment, “Report of The Expert Committee on Issues relating to Transgender Persons,” (2014), <http://www.socialjustice.nic.in/writereaddata/UploadFile/Binder2.pdf> (Accessed 12 May 2019), pp. 50 and 93. The Expert Committee has suggested that the Ministry of Rural Development, the Ministry of Housing and the Ministry of Urban Poverty Alleviation ensure that transgender persons are able to avail non-discriminatory and safe housing under the housing assistance schemes.

²³⁹ See ICJ Unnatural Offences report, *supra* note 9, pp. 21-23; See also Chapter 5 on public spaces.

²⁴⁰ Lam-Iynti Chittara Nerallu, “Time for Overhauls: Report of national consultations on services in and around state-run and funded shelter homes for girls, women and other vulnerable populations,” (2017), https://www.ohchr.org/Documents/Issues/Women/SR/Shelters/Lam-Iynti%20Chittara%20NeralluReport%20on%20Shelter%20Home%20Consultation%20that%20was%20held%20in%20Delhi%20on%208th_9thSept2016.pdf, p. 23;

²⁴¹ *Id.*, at p. 23 states “There are other layers to this issue, especially vis-à-vis transgender persons. For example, how do trans-men or those who have not had their sex reassignment surgeries, get access to an One Stop Crisis Center or any other women’s shelter? This is a practical concern for trans-men who come to a city for surgeries and need shelter for a period of three to six months.” In the interview with ICJ, Rajesh, Executive Director of Sangama, Bangalore raised concerns around another category of individuals stating that “the hijras too have always been shunned by women’s shelter homes;” ICJ interview, Bangalore, September 2018.

One day I got really ill and I was in terrible pain, but no one did anything. They should've taken us to a doctor."²⁴²

State level Efforts to Establish Transgender Shelter Homes – RTI Responses

A number of states have established shelter homes specifically for LGBTQ persons. In some states, these initiatives were incorporated into schemes formulated by states for the welfare of transgender persons, following the *NALSA* case.

The ICJ sought information about shelters in 11 RTI applications to eight states. The applications asked for the following information: (i) whether transgender persons can be provided accommodation in shelter homes maintained by the government; (ii) whether separate shelter homes are available for transgender persons in the state, if so; (iii) the number of transgender persons who have been accommodated in publicly maintained shelter homes in the state since 2014. Responses were received from state authorities in Delhi, Tamil Nadu, Gujarat, Karnataka, Andhra Pradesh and Kerala.

The responses received from *Andhra Pradesh* stated that no information was available. The responses from *Delhi* and *Gujarat* were incomplete and merely stated that there was no provision for separate accommodation for transgender persons in the shelter homes maintained by the state. The response from *Gujarat* additionally stated that transgender persons are not provided accommodation in shelter homes maintained by the state government.

The response from *Tamil Nadu* stated that transgender persons cannot be provided accommodation in shelter homes specifically maintained for women. The response also stated that separate shelter homes for transgender persons are not maintained by the state government, which contradicts ICJ field research in Chennai, where the ICJ visited a shelter home for transgender persons maintained in partnership between the state and a community-based organization. The Tamil Nadu Government has also taken steps to provide housing to transgender persons, including transmen, in collaboration with non-government and community-based organizations.²⁴³

The response from the state of *Karnataka* indicated that transgender persons have been provided housing through Rajiv Gandhi Rural Housing Corporation under the Special Housing Scheme. As per the response, from 2014 through February 2018, a total of 30 houses have been allocated to transgender persons. The Karnataka State Transgender Policy lists the establishment of shelter homes for transgender persons as one of its objectives.²⁴⁴ It has sought to expand the use of Santhwana centres [temporary shelter homes for women] to transgender persons to be used as one-stop crisis centres.²⁴⁵ It also seeks to open five

²⁴² ICJ interview, Baroda, December 2018.

²⁴³ Yogesh Kabirdoss, "14 transgender people get tenement allotment orders in Chennai," *The Times of India*, 26 February 2019, <https://timesofindia.indiatimes.com/city/chennai/14-transgender-people-get-tenement-allotment-orders-in-chennai/articleshow/68173766.cms> (Accessed 12 May 2019).

²⁴⁴ Karnataka, India. 2017. *State Policy on Transgenders*. Government of Karnataka. <http://www.khpt.org/wp-content/uploads/2018/01/TG-policy-1.pdf> (Accessed 12 May 2019), p. 14.

²⁴⁵ Id, "Santhwana Centres, which are run with assistance from various NGOs and provide temporary shelter to women who have been subjected to atrocities can also be utilized as one stop crisis centres for transgenders- Simultaneously, five shelter homes may be opened in different

shelter homes for the use of transgender persons in various parts of the state.²⁴⁶ No information regarding the implementation of these plans was furnished in response to the RTI application.

In response to the application filed by ICJ, the Social Justice department of the state of *Kerala* stated that shelter homes had not yet been established under the State Policy for Transgenders in Kerala, 2015. The state policy lists the establishment of shelter homes for transgender persons as a policy objective.²⁴⁷

parts of the State for the exclusive use of transgenders according to the population of transgenders in those areas.”

²⁴⁶ Id.

²⁴⁷ Kerala, India. 2015. State Policy for Transgenders in Kerala. Government of Kerala. <https://kerala.gov.in/documents/10180/46696/State%20Policy%20for%20Transgenders%20in%20Kerala%202015> (Accessed 12 May 2019), p. 12 states “Establish shelter homes in different parts of the State for the exclusive use of TGs according to the population of TGs in those areas.”

RECOMMENDATIONS ON HOUSING

To the Parliament of India

- Amend the laws to enable LGBTQ persons to be recognized as victims of familial violence to give effect to the Supreme Court's decision in *NALSA* and to facilitate remedies, and access to justice for LGBTQ persons who face familial and other violence in the context of the home.
- Amend the Indian Penal Code, 1860 to introduce provisions prohibiting all forms of non-consensual "conversion" or "corrective" therapies and/or procedures aimed at "changing" an individual's sexual orientation or gender identity.

To the Central Government of India

- Issue guidance under Ministry of Housing and Urban Poverty Alleviation for evicting people from informal settlements in line with international law and standards, including Principle 15 of the Yogyakarta Principles.
- Develop a national policy and guidance for state governments in respect of the establishment and administration of shelter homes for LGBTQ persons, consistent with India's constitutional and international obligations. Such guidelines should ensure that disaggregated data is collected by all shelter homes about the self-identified gender identity of occupants of such homes.

To State Legislatures

- Take substantial measures to ensure security of tenure and access to affordable, habitable, accessible, culturally appropriate and safe housing (Principle 15, Yogyakarta Principles) through the amendment of state rental laws, in particular by:
 - requiring that all rental agreements be in writing;
 - including provisions on non-discrimination based on SOGIE, particularly in determining tenancy, the amount of rent to be charged, grounds of eviction, and the lessor's responsibility to maintain the house;
 - removing provisions that list "immoral acts" as a ground for eviction (such as the Delhi Rent Act, 1999, Karnataka Rent Act 1999, and Punjab Rent Act 1995);
 - levying penalties on landlord for entering leased premises without notice.

To the State Governments

- Give priority to transgender persons in accordance with *NALSA* and India's obligations under ICESCR, which require that persons from marginalized or disadvantaged communities, including LGBTQ communities, be given priority in housing schemes. Monitor implementation of such schemes and ensure availability of housing to both transgender men and transgender women.

- Take steps towards establishing shelter homes for transgender persons in each state based on consultation with all concerned stakeholders.
- Prohibit, prevent and protect against discrimination by all state shelter homes on prohibited grounds, which includes discrimination on the basis of sexual orientation and gender identity in admission criteria. Issue guidance towards the same, based on consultation with concerned stakeholders.
- Initiate training programmes for police officials and officers, state employed healthcare workers, social workers and shelter home employees on the rights of LGBTQ persons pursuant to the relevant jurisprudence and international human rights law. LGBTQ persons should be employed to assist in the planning and execution of such training programmes.

To All Government Entities

- Ensure the effective and meaningful consultation of LGBTQ persons in the execution of all legislative and policy measures.

WORK

LGBTQ persons typically face discrimination, abuse and exclusion when seeking employment. Transgender persons in particular “*face huge hurdles in accessing... work and are challenged daily by issues such as access to health care, access to housing, getting an adequate standard of living, and personal safety.*”²⁴⁸ While transgender and gender non-binary persons face heightened discrimination based on their gender identity and gender expression, other members of the LGBTQ community are equally susceptible to SOGIE-based discrimination in accessing work.

As with a lack of adequate housing, inability to access decent work may carry an adverse impact on access to other human rights, including the right to water and sanitation, right to health, right against sexual harassment, right to life, liberty, and security of person. SOGIE-based discrimination in employment perpetuates and magnifies other forms of discrimination based on caste, economic or social status, gender, age, able-bodiedness and poverty.²⁴⁹

Worldwide, LGBTQ persons face higher unemployment rates than average, and, according to the World Bank SOGI Task Force, are “likely overrepresented in the bottom 40%” of the economic strata of the population.²⁵⁰ According to the 2011 Indian Census, 38% of transgender respondents had paid work, lower than the rate for the rest of the population (46%).²⁵¹ A 2017 study conducted on behalf of the National Human Rights Commission of India found very high levels of unemployment among transgender persons interviewed in Delhi and Uttar Pradesh, with many forced to take up low paying work in the informal sector and at high risk of abuse.²⁵²

²⁴⁸ Vitit Muntarbhorn, Independent Expert on sexual orientation and gender identity, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, UN Doc. A/HRC/35/36, (2017), para. 59.

²⁴⁹ This situation has been highlighted by transgender rights activist Living Smile Vidya, who asserts that Dalit transgender persons face exacerbated exclusion and have limited employment opportunities due to the multiple and intersecting forms of discrimination faced on the basis of belonging to the Dalit community as well as the transgender community. Living Smile Vidya, *I am Vidya: A Transgender's Journey*, Rupa Publications India, 2013.

²⁵⁰ Dominik Koehler, “LGBTI people are (likely) over represented in the bottom 40%,” The World Bank, 2015, <https://blogs.worldbank.org/governance/lgbti-people-are-likely-over-represented-bottom-40> (Accessed 12 May 2019).

²⁵¹ India. Census of India, 2011. Office of the Registrar General & Census Commissioner. <http://censusindia.gov.in/>; Detailed data can be obtained from http://www.censusindia.gov.in/2011census/PCA/PCA_OTH_0000_2011.xlsx; See Rema Nagarajan, “First count of third gender in census: 4.9 lakh,” Times of India (30 May 2014), <http://timesofindia.indiatimes.com/India/First-count-of-third-gender-in-census-4-9-lakh/articleshow/35741613.cms> (Accessed 12 May 2019).

²⁵² National Human Rights Commission, “Study on Human Rights of Transgender as a Third Gender”, 2017, http://nhrc.nic.in/sites/default/files/Study_HR_transgender_03082018.pdf, pp. 46-48. Also, see Center for Talent Innovation, S.A. Hewlett et al., “The Power of “Out” 2.0: LGBT in the Workplace,” 2013; Mission for Indian Gay & Lesbian Empowerment, “In & Out: The Indian LGBT Workplace Climate Survey,” 2016, <http://www.gaystarnews.com/wp-content/uploads/2016/06/Indian-LGBT-Workplace-Climate-Survey-2016.pdf> (Accessed 12 May 2019). The State Literacy Mission of Kerala conducted a survey among 918 persons from the transgender community, which showed that about 20% of those surveyed were unemployed. The objective of the survey was to identify those transgender persons who would be willing to enroll in continuing education programmes of the Literacy Mission. Kerala, India. *Continuing Education*

This chapter will examine the discrimination faced by LGBTQ persons seeking to access work as well as the conditions of that work. It looks at three stages of work:

1. **Recruitment**, including denial of employment, difficulties in procuring identity documents, and gendered workplace eligibility requirements;
2. **Working conditions**, including gendered workspaces, and sexual violence, verbal abuse, and harassment faced by LGBTQ persons; and
3. **Job Security**, including the risk of wrongful termination, and being forced out of work due to SOGIE-based discrimination.

The chapter will also review India's constitutional international legal obligations to respect, protect and fulfill LGBTQ persons' right to work, including examination of the remedies available against both State and non-state actors for violations.

As with the right to housing, the access to and enjoyment of the right to decent work by LGBTQ persons' is dependent on and in turn influences access to and enjoyment of several other human rights. The analysis that follows will therefore also assess the impacts of lack of access to employment on the right to water and sanitation, right to health, and the right to life, including to be protected from acts of physical and sexual violence and harassment.

RIGHT TO WORK IN INTERNATIONAL AND DOMESTIC LAW

The right to work is a right protected in ICESCR (articles 6-8) and UDHR (article 23). International standards surrounding aspects of rights at work are also contained in numerous including conventions and recommendatory instruments of the International Labour Organization (ILO).²⁵³ Aspects of these rights are also protected under article 22 of the ICCPR protecting the right to freedom of association.

Article 6 of the ICESCR obligates States to take steps to ensure the full realization of the right to work in order "to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual." Article 7 provides that everyone has the right to just and favorable conditions of work, and sets out a number of specific aspects of work conditions, which States must ensure. Article 8 provides for a number of labour rights, including the right to form and join trade unions and trade union federations, as well as the right to strike. The ESCR Committee has clarified various aspects of the right to work in its General Comments relating to article 6 and article 7.²⁵⁴

Programme for Transgenders. Kerala State Literacy Mission Authority.

<https://literacymissionkerala.org/en/services/continuing-education-programme-for-transgenders> (Accessed 12 May 2019).

²⁵³ ILO Equal Remuneration Convention, 1951 (No. 100) and the ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

²⁵⁴ ESCR Committee, General comment No. 18: The right to work, UN Doc. E/C.12/GC/18, (2006); ESCR Committee, General comment No. 23 (2016) on the right to just and favourable conditions of work, UN Doc. E/C.12/GC/23, (2016).

The Yogyakarta Principles also recognize the right to “decent and productive work, to just and favourable conditions of work and to protection against unemployment, without discrimination on the basis of sexual orientation or gender identity.”²⁵⁵

General right to work

In regard to article 6 of the ICESCR, the ESCR Committee clarifies that all work must be “decent work,” defined as work that “respects the fundamental rights of the human person as well as the rights of workers in terms of conditions of work safety and remuneration” and “provides an income allowing workers to support themselves and their families”.²⁵⁶

This requirement applies to independent and informal work, as well as wage-paid formal sector work.²⁵⁷ Given the informal nature of much of the work conducted by LGBTQ individuals in India, the extension of the protection of the right to work to the informal work context is crucial. Recommendation 204 of the International Labour Organisation (ILO) provides further content to the rights of informal workers and requires States to protect these rights while simultaneously pursuing the formalization of informal working relationships.²⁵⁸

The ESCR Committee sets out three interdependent elements of the general right to work under article 6:

1. **Availability:** The right to work includes a right to State-provided services to help individuals “identify and find available employment”. In this regard, the ESCR Committee emphasizes access to work as “an opportunity for economic self-reliance and in many cases a means to escape poverty”.²⁵⁹
2. **Accessibility:** The right to work includes a right for individuals to be able to access work opportunities without discrimination on prohibited grounds including sexual orientation and gender identity. Work must be physically, economically and geographically accessible.
3. **Acceptability and Quality:** The right to work includes a right to just and favorable conditions of work, a right to freely choose and accept work, and a right to form trade unions.²⁶⁰ This component of the right to work should also be interpreted in the context of the requirements that all work is “decent work”.

Where a State employs people, the **obligation to respect** requires it to refrain from “interfering directly or indirectly” with the “enjoyment” of the right to work.²⁶¹ The obligation to respect the right to work requires States to “refrain [] from denying or limiting equal access to decent work for all persons” but

²⁵⁵ Yogyakarta Principles, principle 12.

²⁵⁶ ESCR Committee, General comment No. 18: The right to work, UN Doc. E/C.12/GC/18, (2006), para. 7.

²⁵⁷ ESCR Committee, General comment No. 18: The right to work, UN Doc. E/C.12/GC/18, (2006), para. 6

²⁵⁸ The Indian Parliament has, significantly, approved ILO Recommendation 204. *Cabinet approves ILO Recommendation No. 204 (R-204) concerning transition from the informal to the formal economy*. Press Information Bureau, Government of India. <http://pib.nic.in/newsite/PrintRelease.aspx?relid=134206> (Accessed 12 May 2019).

²⁵⁹ ESCR Committee, General comment No. 18: The right to work, UN Doc. E/C.12/GC/18, (2006), paras. 12(a) and 14.

²⁶⁰ ESCR Committee, General comment No. 18: The right to work, UN Doc. E/C.12/GC/18, (2006), para. 12.

²⁶¹ ESCR Committee, General comment No. 23 (2016) on the right to just and favourable conditions of work, UN Doc. E/C.12/GC/23, (2016), para. 58.

“especially disadvantaged and marginalized individuals and groups” including “members of minorities” such as LGBTQ persons.²⁶² States must “take measures to combat discrimination and to promote equal access and opportunities,” and are also required to “prohibit all forms of economic exploitation and forced labour of children.”²⁶³

“[L]aws, policies and actions” which contravene the standards set out in articles 6-8 of the ICESCR violate the duty to respect the right to work.²⁶⁴ In addition, “[a]ny discrimination in access to the labour market or means and entitlements for obtaining employment”, constitutes a violation of the ICESCR.²⁶⁵

The **obligation to protect** requires States to protect the components of that right against interference by non-state actors, including private employers. In this connection, they must “adopt legislation or to take other measures ensuring equal access to work”.²⁶⁶ States must ensure that measures taken to protect the right to work “also cover the informal sector” and recognizes that “certain workers” whose employment is precarious “may require specific measures” as a result of their particular circumstances and vulnerabilities.²⁶⁷

A failure to take “all necessary measures” to prevent infringements of the right to work by any “third parties” amounts to a violation of the right to work.²⁶⁸ States are therefore compelled, for example, to “regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to work”.²⁶⁹ The obligation to protect therefore requires States to “prevent, investigate, punish and redress” abuses of the right to work including those arising from discrimination in contravention of ICESCR. Existing laws aimed at protecting the right to work must be “adequate and effectively enforced” including through the imposition of “sanctions and appropriate penalties on third parties”²⁷⁰

The **obligation to fulfill** requires States to undertake specific measures including: (i) establishing a national policy on the right to work; (ii) adopting a plan to counter unemployment; (iii) increasing resource allocation to reduce unemployment, particularly for disadvantaged and marginalized groups; (iv) establishing a mechanism to compensate for lost employment; and (v) providing employment services at the national and local levels.

The ESCR Committee is clear that failure to adopt such measures and “insufficient expenditure or misallocation of public funds which results in the

²⁶² ESCR Committee, General comment No. 18: The right to work, UN Doc. E/C.12/GC/18, (2006), para. 23.

²⁶³ *Id.*, para. 24.

²⁶⁴ *Id.*, para. 33.

²⁶⁵ *Id.*, para. 34.

²⁶⁶ ESCR Committee, General comment No. 18: The right to work, UN Doc. E/C.12/GC/18, (2006), para. 25.

²⁶⁷ ESCR Committee, General comment No. 23 (2016) on the right to just and favourable conditions of work, UN Doc. E/C.12/GC/23, (2016), para. 59.

²⁶⁸ ESCR Committee, General comment No. 18: The right to work, UN Doc. E/C.12/GC/18, (2006), para. 35

²⁶⁹ *Id.*

²⁷⁰ ESCR Committee, General comment No. 23 (2016) on the right to just and favourable conditions of work, UN Doc. E/C.12/GC/23, (2016), para. 59.

non-enjoyment of the right to work by individuals or groups, particularly the disadvantaged and marginalized” amounts to a violation of the right to work.²⁷¹

The obligation to fulfill also includes a requirement to adopt “positive measures” to ensure the “sufficient recognition of the right through laws, policies and regulations” including on the prohibition of discrimination.²⁷² Such positive measures include the introduction by the State of “quotas or other temporary special measures to enable women and other members of discriminated groups to reach high level posts” and the provision of “incentives for the private sector to do so”.²⁷³

Minimum core of the right to work

The elimination of discrimination is a minimum core obligation of the right to work, which must be realized immediately, and may involve the special consideration of disadvantaged and marginalized individuals and groups. In particular, the obligation involves:

1. **Ensuring access to employment**, including access to employment for “disadvantaged and marginalized individuals and groups” and sufficiently decent employment that it permits those employed to “live a life of dignity”;
2. **Avoiding measures that result in discrimination** in both public and private sectors. This includes ensuring no “weakening [of] mechanisms for the protection” of disadvantaged and marginalized individuals and groups; and
3. **Adoption and implementation of a national employment plan** “addressing the concerns of all workers on the basis of a participatory and transparent process” and “target[ing] disadvantaged and marginalized individuals and groups in particular”.

In addition to these core obligations, the satisfaction of “minimum essential levels of the right” to just and favourable working conditions pursuant to ICESCR article 7, includes immediate obligations to:

1. **Legislate guarantees for non-discrimination**, including on the basis of “sex”, “sexual orientation”, “gender identity” and “intersex status”;
2. **Establish a system to combat gender discrimination in the workplace**, including discrimination against transgender persons;
3. **Legislate non-discriminatory and non-derogable minimum wages** that are “fixed taking into consideration relevant economic factors and indexed to the cost of living so as to ensure a decent living for workers and their families”;
4. **Adopt and implement national policy on occupational safety and health** that is “comprehensive” and is therefore implicitly required to take into consideration the health and safety of all workers including the particular needs of disadvantaged and marginalized workers such as transgender workers;
5. **Legally define and prohibit harassment**, specifically “sexual harassment” to which LGBTQ persons are vulnerable. The ESCR Committee indicated that such definition and prohibition should be achieved by law and “appropriate complaints procedures” created and “criminal sanctions” established.

²⁷¹ Id., para. 36.

²⁷² ESCR Committee, General comment No. 23 (2016) on the right to just and favourable conditions of work, UN Doc. E/C.12/GC/23, (2016), para. 61.

²⁷³ Id.

6. **Legally determine minimum work standards** that cover “rest, leisure, reasonable limitation of working hours, paid leaves and public holidays”.

The ESCR Committee has set out the following principles and guidelines concerning article 7 and discrimination based on SOGIE in the context of ensuring just and favorable conditions of work:

1. **Equality of remuneration** - Equality of remuneration applies to all workers without discrimination on prohibited grounds including on sexual orientation and gender identity;
2. **Equality of Opportunity** – All workers to have the right to equal opportunity for promotion through fair, merit-based and transparent processes, without discrimination, based on prohibited grounds including sexual orientation and gender identity;
3. **Freedom from Workplace Harassment** – All workers must be free from physical and mental harassment including sexual harassment. Laws, including criminal and labor laws, that define harassment should make specific reference to sexual harassment and other forms of harassment on the basis of prohibited grounds of discrimination, including, “sexual orientation, gender identity, and intersex status.”
4. **Consultations with LGBTQ Persons** – There should be consultation with organizations representing LGBTQ rights, as well as other marginalized populations in drafting, implementing, reviewing and monitoring laws and policies related to the right to just and favorable conditions of work.²⁷⁴

The ESCR Committee has emphasized that workplace discrimination based on “sex”, “sexual orientation”, “gender identity” and “intersex status” violate the right to work under article 7. States have an immediate obligation to prevent all such discrimination in the workplace, whether formal or informal, public or private.

In addition, the International Labour Organization (ILO) Conventions and other standards are particularly relevant to the right to work. The ILOs main conventions on elimination of discrimination in the workplace – ILO Equal Remuneration Convention, 1951 (No. 100) and the ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111) – have been ratified by India.

The ILO Recommendation concerning HIV and AIDS and the World of Work calls on States to encourage empowerment of workers regardless of their sexual orientation or membership of a vulnerable group.²⁷⁵

Finally, the Yogyakarta Principles include the right to “decent and productive work, to just and favourable conditions of work and to protection against unemployment, without discrimination on the basis of sexual orientation or gender identity”.²⁷⁶

²⁷⁴ ESCR Committee, General comment No. 23 (2016) on the right to just and favourable conditions of work, UN Doc. E/C.12/GC/23, (2016), para 11; See ICESCR, article 2 (2); ESCR Committee, General comment No. 20: Non-discrimination in economic, social, and cultural rights, UN Doc. E/C.12/GC/20, (2009).

²⁷⁵ International Labour Organization, Recommendation concerning HIV and AIDS and the World of Work (R200), 2010.

²⁷⁶ Yogyakarta Principles, principle 12.

India has a legal obligation, engaging the executive, administrative, the legislative, the judicial organs of State to protect LGBTQ persons and ensure their full range of work rights without discrimination.

The Right to Work in Indian Constitutional Law

The right to work is not expressly provided for in the Indian Constitution. However, the Constitution does recognize a right “to practise any profession, or to carry on any occupation, trade or business” (Article 19(c)), which is included under the “right to freedom”. Nevertheless, in its “Directive Principles of State Policy,” the Constitution does make direct reference to the “right to work” and work-related issues.²⁷⁷

The Directive Principles indicate that the State must direct its policy at ensuring “an adequate means of livelihood”,²⁷⁸ “equal pay for equal work”,²⁷⁹ “just and humane conditions of work”,²⁸⁰ “a living wage” and “conditions of work ensuring a decent standard of life”.²⁸¹ Most pointedly, the State is directed to “make effective provision for securing the *right to work*” including “assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want”.²⁸²

Though Directive Principles are not directly enforceable or justiciable, Indian courts have interpreted binding rights (such as the Article 21 right to life) together with directive principles to ensure the constitutional protection of ESCR in various cases.

In *Bandhua Mukti Morcha*, the Supreme Court held that “the right to live with human dignity” in Article 21 of the Constitution “derives its life breath from” Directive Principles 39, 41 and 42. The Court therefore concluded that the State was bound to ensure “just and humane conditions of work” and must therefore enact and ensure implementation of “various social welfare and labour laws enacted by Parliament for the purpose of securing to the workmen a life of basic human dignity in compliance with the Directive Principles of State Policy.”²⁸³

The Supreme Court reaffirmed this conclusion in *Olga Tellis v. Bombay Municipal Corporation*, stating that “[i]f there is an obligation upon the State to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life.”²⁸⁴

In line with the India’s obligations under the ICESCR, Article 21 of the Indian Constitution alongside Directive Principles 39, 41, and 42 therefore provides for a justiciable and enforceable right to work in Indian constitutional law.

²⁷⁷ Constitution of India, Articles 41-43; See also Articles 39(a), (d), (e).

²⁷⁸ Constitution of India, Article 39(a).

²⁷⁹ Constitution of India, Article 39(d).

²⁸⁰ Constitution of India, Article 42.

²⁸¹ Constitution of India, Article 43.

²⁸² Constitution of India, Article 41.

²⁸³ Supreme Court of India, *Bandhua Mukti Morcha v. Union of India (UOI) and Ors.*, (1984)3SCC161, para. 14.

²⁸⁴ Supreme Court of India, *Olga Tellis and Ors. v. Bombay Municipal Corporation and Ors.*, 1986 AIR 180, para. 33

Importantly, it has also now been established that this right extends to all persons, regardless of their gender identity without discrimination. In *Navtej* the Supreme Court recognized that the Indian Constitution's guarantees of equality of opportunity and non-discrimination "in matters of employment" or "appointment to office under the State," apply to LGBTQ persons who have a right to non-discrimination in access and enjoyment of the right to work.²⁸⁵

This position in Indian law is, as indicated above, aligned with India's obligation to protect the right to work in articles 6-8 of the ICESCR. The Indian legal framework therefore guarantees the right to non-discrimination on the basis of sexual orientation and gender identity in the exercise of right to work.

