6.3.2023

**To,**

**Mr. Morris Tidball-Binz**

**Special Rapporteur on extrajudicial, summary or arbitrary executions**

**OHCHR-UNOG**

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***Sub: Written contribution on practices for the investigation, documentation, and prevention of deaths of LGBTQ members in custody in the criminal justice context with particular reference to India***

**The Centre for Human Rights Law and Policy**, School of Legal Studies, REVA University, India welcomes the Special Rapporteur’s initiative to prepare a report on deaths in custody, to be presented at the 53rd regular session of the Human Rights Council, in June 2023. The Centre for Human Rights Law and Policy hereby submits its inputs on deaths of LGBTQ members in custody in the criminal justice context with particular reference to India. As per the Centre there is an urgent need to address the arbitrary detention and ill-treatment of LGBTQ members mainly by the police.

The Centre for Human Rights Law and Policy consents to its contribution being published on the website of the mandate on extrajudicial, summary or arbitrary executions.

Yours sincerely,

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**Written contribution on practices for the investigation, documentation, and prevention of deaths of LGBTQ members in custody in the criminal justice context with particular reference to India**

Deaths in custody are not uncommon. They may be due to natural causes; but they may also be instances of unlawful killing, or the result of ill-treatment or inadequate conditions of detention. In many countries, and for a variety of reasons, deaths in custody are poorly investigated. In some cases, legislation providing for mandatory investigation does not exist. Elsewhere, clear procedures are not in place, or the skills and investigative resources required are not available. More often than not, [detaining authorities](https://documents-dds-ny.un.org/doc/UNDOC/LTD/G21/062/39/PDF/G2106239.pdf?OpenElement) are unaware of the importance, and the benefits, of proper investigation. Where detaining authorities are implicated in foul play, officials may also be particularly interested in preventing an investigation. Note that, [proper investigation into deaths that occur in custody](https://www.ohchr.org/en/documents/thematic-reports/ahrc5230-good-practices-national-criminalization-investigation) serves several purposes: it assists the bereaved by providing objective and timely information and helps them to obtain death certificates; it contributes to dispelling concerns about inadequate care or foul play when the death was due to natural causes; it is indispensable when a criminal investigation is required; and it provides information that is essential for preventing such deaths in the future.

Under the [human rights law regime](https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet4rev.1en.pdf), the prohibition against the arbitrary deprivation of life, read in conjunction with the general obligation to respect and ensure human rights within the State’s jurisdiction, has been interpreted as imposing by implication an obligation to investigate alleged violations of the right to life. This obligation is put into effect whenever a detainee - without injuries when taken into custody - is injured or has died. The obligation to investigate deaths in custody has also been interpreted as deriving from a combination of the prohibition against the arbitrary deprivation of life and the obligation to provide an effective remedy. In cases of alleged arbitrary deprivation of life, the right to an effective remedy entails an effective investigation, one that should result in the identification, prosecution and punishment of those responsible. Furthermore, there are also a number of pertinent international standards for investigating deaths in custody, most of which are embodied in the [Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions](https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/executions.pdf), adopted by the United Nations Economic and Social Council in 1989.

Despite the international human rights mandate prohibiting torture or cruel, inhuman or degrading treatment or punishment, [police officers](https://www.hrw.org/news/2020/10/01/egypt-security-forces-abuse-torture-lgbt-people) around the world have often [arbitrarily arrested people](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/655710/Deaths_in_police_custody_A_review_of_the_international_evidence.pdf) (especially those belonging to marginalized sections of society) and detained them in inhuman conditions and systematically subjected them to ill-treatment including torture. For instance, use of excessive force, and other forms of cruel, inhuman or degrading treatment, as well as arbitrary detention, against the LGBTQ community by police officers in [India](http://www.uncat.org/wp-content/uploads/2021/03/IndiaTortureReport2020.pdf), though rampant has not been adequately documented. Note that, there is [no official statistical data available](https://thewire.in/rights/custodial-death-uttar-pradesh) as to what portion of the total number of recorded deaths in police custody involve members of the LGBTQ community. The absence of a separate insight into custodial violence against the LGBTQ community only speaks of the neglect this community faces.