Related Human Rights

Right to Legal Gender Recognition

Recognition of one's gender identity is fundamental to the enjoyment of all rights. The UN Independent Expert on SOGI has addressed this principle: "The right to effective recognition of one's gender identity is linked to the right to equal recognition before the law established in article 6 of the Universal Declaration of Human Rights, subsequently set out in international human rights law, beginning with article 16 of the ICCPR, and also present in other universal human rights treaties and regional human rights instruments."²⁸⁶

Furthermore, Principle 3 of the Yogyakarta Principles indicates that "[e]ach person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom." It urges States to "[t]ake all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person's gender/sex — including birth certificates, passports, electoral records and other documents — reflect the person's profound self-defined gender identity."²⁸⁷

The ESCR Committee has also affirmed that "the absence of legal recognition of their gender identity is a barrier to transgender persons having effective access to work".²⁸⁸ The Committee has said that a State should "put in place a quick, transparent and accessible procedure for legal gender recognition, to facilitate the enjoyment of [ICESCR] rights by transgender persons."²⁸⁹

Right to Education

The right to education is guaranteed in articles 13 and 14 of the ICESCR. Education must be protected not only as a right in itself but also as an

²⁸⁵ *Navtej Singh*, paras. 16, 191.

²⁸⁶ Victor Madrigal-Borloz, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, UN Doc. A/73/152, (2018), para. 20.

²⁸⁷ Yogyakarta Principles. Principle 3.

²⁸⁸ ESCR Committee, Concluding observations on the fifth periodic report of Costa Rica, UN Doc. E/C.12/CRI/CO/5, (2017), para. 20.

²⁸⁹ ESCR Committee, Concluding observations on the sixth periodic report of the Russian Federation, UN Doc. E/C.12/RUS/CO/6, (2017), para 23(b).

“indispensable means of realizing other human rights”.²⁹⁰ The access and enjoyment of the right to education is an enabling right that is necessary for the “full development of the human personality” and full participation in society.²⁹¹

The ESCR Committee has emphasized the link between the accessibility of education and the ability to find work.²⁹² The obligation to fulfill the right to work includes adopting “national policies relating to adequate education and vocational training... to promote and support access to employment opportunities for young persons.”²⁹³

The ESCR Committee has affirmed that these guarantees mean that education must be available, accessible, acceptable, and adaptable. The right is generally subject to progressive realization, but State Parties are under immediate obligations to extend the right without non-discrimination, and to take “deliberate, concrete, and targeted” steps towards its full realization.²⁹⁴

The ESCR Committee has further stated that the State should “implement a zero-tolerance policy against harassment in schools, paying particular attention to lesbian, gay, bisexual or transgender children or children of lesbian, gay, bisexual or transgender families, and ensure effective protection of victims of bullying and their families”.²⁹⁵

Right to be Free of Workplace Harassment and Discrimination

Article 7 of the ICESCR protects the right to just and favourable conditions of work. States must ensure that the right to work is enjoyed by all without discrimination. The right to just and favourable conditions of work includes the right to be free from physical and mental harassment, including sexual harassment, at the workplace.²⁹⁶

States have a core obligation of immediate effect to take effective legislative measures to protect persons from sexual harassment, including criminal sanction, and provide a specific definition of sexual harassment in both public and private sector. The ESCR Committee has indicated that such legislation should cover the following:²⁹⁷

- Harassment by and against any worker;
- Prohibition of harassment, including sexual harassment;
- Identification of duties of employers, managers, supervisors and workers to prevent, resolve and remedy harassment;
- Access to justice for victims of harassment;

²⁹⁰ ESCR Committee, General Comment No. 13: The Right to Education (Art. 13), UN Doc. E/C.12/1999/10, (1999), para. 1.

²⁹¹ See ESCR Committee, General Comment No. 13: The Right to Education (Art. 13), UN Doc. E/C.12/1999/10, (1999), para. 1.

²⁹² ESCR Committee, General comment No. 18: The right to work, UN Doc. E/C.12/GC/18, (2006), para. 13-15.

²⁹³ ESCR Committee, General comment No. 18: The right to work, UN Doc. E/C.12/GC/18, (2006), para. 14, 27.

²⁹⁴ See ESCR Committee, General Comment No. 13: The Right to Education (Art. 13), UN Doc. E/C.12/1999/10, (1999), para. 43.

²⁹⁵ ESCR Committee, Concluding observations on the sixth periodic report of the Russian Federation, UN Doc. E/C.12/RUS/CO/6, (2017), at para 57(b).

²⁹⁶ ESCR Committee, General comment No. 23 (2016) on the right to just and favourable conditions of work, UN Doc. E/C.12/GC/23, (2016), para. 48.

²⁹⁷ ESCR Committee, General comment No. 23 (2016) on the right to just and favourable conditions of work, UN Doc. E/C.12/GC/23, (2016), para. 65(e).

- Compulsory training for staff, including managers and supervisors, on harassment;
- Protection of victims including focal points and avenues for complaint;
- Prohibition of reprisals for complaints about harassment;
- Procedures for notification and reporting to public authorities about instances of sexual harassment; and
- Provision of clearly visible, workplace specific policies developed in consultation with workers and relevant stakeholders such as civil society organizations.

Sexual harassment in the workplace against women, including lesbian, bisexual, and transgender women, has been recognized as a form of gender-based violence by the UN General Assembly.²⁹⁸

Right to Water and Sanitation

The ICESCR recognizes everyone's right to enjoy the highest attainable standard of physical and mental health. Article 12(2)(b) provides that among the steps needed to be taken by the State towards progressive realization of the right to health is "improvement of all aspects of environmental and industrial hygiene". This includes ensuring an adequate supply of safe and potable water and basic sanitation.²⁹⁹ The ESCR Committee has also recognized the importance of water for accessing right to work.³⁰⁰

The UN General Assembly has also recognized the right to water and sanitation as a right protected by international law, including in its resolution 17/69 of 2105.³⁰¹

The State has an immediate obligation to ensure access to water without discrimination on prohibited grounds including sexual orientation and gender identity and to take steps towards realization of this right, including adopting a national strategy or plan of action for realization of right to water.³⁰² Further, States have a core obligation to ensure that "physical security is not threatened when having to physically access to water".³⁰³

OBSTACLES TO LGBTQ PERSONS' ENJOYMENT OF THE RIGHT TO WORK

LGBTQ persons in India are at substantial risk of discrimination at all stages of the employment process. They are often unable to access or complete education due to discrimination and harassment, stigma and outright exclusion, and are thus often, unable to acquire the qualifications needed by workplaces.³⁰⁴ They

²⁹⁸ UN General Assembly, Declaration on the Elimination of Violence against Women, UN Doc. A/RES/48/104, (1993), at p. 3.

²⁹⁹ ESCR Committee, General comment No. 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4, (2000), para. 15.

³⁰⁰ ESCR Committee, General Comment No. 15: The right to water, UN Doc. E/C.12/2002/11, (2003), para 6.

³⁰¹ UN General Assembly, The human rights to safe drinking water and sanitation, UN Doc. A/RES/70/169, (2016).

³⁰² ESCR Committee, General Comment No. 15: The right to water, UN Doc. E/C.12/2002/11, (2003), para 47.

³⁰³ ESCR Committee, General Comment No. 15: The right to water, UN Doc. E/C.12/2002/11, (2003), para 37.

³⁰⁴ UNICEF (ROSA), "Violence Against Children in Education Settings in South Asia: A desk review," (2016), <https://www.unicef.org/rosa/media/1346/file> (Accessed 12 May 2019), p. 9; See also,

face discrimination from prospective employers, are often harassed during the recruitment process, and are excluded from opportunities due to gender specific requirements of the jobs.

When LGBTQ individuals are able to access workplaces, they are vulnerable to sexual harassment, assault, verbal harassment, and other forms of workplace harassment and discrimination. Gendered workspaces, in particular toilets, create additional difficulties, including placing LGBTQ at risk of assault. LGBTQ employees also report being forced, as a consequence of persistent discrimination and abuse, into leaving their jobs, or having their employment arbitrarily terminated. Transgender persons and gender non-conforming persons face an additional hurdle in accessing employment, as they lack identity documents in their preferred or expressed gender.

This chapter will discuss the human rights violations faced at each of the following stages of the employment process:

Accessing Employment: This section looks at the process of accessing educational opportunities leading to employment; the various forms of discrimination faced such as discriminatory denial of employment opportunities; difficulties in accessing identity documents, and gender specific limitations on entry into the workplace.

Workplace Discrimination and Abuse: This section looks at the gendered nature of workspaces, and LGBTQ persons' vulnerability to abuse and workplace discrimination. It also looks at discrimination, harassment and other abuse faced by LGBTQ persons who are sex workers.

Vulnerability to Dismissal: This section examines the lack of security of tenure faced by LGBTQ persons due to arbitrary dismissal from jobs, and being forced to leave jobs due to discrimination and harassment.

Accessing Employment

Access to education and vocational training and guidance

Limited educational and vocational training opportunities have a direct impact on the right to work. Information gained from interviews suggests that discrimination based on gender expression that is at variance with the sex assigned at birth is reinforced in educational institutions.³⁰⁵ As a result, individuals with real or perceived non-normative sexual orientation and gender identity suffer poor learning outcomes, thus limiting their access to employment opportunities in the formal sector.³⁰⁶ Education and training opportunities are also denied to LGBTQ persons due to harassment, bullying and violence.³⁰⁷

Ministry of Social Justice and Empowerment, "Report of the Expert Committee on the Issues relating to Transgender Persons," 2014, <http://socialjustice.nic.in/writereaddata/UploadFile/Binder2.pdf> (Accessed 12 May 2019), p. 6.; See also UNDP and ILO, "LGBTI People and Employment: Discrimination Based on Sexual Orientation, Gender Identity and Expression, and Sex Characteristics in China, the Philippines and Thailand," (2018), http://www.asia-pacific.undp.org/content/rbap/en/home/library/democratic_governance/hiv_aids/lgbti-people-and-employment--discrimination-based-on-sexual-orie.html (Accessed 12 May 2019).

³⁰⁵ Id., UNICEF.

³⁰⁶ UNICEF, *supra* note 304, p. 9 states "Patterns of gender discrimination in broader society are reproduced and reinforced in learning environments, including in curricula and textbooks. Rigid notions of masculinity are linked to several forms of VAC in education settings, and such violence

Accounts of bullying in schools were common among those interviewed for this report. T, a transgender man from Bangalore reported that:

"It became hard for me because everyone made fun of me, they didn't sit with me, and they didn't even touch me as if I had some disease. The teachers also sometimes made me sit separately. I felt troubled both at home and in school so I decided to stop school."³⁰⁸

Others shared accounts of being excluded from peer groups,³⁰⁹ being called pejorative names such as "*homo*,"³¹⁰ being bullied and publicly made fun of by teachers,³¹¹ and being subjected to violence because of their gender expression.

B1, a *nupi manbi* from Manipur told the ICJ about the bullying she faced in school because of her gender expression:

"During school I was bullied a lot, I was called 'homo' etc. Because of this I didn't study any more. I was lethargic and because of the bullying decided to stop studying."³¹²

C1, a gay cis-gendered man from Kochi recalled how he was bullied for his gender expression by a teacher and other students:

"When I was in 12th standard, one of my English teachers asked me to read something aloud. When I took my textbook in hand, I was not able to read in a loud, or in a masculine way as she expected. She took a stick and hit me and abused me using derogatory words in Malayalam, like *chantupottu* and *annum pennum kettathu*.³¹³ The entire class was looking at me. I was crying in the crowd and I just immediately ran away, vomiting. Till my final year exam, I did not sit in that class. During her hour, I would stand outside. I did not speak with her. I was really closed up after that. I was not able to talk to anyone."³¹⁴

negates the common perception that boys can be perpetrators but not victims of violence. In many cases, children and adolescents (both girls and boys) face physical, sexual and psychological violence when they are perceived as deviating from prescribed gender roles;" Nirantar, "Policy Audit: A Heteronormativity Audit of RMSA – A Higher Education Programme in Indian Schools," (2013), <https://opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/3278/ER47%20Final%20Online.pdf?sequence=1&isAllowed=y> (Accessed 12 May 2019), p. 4 states "All aspects of school life – from textbooks, pedagogy, friendships and student-teacher dynamics to uniforms, bathrooms and seating arrangements – are informed by and further strengthen the gender binary. When students break its rules, they can be ridiculed, rebuked and, sometimes, severely punished with physical violence."

³⁰⁷ M.V. Lee Badgett, "The Economic Cost of Homophobia and the Exclusion of LGBT persons: A Case Study of India," World Bank, 2014, <http://documents.worldbank.org/curated/en/527261468035379692/pdf/940400WP0Box380usion0of0LGBT0People.pdf>, p. 20 states "Some evidence suggests that LGBT people face exclusion in educational settings. A small set of studies in India find that education and training opportunities are denied to LGBT people or are made more difficult by negative treatment of and lack of support for LGBT People." Based on the 2011 Census of India, the study states that "Only 46 percent of those using the other gender option were literate, compared with 74 percent of the other population," subject to limitations of the Census survey.

³⁰⁸ ICJ interview, Bangalore, September 2018.

³⁰⁹ ICJ interview, Baroda, December 2018.

³¹⁰ ICJ interview, Imphal, October 2018.

³¹¹ ICJ interview, Kochi, October 2018.

³¹² ICJ interview, Imphal, October 2018.

³¹³ A derogatory term to describe someone a man who is effeminate or queer.

³¹⁴ ICJ interview, Kochi, October 2018.

D, a transgender man from Delhi reported the harassment he faced in school as follows:

"I was humiliated, scolded, and punished by the teachers – I was made to stand on the bench, thrown out of class and interrogated about my gender expression. They would ask me to wear the girls' uniform and also slap me and cane me for not following the dress code. After puberty things became very difficult. My dysphoria became very strong and I couldn't focus on my studies. I started failing subjects and had depression."³¹⁵

School uniforms, dress code and appearance, participation in sports, access to toilets, and sometimes even seating arrangements are frequently determined by dividing male and female students to the exclusion or discomfort of transgender and gender non-binary persons. These conditions make it difficult for students with gender expression or identity, at variance with the sex assigned at birth to realize their right to education.

W, a gender-queer transgender man and scientist from Delhi described his experience as follows:

"When I was in school, I would want to play sports a lot – and that was seen as "masculine." Barriers that I faced were in terms of masculine nerdiness. Even though girls outperform boys, they are not considered nerds. Nerds are disregarding instruction but exploring other intense academic interests – and I wasn't a part of that group because it wasn't okay for women to claim space as nerds. Boys would sit together and be like "we are going to code" – and I'd be like I want to come too, but they would refuse saying "It's boys only" and I'd tell them "But I'm a boy!" – but they would reject that."³¹⁶

D1, a *nupi manbi* from Manipur reported being forced to wear the boys' uniform, even though she felt uncomfortable in it. She told the ICJ:

"I didn't want to wear the school male uniform. I wanted to wear girl's clothes hence I was made fun of a lot and bullied. Because of all these reasons I decided to stop studying more."³¹⁷

Other interviewees reported similar experiences of discrimination and exclusion:

"The teachers used to force us to grow our hair – I used to lie to them and tell them that I have a problem and my hair doesn't grow. So I would routinely get a haircut to keep up with that lie."³¹⁸

"My teacher made me sit outside the class for studies and while writing exams also. I was not allowed to talk to other boys. Girls would also not talk with me. I used to listen to the lessons only from outside the classroom. Yet, I wrote the exams and did well. I was first in class. I was facing discrimination throughout my school days. I was not allowed to talk to anyone even during lunchtime. My school teacher also sexually abused me."³¹⁹

"When I took admission in another school, the Principal asked me to wear skirt as the school uniform. I was scared so I said yes to wearing skirts, but I was still the

³¹⁵ ICJ interview, Delhi, August 2018.

³¹⁶ ICJ interview, Delhi, August 2018.

³¹⁷ ICJ interview, Imphal, October 2018.

³¹⁸ ICJ interview, Baroda, December 2018.

³¹⁹ ICJ interview, Chennai, August 2018.

same inside and I used to wear shorts underneath my skirt. Whenever I got an opportunity, I removed my skirt. This is commonplace in our lives".³²⁰

"I always used the girl's washroom, but I had to be careful because if the chowkidaar(guard) saw me he would scold me. It was uncomfortable. The chowkidaar used to throw me out of the washroom saying that I am a boy and I am not allowed to use it."³²¹

In addition, there are systemic barriers to accessing education to transgender persons seeking to enter educational institutions. Some interviewees suspected that they had been denied admission because of their SOGEISC.

F1, a transgender woman and activist from Kochi described her experience:³²²

"The Student Federation of India made a transgender column [in admission forms] at the time of admission [to state universities]. We three [transgender individuals] applied. When the first allotment list was released, we didn't get any seats. I got in the second list for BA (Philosophy). I went there for admission at 9 am and by 1:30 pm they had announced a change in the admission list. I didn't find my name in the list, but the people with lower rank were there on the list and my name had vanished.

We understood that they are not giving admission because of our identity as transgenders. We decided we will fight and take admission this year. We made a complaint. With the help of transgender cell and transgender justice committee we sent the complaint to the Ministry.³²³ As a result of that complaint they gave us reservation. In every department of every college, there would be 2 seats reserved for transgenders."³²⁴

Gendered learning environments, gendered admission requirements, and other forms of discrimination create barriers for LGBTQ persons' right to education. States have an obligation to prohibit discrimination in education through legislative measures, and that failure to do so constitutes a violation of State's obligations.³²⁵

Article 21A of the Indian Constitution recognizes the right to "free and compulsory education to all children of the age of six to fourteen years". This right is implemented through the Right of Children to Free and Compulsory

³²⁰ ICJ interview, Imphal, October 2018.

³²¹ ICJ interview, Delhi, August 2018.

³²² ICJ interview, Kochi, October 2018.

³²³ The Kerala Transgender Policy of 2015 led to the setting up of a transgender cell which supported the functioning of the state transgender justice board and district transgender justice committees. The cell was formed due to an outcry from the activist community in response to the issuance of flawed identity cards for transgender persons. Kerala, India. 2018. *Transgender cell constituted*. Government of Kerala, Social Justice Department. http://swd.kerala.gov.in/scheme-info.php?scheme_id=IDE0NA== (Accessed 12 April 2019).

³²⁴ In July 2018, the Government of Kerala announced that it had sanctioned two additional seats in all courses in Universities and affiliated colleges exclusively for transgender students. Kerala, India. 2018. *G.O. (Ms.) No. 153/2018/HEDN dt. 3/7/2018*. Higher Education Department, Government of Kerala. <http://www.highereducation.kerala.gov.in/images/stories/2018/ms153.pdf> (Accessed 12 May 2019).

³²⁵ ESCR Committee, General comment No. 20: Non-discrimination in economic, social, and cultural rights, UN Doc. E/C.12/GC/20, (2009); ESCR Committee General Comment No. 13: The Right to Education (Art. 13), E/C.12/1999/10, 1999.

Education Act, 2009,³²⁶ which provides for free elementary education of satisfactory and equitable quality in an educational institution.

The Act defines "child" as "a male or female child of the age of six to fourteen years."³²⁷ While it specifically prohibits discrimination against children who belong to "disadvantaged group" in accessing education,³²⁸ including on the basis of "disadvantage owing to ... gender,"³²⁹ the binary definition of child prevents an expansive definition of this section. However, the Government of Delhi has recognized transgender children as belonging to a disadvantaged group, via a gazette notification in light of *NALSA*.³³⁰

The Indian State must eliminate all discrimination in access to education based on gender identity and sexual orientation as it is constitutionally prohibited in Indian law and clearly violates the rights to education and equality in the Indian Constitution.

LGBTQ persons are often denied jobs in both the formal and informal sectors due to their actual or perceived sexual orientation or gender identity. Formal gender restrictions on some jobs, such as in the navy, army, and on flight crews create barriers for transgender persons. This is further compounded by the difficulty of obtaining required identity documents.

Due to the difficulties in accessing work in the formal sector, transgender and gender non-binary persons often take up work in the informal sector, or choose other livelihoods.³³¹ The Expert Committee Report on issues related to transgender persons also found that trouble accessing work "leaves many MtF

³²⁶ Right of Children to Free and Compulsory Education Act 2009, Section 3 states "(1) Every child of the age of six to fourteen years, including a child referred to in clause (d) or clause (e) of Section 2, shall have the right to free and compulsory education in a neighbourhood school till the completion of his or her elementary education," (RTE Act).

³²⁷ RTE Act, Section 2(c).

³²⁸ RTE Act, Section 8 states, "The appropriate Government shall...(c) ensure that the child belonging to weaker section and the child belonging to disadvantaged group are not discriminated against and prevented from pursuing and completing elementary education on any grounds."

³²⁹ RTE Act, Section 2(d) defines a child belonging to a disadvantaged group as "a child with disability or a child belonging to the Scheduled Caste, the Scheduled Tribe, the socially and educationally backward class or such other group having disadvantage owing to social, cultural, economical, geographical, linguistic, gender or such other factor, as may be specified by the appropriate Government, by notification."

³³⁰ Delhi, India. 2014. "Notification." Government of the National Capital Territory of Delhi, Directorate of Education, http://www.edudel.nic.in/upload_2013_14/delhigazette_dt_13112014.pdf (Accessed 27 May, 2019), states "In exercise of the powers conferred by clause (d) of section 2 of the Right of Children to Free and Compulsory Education Act, 2009 (35 of 2009) (RTE Act) the Lieutenant Governor National Capital Territory of Delhi is pleased to notify inclusion of a "transgender" child within the meaning of "child belonging to disadvantaged group" as defined in the said section of the RTE Act applicable to all schools situated within the National Capital Territory of Delhi."

³³¹ Lee Badgett, *supra* note 307, p. 26, states that "Lack of access to jobs, barriers to education and housing, and rejection by families, for example, can put LGBT people in precarious economic positions;" See Sivananda Khan *et al*, "From the front line," Naz Foundation, 2005, <http://www.hivpolicy.org/Library/HPP000907.pdf> (Accessed 12 May 2019), at p. 3 states "This stigmatisation and social exclusion further disempowers feminised males educationally and economically, increasing their poverty, which often forces them into sex work;" See Pankaj Masih *et al*, "Ummeed Live 2012: Third Gender Leadership Development Project, Raipur, Chhattisgarh," 2012, <https://issuu.com/undp/docs/ummeed-live-2012--third-gender-leadership-developm/1?ff&e=3183072/2556768> (Accessed 12 May 2019), at p. 20 states that in Chhattisgarh 93% of the transgender population makes it living from sex work, begging, and dancing at weddings.

(male to female) transgender people, especially those from working class backgrounds, with no alternative but begging and sex work.”³³² The informal sector, sex work in particular, is poorly regulated. As a result, individuals are unable to access effective legal remedies for discrimination, harassment, and other violations of the right to work.³³³

Eligibility requirements as obstacles to employment

Jobs that attach gender-specific eligibility requirements *de facto* exclude transgender and gender non-binary persons. State security forces such as the army, navy, police and airline crews, by way of example, have gendered qualifications requirements.

Several LGBTQ persons who have been denied access to jobs due to gender specific requirements have turned to courts for a remedy. The following section examines significant, though inconsistent, jurisprudential developments in connection with such efforts.

The law sets out gendered eligibility criteria for several posts in the Armed Forces, Navy, and the state Police.³³⁴ The Armed Forces, Navy and State Police and other security forces typically maintain a strict division of work between men and women, with many posts being reserved for men.³³⁵ As a consequence, transgender persons are unable to access these jobs.

The case of Sabi Giri is instructive. Sabi Giri, a transgender woman, joined the Navy as a cis-gendered man, where she was employed as a sailor for seven years. After seven years, she transitioned to a transgender woman and was dismissed from her job. The Navy argued that this was not discriminatory as, per the law, the post was only available to men. Sabi Giri filed a petition for wrongful termination. The case is currently ongoing.

Sabi Giri’s lawyers described the motivation for bringing the case:

“We wanted to test *NALSA v. UOI*. It's very well for the Court to give a declaration that transgender identity is recognized but how does the declaration get implemented? The Navy Act and other military laws are not progressive. The Navy Act does even not recognize the transgender identity. Hence, we realized that we need to challenge the constitutionality of the law and not just Sabi’s termination of employment. The Navy has responded that given that they do not have rules or regulations pertaining to transgender persons, the Ministry of Defence needs to advise them. In

³³² Ministry of Social Justice and Empowerment, “Report of The Expert Committee on Issues relating to Transgender Persons,” (2014), <http://www.socialjustice.nic.in/writereaddata/UploadFile/Binder2.pdf> (Accessed 12 May 2019), p. 47.

³³³ John Godwin, “Sex Work and The Law in Asia and The Pacific,” UNDP (2012), <https://www.undp.org/content/dam/undp/library/hiv/aids/English/HIV-2012-SexWorkAndLaw.pdf> (Accessed 12 May 2019).

³³⁴ Army Act, 1950, Section 12; Air Force Act, 1950, Section 12; Indian Navy Act, 1957, Section 9(2), contain provisions excluding women from eligibility for enrolment.

³³⁵ For instance, in the Indian Navy, only men are qualified to become sailors. Only men can serve in combat roles in the Indian Army. See UC Jha, “Women must fight to get combat roles in the Armed Forces,” DNA India, 22 May 2018, <https://www.dnaindia.com/analysis/column-women-must-fight-to-get-combat-roles-in-the-armed-forces-2617433> (Accessed 12 May 2019).

their wildest imagination they could not have anticipated a case like this.³³⁶

The petition argues that the law infringes upon the rights to equality, non-discrimination, and life and liberty. It demands that Sabi Giri be reinstated, and awarded damages and compensation. The petition also calls for the Navy to be compelled "to frame a policy for the recruitment, enrolment and conditions of service of transgender persons, after due consultation with the transgender community."³³⁷

Positions in the State Police forces are also restricted within the gender binary – male and female – and state officials have been hesitant to admit individuals who identify as transgender, gender non-binary, or who may have intersex variations. Hence, when transgender, gender non-binary persons, or persons with intersex variations have sought to join the police force, they have had to identify as a man or a woman. This often leads to problems when they undergo medical tests required as part of the recruitment process. Moreover, individuals with intersex variations have been outed during medical tests without their consent and sometimes, without prior knowledge of their intersex variation.

These medical examinations frequently result in doctors incorrectly labeling individuals as "pseudo hermaphrodite",³³⁸ "hermaphrodite, unisex, or transgender,"³³⁹ "transgender by birth"³⁴⁰ "pseudo-hermaphrodite" or "transsexual".³⁴¹ The medical certificates have then been used as the basis to halt recruitment or deny appointment letters.³⁴²

Some individuals have successfully challenged the denial of employment by the state Police, contending that the denial is discriminatory.

One such case, *Nangai v. The Superintendent of Police*, in the High Court of Madras, involved a person identified as a woman in her birth certificate. She had expressed as a woman and had been dismissed from her position as a police constable on a number of grounds, including not disclosing her "transgender" identity, when applying under the "woman" quota. A medical examination conducted as part of the recruitment process incorrectly stated that she was "transgender by birth", as she had intersex variations, and this was one of the grounds for the termination of her appointment. The Court held that forcing her to accept a different gender was a violation of her rights, citing *NALSA*, and ordered that she be reinstated.³⁴³

In another case, *Faizan Siddiqui v. Sashastra Seema Bal*, in the High Court of Delhi, the petitioner challenged the decision of the medical board of the SSB (an armed police force) which had declared her medically unfit, stating that she had a "congenital anomaly and pseudo hermaphroditism," even though she met all

³³⁶ ICJ interview with Amritananda Chakravorty and Mihir Samson, Delhi, August 2018.

³³⁷ High Court of Delhi, *Manish Kumar Giri @ Sabi Giri v. Union of India*, W.P.(C) 9535/2017.

³³⁸ High Court of Delhi, *Faizan Siddiqui v. Sashastra Seema Bal*, W.P.(C)No.7208/2008, at para. 42.

³³⁹ High Court of Rajasthan, *Ganga Kumari v. State of Rajasthan*, 2017 (4) WLN 554 (Raj.), at para. 14.

³⁴⁰ High Court of Madras, *Jackuline Mary v. The Superintendent of Police, Karur*, 2014LabIC3875, at para. 6.

³⁴¹ High Court of Madras, *G. Nagalakshmi v. Director General of Police*, (2014)7MLJ452, at para. 10.

³⁴² High Court of Madras, *Nangai v. Superintendent of Police*, (2014)4MLJ12.

³⁴³ High Court of Madras, *Nangai v. Superintendent of Police*, (2014)4MLJ12.

objective criteria for physical fitness. The Court held that such a declaration was arbitrary, irrational, and illegal. The Court stated that the petitioner's medical condition of "complete androgen insensitivity" did not have any bearing on her ability to perform the duties that would be assigned to her.³⁴⁴

Similar restrictions have been challenged in the other areas of public employment such as airline flight crews and public health workers.

In the ongoing case of *Shanavi Ponnusamy v. Ministry of Civil Aviation*, in the Supreme Court of India,³⁴⁵ a transgender woman was rejected for a cabin crew job with Air India, a State-owned airline, after applying under the "female" category.³⁴⁶ Air India argued that she had been rejected because she had not scored the requisite marks in subjective personality tests for women.³⁴⁷ She has challenged the dismissal claiming that requiring her to meet the criteria set out for cis-gendered women and not providing a "transgender" option in the application process violates her right to recognition of her transgender identity. The case is ongoing in the Supreme Court.

In *Sumita Kumari v. State of West Bengal and Others*, in the High Court of Calcutta, a transgender woman applied to work as an Accredited Social Health Activist (ASHA) worker and was denied the opportunity.³⁴⁸ The government guidelines for the position indicated that only married, divorced, or widowed cis-gendered women could be appointed as ASHA workers. In response to a petition challenging the denial of employment, the High Court of Calcutta subsequently issued a decision holding that the exclusion of transgender women was not discriminatory, as the guidelines had also excluded men and dismissed the petition. This unfortunate decision is clearly inconsistent with *NALSA*.³⁴⁹ The case has not been appealed.

This reasoning has also not been adopted in a similar case by the High Court of Calcutta. In *Atri Kar v. State Bank of India*, the High Court of Calcutta ruled in favour of a transgender person who had applied for a job at the State Bank of India recognizing their right to participate in a recruitment process free of gender identity-based discrimination. The Bank had argued that it was not required to facilitate the participation of a transgender person in its selection process by having a column for transgender persons on its application form. The Court rejected this argument holding that this was a denial of a "right to

³⁴⁴ High Court of Delhi *Faizan Siddiqui vs Sashastra Seema Bal*, W.P.(C)No.7208/2008.

³⁴⁵ Supreme Court of India, *Shanavi Ponnusamy v. Ministry of Civil Aviation* Writ Petition(s)(Civil) No(s). 1033/2017.

³⁴⁶ High Court of Calcutta, *Sumita Kumari v. State of West Bengal*, WP 8911 (W) of 2015.

³⁴⁷ Air India's hiring policy explicitly excludes transgender persons without reasonable justification, and violates their fundamental rights to equality and non-discrimination in matters of employment, and right to life with dignity. ICJ Interview with Lawyers Collective, representing Shanavi Ponnusamy, Delhi, February 2019.

³⁴⁸ High Court of Calcutta, *Sumita Kumari v. State of West Bengal*, WP 8911 (W) of 2015.

³⁴⁹ The decision appeared to be flawed in a number of respects. The Court did not ask the State to provide any justification for excluding men or transgender persons. Moreover, the judgment did not take into account the systemic discrimination faced by transgender persons, and the disparate impact of the restricted hiring policy on them. Further, it failed to acknowledge that even if the intent of the policy were not discriminatory, the impact was clearly discriminatory in excluding transgender persons based on their gender identity, without any objective or reasonable justification.

participate in a selection process on the basis of the sex of the petitioner” in violation of *NALSA* and was a violation of her right to non-discrimination.³⁵⁰

Law and Jurisprudence on Discriminatory Gender Specific Eligibility Requirements

As indicated, the ESCR Committee has clarified that the ICESCR requires that work must be available, accessible, acceptable and of good quality. With regard to the accessibility of work, the ICESCR also prohibits any discrimination in “access to and maintenance of employment” on prohibited grounds, which include sexual orientation and gender identity.³⁵¹ States must therefore prohibit in law and practice, discrimination based on SOGIE in the context of measures taken to realize the right to work.

State Parties are under an immediate obligation to protect the right of LGBTQ persons to non-discrimination in access to work by enacting legislative measures to prohibit direct and indirect discrimination in access to work on the basis of being LGBTQ,³⁵² and provide access to effective remedies as appropriate in the form of restitution, compensation, satisfaction, and a guarantee of non-repetition.³⁵³ In addition to legislative measures, States must also undertake awareness raising, institute accountability measures, and take action to address the root causes of discrimination.³⁵⁴

Work restrictions that are based on gender stereotypes have been held impermissible by the Supreme Court. In the case of *Anuj Garg*, the Court struck down a law that prevented women from working in premises that served liquor based on gender stereotypes, stating that the “legislation suffers from incurable fixations of stereotype morality and conception of sexual role”.³⁵⁵ In light of the decisions in *Anuj Garg* and *NALSA*, it is clear that gender specific entry requirements for employment are violative of Articles 14 (right to equality), 15 (right to non-discrimination), and 16 (equality of opportunity in employment) of the Indian Constitution.

Recent jurisprudence also casts doubt on the constitutionality of mandatory medical examinations if they are used to discriminate against applicants based on their SOGIE.³⁵⁶ The Court in *Navtej* was clear that the State is not permitted,

³⁵⁰ High Court of Calcutta, *Atri Kar v. Union of India*, W.P. No.6151(W) of 2017.

³⁵¹ ESCR Committee, General comment No. 18: The right to work, UN Doc. E/C.12/GC/18, (2006), para. 12(b)(i); ESCR Committee, General comment No. 20: Non-discrimination in economic, social, and cultural rights, UN Doc. E/C.12/GC/20, (2009).

³⁵² ESCR Committee, General comment No. 20: Non-discrimination in economic, social, and cultural rights, UN Doc. E/C.12/GC/20, (2009); ESCR Committee, General comment No. 18: The right to work, UN Doc. E/C.12/GC/18, (2006), para. 19.

³⁵³ ESCR Committee, General comment No. 18: The right to work, UN Doc. E/C.12/GC/18, (2006), para. 48.

³⁵⁴ ESCR Committee, General comment No. 20: Non-discrimination in economic, social, and cultural rights, UN Doc. E/C.12/GC/20, (2009).

³⁵⁵ Supreme Court of India, *Anuj Garg and Ors. v. Hotel Association of India*, (2008)3SCC1, para. 44.

³⁵⁶ In *Puttuswamy*, the Supreme Court held that the constitutionally protected right to privacy includes the right to be able to “make decisions on vital matters concerning life” and that the guarantees of liberty, autonomy, and privacy intersect with gender to “create a private space which protects all those elements which are crucial to gender identity,” *Puttaswamy*, para. 169; See Danish Sheikh, “Queer Rights and the Puttaswamy Judgement,” *Economic and Political Weekly*, Vol. LII(51), 2017,

pursuant to Article 14, to institute policies that disadvantage groups based on an “intrinsic or core” trait.³⁵⁷ There have been efforts by some state governments to create employment schemes for transgender persons within their state transgender policies, which also focus on non-discrimination in workplace through workplace sensitization, transgender person inclusive workplace sexual harassment policies, among others. However, the implementation of these schemes has been poor.³⁵⁸

While the courts have shown some (albeit inconsistent) responsiveness to these issues, statutory remedies are limited, The Equal Remuneration Act, 1976 does provide for remedies for discrimination during the recruitment process. It prohibits employers from devising a recruitment process that would result in gender-based discrimination to the disadvantage of women.³⁵⁹ However, the Act has not been amended to take into account discrimination on other grounds, such as sexual orientation or gender identity.

Anti-discrimination in relation to employment was also sought to be incorporated in the now lapsed Transgender Persons (Protection of Rights) Bill, 2018. However, an enforcement mechanism was not proposed therein.³⁶⁰ The states of Kerala and Karnataka have taken positive measures to facilitate transgender persons right to work, including providing financial assistance for transgender persons to focus on self-employment.³⁶¹ Both states have adopted state transgender policies.³⁶²

Lack of identity documentation

A range of the documents, including matriculation certificates, educational degree certificates, identity documents permanent account number cards, voter ID cards, passports, are important to the recruitment process.

https://www.epw.in/system/files/pdf/2017_52/51/CM_LII_51_231217_Privacy_Spl_Danish_Sheikh.pdf (Accessed 12 May 2019).

³⁵⁷ Navtej Singh, para 500 and 522.

³⁵⁸ See Kerala, India. 2015. State Policy for Transgenders in Kerala. Government of Kerala.

<https://kerala.gov.in/documents/10180/46696/State%20Policy%20for%20Transgenders%20in%20Kerala%202015> (Accessed 12 May 2019), p. 11.

³⁵⁹ Equal Remuneration Act, 1976, Section 5.

³⁶⁰ The Transgender Persons (Protection) of Rights Bill, 2018,

https://www.prsindia.org/sites/default/files/bill_files/Transgender%20persons%20bill%20as%20passed%20by%20LS.pdf. Also see ICJ. 2018. *India: Parliament must Revise Problematic Transgender Persons (Protection of Rights) Bill, 2018*. <https://www.icj.org/india-parliament-must-revise-problematic-transgender-persons-protection-of-rights-bill-2018/> (Accessed 12 May 2019).

³⁶¹ According to the responses received by the ICJ to its RTI requests, the maximum amount of financial assistance under the Kerala scheme is Rs. 50,000 per person. In addition, approval has been received for financing the Naipunya Job Training Scheme for transgender persons with an amount of Rs. 70 lakhs. The Government of Karnataka has also begun a Transgender Rehabilitation Scheme, under which transgender persons have been encouraged to take up income generating activities, for which Rs. 50,000 are provided to each person, wherein Rs. 25000 is provided as loan, and the rest as a subsidy.

³⁶² See Kerala, India. 2015. State Policy for Transgenders in Kerala. Government of Kerala.

<https://kerala.gov.in/documents/10180/46696/State%20Policy%20for%20Transgenders%20in%20Kerala%202015> (Accessed 12 May 2019); Karnataka, India. 2017. State Policy on Transgenders.

Government of Karnataka. <http://www.khpt.org/wp-content/uploads/2018/01/TG-policy-1.pdf> (Accessed 12 May 2019). As per the RTI response received by the ICJ, till date, 5154 transgender persons have been provided a total sum of Rs. 1027.93 lakhs.

Transgender and gender non-binary persons face challenges to changing their gender markers and names on identity documents. This acts as a barrier to employment as many employers ask for identity documents as part of the application process.

These challenges are made more difficult by conflicting bureaucratic processes, the refusal by educational institutes to provide documents to transgender persons, and an understandable reluctance to change gender markers for fear of erasing the connection to previous professional accomplishments, particularly given the difficulties in making retroactive changes across many documents.

G1, a transgender man from Baroda who works as a bus conductor, said that he is forced to identify as a woman at work since he has not been able to change his gender markers in official documents.

“Right now, I have to say that I am a girl. My documents have my gender as female. In government jobs one has to be cautious with all these things. At least I get to wear a shirt as a conductor as thankfully there is no separate dress code for women.”³⁶³

W, a genderqueer transgender man and scientist discussed the discrimination that he faces due to the mismatch between his identity documents, certificates, and his appearance.

“One of the most significant barriers to employment – other than blatant discrimination – is the mismatch between certificates, ID documents and appearance. If I were to change my name and gender officially, I would not be employable. It gives the employer information about one’s trans history and enables discrimination. There have been other trans academics who have transitioned but they have had to forego their connections to past papers – so entire publication history at that point is invalid. For me, I am still employable because my name and gender have not changed on paper. If it were to change those, I wouldn’t be employable, at least as a scientist.”³⁶⁴

The central government and state government boards of educational institutions have compounded this problem by refusing to provide certificates and marksheets in corresponding gender and name. One interviewee noted that the Bangalore University refused to give a transgender woman her marksheet in her corresponding gender even though she had the requisite documentation for official legal recognition as a transgender woman.³⁶⁵ In another case, the University did not give a transgender man fresh educational certificates in his preferred gender even though he had the requisite documentation for official legal recognition as a transgender man. The High Court of Karnataka held that this decision of the University was in violation of *NALSA*.³⁶⁶

In yet another case, a transgender man was unable to change his name on school and college certificates despite providing documentation for the identity change. The High Court of Madras stated that “[m]erely because the petitioner

³⁶³ ICJ interview, Baroda, December 2018.

³⁶⁴ ICJ interview, Delhi, August 2018.

³⁶⁵ ICJ interview, Bangalore, September 2018.

³⁶⁶ High Court of Karnataka, *Jeeva M. v. State of Karnataka & Anr.*, W.P. 12113/2019, order dt. 26 March 2019, <https://clpr.org.in/litigation/jeeva-m-v-state-of-karnataka-anr/> (Accessed 12 May 2019).

belongs to the third gender, he or she cannot be made to run from pillar to post on the ground that there are no rules available permitting such changes” and ordered Anna University as well as the school authorities to provide the transgender man with certificates in his preferred gender.³⁶⁷ A Higher Secondary school in Madurai did not provide a transgender woman certificates in her preferred name and gender. The High Court of Madras ordered the school to make the necessary changes in her records.³⁶⁸

The Central Board of Secondary Education,³⁶⁹ an educational board set up by central government responsible for providing matriculation certificates has also refused to change gender markers in the certificates issued by them retroactively, stating that they see these as recording facts as they stood at the time of matriculation.³⁷⁰ This creates a challenge for individuals, as matriculation certificates are required to be produced as identity documents for accessing employment.

Under the ESCR Committee, legal recognition of gender identity must be a simple administrative process that does not require applicants to present medical certification, undergo surgery, sterilization or other procedures.³⁷¹ Mandating such procedures as part of any administrative process will generally constitute a violation of the right to “control one’s health and body”, one of the components of the right to health.³⁷² A State’s failure to recognize, or to place obstacle before, a person’s right to self-determined gender identity, is an impermissible impediment to equal access to justice and the right to an effective remedy under international human rights law.

Official recognition of one’s self-identified gender without the need for medical intervention, has been recognized as a right by the Supreme Court in *NALSA*.³⁷³

³⁶⁷ High Court of Madras, *K. Gowtham Subramaniam vs. Controller of Examination Anna University*, 2017(5)ALLMR78.

³⁶⁸ High Court of Madras, *S. Swapna (Transgender) v. State of Tamil Nadu*, W.P. (MD) No. 10882/2014.

³⁶⁹ The Central Board of Secondary Education is a national level education board that regulates public and private schools in India. It is controlled and managed by the Ministry of Human Resources and Development of the Union Government.

³⁷⁰ The CBSE’s bye laws permit “correction” in the name of the document holder, and do not permit change of name; India. 2018. *Notification*. Central Board of Secondary Education. <http://cbse.nic.in/newsite/attach/NOTIFICATION%2001-02-2018.pdf> (Accessed 12 May 2019). Newspaper reports indicate that CBSE has submitted before the High Court of Delhi in the case of *Riya Sharma v. Union of India*, that name and gender on matriculation certificates record historical facts and cannot be changed. This case is ongoing; High Court of Delhi, *Riya Sharma v. Union of India*, W.P.(C) 6595/2017, CM No. 27314/2017; “Help Transwoman Alter Name, Gender in Marksheets: HC to CBSE, DU,” *The Quint*, 21 February, 2019, <https://www.thequint.com/news/india/transgender-seeks-name-gender-change-in-education-records> (Accessed 12 May 2019).

³⁷¹ ESCR Committee, Concluding observations on the second periodic report of Lithuania, UN Doc. E/C.12/LTU/CO/2, (2014), para. 8; See also CEDAW, Concluding observations on the seventh periodic report of Belgium, UN Doc. CEDAW/C/BEL/CO/7, (2014), paras. 45(a) and (b).

³⁷² ESCR Committee, General comment No. 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4, (2000), para. 8.

³⁷³ *NALSA*, para. 129(5). The Report of the Expert Committee on Issues relating to Transgender Persons recommended that a transgender person be able to identify as either a man, woman, or transgender. The Committee further suggested that terms such as “other” “others” etc. should not be used in place of “transgender.” Ministry of Social Justice and Empowerment, “Report of The Expert Committee on Issues relating to Transgender Persons,” (2014),

However, State institutions have still refused to change individuals' gender markers on their documentation citing policy constraints.

While Courts have granted relief when petitioners have asked for identity documents in their corresponding gender, in each of the cases brought to Court, the petitioners had undergone sex reassigned surgery (a fact that the Courts seemed to give some weight in their decisions).³⁷⁴ This risks giving the impression, absent an explicit ruling clarifying this point, that the issuance of certificates with new gender markers is somehow linked to a person having undergone medical intervention. Such an interpretation would be in violation of *NALSA*, which recognizes the right of transgender persons to self-identify without need of medical intervention.³⁷⁵

Refusal to change gender and name in educational certificates thus amounts to direct discrimination by education boards and universities.³⁷⁶ One possible avenue for victims of discrimination seeking a remedy for the denial of educational documents would be to file for a *writ of mandamus*³⁷⁷ requiring the schools and universities to change their policy, and to provide certificates without undue delay on the ground as part of the performance of their state functions.

Conditions of Work

LGBTQ persons face a range of challenges at the workplace, including discrimination due to infrastructural limitations (such as gendered toilets), restrictive office policies (such as gendered dress code requirements), as well as workplace harassment including verbal, physical and sexual harassment by their co-workers and employers. In addition, they also often face harassment in the form of mis-gendering,³⁷⁸ and denial of benefits available to cis-gendered heterosexual employees.

<http://www.socialjustice.nic.in/writereaddata/UploadFile/Binder2.pdf> (Accessed 12 May 2019), pp. 31, 32.

³⁷⁴ Two cases are worth noting in this regard. In *S. Swapna (Transgender) v. The State Of Tamil Nadu*, the High Court of Madras ordered state authorities to correct a transwoman's school certificates, finding that: "When a transgender undergoes a sex reassignment surgery and makes an application thereafter for change of name and sex in the relevant records... the concerned authorities are expected to verify the records and make consequential changes in the concerned records." High Court of Madras, *S. Swapna (Transgender) v. State of Tamil Nadu*, W.P. (MD) No. 10882/ 2014. In *K. Gowtham Subramaniam v. The Controller of Examination*, the High Court of Madras ordered Anna University to provide a transgender man with a certificate in his preferred gender, noting that the petitioner had "become a complete male". High Court of Madras, *K. Gowtham Subramaniam vs. Controller of Examination Anna University*, 2017(5)ALLMR78, at para. 3.

³⁷⁵ *NALSA*, para. 129(5) states "any insistence for SRS for declaring one's gender is immoral and illegal."

³⁷⁶ A private establishment furnishing an important public service, with state aid, can be classified as a State agency under Article 12 of the Constitution; Supreme Court of India, *Sukhdev and Ors. v. Bhagatram Sardar Singh Raghuvanshi and Anr.*, (1975)1SCC4). In *Unnikrishnan v. State of Andhra Pradesh*, the Supreme Court held that educational institutions must act fairly as they discharge a public duty; Supreme Court of India, *Unnikrishnan v. State of Andhra Pradesh* (1993 AIR 217).

³⁷⁷ A writ of mandamus is a writ issued by a superior court to compel a lower court or a government officer to perform mandatory or purely ministerial duties correctly.

³⁷⁸ "Mis-gendering" means referring to a person, especially a transgender person, using a pronoun that does not match the gender with which they identify.

Gendered Workspaces

Workspaces are often gendered in their structure and environment, particularly in the context of toilets and dress codes. Workplaces often do not have accessible toilets for transgender persons and gender non-conforming persons, thereby denying to individuals their rights to water and sanitation. Moreover, workplaces often have compulsory gendered dress codes, to which employees must adhere.

Access to toilets at workplaces

In India, as in most other countries, toilets in workplaces are usually labeled “male” or “female” and are intended to cater exclusively for persons sexed male and female and gendered consistently with their sex. This creates a significant problem for transgender persons in accessing toilet facilities.

H1, a transgender man from Imphal, for example, reported that when he tried to use toilets designated for women in his workplace, he was admonished and told to use men’s toilets instead.

“I used to go to the female toilet and then the females used to tell me that I should go to the gent’s toilet. After such incidents, I have decided to go to the gents’ toilet only. I don’t use the urinals there, instead I use the commode in a way that others don’t know how I am peeing inside.”³⁷⁹

T, a transgender man from Bangalore, mentioned that in some jobs, men are expected to change [clothes] together in a common space. This may be difficult for transgender men. He explains:

“We get whatever small jobs that we can get in order to survive. In many such jobs, what happens is that transmen join saying they are men. They are then given the gent’s uniform and shown the gent’s room to change. Many transmen have had surgeries, many haven’t. They hence find it very uncomfortable to change their clothes in front of other men, in fear of what the others might think of their body. They fear that people will get to know of their trans identity.”³⁸⁰

The inaccessibility of toilets in workplaces creates additional barriers for transgender and gender non-binary persons in accessing work without discrimination, and thus violates their right non-discriminatory access to work. The ESCR Committee has clarified that the ICESCR protects access to safe drinking water and adequate sanitation facilities as an essential element of a safe and healthy working environment.³⁸¹ The United Nations Special Rapporteur on the right to water and sanitation (UN Special Rapporteur on Drinking Water and Sanitation) has emphasized that:

“Restrictive gender recognition laws not only severely undermine transgender peoples’ ability to enjoy their rights to basic services, it also prevents them from living safely, free from violence and discrimination. Water and sanitation facilities must be safe, available, accessible, affordable, socially and culturally acceptable, provide privacy and ensure dignity for all individuals, including those who are transgender and gender non-conforming.”

³⁷⁹ ICJ interview, Imphal, October 2018.

³⁸⁰ ICJ interview, Bangalore, September 2018.

³⁸¹ ESCR Committee, General comment No. 23 (2016) on the right to just and favourable conditions of work, UN Doc. E/C.12/GC/23, (2016), para. 30.

This right has also been established in the jurisprudence of the Supreme Court of India. In *Consumer Education & Research Center and others v. Union of India*, the Supreme Court held that right to life, which is interpreted as right to live with dignity (Article 21), includes “right to livelihood, better standard of life, hygienic conditions in work place and leisure,”³⁸² and recognizes as fundamental, the right of workers to “health, medical aid to protect the health and vigour to a worker while in service or post retirement”.³⁸³ Further, in *Bandhua Mukti Morcha*, the Court upheld the right to water and sanitation, including rest rooms, directing the government to provide “latrines and urinals” for all workers.³⁸⁴

Dress codes and appearance standards

Workplace policies or underlying heteronormative expectations regarding dress codes of workers can become restrictive for LGBTQ persons, and in some cases constitute discrimination or harassment violative of their right to work.

E, a transgender man from Imphal recounted how the principal at the school where he once used to teach, would ask him to dress in a particular way:

“...the principal and the rest of the teachers told me to wear something like a sari or salwaar-kameez.³⁸⁵ They said that if I dress up like men, the children would also turn up like me.”³⁸⁶

D, a transgender man from Delhi, told the ICJ about the gendered dress coding he had to adhere to while he was employed (pre-transition) as a teacher at a school.

“If you’re a teacher you are supposed to dress ‘properly’ and look respectable. In that school, saris were mandatory, so I used to wear pants under my sari to feel like a man. It was very disturbing for me and ultimately, I quit that job.”³⁸⁷

Sabi Giri, a transwoman who was dismissed from Naval service after undergoing sex reassignment surgery had to go on leave in order to be able to express and present as a woman, as the Naval rules did not allow any flexibility in terms of dressing and appearance, also because the post was only available to cis-gendered men.³⁸⁸ The lawyers representing Sabi Giri explain that:

“[s]he was expected to conform to strict gendered standards for men for uniform and appearance, and was not allowed to present as a woman, and hence would leave her Navy base to be able to express as a woman but was then treated as violating disciplinary standards.”³⁸⁹

If enforced in a discriminatory manner, dress codes and standards of appearance at workplaces can violate the rights to self-identification of gender identity and gender expression, expression of individual liberty and autonomy, and non-discrimination in access to work. The State has an *obligation to protect* that

³⁸² Supreme Court of India, *Consumer Education & Research Center and others v. Union of India*, AIR 1995 SC 922, at paras. 24.

³⁸³ Supreme Court of India, *Consumer Education & Research Center and others v. Union of India*, AIR 1995 SC 922, at paras. 27.

³⁸⁴ Supreme Court of India, *Bandhua Mukti Morcha v. Union of India (UOI) and Ors.*, (1984)3SCC161.

³⁸⁵ Sari and Salwar-Kameez are articles of clothing typically associated with feminine clothing.

³⁸⁶ ICJ interview, Imphal, October 2018; ICJ interview, Delhi, August 2018.

³⁸⁷ ICJ interview, Delhi, August 2018.

³⁸⁸ ICJ interview with Amritananda Chakravorty and Mihir Samson, Delhi, August 2018.

³⁸⁹ ICJ interview with Amritananda Chakravorty and Mihir Samson, Delhi, August 2018.

includes taking legislative, administrative and practical measures to ensure that LGBTQ persons can access workplaces without discrimination – including by private actors. This obligation would extend to discriminatory dress code and appearance policies. Such discriminatory dress codes and appearance standards may also violate the Indian State’s constitutional obligations to uphold the right of all persons to determine their own gender identity and expression, which is a part of right to live with dignity (Article 21), and right to freedom of expression (Article 19).³⁹⁰

The Supreme Court has recognized that practices based on sex and gender stereotypes that limit one’s participation in public life violate the right to non-discrimination and are unconstitutional.³⁹¹ Such practices promote “ambient heterosexism of the public space”³⁹² in workplaces, create barriers to expressing one’s self-determined gender identity, and may violate the right to privacy and autonomy, which is an essential component of the right to live with dignity.³⁹³

Harassment in the Workplace

Sexual harassment and gender-based violence³⁹⁴ in the workplace are violations of individual’s rights to life with dignity, equality, non-discrimination, and privacy, and violate the human rights of LGBTQ persons protected under international law. The ILO has also recognized sexual harassment as a form of sex discrimination at the workplace.³⁹⁵

As described above, the ESCR Committee has indicated that measures to prevent and address all forms of harassment form part of the “immediate” minimum core obligations of all States in terms of the right to work. States are required to legally define and prohibit all harassment, including sexual harassment. Under the ICESCR, States must ensure that there are “appropriate complaints procedures” in all workplaces so that effective redress for sexual harassment is available including, where appropriate, “criminal sanctions”.³⁹⁶

LGBTQ persons interviewed for this research reported workplace harassment including:

³⁹⁰ *NALSA*, para. 69, 65.

³⁹¹ *Navtej Singh*, para. 414.

³⁹² *Navtej Singh*, para 414.

³⁹³ *Puttaswamy*, para. 188(F) states, “While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being.”

³⁹⁴ Sexual harassment has been defined under General Recommendation No. 19 to CEDAW as “*Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions.*” Gender-based violence is defined by CEDAW in their General Recommendation 19 as “*violence that is directed against a woman because she is a woman or that affects women disproportionately.*” General Recommendation No. 35 extended the protections under CEDAW against sexual assault and harassment to transgender persons as well. CEDAW, General Recommendation No. 19: Violence against women, (1992), paras. 18 and 6. CEDAW, General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19, UN Doc. CEDAW/C/GC/35, (2017), para. 12.