**A. LGBTQ Rights in India**

The Supreme Court of India in [*National Legal Service Authority v. Union of India & Others*](https://indiankanoon.org/doc/193543132/)*,* Writ Petition (Civil) No. 604 of 2013 has enumerated various rights that are available to the members of the LGBTQ community in relation to being treated humanely while in detention:

*“Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Sexual orientation and gender identity are integral to each person’s dignity. States shall:*

*A. Ensure that placement in detention avoids further marginalising persons on the basis of sexual orientation or gender identity or subjecting them to risk of violence, ill-treatment or physical, mental or sexual abuse;*

*B. Provide adequate access to medical care and counselling appropriate to the needs of those in custody, recognising any particular needs of persons on the basis of their sexual orientation or gender identity, including with regard to reproductive health, access to HIV/AIDS information and therapy and access to hormonal or other therapy as well as to gender-reassignment treatments where desired;*

*C. Ensure, to the extent possible, that all prisoners participate in decisions regarding the place of detention appropriate to their sexual orientation and gender identity;*

*D. Put protective measures in place for all prisoners vulnerable to violence or abuse on the basis of their sexual orientation, gender identity or gender expression and ensure, so far as is reasonably practicable, that such protective measures involve no greater restriction of their rights than is experienced by the general prison population;*

*E. Ensure that conjugal visits, where permitted, are granted on an equal basis to all prisoners and detainees, regardless of the gender of their partner;*

*F. Provide for the independent monitoring of detention facilities by the State as well as by non-governmental organisations including organisations working in the spheres of sexual orientation and gender identity;*

*G. Undertake programmes of training and awareness-raising for prison personnel and all other officials in the public and private sector who are engaged in detention facilities, regarding international human rights standards and principles of equality and non-discrimination, including in relation to sexual orientation and gender identity.”*

But despite the Supreme Court’s verdict, the National Crime Records Bureau (NCRB), the agency responsible for collecting and analysing crime data as defined by the Indian Penal Code 1860 and other Special and Local Laws [has repeatedly failed to document cases against members of the LGBTQ community](https://indiankanoon.org/doc/195592525/). The Supreme Court of India has also published a [Sensitization Module for the Judiciary on the LGBTQIA+ Community](https://districts.ecourts.gov.in/sites/default/files/LGBTIQA_report.pdf) on November 26, 2022 with the intention of educating judges, justices, and other members of the legal system about the LGBTQ community in India. One of its key points is the admission that there are no constitutional protections or legal measures in place in India to shield members of the LGBTQ community from discrimination. The module was created as a collection of suggestions that some judges and tribunals can opt to observe. It is clear that there is not adequate representation from gay and trans people who practise law, despite the fact that the authors to the module are varied and include attorneys, advocates, and academics. The module establishes procedures that the police and judges may adhere to when deciding on criminal charges made by or against LGBTQ individuals. This is important because police sensitization regarding how they should handle members of the queer community has largely been missing. The discrimination that members of the LGBTQ community experience is also highlighted, including any family violence, public violence, custody violence, and violence when seeking medical treatment. There is also a section in the module on special problems relating to transgender people, which is significant because trans people have frequently been left out of discussions about queer rights. Other sections cover dos and don’ts, pronoun usage, avoiding stereotypes, and generally how to be more accepting of the LGBTQ community, particularly in court.

The module offers a thorough analysis of gender and sexual variety as well as a history of the laws that have affected the rights of the LGBTQ group. The most crucial portion of the module - and its final section - deals with ideas and recommendations. The recommendations include both humane changes, such as understanding and accepting of other gender identities, and institutional changes, such as installing gender-neutral restrooms in courts and police stations.

The members of the LGBTQ community in India encounter structural barriers in public and private places which prevent them from getting services such as justice delivery, education, jobs, healthcare, and financial services. The pervasive discrimination that affects the community in both subtle and major ways is the cause of the structural obstacles that it encounters.