³⁹⁵ International Labour Organization, Discrimination (Employment and Occupation) Convention, C111, 1958.

³⁹⁶ ESCR Committee, General comment No. 23 (2016) on the right to just and favourable conditions of work, UN Doc. E/C.12/GC/23, (2016), para. 65(e).

- Sexual harassment and assault;
- Verbal abuse;
- Being deliberately and inadvertently mis-gendered;
- Failure to acknowledge the historical work record of a transgender person after sex reassignment surgery; and
- Being typecast into certain roles in the workplace.

They also consistently reported they had no place to go to seek an effective remedy for this treatment – including those working in State institutions.

Sexual Harassment and gender-based violence

LGBTQ persons consistently reported feeling vulnerable to sexual harassment and assault in the workplace, and were often victims of serious incidences of assault and harassment. This is consistent with other research findings in India and globally.³⁹⁷

Incidents of sexual harassment and assault in the workplace were frequently raised by persons interviewed. Such violations took many forms, including subtly discriminatory comments and explicitly sexual overtures.

T, a transgender man and activist from Bangalore said that he was asked improper and sexually suggestive questions by his former employer.

“In the company [where I used to work], people asked me sexually coloured questions. They asked me how I had sex, whether I had periods. The director of the company used to take one extra hour [of meetings] with me; it was a session where he would talk about my future in the company and otherwise. It so happened that while talking about the future and things about my professional life, he used to talk about my personal life. He used to ask me questions like why do you want to be a boy? How do you get pleasure et cetera? He wanted me to convert [my gender identity] and it made me very uncomfortable. He talked too much about my personal life so then I decided to leave the job.”³⁹⁸

J1, a transgender man and activist from Chennai, who worked at a tailoring institute, was sexually harassed by his co-workers:

“They started talking about comparing everyone’s penis size... All of them removed their [underwear] and asked me to do the same. I said politely that I didn’t want to prove anything by showing my penis to all of them. I told them to carry on if they wanted to, but that I wouldn’t remove my pants. I left the job politely after that incident.”³⁹⁹

Transgender persons interviewed for this research reported particularly egregious instances of sexual assault. P, a transgender woman and activist from Bangalore was sexually assaulted in the textile factory where she worked. She recalled the assault:

“I was making white silk sarees and someone bit my lips very hard in the dark and pushed me. I was in pain and there was blood everywhere and when the power came, I saw blood even on the silk saree which was in the machine. I was crying and the manager came and shouted at me saying it is because of me the boys at the factory are getting spoilt. Instead of

³⁹⁷ S.A. Hewlett *et al.*, *supra* note 252; See Mission for Indian Gay & Lesbian Empowerment, *supra* note 252.

³⁹⁸ ICJ interview, Bangalore, September 2018.

³⁹⁹ ICJ interview, Chennai, August 2018.

consoling me or taking me to the hospital as I couldn't speak as the lips were cut badly, I was being blamed for what was done to me by the boys."⁴⁰⁰

As outlined above, article 7 of the ICESCR protects the right to just and favourable conditions of work. The right to just and favourable conditions of work includes the right to be free from physical and mental harassment, including sexual harassment, at the workplace.⁴⁰¹ States have an obligation of immediate effect to take effective legislative measures to protect persons from sexual harassment, including criminal sanction, and provide a specific definition of sexual harassment.⁴⁰²

There are some provisions in Indian law that provide a potential remedy for acts of sexual harassment although there are significant hurdles to bringing a complaint for an LGBTQ person who has been the victim of harassment or abuse.

The provisions of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (POSH) in India covers all workplaces including public and private workplaces in both the informal and formal sectors. POSH defines sexual harassment as, "physical contact or advances; a demand or request for sexual favours; making sexually coloured remarks; showing pornography; or any other unwelcome physical, verbal or non-verbal conduct of a sexual nature."⁴⁰³

The IPC also penalizes sexual offences including sexual harassment, assault or criminal force with intent to outrage modesty, assault with intent to disrobe, voyeurism, stalking, and rape, and can punish the guilty perpetrator with sentences ranging from one year to a lifetime based on the offence committed.⁴⁰⁴

Even though instances of sexual harassment and assault against LGBTQ persons have been reported in the media, the current legal framework offers very little protection for LGBTQ persons. POSH and the relevant criminal law provisions under IPC recognize only "women" as potential victims of sexual offences. Moreover, when lesbian and bisexual women complain about sexual harassment and assault, they may still face SOGIE-based discrimination and barriers in accessing the justice system.⁴⁰⁵ Furthermore, transgender persons and cis-

⁴⁰⁰ ICJ interview, Bangalore, September 2018.

⁴⁰¹ ESCR Committee, General comment No. 23 (2016) on the right to just and favourable conditions of work, UN Doc. E/C.12/GC/23, (2016), para. 48.

⁴⁰² ESCR Committee, General comment No. 23 (2016) on the right to just and favourable conditions of work, UN Doc. E/C.12/GC/23, (2016), para. 65(e).

⁴⁰³ The Sexual Harassment of Women at Workplace Act, 2013 (POSH) holds the employer (in case of organizations with more than 10 employees) and the district officer (in case of organizations with less than 10 employees) responsible for setting up a complaints committee; POSH, Sections 4(1) and 6(1). The committee is tasked with ensuring time bound, confidential hearings, which can grant to the petitioner interim measures such as leave up to 3 months, transfer the respondent to a different workplace etc; POSH, Sections 11 and 12. If successful the aggrieved employee has a right to compensation calculated based on her mental trauma, medical expenses, loss in career opportunities among others, in addition to punishment for the perpetrator which may include a written apology, withholding of promotion, termination of service, among others; POSH, Section 15. Further, the aggrieved employee also has the right to pursue the criminal justice system with support from the employer/district officer; POSH, Section 28; IPC, Section 354A.

⁴⁰⁴ IPC, Sections 354, 354A, 354B, 354C, 354D, 375.

⁴⁰⁵ See ICJ Unnatural Offences report, *supra* note 9.

gendered gay men are not covered by these laws at all. In theory, a transgender man with a government approved identity document identifying him as a woman could use that identification to seek a remedy. However, he would have to be willing to use the document and risk being subject to SOGIE-based discrimination at the hands of the police, lawyers or other court officials. In some states, transgender women have been able to access remedies for sexual assault in criminal law, but a lack of (or contradictory) judicial precedent from other states may pose barriers for transwomen who seek to access these remedies.⁴⁰⁶

Gay cis-gendered men also have very few available legal remedies. They can only take recourse to the criminal justice system through provisions on criminal force and assault, or under Section 377 for non-consensual sexual intercourse.

The Justice Verma Committee, set up to recommend amendments to the criminal law to the government in 2012, concluded that sexual offence laws should be amended to ensure gender-neutrality with respect to victims of sexual offenses.⁴⁰⁷ The Expert Committee set up to study issues faced by transgender persons and suggest measures in 2013 also recommended that workplace harassment policies be transgender inclusive, and that workplaces “meaningfully apply” anti-discrimination policies to “the processes of hiring, retention, promotion, and employee benefits.”⁴⁰⁸

A number of Indian lawyers and civil society organizations including the Lawyers Collective, Partners in Law and Development, and the People’s Union for Civil Liberties have also recommended a gender-neutral law for victims of sexual offence laws, largely in recognition of sexual violence faced by LGBT persons.⁴⁰⁹ This is in line with the requirement under international law that States prohibit harassment “against any person” irrespective of gender identity or sexual orientation.⁴¹⁰

Under the state transgender welfare policy of Karnataka, the state law department has been directed to take necessary steps to make the POSH Act inclusive of transgender persons.⁴¹¹

⁴⁰⁶ High Court of Delhi, *Anamika v. Union of India*, W.P. (CrI.) 2537/2018.

⁴⁰⁷ Report of the Committee on Amendments to Criminal Law, (2013), <https://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committee%20report.pdf>, pp. 439-40.

⁴⁰⁸ Ministry of Social Justice and Empowerment, “Report of The Expert Committee on Issues relating to Transgender Persons”, (2014), <http://www.socialjustice.nic.in/writereaddata/UploadFile/Binder2.pdf> (Accessed 12 May 2019), pp. 43 – 47, at p. 48.

⁴⁰⁹ See Partners for Law in Development and SAMA Resource Group for Women and Health, “Status of Human Rights in the Context of Sexual Health and Reproductive Health Rights in India,” 2018, http://nhrc.nic.in/sites/default/files/sexual_health_reproductive_health_rights_SAMA_PLD_2018_01012019_0.pdf (Accessed 12 May 2019), p. 142; Peoples Union for Civil Liberties-Karnataka, “Human Rights Violations Against the Transgender Community,” 2003, <http://ai.eecs.umich.edu/people/conway/TS/PUCL/PUCL%20Report.html>, p. 29.

⁴¹⁰ ESCR Committee, General comment No. 23 (2016) on the right to just and favourable conditions of work, UN Doc. E/C.12/GC/23, (2016), para. 65(e).

⁴¹¹ Kerala, India. 2015. State Policy for Transgenders in Kerala. Government of Kerala. <https://kerala.gov.in/documents/10180/46696/State%20Policy%20for%20Transgenders%20in%20Kerala%202015> (Accessed 12 May 2019).

Verbal abuse, mis-gendering, and other forms of workplace harassment

LGBTQ persons are often subjected to verbal harassment by their co-workers and employers. This includes the use of derogatory words hinting at their sexual orientation or gender identity.

L, a transgender woman and activist recounted the harassment that she faced while working at a departmental store in Bangalore:

“During my first job, whenever I was at the cash counter, my colleagues used to come and tease me and call me by mocking names. They used to say things like, ‘Look there is a *khauja*’.”⁴¹²

E1, a transgender man from Baroda said that he was called a *hijra* by his former employer.

“Once I was working at this big company as an HR educator and I had a female boss, so I thought I’d feel safe and not get harassed. But I was treated very badly by my boss. She used to call me derogatory words indicating “hijra” and make more remarks. I felt very uncomfortable and quit the job in a month.”⁴¹³

While working as a nurse at a hospital, K1, a transgender woman from Imphal, was told by a doctor working at that the hospital that she is “of no use to society.”

“On the very first day, a doctor told me ‘you are girl, you have long hair, and even you studied nursing, you people are of no use to the society, so you better go’. This happened at a private hospital. It was the first job I had applied for in Manipur.”⁴¹⁴

Several transgender persons reported being mis-gendered by their employers as well as colleagues, due to a lack of understanding of their trans identities.

W, a genderqueer transgender man and scientist who teaches at a university, had to educate his colleagues and students about his identity:

“I have insisted that my name and email ID for all intra-university purposes is my name of choice and pronoun. Good thing is that students will use my name and pronoun of choice – that is very affirming. Many colleagues, even if they use my name of choice, the fact that everyone knows I’m trans, I get mis-gendered a fair bit.

I have provided corrections many times and that has not changed. At my previous place of work, it was impossible to live in my preferred gender and name, till today I get mis-gendered. Every time I correct someone it feels like an act of self-inflicted degeneration and cis-people don’t have to do that. I feel that it is sometimes more dignified to not respond when people refer to me in the wrong pronoun.”⁴¹⁵

Co-workers and clients may also either fail to recognize a transgender person’s gender identity, or mis-gender them. G1, a transgender man from Gujarat who works as a bus conductor told us that passengers often ask him to clarify

⁴¹² ICJ interview, Bangalore, September 2018. “Khauja” is a derogatory term used for transgender persons.

⁴¹³ ICJ interview, Baroda, December 2018.

⁴¹⁴ ICJ interview, Imphal, October 2018.

⁴¹⁵ ICJ interview, Delhi, August 2018.

whether he is a “male or female” which was not only embarrassing but he also feared harassment.⁴¹⁶

C1, a gay man from Kochi said that a former place of work refused to acknowledge that he had worked with them because of his sexual orientation. They did not want to be associated with an employee who was gay, and thus refused to give him a letter acknowledging his work experience. He said:

“When I joined them [his former place of work], I told them I am a queer person so they told me they ‘don’t have any issue, you can be with us.’ I started working with them and gradually their tone changed. [After I quit] I went to their office, and they said we can give you the salary [for the last month] but we can’t give you the experience letter. So, I asked why and they said that we don’t want to say that a gay person worked in our office or our establishment...At the end, the advocate helped me. [We told them that] if you don’t provide the experience letter, then we will run to the court and we will file a petition to the state human rights commission and that’s when they provided the experience letter. But in that, they didn’t provide a clear [assessment of my work]. I was working with them for long years and I was working a business developer. They just wrote two lines saying that I was working with them and my profile is good. That’s it.”⁴¹⁷

Even when LGBTQ persons are given work, they are often typecast into certain roles based on assumptions about their gender identity and appropriate gender roles. A 2012 ILO study concluded this was one reason why LGBTQ persons “stay away from formal employment altogether, taking up freelance or informal work.”⁴¹⁸

The use of derogatory words, and mis-gendering (whether intentional or accidental) can create hostile work environment for LGBTQ persons – amounting to SOGIE-based harassment and discrimination in the workplace, which is prohibited in international law.⁴¹⁹ The duty to protect the right to work includes the obligation to ensure that workplaces are free of discrimination. In this connection, the ESCR Committee has stressed that States must ensure that workplaces are free of “mental harassment.”⁴²⁰

In *NALSA* the Supreme Court upheld the right to expression of gender as part of gender identity, protected under the right to freedom of expression and right to life and liberty and privacy under Article 21. This includes the right to “express oneself in diverse forms”.⁴²¹ It clarified that the State may not “prohibit, restrict or interfere” with a transgender person’s expression of their personality.⁴²² However, India does not have a specific legislation that outlaws the use of derogatory words targeted at a persons’ real or perceived SOGIE.

⁴¹⁶ ICJ interview, Baroda, December 2018.

⁴¹⁷ ICJ interview, Kochi, October 2018.

⁴¹⁸ International Labour Organisation, “Discrimination at work on the basis of sexual orientation and gender identity: Results of ILO’s Pride Project,” 2015, https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/briefingnote/wcms_368962.pdf (Accessed 12 May 2019).

⁴¹⁹ ESCR Committee, General comment No. 20: Non-discrimination in economic, social, and cultural rights, UN Doc. E/C.12/GC/20, (2009).

⁴²⁰ ESCR Committee, General comment No. 23 (2016) on the right to just and favourable conditions of work, UN Doc. E/C.12/GC/23, (2016), para. 48.

⁴²¹ *NALSA*, at para. 67.

⁴²² *NALSA*, at para. 66.

Failing to recognize the work experience of an existing or former employee solely due to their SOGIE is a clear case of discrimination (Articles 15(1) and 15(2), and a violation of the right to equality (Article 14).

As set out in *NALSA* and *Navtej* decisions, the State is required to fulfill its duty to protect the right to non-discrimination of LGBTQ individuals in matters of employment by facilitating awareness-raising. The State also has an obligation to take steps to combat the discrimination and harassment faced by the LGBTQ persons in public and private workplaces through legislative or policy measures. This includes taking measures to ensure that the self-identified gender of transgender persons is recognized in their workplaces by their employers and co-workers.

Job Security

LGBTQ persons often suffer impediments to job security in their employment as a result of workplace harassment or the threat of harassment, and arbitrary and/or discriminatory dismissals. Almost all interviewees mentioned repeated job changes due to harassment.

These job changes resulted from both direct discrimination and indirect discrimination. Direct discrimination included sexual harassment, and verbal and non-verbal abuse. Indirect discrimination included gendered workspaces, non-recognition of preferred gender identity, discriminatory office policy and workplace bullying.

L1, a queer man and activist from Chennai, for example, had to change jobs. He explained the reason for the job change:

“I was earlier working in Chennai in a private concern in a senior position but those in junior positions with less experience and skill were paid more than me. This affected my self-esteem; others also saw me as someone unimportant. Further, those who were already discriminating against me for my gender expression also started ignoring me and considering me as one without any capacity when they got to know the management was paying me less than my juniors. Ideally, the salary should be based on the work done and not on gender expression. I felt it was unfair I was paid less only because of my gender expression. So, I was forced to change jobs. I could not continue in any one company for a long time. Even people in my family lost respect for me when I was not able to find any job with good pay that I could continue with. I did not want this to happen again to anyone, and so I got involved in social work. I also personally felt more comfortable with NGO work because I could freely express my gender without discrimination here.”⁴²³

X, a gay man and activist was compelled to leave his job as a teacher in a college after he came out publicly as a gay man. He was subjected to questions about his relationships with his students that would not have been asked of a heterosexual teacher. As a result, he felt unwelcome at his workplace, and resigned. He said:

“Before I came out, things were fine, but as soon as they got to know, suddenly people were different, and they started asking different questions.

⁴²³ ICJ interview, Chennai, August 2018.

They wanted to know if I am with anyone, who made me gay, what it is like to be gay and stuff like that. No one was bothered about the fact that I had a research degree, and that I was teaching very well. Everything became about my homosexuality and all activities related to it. If I spoke to a student, or took a picture, then it was that I was not doing it with right intention. I had a rented accommodation near college and sometimes students used to come and talk with me and I used to make them tea. I then stopped calling them and I maintained my distance because I didn't want people to think anything wrong. People stopped talking to me when I was walking in the corridor, the whole environment changed for me."⁴²⁴

M1, a transgender man from Gujarat, felt compelled to leave his job because of the harassment he faced at his workplace, after his sexual orientation was known to his colleagues. He explains:

"There was a female nurse in the hospital with whom I was in a relationship with. The whole hospital started talking about it, saying that I am having relationships like a man. After they heard about my relationship, they started a fight with me. They blamed me for not handling the cases properly, they said that I don't do the accounts properly, that I don't talk to the patients properly. When I discussed the same with my father, he told me that I should leave the place, so I left the job."⁴²⁵

Discrimination in the workplace also contributes to "closeting" or the hiding of gender identity and sexual orientation by LGBTQ persons. Interviewees reported fear about being found out or "outed", and consequently facing further discrimination and of wrongful termination.⁴²⁶

Under the ICESCR, the right to work includes protection against "any discrimination in access to and maintenance of employment",⁴²⁷ and against discriminatory termination of employment based on "LGBTI" status.⁴²⁸ Articles 7 and 2(2) of the ICESCR together provide that just and favorable conditions of work without discrimination of any kind are necessary for the enjoyment of the right to work. Article 7(c) provides that everyone should have "equal

⁴²⁴ ICJ interview, Kochi, October 2018.

⁴²⁵ ICJ interview, Baroda, December 2018.

⁴²⁶For instance, the 2015 case of *Dr. Shrinivas Ramchandra Siras v. Aligarh Muslim University*, in which a gay professor was suspended from Aligarh Muslim University on allegations of "gross misconduct" for indulging in "immoral sexual activity" and "tarnishing the image" of the faculty. While he got back his job as professor, along with his accommodation, until his retirement, the letter revoking his suspension only arrived after his demise; High Court of Allahabad, *Dr. Shrinivas Ramchandra Siras & Ors. v. The Aligarh Muslim University*, Civil Misc. Writ Petition No.17549 of 2010, order dated April 1, 2010; See Deepu Sebastian Edmond, "Section 377 and Aligarh Muslim University's Shrinivas Siras: Eight years later," *The Hindu*, 12 September 2018, <https://www.thehindu.com/opinion/op-ed/eight-years-later/article24929248.ece> (Accessed 12 May 2019). In a more recent March 2018 case, a schoolteacher in Kolkata was suspended, allegedly on grounds of his sexual orientation, two days after he published a book on being openly homosexual. He is yet to challenge his suspension in court, according to media reports. Premankumar Biswas, "Kolkata teacher says he was fired from reputed school because he is homosexual," *The Indian Express*, 21 March 2018, <https://indianexpress.com/article/india/kolkata-teacher-says-he-was-fired-from-reputed-school-because-he-is-homosexual-5104894/> (Accessed 12 May 2019).

⁴²⁷ ESCR Committee, General comment No. 18: The right to work, UN Doc. E/C.12/GC/18, (2006), para. 12(b)(i).

⁴²⁸ ESCR Committee, General comment No. 23 (2016) on the right to just and favourable conditions of work, UN Doc. E/C.12/GC/23, (2016), para. 31.

opportunity... to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence," meaning that termination or non-promotion based on discriminatory purposes is unlawful.

In this connection, India has an immediate obligation to adopt legislation to guarantee equal treatment in hiring, promotion, and termination of service, and to undertake surveys to monitor changes over time.⁴²⁹

In Indian law, unfair dismissal is governed by the Industrial Disputes Act, 1947, which states the rights of "workmen,"⁴³⁰ state (provincial) laws governing shops and establishments, service laws and by-laws applicable to a particular service, and the terms and conditions of the employment contract. The Industrial Disputes Act, 1947 also guarantees fair proceedings for challenging the grounds of termination of employment, but does not provide a definition of unfair dismissal.⁴³¹

The Supreme Court has made clear that arbitrary and unreasonable termination of employment of individuals unlawfully deprives affected persons of their livelihood. For example, in *Charan Singh*, the Court held an employer liable for terminating the service of its employee and depriving him of his livelihood for a long period.⁴³²

According to the Supreme Court, termination of employment because of a person's SOGIE, or based on stereotypes associated with the SOGIE of an employee would constitute a violation of rights guaranteed under Articles 14 (right to equality) and Article 15(1) (right to non-discrimination) of the Constitution.⁴³³ Despite some limited remedies under the law,⁴³⁴ access to legal redress in cases of wrongful termination of employment is compromised by inconsistent and slow application of the law and legal process in the Indian judicial system.⁴³⁵

Box 2: SEX WORK

Criminal laws in force in India leave sex workers vulnerable to police action and institutionalization, forced medical testing for HIV, arbitrary arrests, and violence from the police and non-state actors. As a result, sex workers, including

⁴²⁹ ESCR Committee, General comment No. 23 (2016) on the right to just and favourable conditions of work, UN Doc. E/C.12/GC/23, (2016), para. 33.

⁴³⁰ Industrial Disputes Act, 1947, Section 2(s) defines "workman" as "any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward..."

⁴³¹ Industrial Disputes Act, 1947, Section 2A.

⁴³² Supreme Court of India, *State of U.P. v. Charan Singh* MANU/SC/0356/2015.

⁴³³ *NALSA*, para 59; *Navtej Singh*, para 393; *Anuj Garg*, para. 44.

⁴³⁴ The Supreme Court has held that in cases of unfair dismissal, the employee is entitled to reinstatement and back wages as the "normal rule". Supreme Court of India, *Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D. ED.) and Ors*, (2013) 10 SCC 324, paras. 33(i) and 38.

⁴³⁵ Sabi Giri, whose case has been discussed above, has remained unemployed since she challenged her wrongful termination by the Indian Navy, as no interim relief has been forthcoming in her case so far. High Court of Delhi, *Manish Kumar Giri @ Sabi Giri v. Union of India*, W.P.(C) 9535/2017.

transgender persons who undertake sex work are deprived of just and fair conditions of work.⁴³⁶

The interviews suggest that state police forces have taken large-scale action against sex workers in order to remove them from public spaces. One such incident was reported by Bindu Dodahatti, a lawyer working at Alternative Law Forum.

“Three months ago, the Majestic area [central bus stand in Bangalore] got a new Deputy Commissioner of Police [DCP]. He has stated that ‘I will clean Majestic and send away the sex workers who are here.’ They started detaining these people... On one night, 25 sex workers including trans and cis-women were detained at around midnight ... Women were literally chased on the streets and beaten up. We took their pictures with bruises all over the body – all of this happened on that night and in fact, multiple nights. Female cops were also involved... who don’t wear police clothes; they wear black shirts and white-black striped pants. They hold lathis and they are placed in different parts of Bangalore wherever the sex workers are. They chase them. They started this after we took this matter to the home minister. They have said that they won’t arrest the sex workers but they will make sure that they can’t stand anywhere.”⁴³⁷

Police often take action against transwomen under the assumption that they are sex workers. In many such cases, there is no evidence of solicitation. N1, a transwoman and activist from Delhi reported:

“When I got out of the airport at night, I had to walk for a very short distance. The police called me and asked where I came from. I showed them my boarding pass as I had just landed in Delhi. They asked me if I am a sex worker. They did not allow me to call my friend and switched off my phone. They kept me in the police station, that was the scariest night for me.”⁴³⁸

Teertha, a transwoman from Kochi, reported an incident in which several transwomen were arrested on the suspicion of soliciting clients for sex work, despite the absence of any evidence to support this claim.

“But once when we were staying at a lodge, I had gone for work. When I came back there was a huge crowd at my lodge. I got spared because I was in uniform. But there were another 5 transgender persons who were arrested at that time. They had been remanded for 5 days being accused of running an online sex racket. We all showed them our ID cards as we were working at the Kochi metro. But they said that we are doing sex work here... When the police came, they see transgender persons and think it’s a grand opportunity for them to fetch us.”⁴³⁹

⁴³⁶ Ondede, “A report on the human rights violations against transgenders in Karnataka,” 2014, <https://www.scribd.com/document/277108005/Final-Report-on-Human-Rights-Violations-of-Transgender-Persons> (Accessed 12 May 2019); People’s Union for Civil Liberties – Karnataka (PUCL-K), “Human rights violations against sexuality minorities in India,” 2003, http://pucl.org/sites/default/files/reports/Human_Rights_Violations_against_the_Transgender_Community.pdf, pp.24-31.

⁴³⁷ See “Sex workers allege harassment by police,” *The Hindu*, March 5, 2019, <https://www.thehindu.com/news/cities/bangalore/sex-workers-allege-harassment-by-police/article26439999.ece> (Accessed 12 May 2019).

⁴³⁸ ICJ interview, Delhi, October 2018.

⁴³⁹ See “Transgender attempts suicide at police station,” *The Hindu*, January 6, 2018, <https://www.thehindu.com/news/cities/Kochi/transgender-attempts-suicide-at-police-station/article22384650.ece> (Accessed 12 May 2019).

The UN Special Rapporteur on Torture has noted that laws and policies that appear to be “tough on crime” excessively penalize sex work,⁴⁴⁰ and the Committee on the Elimination of all forms of Discrimination against Women has called for repeal of laws that criminalize LBT women sex workers, in the context of repealing provisions that allow gender-based violence against women.⁴⁴¹ The need for occupational health and safety of sex workers to be protected has also been emphasized by the ILO⁴⁴² and the UNDP.⁴⁴³

The use of force in excess of what is “necessary” and “proportionate” to remove sex workers from public spaces amounts to “cruel, inhuman or degrading treatment or punishment” and is prohibited by the ICCPR, and the Convention against Torture (1984).⁴⁴⁴

In Indian law, sex work is per se not illegal but all the surrounding activity – such as solicitation of clients for sex work in the vicinity of a public place, living on the earnings of a sex worker, and running a brothel – is criminalized under the Immoral Traffic (Prevention) Act, 1956 (ITPA).⁴⁴⁵ Hence, sex workers risk harassment and abuse from police and other State actors. ITPA requires rehabilitation of sex workers “rescued” under the Act by the police if it appears that they show “prospects of rehabilitation”.⁴⁴⁶ Compulsory institutionalization violates the constitutional protection of the right to live with dignity, and the right to liberty (Article 21), as it does not distinguish between minors and

⁴⁴⁰ Prof. Nils Melzer, Report of the Special Rapporteur on torture, and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/HRC/40/59, (2019), para 59.

⁴⁴¹ CEDAW, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, UN Doc. CEDAW/C/GC/35, (2017), para. 31(a) states that states should “Repeal all legal provisions that discriminate against women, and thereby enshrine, encourage, facilitate, justify or tolerate any form of gender-based violence against them; In particular ... legislation that criminalises women in prostitution...” See Aarthi Pai *et al*, “Status of Sex Workers in India,” 2014, <http://feministlawarchives.pldindia.org/wp-content/uploads/Status-of-sex-workers-in-India.pdf>? (Accessed 12 May 2019).

⁴⁴² ILO Recommendation concerning HIV and AIDS and the World of Work, 2010 (No 200). Sex work is not explicitly mentioned in the Recommendation, but the discussions on record indicate a clear understanding that it is covered by this instrument. See International Labour Organisation, HIV AIDS and the world or work: Report of the Committee on HIV/ AIDS, Provisional Record 13 (Rev.), available at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_141773.pdf (Accessed 12 May 2019), paras. 192-210.

⁴⁴³ UNDP, Sex Work and the Law in Asia Pacific, (2012), <https://www.undp.org/content/dam/undp/library/hivaids/English/HIV-2012-SexWorkAndLaw.pdf> (Accessed 12 May 2019), p. 7 and 35; Aarthi Pai, *supra* note 441, p. 3.

⁴⁴⁴ Nils Melzer, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Extra-custodial use of force and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/72/178, (2017).

⁴⁴⁵ ITPA, Sections 3, 4 and 8. In addition, “trafficking” has been loosely defined in the IPC, leading to the conflation of trafficking and sex work; IPC, 370 and 370A. The Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018 also conflates sex work with trafficking, and relies on the same raid-rescue-rehab model; Prabha Kotiswaran, “The criminal law as sledgehammer: the paternalist politics of India’s 2018 Trafficking Bill,” Open Democracy, 9 July 2018, <https://www.opendemocracy.net/beyondslavery/prabha-kotiswaran/criminal-law-as-sledgehammer-paternalist-politics-of-india-s-2018-tr> (Accessed 12 May 2019); Aarthi Pai *et al*, “In Its Haste to Rescue Sex Workers, ‘Anti-Trafficking’ Is Increasing Their Vulnerability,” Economic and Political Weekly Engage, 18 July 2018, <https://www.epw.in/engage/article/raid-and-rescue-how-anti-trafficking-strategies-increase-sex-workers-vulnerability-to-exploitative-practices> (Accessed 12 May 2019).

⁴⁴⁶ ITPA, Sections 17 (2) and 19(3).

consenting adults. Rehabilitation is often involuntary, and places significant constraints on the liberty of movement of those detained in these homes.⁴⁴⁷ The Supreme Court has also observed that rehabilitation homes often resemble “prisons.”⁴⁴⁸ Police arresting transgender persons on the presumption that they are sex workers without adequate cause also violates their rights to non-discrimination and equal treatment.

⁴⁴⁷ Aarthi Pai *et al*, *supra* note 441.

⁴⁴⁸ Supreme Court of India, *Budhadev Karmaskar v. State of West Bengal*, Appeal (Crl.) No. 135/2010, interim order dated August 24, 2011.

RECOMMENDATIONS ON WORK

To the Government of India

- Take measures to ensure access to education for all children without discrimination based on SOGIE, in line with India's constitutional obligations and international law and standards, including:
 - Amending S. 2(c) of the Right of Children to Free and Compulsory Education Act, 2009 which defines child as "male or female child" to include all children regardless of gender.
 - Enforcing the provision of the Right of Children to Free and Compulsory Education Act, 2009 – currently largely unimplemented except in Government of National Capital Territory of Delhi - requiring at least 25% of seats to go to children "belonging to weaker section and disadvantaged group in the neighbourhood" wherein disadvantaged group includes "group having disadvantage owing to ...gender".
 - Ensuring that no public schools discriminate against gender non-conforming children in the entry criteria or in treatment of children – including ending mandatory gendered dress codes, and gendered appearance requirements in schools.
 - Taking steps towards ensuring education on SOGIE in all school and colleges and in consultation with civil society and LGBTQ persons.
- Revise educational curricula in schools to ensure the incorporation of a perspective of SOGIE consistent with *NALSA*, *Navtej* and India's international human rights obligations.
- Establish a policy in line with *NALSA* for the recruitment, enrollment and conditions of service for transgender and gender non-binary persons, after due consultation with the community.
- Take measures to ensure that where the State is an employer, including in security, positions do not exclude eligibility of or discriminate against transgender and gender non-binary persons.

To the Parliament of India

- Amend laws on sexual harassment to ensure the full and equal benefit of legal provisions protecting against sexual harassment in the workplace to LGBTQ persons, in particular transgender persons.
- Expand the definition of "sexual harassment" in Section 2(n) of the Sexual Harassment of Woman at Workplace (Prevention, Prohibition, and Redressal) Act, 2013 to include use of harassment based on SOGIE including the intentional mis-gendering by employer, supervisor(s), or colleague(s), during the period of employment, at the time of termination of employment, and in the performance of post-termination duties.

- Review and amend all labour laws including The Equal Remuneration Act, 1976, and service laws and by-laws to make them inclusive of LGBTQ employees, and to ensure non-discrimination on the basis of prohibited grounds, including SOGIE, in treatment in hiring, promotion, and dismissal.
- Amend the Immoral Traffic Prevention Act, 1956 to remove the criminal consequences attached to sex work, which makes sex workers vulnerable to violence, and take legislative measures to ensure safe working conditions for sex workers.

To All State Governments of India

- Abolish mandatory medical testing as part of recruitment policies, unless essential for the role, and in such cases, take steps to ensure that the medical procedures are inclusive of LGBTQ persons and in line with *NALSA* and international standards.
- Amend or remove recruitment procedures for public employment that impose selection criteria that discriminate on the basis of sexual orientation or gender identity or expression.
- Elaborate and implement state transgender policies to include measures for workplace sensitization, and LGBTQ persons' inclusive workplace sexual harassment policies. In states such as Karnataka and Kerala where these policies exist, amend laws on sexual harassment at workplace.

To executive, administrative and legislative entities

- Ensure the effective and meaningful consultation of LGBTQ persons in the execution of all legislative and policy measures.

PUBLIC SPACES

Safe and accessible public spaces are crucial to enjoying one's human rights to life, liberty, dignity, freedom of expression, freedom of assembly, right to political participation, freedom of movement, rights to health, water and sanitation.⁴⁴⁹ Public spaces connect places of work, housing, and recreational spaces. They are where communities' gather, socialize, form alliances, voice concerns and engage in cultural activities. Without safe and equal access to such places, LGBTQ persons cannot fully enjoy equality and equal protection as individuals and members of their communities. For many LGBTQ persons, public spaces like parks and streets also operate as temporary shelters and places of work.

LGBTQ persons frequently face discrimination in accessing public spaces and are subject to violence and harassment from police and others in such spaces. When attempting to use public transport, they risk harassment and mis-gendering in security queues and are often unable to access transport because of lack of gender identity documents that conform to their gender expression. Moreover, LGBTQ persons typically experience significant challenges in using public toilets – whether in parks, malls or on public transport. Finally, at public cultural and religious events LGBTQ persons' risk denial of entry as well as sexual and other forms of harassment.

The vulnerability of LGBTQ persons to stigma and abuse in public spaces was recognized by the Supreme Court in *NALSA*:

“Our society often ridicules and abuses the Transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are sidelined and treated as untouchables, forgetting the fact that the moral failure lies in the society's unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change.”⁴⁵⁰

While there is no self-standing right to access public spaces in international law, inaccessibility of public spaces implicates the full range of civil, cultural, political, economic and social rights. This chapter will therefore look at a selection of rights the exercise of which are most significantly affected when public spaces are made inaccessible to LGBTQ persons.

This chapter will examine instances of discrimination in access to and enjoyment of public spaces on the basis of real or perceived sexual orientation, and gender identity and expression. It focuses on access to public spaces that were most

⁴⁴⁹ ESCR Committee, General Comment No. 4: The right to adequate housing (article 11(1) of the Covenant), UN Doc. E/1992/23, (1991), para. 8(f) states “Location: Adequate housing must be in a location which allows access to employment options, health-care services, schools, child-care centres and other social facilities. This is true both in large cities and in rural areas where the temporal and financial costs of getting to and from the place of work can place excessive demands upon the budgets of poor households. Similarly, housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants.”

⁴⁵⁰ *NALSA*, at para. 1.

frequently cited as sites of violence and discrimination by interviewees. These public spaces include:

- Streets and parks that are otherwise open to the public (whether publicly or privately owned and maintained);
- Public transport (such as buses, trains, metro, railways, and airways);
- Gendered spaces within any public spaces (such as toilets, or areas that control access to single sex spaces such as security queues); and
- Malls and shopping centers, which, though often privately owned are most often open and accessible to the public.

ACCESS TO PUBLIC SPACES AND HUMAN RIGHTS LAW

International law framework on public spaces

Non-discriminatory access to public spaces is important for the protection of various existing rights under international human rights law. Without access to public spaces it will be difficult for any person to fully exercise a range of civil, cultural, economic, political and social rights.

The rights of freedom of peaceful assembly and association,⁴⁵¹ freedom of expression and opinion,⁴⁵² freedom of movement,⁴⁵³ and the right to political participation⁴⁵⁴ all require equal access to public spaces for their effective exercise.

The importance of equal and non-discriminatory access to public spaces for the exercise of the right to peaceful assembly has been highlighted by the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association. The UN Special Rapporteur has called upon States to take positive measures to protect the right to peaceful assembly by ensuring access to public spaces,⁴⁵⁵ and has noted that privatization of public spaces poses a challenge and potential obstacle to exercising the right to freedom of peaceful assembly and association.⁴⁵⁶

The right to take part in the conduct of public affairs is recognized and protected under article 25 of the ICCPR. States must take legislative and other measures to ensure that this right is enjoyed without discrimination.⁴⁵⁷ The right to political participation includes the right to voice political opinions through peaceful

⁴⁵¹ ICCPR, articles 21 and 22.

⁴⁵² ICCPR, article 19.

⁴⁵³ ICCPR, article 12.

⁴⁵⁴ ICCPR, article 25.

⁴⁵⁵ Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, UN Doc. A/70/266, (2015).

⁴⁵⁶ Clément Nyaletsossi Voule, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, UN Doc. A/73/279, (2018), para 99.

⁴⁵⁷ Human Rights Committee, General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), UN Doc. CCPR/C/21/Rev.1/Add.7, (1996).

assembly, such as meetings, sit-ins, strikes, rallies, or protests, all of which may require access to public spaces.⁴⁵⁸

The right to freedom of movement is protected under article 12 of the ICCPR. Article 12 (1) provides that “everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.” As the Human Rights Committee has emphasized, “liberty of movement is an indispensable condition for the free development of a person.”⁴⁵⁹ Access to public streets and thoroughfares is essential to give full effect to the right to freedom of movement. States therefore have an obligation to ensure that the right to freedom of movement is protected from both public and private interference.⁴⁶⁰

The ICCPR guarantees the right to non-discrimination.⁴⁶¹ Article 26 prohibits discrimination “in law or in fact” “on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁴⁶² Apart from publicly owned places like public transport, streets and public parks, sidewalks, and public toilets, privately owned spaces such as restaurants, parks, and hotels are typically public accommodations. Privately owned spaces which typically allow public access, are therefore subject to general non-discrimination law pursuant to the Indian Constitution and international human rights law.⁴⁶³

Non-discriminatory access to public transport may in certain circumstances be necessary for the enjoyment of human rights.⁴⁶⁴ The CRPD provides that accessibility to the physical environment, transportation, and to facilities open to and provided to the public is essential for leading an independent life and to fully participate in all aspects of life.⁴⁶⁵ Indeed the Convention includes a right to access the physical environment, including public spaces, as a separate legally enforceable right.⁴⁶⁶

The CRPD has clarified that:

⁴⁵⁸ OHCHR, Factors that impede equal political participation and steps to overcome those challenges, UN Doc. A/HRC/27/29, (2014), para. 23; Human Rights Committee, General comment No. 34 - Article 19: Freedoms of opinion and expression, UN Doc. CCPR/C/GC/34, (2011).

⁴⁵⁹ Human Rights Committee, General comment No. 27: Freedom of movement (Art.12), UN Doc. CCPR/C/21/Rev.1/Add.9, (1999), para 1.

⁴⁶⁰ Human Rights Committee, General comment No. 27: Freedom of movement (Art.12), UN Doc. CCPR/C/21/Rev.1/Add.9, (1999), para. 6 states, “The State party must ensure that the rights guaranteed in article 12 are protected not only from public but also from private interference. In the case of women, this obligation to protect is particularly pertinent. For example, it is incompatible with article 12, paragraph 1, that the right of a woman to move freely and to choose her residence be made subject, by law or practice, to the decision of another person, including a relative.”

⁴⁶¹ ICCPR, article 26(2).

⁴⁶² Human Rights Committee, General comment No. 18: Non-discrimination, (1989).

⁴⁶³ ICCPR, article 26. CERD, article 5(f) prohibits discrimination in access to “any place or service intended for use by the general public.”

⁴⁶⁴ See, for example ESCR Committee, General Comment No. 4: The right to adequate housing (article 11(1) of the Covenant), UN Doc. E/1992/23, (1991), para. 8(f). Transport is often necessary for, as examples, access to healthcare services, education and work opportunities.

⁴⁶⁵ CRPD, articles 3 and 9.

⁴⁶⁶ CRPD, article 9.

“It is important that accessibility is addressed in all its complexity, encompassing the physical environment, transportation, information and communication, and services. The focus is no longer on legal personality and the public or private nature of those who own buildings, transport infrastructure, vehicles, information and communication, and services. *As long as goods, products and services are open or provided to the public, they must be accessible to all, regardless of whether they are owned and/or provided by a public authority or a private enterprise.*”⁴⁶⁷

In addition to a broad right to access public spaces without discrimination, inaccessibility of particular public spaces directly violates certain human rights. For example, inaccessibility of toilets in public spaces might violate the rights to adequate sanitation, water and health. Similarly, inaccessibility of transport might violate the right to freedom of movement, work, education and health. Inaccessibility of restaurants, cinema halls, malls, and shopping centers can violate the right to take part in cultural life. This section further elaborates briefly on each of these rights.

Right to water and sanitation

The right to water and sanitation is protected under international human rights law, including as part of the right to health and the right to adequate standard of living, under the ICESCR⁴⁶⁸ and the UDHR,⁴⁶⁹ and encompasses the right to access a variety of goods, services, and facilities, including potable water and sanitation.⁴⁷⁰ The right to water and sanitation were recognized as self-standing rights by the UN General Assembly in 2010.⁴⁷¹

Access to water and sanitation are also crucial in realizing other human rights such as the right to adequate housing⁴⁷² and the right to work.⁴⁷³ CEDAW,⁴⁷⁴ CRC,⁴⁷⁵ CRPD⁴⁷⁶ and CERD⁴⁷⁷ all recognize the dependence of realization of other rights on the availability of water and sanitation.

⁴⁶⁷ CRPD, General Comment No. 4: The right to inclusive education, UN Doc. CRPD/C/GC/4, (2016), para. 13. (Emphasis added).

⁴⁶⁸ ICESCR, articles 11 and 12.

⁴⁶⁹ UDHR, article 25.

⁴⁷⁰ ESCR Committee, General comment No. 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4, (2000).

⁴⁷¹ UN General Assembly, The human right to water and sanitation, UN Doc. A/RES/64/292, (2010).

⁴⁷² ESCR Committee, General Comment No. 4: The right to adequate housing (article 11(1) of the Covenant), UN Doc. E/1992/23, (1991), para. 8(b) states “All beneficiaries of the right to adequate housing should have sustainable access to ... sanitation and washing facilities ...”

⁴⁷³ ESCR Committee, General comment No. 23 (2016) on the right to just and favourable conditions of work, UN Doc. E/C.12/GC/23, (2016), para. 30 states, “Access to safe drinking water, adequate sanitation facilities that also meet women’s specific hygiene needs, and materials and information to promote good hygiene are essential elements of a safe and healthy working environment.”

⁴⁷⁴ CEDAW, articles 11 (1) (f), 12 and 14 (2) (b) and 14(2)(h).

⁴⁷⁵ CRC, article 24.

⁴⁷⁶ CRPD, article 25.

⁴⁷⁷ CERD, article 5.

Sanitation facilities must be available, accessible, affordable, acceptable and of good quality.⁴⁷⁸ Sanitation facilities are an underlying determinant of health and should be available in sufficient quantity.

As the ESCR Committee has noted, "ensuring that everyone has access to adequate sanitation is not only fundamental for human dignity and privacy, but is one of the principal mechanisms for protecting the quality of drinking water supplies and resources."⁴⁷⁹ Sanitation facilities should be physically and economically accessible, and the design "must respect privacy and dignity of the users." Non-discrimination is also an essential component of the right to water and sanitation.⁴⁸⁰

The obligation to adopt legislation and other measures to ensure equal access to the determinants of health, including sanitation facilities, are immediate obligations.⁴⁸¹ States have an obligation to fulfill the right to sanitation through the enactment of legislation and by adopting "a national health policy with a detailed plan for realizing the right to health."⁴⁸²

Exclusion from public facilities such as toilets also results in the violation of other rights, including the right to dignity and privacy. In addition to further stigmatizing excluded communities,⁴⁸³ the denial of opportunities to evacuate one's bowels/bladder in a dignified manner can compromise human dignity, cause suffering, and amount to cruel, inhuman, and degrading treatment.⁴⁸⁴

The Yogyakarta Principles call upon States to ensure safe and dignified access to adequate sanitation facilities for all persons, without SOGIESC based discrimination.⁴⁸⁵ Sustainable Development Goal 6 also calls for clean water and

⁴⁷⁸ ESCR Committee, General comment No. 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4, (2000).

⁴⁷⁹ ESCR Committee, General Comment No. 15: The right to water, UN Doc. E/C.12/2002/11, (2003), para. 29.

⁴⁸⁰ ESCR Committee, General comment No. 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4, (2000), paras. 12(b), 18-9.

⁴⁸¹ Jasdeep Randhawa, "Public Space – The Conduit for Realizing Human Rights in Cities for All," <http://www.sustasis.net/Randhawa.pdf>, at p. 3 states "According to the Committee on Economic, Social and Cultural Rights (ESCR Committee), State parties have a 'core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights'. The provision of minimum essential levels is an immediate obligation. (General Comment 3) The right to water and sanitation is subject to progressive realization. While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on States parties various obligations which are of immediate effect. States parties have immediate obligations in relation to the right to health, such as the guarantee that the right will be exercised without discrimination of any kind (art. 2.2) and the obligation to take steps (art. 2.1) towards the full realization of article 12."

⁴⁸² ESCR Committee, General comment No. 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4, (2000).

⁴⁸³ Catarina de Albuquerque, Report of the Special Rapporteur on the human right to safe drinking water and sanitation, UN Doc. A/HRC/21/42, (2012); Human Rights Council, The human rights to safe drinking water and sanitation, UN Doc. A/HRC/RES/33/10, (2016).

⁴⁸⁴ Catarina de Albuquerque, Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Addendum: Mission to the United States of America, UN Doc. A/HRC/18/33/Add.4, (2011), para. 58.

⁴⁸⁵ Yogyakarta Principles plus 10, principle 35 states, "Everyone has the right to equitable, adequate, safe and secure sanitation and hygiene, in circumstances that are consistent with human dignity,

sanitation for all persons. Target 6.3 seeks to “achieve access to adequate and equitable sanitation and hygiene for all ... paying special attention to the needs of ... those in vulnerable situations” by 2030.⁴⁸⁶

Right to take part in cultural life

Article 15 of the ICESCR protects the right of everyone to take part in cultural life.⁴⁸⁷ CERD protects the right to equal participation in cultural activities;⁴⁸⁸ CEDAW protects the right to participate in all aspects of social and cultural life;⁴⁸⁹ CRC protects the right to participate fully in cultural and artistic life;⁴⁹⁰ and CRPD protects the right to take part on an equal basis with others in cultural life.⁴⁹¹

LGBTQ persons have a right to access all aspects of cultural life without discrimination.⁴⁹² Cultural life also includes “customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence,”⁴⁹³ which no doubt include, for example, queer pride parades and festivals.

The three components of the right to cultural life are the rights to: 1) participate in cultural life; 2) access cultural life; and 3) contribute to cultural life.⁴⁹⁴ Participation entitles an individual or a group of individuals “to act freely, to choose his or her own identity, to identify or not with one or several communities or to change that choice”. Access entitles individuals to “know and understand” their own culture “and that of others through education and information”. Contribution includes a right for all individuals to contribute to “the spiritual, material, intellectual and emotional expressions of the community.”⁴⁹⁵

without discrimination, including on the basis of sexual orientation, gender identity, gender expression or sex characteristics.”

⁴⁸⁶ General Assembly, Transforming our World: the 2030 Agenda for Sustainable Development, UN Doc. A/RES/70/1, (2015), Goal 6; See C. Benjamin and A Hueso, “LGBTI and Sanitation: what we know and what the gaps are,” 2017, <https://wedc-knowledge.lboro.ac.uk/resources/conference/40/Benjamin-2649.pdf> (Accessed 12 May 2019).

⁴⁸⁷ Article 15, ICESCR provides “The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life;... 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture;” This right corresponds to the right to take part in cultural life under article 27 of the UDHR.

⁴⁸⁸ CERD, article 5 (e) (vi).

⁴⁸⁹ CEDAW, article 13 (c).

⁴⁹⁰ CRC, article 31, para. 2.

⁴⁹¹ CRPD, article 30, para. 1.

⁴⁹² ICESCR, article 15.

⁴⁹³ ESCR Committee, General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/21, (2009).

⁴⁹⁴ Id., para. 15(a)-(c).

⁴⁹⁵ ESCR Committee, General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/21, (2009), paras. 50-53.

States are under immediate obligations to ensure that the right to take part in cultural life is implemented without discrimination, to recognize cultural practices, and to refrain from interfering in the enjoyment and development of culture.⁴⁹⁶

Principle 22 of the Yogyakarta principles affirms that States should take measures necessary to ensure opportunities for participation of all persons in cultural life, regardless of their SOGIE.⁴⁹⁷ Principle 38 of the Yogyakarta Principles plus 10 states that States should “ensure the right to practice, protect, preserve and revive the diversity of cultural expressions of persons of all sexual orientations, gender identities, gender expressions and sex characteristics.”⁴⁹⁸

Domestic law framework

“Public spaces” are not defined in the Indian legal and policy framework. Nevertheless, the Indian Constitution guarantees to every citizen a fundamental right to access public spaces without discrimination on prohibited grounds. Article 15(2) of the Indian Constitution prohibits discrimination by State as well as private actors in “access to shops, public restaurants, hotels, and places of public entertainment” or in “the use of wells, tanks, bathing ghats,⁴⁹⁹ roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public”, on the basis of religion, caste, race, sex, place of birth.⁵⁰⁰ The Supreme Court has recognized that prohibited categories for discrimination also include gender identity⁵⁰¹ and sexual orientation.⁵⁰²

⁴⁹⁶ ESCR Committee, General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/21, (2009), para. 44.

⁴⁹⁷ Yogyakarta Principles, principle 22 states, “The Right to Participate in Cultural Life: Everyone has the right to participate freely in cultural life, regardless of sexual orientation or gender identity, and to express, through cultural participation, the diversity of sexual orientation and gender identity. States shall: Take all necessary legislative, administrative and other measures to ensure opportunities for the participation in cultural life of all persons, regardless of, and with full respect for, their sexual orientations and gender identities; Foster dialogue between, and mutual respect among, proponents of the various cultural groups present within the State, including among groups that hold different views on matters of sexual orientation and gender identity, consistently with respect for the human rights referred to in these Principles.”

⁴⁹⁸ Yogyakarta Principles plus 10, principle 38.

⁴⁹⁹ “Ghat” refers to a series of steps leading down to a body of water. Bathing ghats are common areas used for bathing.

⁵⁰⁰ Constitution of India, Article 15(2) states, “No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to (a) access to shops, public restaurants, hotels and palaces of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.” Supreme Court of India, *Indian Medical Association v. Union of India*, (2011)7SCC179, para 113, states that public spaces that are privately owned but are intended to be open for use by the general public “ought not to be conducting their affairs in a manner which promote existing discriminations and disadvantages.”

⁵⁰¹ *NALSA*, para 59.

⁵⁰² *Navtej Singh*, para. 393; *Puttaswamy*, para. 126; Discrimination on the basis of SOGIE in accessing public spaces has not been addressed legislatively in India. However, various statutes address discrimination in access to public spaces in other identity markers, which were enacted following long drawn struggles against discrimination on the basis of caste identity. These include State (provincial) level temple entry laws that prohibit discrimination in entry to temples on the basis

The prohibition on discrimination extends to spaces “dedicated to the use of the general public”, regardless of whether they are funded by the State. In *Indian Medical Association v. Union of India*, the Supreme Court interpreted the word “shops” under Article 15(2) to include an educational institution, and by extension, all private market transactions that are generally open to the public.⁵⁰³ It also held that prohibition on discrimination in access to such publicly available services extends not merely to entry, but also to provision of services without discrimination.⁵⁰⁴

In *Puttaswamy*, the Supreme Court held that the right to privacy attaches to the individual, not to spaces. As such, one’s right to privacy extends to places outside one’s home as even public places afford a degree of privacy.⁵⁰⁵ This conception was further expanded in *Navtej*, in which the Court highlighted the importance of public spaces for LGBTQ persons, including for sexual expression:

“Privacy creates “tiers of ‘reputable’ and ‘disreputable’ sex”, only granting protection to acts behind closed doors. Thus, it is imperative that the protection granted for consensual acts in private must also be available in situations where sexual minorities are vulnerable in public spaces on account of their sexuality and appearance. If one accepts the proposition that public places are heteronormative, and same-sex sexual acts partially closeted, relegating ‘homosexual’ acts into the private sphere, would in effect reiterate the “ambient heterosexism of the public space.” It must be acknowledged that members belonging to sexual minorities are often subjected to harassment in public spaces. *The right to sexual privacy, founded on the right to autonomy of a free individual, must capture the right of persons of the community to*

of one’s caste (these include the Tamil Nadu Temple Entry Authorization Act, 1947, the Maharashtra Hindu Places of Public Worship (Entry Authorization) Act, 1956, Orissa Temple Entry Authorisation Act, 1948, and the Untouchability Offences Act, 1955), the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 which prohibits discrimination on the basis of caste identity in access to places of public resort (Section 3(y)). The Republic of Pakistan has recently passed a law that *inter alia* prohibits discrimination in accessing public spaces on the basis of gender identity; See Section 14, Transgender Persons (Protection of Rights) Act, 2018, available at http://www.senate.gov.pk/uploads/documents/1521612511_419.pdf (Accessed 12 May 2019).

⁵⁰³ Supreme Court of India, *Indian Medical Association v. Union of India*, (2011)7SCC179 (“In this regard, the purport of the above exposition of clause (2) of Article 15, when read in the context of egalitarian jurisprudence inherent in Articles 14, 15, 16 and Article 38, and read with our national aspirations of establishing a society in which Equality of status and opportunity, and Justice, social, economic and political, would imply that the private sector which offers such facilities ought not to be conducting their affairs in a manner which promote existing discriminations and disadvantages”); See also Gautam Bhatia, “Exclusionary Covenants and the Constitution – IV: Article 15(2), *IMA v. UoI*, and the Constitutional Case against Racially/Religiously Restrictive Covenants,” *Indian Constitutional Law and Philosophy*, 14 January 2014, <https://indconlawphil.wordpress.com/2014/01/14/exclusionary-covenants-and-the-constitution-iv-article-152-ima-v-uoi-and-the-constitutional-case-against-raciallyreligiously-restrictive-covenants/> (Accessed 12 May 2019).

⁵⁰⁴ Supreme Court of India, *Indian Medical Association v. Union Of India* (2011)7SCC179, para. 113.