**B. Suggestions**

**1. Reformation of the Prevailing Laws**

(i) Review the [Transgender Persons (Protection of Rights) Act, 2019](https://www.indiacode.nic.in/bitstream/123456789/13091/1/a2019-40.pdf) and provide comprehensive amendments to enlarge the Act from being a simple self-perceived gender certificate availing set-up to a practical structure to prevent the atrocities against the LGBTQ community.

(ii) Draft New Gender Specific Provisions for Protection of LGBTQ community under the Criminal Codes.

a. Arrest of LGBTQ

Unless the circumstances otherwise require, arrest is to be made in the presence of a women police officer (Or the gender the arrested person is comfortable with),

b. Search of LGBTQ

Whenever an arrested person belonging to the LGBTQ community is to be searched, the search must be conducted by a person of a gender the arrested person is comfortable with strict regard to decency.

c. Body Check of LGBTQ in Prison

The Body Check of the prisoner must be done by or under the supervision of a prison officer with whom the prisoner is comfortable with strict regard to decency.

d. Medical Examination

i. The Medical Examination ought to be done before and after the person is taken into custody to keep records of possible violence - to avoid claims that the bodily injuries are either self-inflicted or had been caused before the person was in their custody.

ii. The Medical examination of accused or arrested to be done by or under the supervision of a female medical officer or registered medical practitioner (Or the gender the arrested person is comfortable with).

iii. The Magistrate must be informed of the arrestee that a medical examination must be conducted at the time of the arrest. Such examination must be conducted by a female registered practitioner and a copy of the report must be provided to the arrestee (Or the gender the arrested person is comfortable with).

e. The provisions under the Indian Penal Code, 1860 relating to Rape, Outraging the Modesty, Sexual Assault and Harassment, Voyeurism, Stalking, etc., are women specific. Necessary amendments are to be made to these provisions to ensure the protection of LGBTQ community (With special reference to Verma Committee Report and 172nd Report of Law Commission of India).

f. [Section 176 of the Code of Criminal Procedure, 1973](https://legislative.gov.in/sites/default/files/A1974-02.pdf) – Where rape is alleged to be reported on any person belonging to LGBTQ community while in police or judicial custody, an inquiry or investigation is to be held by the higher authorities within the police department. Additionally, an inquiry should be held by the Judicial Magistrate or the Metropolitan Magistrate, as the case may be, within whose local jurisdiction the offence has been committed (Note that, there is a need to expand the existing provision to be more gender fluid).

It is also recommended to draft an anti-torture legislation that may be passed as a stand-alone domestic anti-torture legislation (As recommended under 273rd Report of Law Commission).

**2. Separate prison cells to be maintained for prisoners belonging to LGBTQ community that uphold their bodily rights.**

**3. Free Legal Aid under** [**NALSA**](https://nalsa.gov.in/) **or other national bodies providing Pro Bono Legal Aid Services to be provided to persons belonging to LGBTQ community.**

**4. Adjudication of cases of custodial death and torture of persons belonging to LGBTQ community on a daily basis in fast track courts along with making necessary amendments in local/national laws for criminally prosecuting members of law enforcement agencies (including policemen, military, or paramilitary personnel) charged with such death and torture (With reference to 273rd Report of Law Commission).**

**5. Creation of a national standard public database on the custodial deaths of LGBTQ members in police custody, judicial custody and prisons.**

**6. Ensuring compulsory reservation in employment of LGBTQ members in the fields of security and defence. This will contribute to mitigate future custodial violence towards LGBTQ members.**

**7. Installation of CCTV cameras in all police stations and offices of investigative agencies, such as the Central Bureau of Investigation, the Directorate of Enforcement, and the National Investigation Agency, which conduct investigations and have the power of arrest. This would serve as an effective measure to tackle custodial deaths and violence.**

**8. To impose the burden of proof in case of custodial violence, torture and death on the police or security forces (With Reference to 113th Report of Law Commission of India).**

**9. India should ratify the UN Convention Against Torture to which it became a signatory in 1997. This would bring about improvement to the criminal justice system implementation methods in cases of custodial violence, torture and death (As recommended under 273rd Report of Law Commission of India).**

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