⁵⁰⁵ *Puttaswamy*, para. 32 states, “If the reason for protecting privacy is the dignity of the individual, the rationale for its existence does not cease merely because the individual has to interact with others in the public arena. The extent to which an individual expects privacy in a public street may be different from that which she expects in the sanctity of the home. Yet if dignity is the underlying feature, the basis of recognising the right to privacy is not denuded in public spaces... Privacy attaches to the person and not to the place where it is associated.”

navigate public places on their own terms, free from state interference (emphasis added).⁵⁰⁶

Accessibility of public spaces is essential to the realization of other rights in the Indian Constitution, such as the right to health,⁵⁰⁷ and the right to freedom of movement.⁵⁰⁸ Ultimately, the inaccessibility of public spaces due to discrimination on the basis of a prohibited identity markers such as sexual orientation and gender identity would result in the violation of other rights of LGBTQ persons, and would thus amount to a failure to fulfill the State's duties under Article 15(1), which prohibits discrimination on the basis of sexual orientation and gender identity.

DISCRIMINATION IN ACCESSING PUBLIC SPACES

LGBTQ persons face discrimination in accessing public spaces and services based on their SOGIE. Discrimination may manifest in a variety of forms including:

- Denial of entry to certain public spaces;
- Denial of or inaccessibility of services provided in public spaces due to deficiencies in infrastructure that do not take into account the special needs of LGBTQ persons;
- Exposure to harassment and violence from public and private officials policing access in public spaces; and
- Exposure to harassment and violence from members of the public.

This section explores the barriers experienced by LGBTQ persons in accessing public spaces, and the resulting violations in international and domestic law.

This section is divided into two parts. The first part deals with State-owned and regulated public spaces such as streets, parks, public transport, toilets in public spaces, and cultural places maintained by State funds. The second part deals with privately-owned and operated public spaces, such as shopping centers and hotels, and transport facilities that are generally open for use by the public.

This distinction has been made because privately owned spaces attain a public character only under certain circumstances, and State obligations with regard to publicly and privately-owned spaces may differ under international and domestic law, even though most human rights principles would be applicable in both instances. States have obligations to protect against discrimination and human rights violations in both the public and private spheres, although the nature of those obligations may vary.

⁵⁰⁶ *Navtej Singh*, para. 414. See also Saptarshi Mandal, "'Right To Privacy' In Naz Foundation: A Counter-Heteronormative Critique", *NUJS Law Review*, Vol. 2 (2009), p. 533.

⁵⁰⁷ Constitution of India, Article 21. See Supreme Court of India, *CESC Ltd. vs. Subash Chandra Bose*, (AIR 1992 SC 573,585).

⁵⁰⁸ Constitution of India, Article 19(1)(d).

Publicly-owned or administered spaces

Streets and Parks

The enjoyment of the right to personal liberty and security in public spaces is important for ensuring free access to public spaces. However, LGBTQ persons are vulnerable to SOGIE-based violence and harassment by both State and non-state actors in streets and parks.

Some interviewees shared instances of violence perpetrated by State actors such as the police, which made apparent the targeting of transgender and gender non-binary persons using laws that criminalize sex work and begging. This is supported by other research studies.⁵⁰⁹

For instance, transgender persons who beg for a living are vulnerable to arbitrary police action. L, a transgender woman and activist from Bangalore told the ICJ that the police 'picked up' transgender persons from the street and filed false cases against them in order to meet their daily targets of cases. She said:

"... they take us to the police station and write false cases against us. They tell us that, 'we need 4 cases today, so we have arrested you'. They fine us for Rs. 500 and we are made to stay at the police station for the whole night."⁵¹⁰

Transgender and gender non-binary persons are often stereotyped as sex workers or beggars, making them vulnerable to police action under other provisions in the IPC such as provisions that criminalize public nuisance and obscenity.⁵¹¹ N, a transgender woman and activist from Bangalore described such an incident to the ICJ. She said:

"In 2014, transgender persons were arrested across Bangalore city. The policemen came and told all the community people that "sahab bula rahe hain" (senior police have called for you) and we thought maybe it's only for record keeping or some information that we are being called to the police station for... Some people who were arrested were in their nightwear and had been picked up while buying vegetables. They still had the vegetables in their hands when they were taken into the colony. We asked them what was the reason behind arresting people who weren't even doing sex work or begging at that point of time. We asked them to please tell us the reason and show us the order so that we can then inquire further with the respective authority who has sent that order. But they didn't show it to us...Later, they said that "upar wale sahab se order aaya hai ki sex work or begging nahi karna" (senior officer has sent an order to curb begging and sex work)."⁵¹²

⁵⁰⁹ Ondede, *supra* note 436.

⁵¹⁰ ICJ interview, Bangalore, September 2018.

⁵¹¹ Section 268 of IPC states "Public nuisance.—A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right."; IPC Section 294 states "Whoever, to the annoyance of others; (a) Does any obscene act in any public place, or. (b)Sings, recites or utters any obscene song, ballad or words, in or near any public place, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both."

⁵¹² ICJ interview, Bangalore, September 2018.

The criminalization of begging in India, and in particular its discriminatory enforcement creates a major barrier to the enjoyment of public spaces. The ICJ in its 2017 report “Unnatural Offences”, illustrated how the legal system, through the criminalization of homosexual intercourse, sex work, begging, and various other laws, has created a specter of criminality around LGBTQ identities.⁵¹³ This has a disproportionate impact on the livelihood of transgender persons who often rely on begging and other traditional means of seeking alms for survival.⁵¹⁴

In 2018, in *Harsh Mander v. Union of India*, the High Court of Delhi held that provisions of the Bombay Prevention of Begging Act, 1959, which criminalized begging in the state of Delhi, were unconstitutional. The Court found that the law failed to distinguish between voluntary and involuntary begging, was arbitrary, and thus violated the right to equality under Article 14. The Court found that the criminalization of begging amounted to a violation of the right to live with dignity, guaranteed under Article 21, and the freedom of expression under Article 19.⁵¹⁵

Official responses to such discriminatory targeting have been inadequate, and the Indian State continues to act in contravention of the Indian Constitution and its international legal obligations. Several state level (provincial level) laws that criminalize begging remain in force.⁵¹⁶ Further, many other laws continue to disadvantage the LGBTQ community in general and transgender persons in particular, and deprive them of the right to access public spaces. These include the ITPA, which effectively criminalizes sex work.⁵¹⁷

The specter of criminality around LGBTQ identities also fosters violence, discrimination, and harassment by private actors such that even when these laws are repealed or declared unconstitutional, LGBTQ persons continue to remain vulnerable to harassment by private actors, and exclusion from public spaces such as streets and parks. This is exemplified by a criminal complaint made by the Cubbon Park Walker’s Association against gay men for allegedly engaging in “immoral” activities in the park.⁵¹⁸ This complaint was made a few days after the decriminalization of same-sex intercourse by the Supreme Court, and following its celebration by groups of LGBTQ persons and their allies in the park.⁵¹⁹

The United Nations Special Rapporteur in the field of cultural rights has recognized the suppression of “positive expression and representation of sexual orientation-

⁵¹³ ICJ, Unnatural Offences report, *supra* note 9.

⁵¹⁴ ICJ, Unnatural Offences report, *supra* note 9.

⁵¹⁵ High Court of Delhi, *Harsh Mander v. Union of India*, W.P. (C) 10498/2009, CM Appl. 1837/2010 and W.P. (C) 1630/2015, para. 29.

⁵¹⁶ The Telangana Prevention of Begging Act, 1977; The Andhra Pradesh Prevention of Begging Act, 1977; The Maharashtra Prevention of Begging Act, 1959; The Goa, Daman and Diu Prevention of Begging Act, 1972; The Gujarat Prevention of Begging Act, 1959; The Tamil Nadu Prevention of Begging Act, 1945.

⁵¹⁷ See “Box. 2 Sex Work” at pp. 98-101 of this report; ICJ, Unnatural Offences report, *supra* note 9.

⁵¹⁸ Rohith B R and Santosh Kumar, “Cubbon Park walkers file plaint against homosexuals,” *The Times of India*, 13 September 2018, <https://timesofindia.indiatimes.com/city/bengaluru/cubbon-park-walkers-file-plaint-against-homosexuals/articleshow/65791008.cms> (Accessed 12 May 2019).

⁵¹⁹ “LGBTQ community upset with ‘homophobic’ complaint,” *The Hindu*, 14 September 2018, <https://www.thehindu.com/news/cities/bangalore/lgbtq-community-upset-with-homophobic-complaint/article24948858.ece> (Accessed 12 May 2019).

related themes and of sexual minorities” as a violation of the right to take part in cultural life.⁵²⁰ She has also noted that suppression of the cultural expression of LGBTQ persons contributes to closeting, and encourages and fosters violence against them.⁵²¹

Indeed, public spaces also become sites of violence perpetrated by private actors. For instance, in May 2019, three men allegedly gang-raped two Manipuri transgender women students in Bangalore.⁵²² According to media reports, on 23rd January 2019, a transgender woman was shot at by a cab driver for resisting sexual assault in Delhi,⁵²³ and on 24th January, a transgender woman was found murdered and mutilated in Raipur.⁵²⁴ Similarly in February 2018, a transgender woman named Chandna was allegedly beaten up and stripped in public in Kerala at midnight by a mob who suspected her to be a child kidnapper. In May 2018, in Hyderabad, a mob reportedly attacked a group of transgender women based on a rumour that had spread over social media that they were *dacoits* and child kidnappers. One of the transgender women died from her injuries.⁵²⁵

The presence of LGBTQ persons in public spaces is thus threatened by police action and violence by State and private actors. Apart from violating the right to non-discriminatory access to such spaces, the arbitrary interference with the ability to safely access streets adversely affects other human rights. For instance, the right to work is severely compromised for those who leave their homes to go to their place of work, when they have to navigate unsafe streets.

The inaccessibility of streets and parks also violate the rights of LGBTQ persons to take part in cultural life, which encompasses the rights to participate in, access, and contribute to cultural life, which includes queer pride parades, and festivals that celebrate queer identities and rights.⁵²⁶ The State has an obligation to respect and

⁵²⁰ Karima Bennoune, Report of the Special Rapporteur in the field of cultural rights, UN Doc. A/72/155, (2017), para 87.

⁵²¹ Id.

⁵²² Sowmya Chatterjee, “2 trans women from Manipur allegedly raped in Bengaluru, cops arrest 3 men,” The News Minute, 19 May 2019, <https://www.thenewsminute.com/article/2-trans-women-manipur-allegedly-raped-bengaluru-cops-arrest-3-men-102019>.

⁵²³ “Transgender shot and injured for ‘refusing sex’ by 2 men who offered her lift,” Hindustan Times, 23 January 2019, https://www.hindustantimes.com/delhi-news/transgender-shot-and-injured-for-refusing-sex-by-2-men-who-offered-her-lift/story-nqJOkDzzEJmtNeIEoOxVoO.html?fbclid=IwAR3hu9ByFwOmAmFir2MDMDpuOcX_I8Z_T0NGuyAGcAxGzW3ebkxexGzG9g8 (Accessed 12 May 2019).

⁵²⁴ “Transgender murdered, mutilated by two men in Raipur,” Mirror Now, 25 January 2019, <https://www.timesnownews.com/mirror-now/crime/article/transgender-murdered-mutilated-by-two-men-who-mistook-him-for-a-woman-while-on-a-date/352714> (Accessed 12 May 2019).

⁵²⁵ Nitin B., “Transgender woman killed by Hyderabad mob, another victim of fake WhatsApp forwards,” May 27 2018, <https://www.thenewsminute.com/article/transgender-woman-killed-hyderabad-mob-another-victim-fake-whatsapp-forwards-81995> (Accessed 12 May 2019).

⁵²⁶ ESCR Committee, General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/21, (2009), defines culture to include “customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence.”

protect the rights of LGBTQ persons to engage in cultural practices and eliminate risks to the realization of the right to take part in cultural life.⁵²⁷

Public Toilets

LGBTQ persons often face inadequate access to public toilets and the adverse impacts of violations of the right to sanitation on the right to water, and other human rights. For the purposes of this chapter, public toilets include toilets on the street side constructed and maintained by the State, or open for use of the public, or in public places.⁵²⁸

The ICJ's interviews show that transgender persons express difficulties in accessing sanitation facilities in public spaces, including inability to access toilets (gendered or non-gendered) that correspond to their self-identified gender due to infrastructural deficiencies, and risk of gender-based violence and harassment.⁵²⁹

Akkai Padmashali, a transgender woman and an activist stated in an interview to a newspaper that she was yelled at for attempting to use a women's toilet by a cis-gendered woman. This incident took place in a toilet inside the building of the state Legislature of Karnataka, where she had to attend a meeting with the law minister.⁵³⁰

Inaccessibility of public toilets due to infrastructural deficiencies

Transgender persons may be unable to access gendered toilets which are not designed to suit their needs. For instance, transgender men who have not undergone phalloplasty⁵³¹ are unable to access men's toilets that lack private stalls.

T, a transgender man and activist from Bangalore, reported the difficulties they faced in accessing sanitation facilities during long distance travel by bus:

"Most problems happen in buses because they stop at random *dhabas* (local eateries). There aren't too many washrooms for boys, just washrooms for girls.

⁵²⁷ ESCR Committee, General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/21, (2009), para. 44.

⁵²⁸ See Freshwater Action Network South Asia Sanitation and Hygiene in South Asia, Water Supply and Sanitation & Collaborative Council, Sanitation and Hygiene in South Asia, "Leave No One Behind: Voices of Women, Adolescent Girls, Elderly and Disabled People, and Sanitation Workers," (2015), <https://www.wsscc.org/wp-content/uploads/2016/03/Leave-No-One-Behind-Report-by-WSSCC-and-FANSA-2016.pdf> (Accessed 27 May 2019), p. 29: "The WASH practices of the transgender community in India vary depending on whether they are living in their adopted family with a guru (head of the group), with their own family or independently. Due to social prejudices, it is difficult for transgenders to find rental housing and they end up living in highly congested areas with few toilets. Those who find shelter with a guru share a toilet with over 30 people and thus prefer defecating in the open. Transgenders living with their families usually have access to a toilet, but in rural areas some of them continue to practice open defecation."

⁵²⁹ Some of the problems highlighted by the ICJ's research will typically also affect cis-gendered heterosexual women (such as the risk of sexual violence) and other individuals (such as inadequate access due to poor infrastructure).

⁵³⁰ Prabhu Mallikarjunan, "For Almost 5 Lakh Indians, Using A Public Toilet Means Abuse And Harassment", available at <https://www.youthkiawaaz.com/2016/11/no-public-toilets-for-transgender-people/> (Accessed 26 February, 2019).

⁵³¹ "Phalloplasty" refers to the construction or re-construction of the penis.

The boys just relieve themselves on the road. It is difficult for me in that situation because I don't know what to do. Hence, I just don't use the washroom at all. Even if there is something for boys then there aren't separate cubicles, they are just open. There are no doors and if doors are there then they are not functional. Sometimes the boys just open the door and then I have to stand up really fast. The washrooms for boys are also very dirty."⁵³²

Q, a transgender man, said that even after having undergone top surgery,⁵³³ he still found public toilets that do not have private stalls inaccessible, due to the lack of privacy.

"It's been ten years since I underwent surgery. But still, before using toilets I check that there is no one inside and no one is waiting after me. Whenever I use the washroom, I go to the men's washroom but I fear that someone might come inside at any time. Many a times when I am inside the cubicle sitting and peeing and I get to know that someone is outside using urinals, I sit there till the time that person leaves. So many people working with me in fact tease me like, 'this Q, doesn't urinate in front of any of us.'"⁵³⁴

Transgender persons may also be unwilling to use toilets specifically marked for transgender persons, for fear of revealing their gender identity and exposing themselves to stigma, harassment, discrimination, violence and other abuse. Their inability to access such facilities impacts on their freedom of movement, as well as their ability to access employment opportunities.

E, a transgender man and activist from Imphal, said in reference to the newly built toilet for transgender persons in Imphal describing his discomfort:

"No one uses it, not even men and women. People would've used it if it was a little on the side, but it's right on the road. Going there would mean announcing [one's gender identity] to the world. Who'd want to do that?"⁵³⁵

Impact of inaccessibility of public toilets on transgender persons

Inaccessibility of toilets compels LGBTQ persons to avoid drinking water, and to hold urine for long periods of time.

T, who is a transgender man and a filmmaker from Bangalore said that he avoids drinking water to avoid going to public toilets.

"I have long work hours and shoot days so I just avoid drinking too much water. That helps me not use the washroom. If I have to urgently use it, then I try to see if there is someone I know who can look out for my safety, then I go with them."⁵³⁶

Similar barriers may be experienced by LGBTQ persons in accessing common toilets, whether in public or private spaces.

⁵³² ICJ interview, Bangalore, September 2018.

⁵³³ "Top surgery" includes a variety of procedures, including breast augmentation or removal, intended to alter the appearance of the chest to make it align more closely with a person's self-identified gender.

⁵³⁴ ICJ interview, Baroda, December 2018.

⁵³⁵ ICJ interview, Kochi, October 2018.

⁵³⁶ ICJ interview, Bangalore, September 2018.

P, a transgender woman from Bangalore, said that she avoided using the toilet at her place of work, as she had experienced sexual assault inside a toilet at her previous workplace. She said:

"I used to avoid [drinking] water to avoid going to toilet while traveling. I got kidney problem...other people in the community also face problems like that. So many times we control our urine and it gets too difficult."⁵³⁷

T, a transgender man from Bangalore said that he avoids long distance bus travel due to the unavailability of adequate sanitation facilities. He told the ICJ,

"Sometimes when I am in the bus and I really have to use the washroom, then I just pee on the seat, I have no other option for myself. I now think that maybe I will use adult diapers."⁵³⁸

Smita, a gender non-binary individual, in a published article, wrote:

"Public bathrooms have become a source of great anxiety for me, especially when there are bathroom attendants. In the past two and a half months, I have been physically assaulted seven times in women's bathrooms with women putting their hands on my chest and attempting to push me out. This was done both by the bathroom attendants as well as by the others who were using the bathroom. Two weeks ago, at a bank, a woman grabbed me by my arm, dragged me out of the bathroom, and demanded to see my ID card. She was just another customer at the bank. It's come to a point where I don't drink water when I'm outside simply so that I can avoid using the bathroom."⁵³⁹

Application of international and domestic law on access to adequate sanitation

LGBTQ persons fear discrimination and violence in accessing public sanitation facilities such as public toilets. In her 2012 report, the UN Special Rapporteur on Drinking Water and Sanitation stated that the use of gender segregated public bathrooms:

"has been associated with exclusion, denial of access, verbal harassment, physical abuse and sometimes even the arrest of transgender and intersex individuals. More broadly, they are at risk of exposure, violence and harassment in seeking access to services such as water and sanitation when those are in common areas, or where privacy is unavailable or compromised."⁵⁴⁰

⁵³⁷ ICJ interview, Bangalore, September 2018.

⁵³⁸ ICJ interview, Bangalore, September 2018.

⁵³⁹ Smita Vanniyar, "Where Do I Go?", TARSHI (2019) http://www.tarshi.net/inplainspeak/safe-spaces-for-nonbinary-people/?fbclid=IwAR3jh_NA4jAY2wOR2hCwzFkEojaDuSBLJ7LBpkXepxrZYCvKJrmcyGhoD1U (Accessed 12 May 2019).

⁵⁴⁰ Catarina de Albuquerque, Report of the Special Rapporteur on the human right to safe drinking water and sanitation, UN Doc. A/HRC/21/42, (2012), para. 40; Human Rights Council, The human rights to safe drinking water and sanitation, UN Doc. A/HRC/RES/33/10, (2016). This built on the Special Rapporteur's 2011 report on her mission to the USA in which she acknowledged that "[the] evacuation of the bowels and bladder is a necessary biological function and ... denial of opportunities to do so in a lawful and dignified manner can both compromise human dignity and cause suffering, such denial could, in some cases (e.g., where it results from deliberate actions or clear neglect) amount to cruel, inhumane or degrading treatment. Individuals are sometimes compelled to go to extraordinary lengths to prevent such suffering". UN Human Rights Council, Report of the Special

The UN Special Rapporteur on Drinking Water and Sanitation also recognized that the use of public toilets and bathrooms, which are often gender-segregated, is associated with exclusion, harassment, and abuse of transgender and intersex persons.⁵⁴¹ The problem stems in part from the Indian State's failure to take legislative and other measures, within its maximum available resources, to realize the rights to water and sanitation for LGBTQ persons, in particular transgender and gender non-binary persons. Such inaction includes failure to develop a policy on sanitation in consultation with LGBTQ persons and other concerned stakeholders, and to combat societal stigma.⁵⁴²

Merely allowing transgender persons to use toilets of their choice (male or female), as has been done by the Indian State,⁵⁴³ without doing more, is not sufficient to ensure equal and effective access. Enabling access to toilets for transgender and gender non-binary persons is admittedly a challenge, as both gender-neutral toilets as well as exclusive toilets for transgender persons puts individuals at risk of assault and harassment. The sanitation policies need to be developed in consultation with the community and civil society.⁵⁴⁴

As described above, access to such public spaces has increasingly been recognized as a vital precondition for the effective and equal enjoyment of all human rights under various international legal instruments.⁵⁴⁵

Challenges in entry to public toilets on the basis of SOGIE is a violation of the right to non-discriminatory access to places of public resort, guaranteed under Articles 15(1) and 15(2) of the Constitution. This has been established in cases decided before the Supreme Court and lower courts.

Rapporteur on the human right to safe drinking water and sanitation, Addendum: Mission to the United States of America, UN Doc. A/HRC/18/33/Add.4, (2011) para. 58.

⁵⁴¹ Catarina de Albuquerque, Report of the Special Rapporteur on the human right to safe drinking water and sanitation, UN Doc. A/HRC/21/42, (2012), para. 40; Human Rights Council, The human rights to safe drinking water and sanitation, UN Doc. A/HRC/RES/33/10, (2016).

⁵⁴² Catarina de Albuquerque, Report of the Special Rapporteur on the human right to safe drinking water and sanitation, UN Doc. A/HRC/21/42, (2012), para. 57 states, "Article 17 of the International Covenant on Civil and Political Rights goes on to guarantee that —everyone has the right to the protection of the law against such interference or attacks, thus including an explicit guarantee of protection against interference by private parties. This results in a positive obligation of States parties to protect privacy against interference and attacks by others, which has been found to be of particular relevance, for instance, in relation to persons deprived of personal liberty, older persons, persons with disabilities or transgendered persons. This provision is of enormous significance in the context of combatting stigma. It clearly demonstrates that States' obligations reach into the private sphere. They cannot dismiss stigma as a social phenomenon over which States have no influence. Instead, they have positive obligations that extend into this realm, requiring States, for instance, to take measures that enable women and girls to manage their menstrual hygiene needs in a manner that protects their privacy and dignity."

⁵⁴³ India. 2017. Guidelines on gender issues in sanitation. Ministry of Drinking Water and Sanitation. <https://mdws.gov.in/sites/default/files/Guidelines%20on%20Gender%20issues%20in%20Sanitation.pdf> (Accessed on 26 February, 2019).

⁵⁴⁴ See Durba Biswas, "Challenges for Transgender-inclusive Sanitation in India" *Economic and Political Weekly* Vol. 54, Issue 8 (May 2019), available at <https://www.epw.in/journal/2019/18/commentary/challenges-transgender-inclusive-sanitation-india.html> (Accessed on 28 May 2019).

⁵⁴⁵ CRPD, articles 3 and 9; CERD, article 5(f).

In *Vincent Panikulangara v. Union of India*, the Supreme Court held the State is obliged to create and sustain conditions congenial to good health of all as a component of the right to life.⁵⁴⁶ The unavailability and inaccessibility of public toilets clearly deprives individuals of their right to health.

In *Milun Suryajani v. Pune Municipal Corporation*, the High Court of Bombay directed the Pune Municipal Corporation to construct and maintain toilets for women in public areas, noting that they were essential for leading a life of dignity; the Court read together Article 21⁵⁴⁷ and Article 47⁵⁴⁸ (directive principle on improving public health), to recognize and reiterate the positive obligation of the State to make available public toilets.⁵⁴⁹

In *NALSA*, the Supreme Court of India also recognized the challenges faced by transgender persons in accessing toilets. In this case, the Court directed the Central and state governments to “take proper measures to provide medical care to [transgender persons] in the hospitals and also provide them separate public toilets and other facilities”.⁵⁵⁰ Following this case, a public interest litigation (PIL) case was filed before the High Court of Madras to bring to its attention the lack of toilets for transgender persons, especially in areas where they live in large numbers.⁵⁵¹ This case is pending before the High Court.

The Directive Principles of State Policy in Article 47 of the Constitution indicates that improvement of public health should be regarded as one of the primary duties of the State. Together with Article 21 of the Constitution, which includes the right to health,⁵⁵² this directive principle places a positive obligation upon the Indian State to ensure the availability and accessibility of public toilets for all persons. *NALSA*, in turn, requires access to all rights, including to sanitation, to be accessible without discrimination on the basis of sexual orientation or gender identity and expression.⁵⁵³ The prevalent inaccessibility of public toilets for LGBTQ persons therefore violates their right to live with dignity.

⁵⁴⁶ Supreme Court of India, *Vincent Panikurlangara v. Union of India*, AIR1987SC990; Supreme Court of India, *Virender Gaur v. State of Haryana*, (1995)2 SCC 577, para. 7 states, “...Article 21 protects the right to life as a fundamental right. Enjoyment of life and its attainment including the right to life with human dignity encompasses within its ambit...sanitation without which life cannot be enjoyed.”

⁵⁴⁷ Constitution of India, Article 21.

⁵⁴⁸ Constitution of India, Article 47 states, “The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.”

⁵⁴⁹ High Court of Bombay, *Milun Suryajani v. Pune Municipal Corporation*, 2016(2)ABR105,

⁵⁵⁰ *NALSA*, para 129(6) states that “The Centre and State Governments should take proper measures to provide medical care to TGs in the hospitals and also provide, them separate public toilets and other facilities.”

⁵⁵¹ “Madras HC directs Tamil Nadu government to build public toilets for transgenders”, *Hindustan Times*, 4 April 2017, <https://www.hindustantimes.com/india-news/madras-hc-directs-tamil-nadu-govt-to-build-public-toilets-for-transgenders/story-eVILHoEpkF5RiHwhEF05iL.html> (Accessed on 26 February 2019).

⁵⁵² The Supreme Court of India has held that the right to life under Article 21 encompasses the right to health; Supreme Court of India, *CESC Ltd. vs. Subash Chandra Bose*, AIR 1992 SC 573,585.

⁵⁵³ The 43rd report of the Standing Committee on Social Justice and Empowerment in commenting on the Transgender Persons (Protection of Rights) Bill, 2016, recommended a provision for separate

In view of the *NALSA* decision, the Central and state governments in India have taken some policy measures to enable transgender and gender non-binary persons access to toilets. These include the following:

- The Ministry of Drinking Water and Sanitation is the nodal Ministry for the overall policy, planning, funding and coordination of two programs of the central government: the National Rural Drinking Water Programme⁵⁵⁴ (NRDWP) (for rural drinking water supply) and the Swachh Bharat Mission⁵⁵⁵ (for sanitation in the country). In April 2017, the Ministry also issued guidelines stating that members of the “third-gender community”⁵⁵⁶ should be allowed to use public toilets of their choice (including toilets typically reserved for either men or women).⁵⁵⁷ However, no information regarding the implementation of these guidelines was furnished by the Ministry in response to an application requesting information in this regard.⁵⁵⁸
- The state of Karnataka requires its Transport Department and Urban Development Department to ensure that public toilets for transgender persons are made available in places such as bus stands, shopping places, cinema halls, hospitals and railway stations.⁵⁵⁹ The policy, however, does not specify whether this should be done by constructing gender-neutral toilets, toilets specifically for transgender persons, or by allowing transgender persons to use the toilet of their choice.
- Municipalities in some districts of Tamil Nadu, Karnataka⁵⁶⁰ and Madhya Pradesh⁵⁶¹ have taken steps to construct separate toilets for transgender persons, or unisex toilets open to all.⁵⁶²

public toilets for transgender persons and other such facilities,
https://www.prsindia.org/sites/default/files/bill_files/SCR-%20Transgender%20Bill.pdf (Accessed 12 May 2019), at p. 93.

⁵⁵⁴ India. 2013. National Rural Drinking Water Programme: Movement towards ensuring people’s Drinking Water Security in Rural India Guidelines – 2013. Ministry of Drinking Water and Sanitation. https://mdws.gov.in/sites/default/files/NRDWP_Guidelines_2013_0.pdf (Accessed on 26 February 2019).

⁵⁵⁵ India. 2017. Guidelines for Swachh Bharat Mission (Gramin). Ministry of Drinking Water and Sanitation. https://mdws.gov.in/sites/default/files/Complete%20set%20guidelines_1.pdf (Accessed on 26 February 2019).

⁵⁵⁶ ‘Third-gender’ is a term used to refer to transgender persons.

⁵⁵⁷ India. 2017. Guidelines on gender issues in sanitation. Ministry of Drinking Water and Sanitation. <https://mdws.gov.in/sites/default/files/Guidelines%20on%20Gender%20issues%20in%20Sanitation.pdf> (Accessed on 26 February, 2019).

⁵⁵⁸ RTI response received by ICJ from Ministry of Drinking Water and Sanitation, Union of India.

⁵⁵⁹ Karnataka, India. 2017. State Policy on Transgenders. Government of Karnataka. <http://www.khpt.org/wp-content/uploads/2018/01/TG-policy-1.pdf> (Accessed 12 May 2019).

⁵⁶⁰ Shubhadeep Choudhry, India’s first toilet for transgenders in Mysore, *The Tribune* (20 November 2015). <http://www.tribuneindia.com/news/nation/india-s-first-toilet-for-transgenders-in-mysore/160491.html> (Accessed on 26 February 2019).

⁵⁶¹ Jamal Ayub, “Country’s first: Bhopal to have separate public toilets for transgender community”, *The Times of India* (6 September 2016). <https://timesofindia.indiatimes.com/city/bhopal/Country-s-first-Bhopal-to-have-separate-public-toilets-for-transgender-community/articleshow/54034223.cms> (Accessed on 26 February 2019).

⁵⁶² Mrinalika Roy, “India’s transgender community still waiting for toilets it was promised”, *Reuters* (8 August 2016). <https://in.reuters.com/article/india-transgender-toilets/indias-transgender-community-still-waiting-for-toilets-it-was-promised-idINKCN10J0VL> (Accessed on 26 February 2019).

Unfortunately, government policies are often unknown to State officials ultimately responsible for ensuring access to sanitation (such as local officials, police, and security personnel outside sanitation facilities).

The Chennai Metro Rail Limited, the Bangalore Metro Rail Corporation Limited, and the Lucknow Metro Rail Corporation Limited, in response to a RTI application, stated that the metro authorities had not received any guidelines on the use of public toilets by transgender persons, or on the security screening of transgender persons.⁵⁶³ The Bangalore Metro Rail Corporation Limited and Kochi Metro Rail Limited further stated that while no separate toilets were constructed in metro stations for transgender persons, but transgender persons were free to use the toilets of their choice.⁵⁶⁴

Written policies therefore go largely unimplemented and contrast significantly with the continued reality of the vast majority of LGBTQ individuals who are unable to achieve basic access to water and sanitation throughout India.

Public Transport

State owned and regulated public transport is a primary mode of travel in India.⁵⁶⁵ This includes railways, inter and intra-city buses, and intra-city trains. In addition, the State also constructs and administers airports. Access to public transport is compromised because of discrimination against persons with real or perceived non-normative gender identity and expression. This is because access points for travel by public transport are gendered. These include ticket booking forms, security screening at train stations and airports and toilets at railway stations and at the airport. Further, public transport is also a site of gender-based violence and harassment, which contributes to a general feeling of insecurity in accessing it.

Inaccessibility due to gendered nature of security screening

Entry to public transport facilities such as local trains or metros,⁵⁶⁶ railways, and air travel is usually regulated through security screening at train stations and airports respectively. There are usually two queues – one for men and another for women – with women security guards in charge of frisking women, and men security guards in charge of frisking men. Often, transgender persons are expected to justify their presence in one queue or the other, leading to a public negotiation around their gender identity.

E, a transgender man from Imphal, recounted being publicly called out and asked to stand in the men's queue:

⁵⁶³ RTI responses received from Chennai Metro Rail Limited, the Bangalore Metro Rail Corporation Limited, and the Lucknow Metro Rail Corporation Limited by ICJ.

⁵⁶⁴ Responses received from Bangalore Metro Rail Corporation Limited and Kochi Metro Rail Limited in response to RTI applications filed as part of this project.

⁵⁶⁵ National Transport Development Policy Committee, "National Transport Report: Moving India to 2032," 2014, available at http://planningcommission.nic.in/reports/genrep/NTDPC_Vol_01.pdf, at p. 4.

⁵⁶⁶ Several cities in India have local trains, also referred to as "metros" – that are regulated by government owned corporations, or Public Sector Undertakings.

“Once, a security guard called out from the back, asking me what I was doing at the women’s queue and told me to join the men’s queue. Then I told them that I was female, because I couldn’t have gone to the men’s queue [and be frisked by men].”⁵⁶⁷

W, a gender queer transman and scientist from Delhi:

“It is horrible to access metros. If I’m wearing a good binder,⁵⁶⁸ then I go ahead and get frisked by a male security guard and it doesn’t bother me. I am often loudly called out if I’m perceived to be in the wrong queue, they direct me to join the other queue – based on their assessment of my gender. Somebody or the other figures out and makes it difficult. Airports have always been worse than metros because it feels like they have more security concerns and more of a right to investigate everything, including gender. In metros because there are so many people, you just get patted down quickly and you can pass if you are wearing a good binder.”⁵⁶⁹

N1, a transgender woman from Delhi was forced to stand in the men’s queue at a metro station in Delhi and was sexually assaulted. She said:

“There was a lot of rush. I was just about to get checked [in the women’s queue], there must be some 2-3 women in the queue before me. They called me once to the gents’ queue, I refused to go. Then they called out very loudly and told me to stand in the men’s queue. I didn’t go, I opposed it, but then they forced me. At the security check, [the guard] pressed my breast. When I complained about that, his senior came and apologized.”⁵⁷⁰

The Delhi Metro Rail Corporation, in response to her complaint, issued a notice indicating that she would be permitted to use the security queue of her choice, provided that her clothing was reflective of her self-identified gender, and that she had a photo identity document in her preferred gender. It also said that she could use seats and toilets reserved for disabled persons.⁵⁷¹ The letter, apart from mis-gendering her and failing to recognize her right to use women’s toilets, also fails to recognize her right to access the metro at all stations, and notably is specific only to her – thus avoiding the declaration of an accommodating policy applicable to all transgender persons.

Some interviewees reported being forced to strip by security guards due to security concerns about their binder.

D, a transgender man from Delhi:

⁵⁶⁷ ICJ interview, Kochi, October 2018.

⁵⁶⁸ Binders, which may include metal parts, are used for chest binding by transmen. Chest binding helps in flattening breast tissue to create a male-appearing chest.

⁵⁶⁹ ICJ interview, Delhi, August 2018.

⁵⁷⁰ ICJ interview, Delhi, October 2018.

⁵⁷¹ This notice was sent by the DMRC to the ICJ in response to an RTI application. It states that “...a transgender, has been extended the following services for his/ her intended travel between Dwarka Mor and Nehru Place station of Delhi Metro:- He/she may choose male or female queue at the frisking points depending upon his/her self-identified gender provided his/ her clothing is commensurate with his/ her self-identified gender, He/ she is permitted to occupy seats reserved for “Senior Citizens and Differently Abled” persons in metro train, He/she is permitted to use toilet facilities provided for differently abled persons at the metro stations.”

“When I started expressing as a ‘tomboy’ pre-surgery, the security checks became very difficult. The guards would scan me and look at my breasts touch me inappropriately to figure out what I am. At metro stations also it is very difficult to navigate the security check. Once my binder got detected [by the metal detector] at the airport and they took me inside for more scrutiny. I told them it’s a medical thing, but they insisted on me stripping down. I had no choice but to strip down.”⁵⁷²

Some transgender men use a toy penis, or a folded cloth placed on the crotch to pass as cis-men. T, a transgender man from Bangalore said that:

“Basically, their fear is that people will get to know of their transgender identity, so in response to that fear, they fold cloth and keep it in the crotch to make it look like one has a penis. When going through security that creates trouble because it gets detected and then the security guards ask a lot of questions and can even make them undress.”⁵⁷³

Gendered security screening, which has no provision for accommodating transgender persons, creates barriers for accessing other public spaces as well, such as public monuments. D, a transgender man from Delhi said:

“Once, I was at the Red Fort and the female security guard was scrutinizing me. As she wanted to figure out what I am, suddenly she put her hands in my pants to check if I am a man or woman. I was too shocked to respond to the situation.”⁵⁷⁴

As the above accounts show, transgender and gender non-binary persons may be forced to engage in a public negotiation of their gender identity with State actors who may question the assertion of their self-identified gender.

In some cases, State actors violate persons’ autonomy and privacy to ascertain the “sex” of LGBTQ persons, which may amount to sexual assault. Transgender and gender non-binary persons are also subjected to disproportionate scrutiny during security screening through patting-down or stripping, causing humiliation and embarrassment.

Inaccessibility due to absence of identity documents

Just as a lack of identity documents affects access to work, it also affects the ability of transgender persons to access transport. Identity documents are required to access travel by airways and railways. They may be required for booking tickets, entering the airport or railway station, obtaining one’s boarding pass for air travel, and during immigration check.

Incongruence between the name and gender stated on the identity document, and one’s preferred name, gender identity, and gender expression can create barriers to accessing these modes of transport.

⁵⁷² ICJ interview, Delhi, August 2018.

⁵⁷³ ICJ interview, Bangalore, September 2018.

⁵⁷⁴ ICJ interview, Delhi, August 2018.

P1, a transgender woman from Bangalore, who has not changed her name and gender identity on her identity documents, reported that she avoids air travel because she is required to furnish identity proof to access this mode of transport.

“even while booking flight tickets, I have to get my tickets booked in a different name [dead name]⁵⁷⁵.”

A, a transgender woman and activist from Delhi, told the ICJ that even though an option “T” for transgender persons has been introduced in the Indian Passport, she continues to face more scrutiny than others at the immigration counter at airports. She said:

“I face a lot of problems when I travel across the border from Delhi because Delhi customs doesn’t have ‘T’ as an option, they have binary. The government doesn’t have that system within the immigration department.”⁵⁷⁶

Inaccessibility of public transport due to discrimination, harassment and violence

LGBTQ persons often deal with verbal abuse and harassment from co-passengers in public transport. Sometimes co-passengers ask transgender and gender non-binary persons uncomfortable private questions about their gender identity, and at other times, mock and jeer at transgender and gender non-binary persons.

L, a transgender woman and activist from Bangalore, said of the sexual harassment experienced by her in public transport:

“Even on the trains there are no reserved seats for transgenders. If we sit in [seats reserved for] women, then they get uncomfortable and if we sit in men’s coach then they keep their hands on us or sit very close [to us].”⁵⁷⁷

Interviewees also reported being spoken to in a derogatory sexual tone, as if to proposition sex, with the assumption that all transgender persons are sex workers. N1, a transgender woman and activist from Delhi, described her experience:

“People comment in a very different tone like *kaisi hai janemam, kaha rahti ho* [how are you darling, where do you live?]. While giving money they end up touching my body, that happens a lot. I handle that in a calm manner. Two days ago, when I was begging, a man grabbed both of my hands, he said *madam sacchi aaj kuch nahi hai mere paas* [I don’t have any money to give to you today]. I got my hand free and told him to not touch me again.”⁵⁷⁸

N, a transgender woman from Bangalore spoke of the stigma associated with transgender identities that creates barriers in accessing public transport:

“Our trans community does not use the public transport usually as we face a lot of stigma and discrimination there. If we sit next to men, they look at us in a sexual manner and it is very uncomfortable, and we feel unsafe. If we sit

⁵⁷⁵ ICJ interview, Bangalore, September 2018; “Dead name” is a term used to refer to the birth name of a person who has changed their gender identity and name.

⁵⁷⁶ ICJ interview, Delhi, August 2018.

⁵⁷⁷ ICJ interview, Bangalore, September 2018.

⁵⁷⁸ ICJ interview, Delhi, October 2018.

next to women, they also mistreat us, they tell us to sit on the last seat and they also assume that we are thieves.”⁵⁷⁹

Q1, a cis-gendered gay man based in Delhi explained how his choice of clothes and gender expression affected how freely he was able to access public transport.

“I usually get some stares if I wear something overtly printed or brightly coloured in the metro. I have noticed that since I started going to my new job in formals and all, none of that happens.”⁵⁸⁰

Application of international and domestic law on safe access to public transport

The gendered nature of security screening for accessing public transport, gendered toilets, and violence or harassment create barriers for LGBTQ persons in accessing public transport. Inaccessibility of public transport due to real or perceived SOGIE may interfere with the physical accessibility of rights, including the rights to housing and work.⁵⁸¹

Access to and enjoyment of other rights, such as the right to decent work, is also often dependent on one’s ability to access public transport to travel to their place of work. LGBTQ persons’ inability to safely access public transport therefore violates other rights as well and contributes to their marginalization.⁵⁸²

The State is under an obligation to protect the right to access public transport, which is essential to realize the right to freedom of movement.⁵⁸³ The failure of the State to address barriers to LGBTQ persons’ access to transport amounts to a failure of the State to respect the rights of LGBTQ persons, protect them from private interference, and fulfill their right to freedom of movement by ensuring access to public transport.⁵⁸⁴

The right to freedom of movement also includes the right to leave the country. The State’s failure to issue a passport in the name and gender of one’s choice thus arbitrarily interferes with the right to freedom of movement.⁵⁸⁵

⁵⁷⁹ ICJ interview, Bangalore, September 2018.

⁵⁸⁰ ICJ interview, Delhi, November 2018.

⁵⁸¹ ESCR Committee, General Comment No. 4: The right to adequate housing (article 11(1) of the Covenant), UN Doc. E/1992/23, (1991), para. 8(f); ICCPR, article 2.

⁵⁸² The Committee on the Rights of the Child has in the context of rights of children with disability, emphasized that inaccessibility of public transport contributes to marginalization and compromises access to health; CRC, General comment No. 9 (2006): The rights of children with disabilities, UN Doc. CRC/C/GC/9, (2007), para. 39.

⁵⁸³ Human Rights Committee, General comment No. 27: Freedom of movement (Art.12), UN Doc. CCPR/C/21/Rev.1/Add.9, (1999).

⁵⁸⁴ Human Rights Committee, General comment No. 27: Freedom of movement (Art.12), UN Doc. CCPR/C/21/Rev.1/Add.9, (1999), para. 6.

⁵⁸⁵ Human Rights Committee, General comment No. 27: Freedom of movement (Art.12), UN Doc. CCPR/C/21/Rev.1/Add.9, (1999), para. 18 states, “The application of the restrictions permissible under article 12, paragraph 3, needs to be consistent with the other rights guaranteed in the Covenant and with the fundamental principles of equality and non-discrimination. Thus, it would be a clear violation of the Covenant if the rights enshrined in article 12, paragraphs 1 and 2, were restricted by making distinctions of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

The State also has constitutional obligations. In the case of *Rajive Raturi v. Union of India*,⁵⁸⁶ the Supreme Court held that the lack of accessible public transport resulted in an infringement of the rights to live with dignity,⁵⁸⁷ equal opportunity,⁵⁸⁸ freedom of movement,⁵⁸⁹ and non-discrimination.⁵⁹⁰ While the decision was made in the context of rights of visually impaired persons, the Court recognized that the inaccessibility of built environment for a certain class of persons violates their human rights.

The 43rd report of the Standing Committee on Social Justice and Empowerment on The Transgender Persons (Protection of Rights) Bill, 2016, has recommended separate frisking zones for transgender persons at public places such as airports and, government and private office complexes, to be done by transgender employees.⁵⁹¹

Frisking is a challenging issue for which there is need to find accessible long-term solutions. Separate frisking zones run the risk of outing individuals and increasing their vulnerability to violence and discrimination. Any long-term policy solutions must therefore be based on consultations with community members, statewide collection of disaggregated data, as well as comparative research.⁵⁹²

Systemic barriers that deprive transgender persons of access to public transport violate their rights to live with dignity, freedom of movement, equal opportunity, and non-discrimination.

Public spaces owned by private actors but open to public

This section deals with barriers experienced by LGBTQ persons in accessing privately owned spaces that are generally open for use by the public. Transgender persons experience discrimination in accessing privately owned places that are open to the public and provide public accommodation, such as shopping malls and hotels, private businesses that provide services to the general public, and privately-owned public transport. As noted above, under international human rights law, including article 26 of the ICCPR, the State has an obligation to protect persons accessing such public accommodation from discrimination.

⁵⁸⁶ Supreme Court of India, *Rajive Raturi vs. Union of India (UOI) and Ors*, (2018) 2 SCC 413, paras. 10, 11, 13.

⁵⁸⁷ Constitution of India, Article 21.

⁵⁸⁸ Constitution of India, Article 14.

⁵⁸⁹ Constitution of India, Article 19(1)(d).

⁵⁹⁰ Constitution of India, Article 15(1).

⁵⁹¹ The 43rd report of the Standing Committee on Social Justice and Empowerment, available at https://www.prsindia.org/sites/default/files/bill_files/SCR-%20Transgender%20Bill.pdf, p. 93

⁵⁹² For instance, in the US, transgender persons have a right to ask for private screening and take a witness of their choosing, and have a right to a pat down to be conducted by a person who matches their gender expression. While this cannot be duplicated in India, comparative experiences need to be studied. National Center for Transgender Equality. "Know Your Rights: Airport Security." <https://transequality.org/know-your-rights/airport-security> (Accessed 28 May 2019).

This discrimination ranges from outright denial of entry based on gender identity and expression, refusal to provide services, to surveillance of the activities of transgender persons when they are allowed to enter such places.

Denial of entry and refusal to provide services

T1, a transgender woman and activist from Delhi, recounted an incident of being denied entry to a shopping mall in the following words:

"A colleague and I had gone to Epicuria Mall [in New Delhi]. We had been there several times. This time, we were stopped by the security persons, and asked to wait. They let people behind us enter the mall. When we asked why we were not being allowed to enter, they asked us why we wanted to go inside. I told them that we just wanted to eat at the food court. He allowed us to enter. Soon after, we realized that we were being followed. That is when we took action and complained to the chief of security."⁵⁹³

Transgender persons are often presumed to be sex workers or beggars, and thus suspected of carrying out illegal activities inside shopping malls. N, a transgender woman from Bangalore told her story:

"Transwomen who work on streets all day or who have been seen on streets as sex workers or beggars will never be allowed into malls. They think we will create nuisance inside the malls, or solicit or beg, so they don't allow us. If they do allow us, a security guard will follow us inside to each and every shop or food court where we go."⁵⁹⁴

A, a transgender woman from Delhi, told the ICJ that she was suspected without reason of shoplifting in a shopping mall in Delhi and tailed by security persons. She said:

"There was this one instance where me and another trans-woman were at Saket City Mall [a shopping centre]. There was a guard there who kept following us and checking that we don't shoplift something."⁵⁹⁵

Several interviewees reported facing direct discrimination from private businesses, which either refused to provide services to them, or charged more because of their gender identity and expression.

A, a transgender woman and activist from Delhi said that several salons had refused to provide services to her in the past due to her gender identity.

"A lot of beauty parlours are also not available for us. When we enter, the owner of the parlor will say 'sorry Ma'am, we don't provide services to you.' So, we have to go to selective parlours. In Delhi, I go to this parlor called Images, which is in Lajpat Nagar. That's the only parlor I go to."⁵⁹⁶

T1, a transgender woman from Delhi, spoke of how she was denied entry to a hotel in Surat because of her gender identity and expression.

⁵⁹³ ICJ interview, Delhi, August 2018.

⁵⁹⁴ ICJ interview, Bangalore, September 2018; ICJ interview, Delhi, August 2018.

⁵⁹⁵ ICJ interview, Delhi, August 2018.

⁵⁹⁶ ICJ interview, Delhi, August 2018.

"I had gone to Surat for official purpose with a colleague, but our stay hadn't been pre-booked. We went to several hotels but they did not allow us to enter on the pretext that they did not have any vacant rooms. Some asked for residential proofs. We were not able to get a room until 1 AM the next morning. I suggested to my colleague [a cis-gendered man] that I will go and stay with my relatives, as it was possible that we were not being given a room because of me."⁵⁹⁷

F1, a transgender woman and activist from Kochi was also denied entry into a hotel.

"When I went to Kozhikode, I was stopped from entering a hotel. They said that cross-dressers are not allowed. They were not ready to give [me] a room."⁵⁹⁸

She also mentioned that hotels charge transgender persons more than the standard rent. She said:

"If we don't get any home or space here to live...we had to depend on hotels. When they saw we are transgenders, they started asking us more money. The male or female persons were charged 400 INR but as a transgender I had to pay 600 INR."⁵⁹⁹

Moreover, because access by transgender persons to public transport is also often limited, transgender persons report having to depend on their own transport, and in its absence, on autos [three wheelers] to move within the city. Transgender persons who depend on sex work for a living, often rely on informal partnerships with auto drivers for soliciting clients.

N, a transgender woman from Bangalore described how auto drivers occupy a position of power in relation to trans sex workers, and often exploit this power to charge them more than other customers. She said:

"The community usually uses autos. Autos also charge us more than other customers. If we take other autos that charge us less, some other autowallahs threaten us with a knife and force us to use their autos and pay higher... But we don't have an option, as only few autos will take us trans sex workers in their autos, so we can't fight back."⁶⁰⁰

Application of international and domestic law on access to transport and services

Discrimination in accessing privately owned public spaces on the basis of SOGIE violates the right of LGBTQ persons to take part in cultural life, and the right to non-discrimination.

Article 15(2) of the Constitution of India prohibits discrimination on the basis of sexual orientation and gender identity in accessing places of public resort. This article is enforceable against private actors who operate places of public resort.

⁵⁹⁷ ICJ interview, Delhi, August 2018.

⁵⁹⁸ ICJ interview, Kochi, October 2018.

⁵⁹⁹ ICJ interview, Kochi, October 2018.

⁶⁰⁰ ICJ interview, Bangalore, September 2018.

This prohibition extends to discrimination in access to shopping malls, hotels, and private businesses like salons.⁶⁰¹ Therefore, hotels, shopping malls and other private business that are otherwise open to the public but deny entry to LGBTQ persons violate the rights of transgender and gender non-binary persons.

In *Navtej*, the Supreme Court held that policies based on stereotypes about a protected class that have the effect of discriminating against persons in such classes, are invalid and in violation of the Constitution.⁶⁰² Therefore, public accommodations that deny entry to transgender persons based on the stereotype that all transgender persons are sex workers or beggars who will carry out illegal activities, also violate the right to non-discrimination under Article 15(2).

Similarly, surveillance of LGBTQ persons in privately owned public spaces is a violation of their right to non-discrimination under Article 15(2). Surveillance of LGBTQ persons also violates their right to privacy in public spaces, recognized by the Supreme Court in *Puttaswamy*. While the right to privacy is not enforceable against non-state actors,⁶⁰³ the State is under an obligation to "to take all necessary measures to protect the privacy of the individual."⁶⁰⁴ This has been interpreted by the Court to include a prohibition on discrimination in entry to places of public resort, as well as in provision of services.⁶⁰⁵

⁶⁰¹ Supreme Court of India, *Indian Medical Association v. Union of India*, (2011)7SCC179; See Gautam Bhatia, "Exclusionary Covenants and the Constitution – IV: Article 15(2), *IMA v. UoI*, and the Constitutional Case against Racially/Religiously Restrictive Covenants," *Indian Constitutional Law and Philosophy*, 14 January 2014, <https://indconlawphil.wordpress.com/2014/01/14/exclusionary-covenants-and-the-constitution-iv-article-152-ima-v-uoi-and-the-constitutional-case-against-raciallyreligiously-restrictive-covenants/> (Accessed 12 May 2019).

⁶⁰² *Navtej Singh*, para 393.

⁶⁰³ The right to privacy has been located by the Supreme Court in Articles 21, 14, 19, 20(3), and 24, which operate against the State, and are vertically applicable; *Puttaswamy*; Gautam Bhatia, "The Supreme Court's Right to Privacy Judgment – VII: Privacy and the Freedom of Speech," *Indian Constitutional Law and Philosophy*, 05 September, 2017, <https://indconlawphil.wordpress.com/2017/09/05/the-supreme-courts-right-to-privacy-judgment-vii-privacy-and-the-freedom-of-speech/>; per contra, See Samvad Partners, "Applicability of Justice Puttaswamy v. Union of India to non-state entities," 2 November 2017, https://samvadpartners.com/wp-content/uploads/2017/11/Applicability-of-Puttuswamy-on-Non-State-Actors_03112017.pdf (Accessed 12 May 2019).

⁶⁰⁴ *Puttaswamy*, at para. 188(I) states "(I) Privacy has both positive and negative content. The negative content restrains the state from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the state to take all necessary measures to protect the privacy of the individual."

⁶⁰⁵ The Court found that "[t]o define the word 'shop' in the most generic term one can think of is to state that 'shop' is a place where the owner is prepared to offer his service to anybody who is prepared to go there seeking his service. ... the word 'shop' used here is not used in the limited sense of permitting entry. It is used in the larger sense of requiring the services if the terms of service are agreed to." Supreme Court of India, *Indian Medical Association v. Union of India*, (2011)7SCC179, para. 113.

RECOMMENDATIONS ON PUBLIC SPACES

To the Parliament of India

- Repeal or amend vaguely worded laws such as Section 268, Indian Penal Code, 1860 (Public nuisance), state anti-beggary laws, the state variants of the Criminal Tribes Act, 1871 and other laws that are routinely used to target LGBTQ persons and carry adverse impacts on “rights and freedoms” based on SOGIE, in line with international human rights law.

To the Central and State Governments of India

- Delete the provision in the “Guidelines relating to Issue of Passport in India/Abroad” issued by the Consular Passport and Visa Division of the Ministry of External Affairs that require applicants to produce proof of sex re-assignment surgery when seeking a change in the gender designation on a passport.
- Establish guidance for the human rights compliant treatment of transgender and gender non-binary persons in any place where public officials are charged with police powers, including the sensitization of security guards, immigration and custom officials to LGBTQ rights.
- Collect data from each state on access to toilets for transgender and gender non-binary persons in India; examine shortcomings in existing infrastructure and policy framework in each state. Hold consultations in each state with all stakeholders including LGBTQ persons to identify needs and propose solutions. Amend state governments and Central Government policies including the Central Government’s “Guidelines on gender in sanitation”, accordingly, to protect every person’s right to sanitation.
- Require transport corporations to develop guidelines that require that buses travelling over long distances stop at specified and reasonably frequent periodic intervals, at stops with appropriate sanitation facilities to enable transgender and gender non-binary persons access to sanitation facilities and long-distance travel.
- Take steps to ensure that transgender and gender non-binary persons are able to use the security queue of their choice and are screened by a person of the individual’s preferred gender in all public spaces in particular while accessing public transport. Elaborate guidance in consultation with transgender and gender non-binary persons.
- Require public transport authorities including state specific metro railway corporations, state specific transport corporations, central level Indian

railways and Ministry of Civil Aviation, to ensure sensitization of staff in accordance with *NALSA*.

- The state transgender policies and transgender welfare boards must state in their policies that all public places of worship and state cultural events prohibit SOGIE-based discrimination.

To all Government entities

- Ensure the effective and meaningful consultation of LGBTQ persons in the execution of all legislative and policy measures.

GENERAL RECOMMENDATIONS

The ICJ commends the Indian State for the measures undertaken towards respecting, protecting and fulfilling the rights of LGBTQ persons in conformity with its international and constitutional legal obligations. It recognizes the complexities of implementing the judgments of the Supreme Court on SOGIE-based discrimination and amending its legal and policy framework to ensure that they are LGBTQ inclusive.

The ICJ offers general and specific recommendations (found at the back of each chapter) with the aim of assisting in the development of law and policy that is consistent with international law and good practices, and the jurisprudence of the Indian courts.

To the Parliament of India

- Accede to the Convention Against Torture in line with recommendations of the Law Commission of India Report No.273 "Implementation of 'United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment' through Legislation October, 2017"; adopt anti-torture legislation faithfully incorporating its provisions; and ratify the Optional Protocol to the Convention against torture to provide for preventive mechanisms.
- Ratify the Optional Protocol to the ICESCR, which establishes the communication and inquiry mechanisms for the ICESCR, as well as the Optional Protocols for other international conventions including the ICCPR, CRC, CEDAW and CRPD.
- Amend the provisions in the Indian Penal Code, 1860 on sexual assault, sexual harassment, disrobing, voyeurism, stalking, rape and gang rape (Sections 354,354A, 354B, 354C, 354D, 375, 376, 376A, 376B, 376C, 376D, 509) to introduce gender-neutrality for victims in conformity with international law standards and the recommendations made by Justice Verma Committee in 2013.
- Elaborate a comprehensive Transgender Persons (Protection of Rights) Act that guarantees equal rights and non-discrimination to transgender persons, in accordance with international law and standards, based on consultation with the community, consistent with India's international human rights obligations, and in line with *National Legal Services Authority. v. Union of India*.
- Repeal or amend Section 377, IPC in line with *Navtej Singh Johar & others. v. Union of India* and India's international law obligations.

- Enact a comprehensive anti-discrimination law, based on nationwide consultations with the aim of prohibiting discrimination on protected grounds including SOGIE, and incidental grounds such as marital status, in line with international law and standards.

To the Central Government of India

- Develop a uniform, accessible and understandable process for identity documentation for changing gender markers, in consultation with LGBTQ persons, consistent with the Supreme Court's judgment in *NALSA* and international obligations under UDHR, ICESCR among others.

To the State and Central Governments

- Ensure that all administrative bodies set up under the Central Government and state governments provide critical documents including birth certificates, graduation certificates, marksheets, passports, among others in preferred name and gender, without need for proof of medical intervention, through a simple and accessible process.
- Undertake awareness-raising campaigns with the help of media outlets and civil society regarding SOGIE-based discrimination, access to justice and remedies and State accountability.
- Implement training of all public services officers, including the police on SOGIE concerns and identification of appropriate responses from the police in consultation with LGBTQ persons.

ANNEXURE I: GLOSSARY

This report uses the concepts of sexual orientation and gender identity as described in the Yogyakarta Principles on the Application of International Human Rights law in relation to Sexual Orientation and Gender Identity and in the Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles (Yogyakarta Principles plus 10), and the definitions provided by the OHCHR.

Some of the terms below are English words that can be found in Oxford English Dictionary. However, given their frequent and context specific use in this report, they have been included in this glossary. Other terms defined below are those that are either frequently used in the SOGIE discourse or are colloquially used to refer to LGBTQ identities in India.⁶⁰⁶

While this report refers to lesbian, gay, bisexual, transgender and queer individuals, the ICJ acknowledges that other persons face human rights violations on the basis of their actual or perceived sexual orientation, gender identity and/or expression and sex characteristics, including those who may identify with other terms or none.

Bisexual | This term describes an individual who is physically, romantically and/or emotionally attracted to both men and women. The term bisexuality tends to be interpreted and applied inconsistently, often with a too narrow understanding. Bisexuality does not have to involve attraction to both sexes at the same time, nor does it have to involve equal attraction to or number of relationships with both sexes.

Cis-gender | This is a term used to refer to someone whose gender identity accurately reflects their sex assigned at birth, their bodies, and their gender expression.

Cis-gendered gay man | A cis-gender man who identifies as gay.

Dead name | A term used to refer to the birth name of a person who has changed their gender identity and name.

⁶⁰⁶ International Commission of Jurists, Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity, March 2007, http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf (Accessed 9 April 2019); International Commission of Jurists, Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles, 2017 (Yogyakarta Principles plus 10); Both UN Treaty Bodies and the Special Procedures of the UN Human Rights Council have referred to the Yogyakarta Principles; See, UN Committee against Torture, Concluding Observations of the Committee Against Torture, UN Doc. CAT/C/FIN/CO/5-6 (2011) para. 24; See also, Juan E. Méndez, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/68/295 (2013), para. 70; UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, UN Doc. HCR/GIP/12/01 (2012); OHCHR. "UN Free and Equal", Definitions. <https://www.unfe.org/definitions/>; Oxford English Dictionary, 2019. <https://www.oed.com/>.

Gay | This is a term often used to describe a man whose enduring physical, romantic and/or emotional attraction is to other men, although gay can also be used to describe both gay men and women (lesbians).

Gender binary | The concept that everyone must be one of two genders: men or women. The term also describes the system in which a society divides people into masculine or feminine gender roles, gender identities, and gender attributes.

Gender expression | This term refers to “each person’s presentation of the person’s gender through physical appearance – including dress, hairstyles, accessories, cosmetics – and mannerisms, speech, behavioural patterns, names and personal references”; gender expression may not confirm to one’s gender identity.

Gender-fluid | This term refers to a person who does not identify themselves as having a fixed gender identity.

Gender identity | This term is understood to refer to “each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.”

Gender non-conforming/ Genderqueer | An umbrella term for people whose gender characteristics and/or behaviors fall outside, or in between, traditional masculine or feminine binaries. Gender non-conforming people or Genderqueer people may or may not identify as lesbian, gay, bisexual, transgender.

Gender transition/ Gender Affirmation Surgery/ Sex Reassignment Surgery | The process by which some people strive to more closely align their internal knowledge of gender with its outward appearance. Some people socially transition, whereby they might begin dressing, using names and pronouns and/or be socially recognized as another gender. Others undergo physical transitions in which they modify their bodies through medical interventions.

Heteronormative | Denoting or relating to a worldview that promotes heterosexuality as the normal or preferred sexual orientation.

Hijra | A term used to describe an identity category for people assigned male at birth whose gender identity and/or gender expression is female.

Homophobia | Homophobia is an irrational fear of, hatred or aversion towards lesbian, gay or bisexual people.

Intersex | A terms used to describe people who are born with sex characteristics (including genitals, gonads and chromosome patterns) that do not fit typical binary notions of male or female bodies. Intersex is an umbrella term used to describe a wide range of natural bodily variations. In some cases, intersex traits are visible at birth while in others, they are not apparent until puberty. Some chromosomal intersex variations may not be physically apparent at all. Being intersex relates to biological sex characteristics, and is distinct from a person's sexual orientation or

gender identity. An intersex person may be straight, gay, lesbian, bisexual or asexual, and may identify as female, male, both or neither.

Lesbian | This is a term often used to describe a woman whose enduring physical, romantic and/or emotional attraction is to other women.

LGBTQ | LGBTQ stands for "lesbian, gay, bisexual, transgender and queer". While these terms have increasing resonance, different cultures use different terms to describe people who have same-sex relationships or who exhibit non-binary gender identities.

Mis-gender | Referring to a person, especially a transgender person, using a pronoun that does not match the gender with which they identify.

Non-Normative | Being outside the heteronormative framework.

Nupa Manba | A term used to refer to transgender men in Manipur.

Nupi Manbi | A term used to refer to transgender women in Manipur.

Outing | Exposing someone's lesbian, gay, bisexual or transgender identity to others without their permission. Outing someone can have serious repercussions on employment, economic stability, personal safety or religious or family situations.

Queer | A term people often use to express fluid gender identities and sexual orientations.

Sex characteristics | This term refers to "each person's physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty."

Sexual orientation | This term is understood to refer to "each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender."

SOGIE | Acronym for Sexual Orientation, Gender Identity and Gender Expression.

SOGIESC | Acronym for Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics.

Straight/Heterosexual | An identity for a person who is attracted emotionally, erotically, and/or sexually to members of the opposite sex.

Transgender | This term, sometimes shortened to "trans", is an umbrella term used to describe a wide range of identities whose appearance and characteristics are perceived as gender atypical—including transsexual people, cross-dressers (sometimes referred to as "transvestites"), and people who identify as third gender. Transwomen identify as women but were classified as males when they were born, transmen identify as men but were classified female when they were born, while other trans people don't identify with the gender-binary at all. Some transgender people seek surgery or take hormones to bring their body into alignment with their gender identity; others do not.

Transphobia | Transphobia is an irrational fear, hatred or aversion towards transgender people.

ANNEXURE II: RESPONSES TO RIGHT TO INFORMATION APPLICATIONS FILED BY ICJ

Total number of applications filed: 60

Total number of responses received: 49

S. No.	Public Authority	Issue	Response received	Details of response
Legal gender recognition				
1.	Unique Identification Authority of India (UIDAI)	Legal gender recognition and change of identity markers in Aadhar card	Yes	The query has not been directly answered. The reply of UIDAI states that the list of documents required is available on its website.
2.	Director General of Income Tax (Systems)	Legal gender recognition and change of identity markers in PAN card	Yes	New PAN card: no documentary proof is required in support of gender for applying for PAN card, including in the transgender category. Other documents required to be submitted are proof of identity, proof of address, and date of birth. Change of gender in existing PAN: There is a PAN Correction form for change of gender. It does not require one to attach any documents as proof of gender identity.
3.	Election Commission of India	Legal gender recognition and change of identity markers in Voter ID card	Yes	An applicant self declares their gender for getting enrolled in the electoral roll, while submitting application in Form 6. List of documents required to be provided along with the Form (No. 6) are available online. No legal/ medical document has been prescribed for changing the specified sex/ gender on Voter ID card from male to female/ female to male/ male to transgender/ female to transgender. However, for correction of particulars entered in electoral roll, the applicant can submit the application (Form 8) to the ERO concerned.
4.	Central Board of Secondary Education	Legal gender recognition and change of identity markers in matriculation certificate	Yes	The information requested is available online at: cbse.nic.in/examin~1/NOTIFICATION_exambyelaw_25jun15_2015.pdf (CBSE Examination Bye Laws). It is further stated that the time limit for 'correction' has been extended to five years. [The bye laws allow for "correction in the name to the extent of correction in spelling errors, factual typographical errors."]
5.	Consular Passport and Visa Division of	Legal gender recognition and change of	Yes	The reply says that the information requested is available publicly on the website passportindia.gov.in in the Section – "Compendium

	the Ministry of External Affairs	identity markers in Passport		<p>of Instructions/Guidelines relating to Issue of Passport in India/Abroad.”</p> <p>The mentioned document states that:</p> <p>“8. CHANGE OF SEX There are rare cases of request for change in sex consequent to medical procedure changing sex of an individual. The applicant should give a sworn affidavit regarding the change in sex and furnish supporting certificate from the hospital where he/she underwent the medical treatment for the purpose. Since the change in sex will also normally require a change in name, the applicant in that eventuality, will also have to follow the procedure in para 3.2 above regarding change of name. Passport should be issued on such application only after fresh police verification.”</p> <p>“3.2 Complete Name change For complete/substantial name change an applicant should furnish: i) Prescribed Deed Poll/Sworn Affidavit (Annexure "E" of Appendix-1) ii) Original newspaper cuttings announcing the change of name published in two leading daily newspapers (one popular daily newspaper in the area of the applicant's present address and another at his permanent address) OR name change by Gazette notification published in the Indian Union/State Official Gazette especially in cases of complete name change abroad.”</p> <p>https://portal1.passportindia.gov.in/AppOnlineProject/pdf/Passport_Manual_16_Chapters_to_be_disclosed.pdf</p>
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Access to education and employment

6.	Department of School Education and Literacy, Ministry of Human Resources and Development	Reservations for transgender students in primary education and tertiary publicly funded education - EWS	Yes	Ministry of Human Resources and Development replied that no information is available as to whether transgender persons can avail of reservations for EWS under the RTE Act.
7.	Department of Higher Education, MHRD	Reservations for transgender students in primary education and tertiary publicly funded education - EWS	Yes	As per guidelines issued by Department of Personnel & Training vide OM dated 27th February, 2008 for CPIOs only such information is required to be supplied under the Act which already exists and is held by the public authority or held under the control of the public authority. The CPIO is not supposed to create information or to interpret information or to solve the problems raised by the applicants or to furnish replies to hypothetical questions. Since the information sought by you does not fall under the purview of the RTI Act, the undersigned

				does not have any information to provide in respect of your queries.
8.	Department of School Education and Literacy, Ministry of Human Resources and Development	Reservations for transgender students in primary education and tertiary publicly funded education - SEBC	Yes	Department of School Education and Literacy (MHRD), which is the transferee department, has attached a letter issued by the Department to state and Union Territory governments, which asks these governments "to <u>consider</u> taking appropriate action as per the direction of the Supreme Court" in the <i>NALSA</i> judgment - in order to include transgender children in the socially and educationally backward classes for the purposes of admission in educational institutions.
9.	University Grants Commission	Whether transgender students can claim the status of SEBC for reservation in educational institutions.	Yes	The University Grants Commission has responded that it has issued a notice regarding inclusion of transgender persons under various scholarships/ fellowships. The reply states that this letter is publicly available on the website of the UGC.
10.	University Grant Commission	Whether transgender students can avail of reservation for "Economically Weaker Section" under RTE Act	Yes	No such information is available with this section. But UGC has issued a circular to all universities regarding addressing of issues related to transgender students.
11.	Department of Personnel and Training (Union of India)	Reservations for transgender persons in public employment	Yes	No information available. This application has been marked to Estt. (Res. II) for providing information, if any. "The CPIO is not supposed to create information or to interpret information or to solve the problems raised by the applicants or to furnish replies to hypothetical questions."
12.	Ministry of Social Justice and Empowerment	Reservations for transgender persons in public employment	Yes	The Ministry of Social Justice and Empowerment has introduced a Bill in the Lok Sabha titled <i>Transgender Persons (Protection of Rights) Bill 2016 for the Welfare of Transgender Persons</i> . The said Bill has been passed by the Lok Sabha on 17.12.2018 and the Bill is now pending with the Rajya Sabha. Once the definition and identification of Transgender Persons is established under the Bill, the process of inclusion of Transgender Persons in the category of OBC shall be initiated subsequently.
13.	Ministry of Rural Development, Department of	Employment of transgender persons under	Yes	The section of the MGNREG Act which deals with submission of applications to for obtaining work under this scheme was reproduced in the RTI response, without any specific answer to our

	Rural Development, Union of India	the MGNREGA		query whether transgender persons can apply for work under this scheme. The response also stated that data about the number of transgender persons who work, or have obtained work under the scheme, is not maintained by Ministry.
Access to rehabilitative homes set up under the Immoral Traffic (Prevention) Act, 1956				
14.	Ministry of Women and Child Development (Central Government)	Arrest of transgender sex workers in relation to offences under ITPA, and their accommodation in homes established under the Act.	Yes	Application transferred to NCRB and Ministry of Social Justice and Environment. Replies not received from transferee departments. Reply from Women Welfare Department of MWCD states that the application has been transferred to Anti Trafficking Section (WCD) and Ministry of Home Affairs. Replies not received from transferee departments.
15.	Department of Social Welfare, Delhi		Yes	Data for transgender persons taken into custody under the ITPA in Delhi is not available. "No transgender persons are kept in any institutions being run by the department of Social Welfare in the recent past." "Department of Social Welfare has no provision of any separate homes/institutions for transgender persons/" "No transgender persons are kept in any institutions of the DSW and no vocational training programmes are available separately for transgender persons in the institutions being run by the Department of SW/"
16.	Tamil Nadu		No	
17.	Karnataka State Women's Development Corporation, Karnataka		Yes	Information may be obtained from other departments. Note: Although the departments concerned are named in the RTI Act, the Public Information Officer is required to transfer the application to the concerned department, instead of asking the applicant to file fresh applications.
18.	Manipur		No	
19.	Odisha		No	
20.	Gujarat		Yes	There is no data list to certify an individual as a transgender person.
21.	AP Differently Abled and Senior Citizens Corporation, Andhra Pradesh		Yes	"No orders were issued by the government to this corporation."
22.	Directorate of Social Justice,		Yes	"Nil" for all questions.

	Kerala			
Access to public toilets and public transport				
23.	Ministry of Civil Aviation, Union of India	Use of toilets by transgender persons in airports	Yes	The application was transferred to the Airport Authority of India, which transferred it back to the Ministry. No reply addressing the questions asked was received.
24.	Centre for Railway Information System	Use of toilets by transgender persons in railway stations	Yes	Transferred to Ministry of Railways. Reply from transferee not received.
25.	Ministry of Drinking Water and Sanitation, Union of India	Guidelines on transgender persons' right to sanitation.	Yes	In its reply, the Ministry of Drinking Water and Sanitation has provided a link to the Guidelines on Gender and Sanitation. It has also stated that the guidelines are standing instructions for implementing agencies (implying that therefore, no circulars regarding their implementation need to be issued for their implementation). No information regarding implementation of the guidelines.
26.	Delhi Metro Rail Corporation	Use of toilets and security queues by transgender persons.	Yes	<p>Reply to all questions: There is no policy to accommodate transgender persons as a special category for providing special facilities. [Nirvair Kaur letter appended regarding security queues and use of seats reserved for differently abled persons and senior citizens].</p> <p>Information regarding use of compartments is not available in any material form.</p> <p>Details of the letter issued to Nirvair Kaur [quoting directly from the letter]:</p> <ul style="list-style-type: none"> - Nirvair Kaur, a transgender, has been extended the following services for his/her intended travel between Dwarka Mor and Nehru Place station of Delhi Metro: <ul style="list-style-type: none"> - He/she may choose male or female queue at the frisking points depending upon his/her self-identified gender provided his/her clothing is commensurate with his/her self-identified gender. - He/she is permitted to occupy seats reserved for "Senior Citizens and Differently Abled" persons in metro train. - He/she is permitted to use toilet facilities provided for differently abled persons at the metro stations. - Nirvair Kaur has been asked to carry his/her photo identity card in order to avail above services in a hassle free manner. - All concerned staff posted at Dwarka Mor and Nehru Place should be directed to

				ensure compliance of above guidelines.
27.	Chennai Metro Rail Limited	Use of toilets and security queues by transgender persons.	Yes	The Metro authorities have not received any guidelines on the use of public toilets by transgender persons, or on the security screening of transgender persons. No separate toilets for transgender persons have been constructed at metro train stations.
28.	Kochi Metro Rail Limited	Use of toilets and security queues by transgender persons.	Yes	Transgender persons can use any toilets, including the one for disabled persons. No separate toilets have been constructed. There are no seats/compartments reserved for women in Kochi metro.
29.	Kolkata Metro Rail Limited	Use of toilets and security queues by transgender persons.	Yes	The Kolkata Rail Metro Corporation is implementing the East West Corridor Project in Kolkata. The project is in Construction stage and there is no station which is being used by the public. In 2009-10, when the planning was done, no public toilets were planned at that stage. However, the station planning aspect is being reviewed in light of recent court judgments. Seats and compartments reserved for women will be available for use by transwomen, transmen whose official identification states "female", and transgender persons.
30.	Bangalore Metro Rail Corporation Ltd.	Use of toilets and security queues by transgender persons.	Yes	No guidelines have been issued regarding use of toilets by transgender persons and no separate toilets for transgender persons have been constructed in metro train stations. The reply states "however, they are not restricted for male/ female toilets as the case may be." In 3 cars, there is no reservation of seats/ compartments. In 6 car trains, no reservation exists for transgender persons.
31.	Mumbai Metro Rail Corporation Ltd.	Use of toilets and security queues by transgender persons.	Yes	Metro stations have been provided with public toilets as mentioned in Manual of standards and specifications - which does not mention transgender persons. But the Manual states that men's toilets must have lavatories and one accessible toilet (presumably for Persons With Disabilities, although this is not specified)
32.	Hyderabad Metro Rail Limited	Use of toilets and security queues by transgender persons.	Yes	Hyderabad Metro Rail Project is being executed in Public Private Partnership between state government and L&T Metro Rail Hyderabad Ltd. Toilets at Hyderabad metro are provided as per Concession Agreement between the two parties.
33.	Lucknow Metro Rail Corporation Limited	Use of toilets and security queues by transgender	Yes	No guideline available regarding use of toilets of choice by transgender persons. No separate toilets exist for transgender persons at metro stations.

		persons.		No guidelines available regarding the use of women's compartments by transgender persons.
Access to shelter homes maintained by public authorities				
34.	Department of Social Welfare, Government of National Capital Territory of Delhi	Whether transgender persons can get accommodation in shelter homes maintained by the government.	Yes	No transgender persons are presently living in any of the shelter homes maintained by the Department of Social Welfare, Government of NCT of Delhi in the recent past. DSW does not have any provision for separate homes/institutions for transgender persons.
35.	Commissionerate of Social Welfare, Chennai, Tamil Nadu		Yes	The response states that in Tamil Nadu, accommodation in women's shelter homes is not provided to transgender persons. It further states that separate shelter homes for transgender persons are not maintained by the state government. Note: This is in contradiction to our experience – we went to a shelter home for transgender persons which is maintained by a CBO in partnership with the TN government.
36.	Karnataka		No	
37.	Manipur		No	
38.	Odisha		No	
39.	Office of the Director of Social Defence, Gujarat		Yes	There are no shelter homes maintained by the government for transgender persons. No separate accommodation is provided to transgender persons in shelter homes maintained by the state government.
40.	AP Differently Abled and Senior Citizens Corporation, Andhra Pradesh		Yes	"No orders were available."
41.	Directorate of Social Justice, Kerala		Yes	"Nil"
Rate of stamp duty for registration of property by transgender persons				
42.	Delhi	Whether transgender persons can avail of the concession in stamp duty extended to	Yes	"There is no separate provision in the Stamp Act 1899 for duty charged to transgender persons. Duty is charged as per declaration made by the party."
43.	Odisha		No	

		women		
Constitution of Transgender Welfare Boards in different states				
44.	Department of Social Welfare, Government of NCT of Delhi, Delhi	Constitution of Transgender Welfare Board in the state	Yes	No transgender welfare Board has been set up.
45.	Tamil Nadu		No	Note: Tamil Nadu had established a transgender welfare board in 2008, much before the <i>NALSA</i> judgment.
46.	Karnataka		Yes	Transgender cell has been created vide government order No. WCD/02/WDC/2018 dated 10/1/2018. One meeting of the transgender cell has been conducted so far, on 11.1.2018, with all concerned Development Departments to communicate to them their role and responsibilities under the Transgender Welfare Policy. Instructions have been given to State Institute of Rural Development, Administration Training Institute, Judicial Academy to take up sensitisation programme in their training curriculum. The issue of making public spaces more inclusive has been communicated to the Urban Development Department during meeting held on 11.1.2018.
47.	Manipur		No	
48.	Odisha		No	
49.	Gujarat		Yes	No transgender welfare board has been constituted in the State of Gujarat. Note: The board was established in February 2019, soon after this reply was received by us.
50.	Directorate of Social Justice, Kerala		Yes	Yes, Transgender Justice Board has been set up. The reply lists the powers of the Board. The Transgender Justice Board is competent to monitor and oversee the implementation of the policy, ensure convergence in the implementation of existing schemes, issue guidelines, ensure that development projects are formulated and funds are allocated to them, and facilitate awareness programmes. The Board can certify a person based on their self-declaration. Only self-declaration is required for this certification. If necessary, a district committee can constitute a screening committee for verification of the application for gender identity card. The screening committee will have a psychologist and psychiatrist.

Implementation of state schemes for welfare of transgender persons

<p>51 - 54</p>	<p>Karnataka (total 4 applications sent for technical reasons)</p>	<p>Implementation of provisions of state scheme pertaining to identity recognition, work, housing, gender-based violence, and public spaces.</p>	<p>Yes</p>	<ul style="list-style-type: none"> - Action has been initiated to formulate Monitoring Committee under the Chairmanship of Minister for WCD. - Directions have been issued to District Deputy Director and Development Inspector to formulate Transgender Co-ordination Committee at District Level. - Under the Special Housing scheme, transgender persons have been provided with housing facility through Rajiv Gandhi Rural Housing Corporation. Since 2014-15, and up to February 2018, a total of 30 houses have been sanctioned to transgender persons. - The state has begun a Transgender Rehabilitation Scheme, implemented by the State WDC. Since 2013-14 to 2017-18, transgender persons have been encouraged to take up income generating activities, for which Rs. 50,000 are provided to each transgender person. Out of this, 25000 is provided as loan, and the rest as subsidy. To date 5154 transgender persons have been provided a total sum of Rs. 1027.93 lakhs. - Transgender persons are being encouraged to take financial assistance under Udyogini scheme, but none have availed benefits of the same so far. - Training material/module for sensitization has not yet been developed. It will be prepared through consultation with persons well versed in the subject. - In order to sensitize the public about transgender persons, the government will take necessary steps in the coming days in coordination with Information and Publicity Department. - With respect to reservations in Polytechnics, the reply states that instructions have been given to concerned departments to take appropriate action to implement the policy (5.1.2 and 9.1). - Re amendments to the DV Act and the JJ Act, the reply states that Project Director Stree Shakthi Section and Integrated Child Protection Society, WCD will be asked to take necessary action. [Another response says - JJ Act is a central Act, and any amendment proposal may please be made to the Central government] - Re free legal aid, the response states that a copy of the policy has been sent to the SLSA to take action in this regard. - Law Department has been requested to take steps to make the workplace discrimination law (SHW) inclusive of transgender persons. - Action will be initiated to abide by 9.1 of
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				the transgender welfare policy.
55	Odisha		No	
56 - 60	Kerala (total 5 applications sent for technical reasons)		Yes	<ul style="list-style-type: none"> - The Social Justice Department of the State has given instructions to the State Police Chief to issue a circular to all Station House Officers to not encourage complaints questioning the identity and fundamental rights of transgender persons [See Letter No. 278/B3/2018-Ind dated 25.10.2018, G3/485/2018-Home dt. 26.10.2018] - Administrative sanction has been accorded for an amount of Rs. 70 lakhs vide G.O. (Rt) 596/2017/SJD dated 14.09.2017 to Naipunya Job Training Scheme for transgender persons. - The department has formulated an innovative scheme to provide financial assistance for transgender persons for their livelihood through self-employment. The maximum amount of financial assistance under this scheme is Rs. 50,000 as grant. - No. But if any such case is reported, the department will take necessary steps to safeguard the rights of transgender persons with the cooperation of the home department - Shelter homes have not been established under the state policy in the state. - Annual reports have not been submitted to the Transgender Justice Board so far. - Gender cell in the Social Justice Department is not yet functioning. District Social Justice Committees are competent to verify and recommend the applications for transgender ID cards. This is done through an online process now, where applications are received, verified, and processed with the approval of the District Transgender Justice Committee. - A transgender cell is functioning in the Directorate with contract staff from the transgender community. The department provides transgender friendly toilets for them. Apart from this, the department has taken steps to construct two transgender friendly toilets in Maharaja's College. - No steps have been taken to make laws on gender-based violence inclusive of transgender victims of violence.

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