

“Unnatural Offences”

Obstacles to Justice in India Based on Sexual Orientation and Gender Identity

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I. Introduction and summary

A. F's Story

In 2009, F, a transgender man and activist, was arrested by the police when he was assisting transgender sex workers who were being harassed. "*[The police] took me to the police station and beat me with a stick. They said 'people like you are always supporting sex workers'. I spent that night in the [police] station. The police took my phone. My lawyers couldn't get through and the police did not allow me to inform my family about the arrest. I wasn't given any food or water*", he told the ICJ.¹ The next day, F was charged with committing "public nuisance" under section 290 of the Indian Penal Code [IPC]. Anyone convicted under section 290 may be punished with a maximum fine of INR 200 [approximately US\$ 7]. F's challenge to this in court led to the charges in his case being dismissed later that month.

F then filed a complaint against the police for the ill-treatment he had faced in the police station the night of his arrest. The case was repeatedly listed in court for three years, and F attended court every time it was listed. "*In court, people stared at me, even the judge. But I went to the court even though people were laughing. I went because I wanted my human rights*", he told the ICJ. However, the police never appeared in court. Finally the case was dismissed, but he is not sure why.

F's case demonstrates the experience many queer people in India have with the legal and justice system. Notwithstanding some recent, positive legal developments like the *NALSA* decision [discussed in detail below] and efforts to draft transgender rights legislation, existing legal provisions - including some contained in laws of general application - are often used to criminalize people solely as a result of ignorance of, prejudice or hatred against their real or imputed sexual orientation and/or gender identity or expression.² In F's story, for example, section 290 of the IPC, a criminal provision punishing "public nuisance" was used to detain F when he was assisting transgender sex workers. The police, who should enforce the law in a non-arbitrary and non-discriminatory manner and protect the human rights of everyone, including queer persons, operate instead on the basis of stereotypes and prejudice, and often commit human rights violations against them. The reported ill-treatment of F at the hands of the police is just one illustration. And finally, the judicial system, which should ensure that those responsible for human

¹ ICJ Interview, Kochi, July 2016.

² This report uses the concepts of sexual orientation and gender identity (hereafter: SOGI) as described in the Yogyakarta Principles on the Application of International Human Rights law in relation to Sexual Orientation and Gender Identity. Sexual orientation 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. Gender identity 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.

rights violations are held accountable and act as a check on abuse of power, also failed F. The case dragged on for years before finally being closed, denying him remedy. Many queer persons who approach the formal justice system face similar challenges.

B. International human rights law and Access to Justice

In contemporary India, the enforcement of the law by the police and the country's justice system fails queer people and is in sharp contrast with India's obligations under international human rights law. As F's story demonstrates, far from guaranteeing justice to him, the legal and justice system colluded to violate a range of F's human rights, including the right to non-discrimination, equality before the law, and equal protection before the law; his right to be free from torture and other ill-treatment; and his right to access a remedy. Human rights are enshrined in several instruments by which India is bound.³ Application of international human rights law is guided by the fundamental principles of universality, equality and non-discrimination. All human beings, irrespective of their sexual orientation and gender identity, are entitled to enjoy the protection of international human rights law.⁴

Indian authorities have an obligation to respect, to protect and to fulfill the rights to equality before the law, equal protection of the law and freedom from discrimination; the rights to privacy, liberty and security of the person, including the right not to be subjected to arbitrary arrest and detention; the right to life, to freedom from torture and other ill-treatment; and the right to access justice and to an effective remedy, for all persons, including queer people, without discrimination as to their real or imputed sexual orientation and gender identity. These obligations extend to refraining from interference in the enjoyment of rights, preventing abuses by third parties and proactively tackling barriers to the enjoyment of human rights, including, in the present context, discriminatory attitudes and practices.⁵

Furthermore, several of these rights are also guaranteed by the Indian Constitution: article 14 guarantees all persons equality before the law and equal protection of the law; article 19 guarantees all citizens the freedom of speech, expression and association; and article 21 guarantees all persons protection of their life and personal liberty. The fact that the Indian Supreme Court has used this constitutional framework to recognize and uphold the human rights of queer persons should be welcomed - for example, in the

³ These include the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women; the Convention on the Rights of the Child; the Convention on the Rights of Persons with Disabilities.

⁴ Update Report of the United Nations High Commissioner for Human Rights on Discrimination and violence against individuals based on their sexual orientation and gender identity, UN Doc. A/HRC/29/23, 4 May 2015, (hereafter: the 2015 OHCHR SOGI Report), paras 9 and 10.

⁵ 2015 OHCHR SOGI Report.

landmark case of *NALSA v UOI*,⁶ the Court recognized transgender persons' right to the self-recognition of their gender identity, and grounded its reasoning on the constitutional provisions concerning the rights to equality, non-discrimination, freedom of expression and dignity.⁷ However, the systemic discrimination and violence faced by queer persons in India, and the challenges they face accessing justice and seeking remedies for human rights violations, remain at odds with the above-mentioned constitutional provisions.

In particular, this report studies queer persons' attempt to access justice in India, and the barriers they face in the process. In the context of access to justice for people living in poverty, the Special Rapporteur on extreme poverty and human rights has noted that to ensure access to justice: *"States have an obligation to construct a legal and institutional framework which facilitates access to independent and effective judicial and adjudicatory mechanisms and ensures a fair outcome for those seeking redress, without discrimination of any kind. However, guaranteeing de jure access to judicial and adjudicatory mechanisms is not sufficient to ensure that all individuals have de facto access to justice. States must also take positive measures to ensure laws and policies are substantively non-discriminatory, including measures to eliminate conditions, which cause or help to perpetuate discrimination. In many instances, laws, policies and procedures may indirectly discriminate against, or have a disproportionate impact upon, persons living in poverty. In addition, various extralegal factors also limit or obstruct their de facto access to justice"*.⁸

This report employs a similar understanding of access to justice in the context of queer persons in India. As the observations by the Special Rapporteur above indicate, access to justice is both a procedural and substantive concept that includes several relevant rights, such as equality and non-discrimination, the right to recognition as a person before the law, and the right to effective remedies.

This report uses the term "queer" to refer to any individual who identifies with a non-normative sexuality or gender identity. It includes individuals who identify as lesbian, gay, bisexual, transgender, intersex and gender-queer, and also encompasses persons who may not fit into any of these identity

⁶ National Legal Services Authority v. Union of India, (2014) 5 SCC 438 (hereinafter: *NALSA v UOI*). This case is discussed in more detail later in the report.

⁷ **Equality:** The Court held that non-recognition of their gender identity denied transgender persons equal protection of the law. There was a constitutional obligation upon the State to ensure such equal protection proactively. **Non-Discrimination:** Discrimination is prohibited under the Indian Constitution on a number of specified grounds, which includes "sex". The Court read the term "sex" to include "gender identity". **Freedom of Speech and Expression:** The Court interpreted the right to freedom of speech and expression as including the right to expression of one's self-identified gender, which could be expressed through dress, words, action, behavior or any other form. **Dignity:** The Court found that since gender constituted the core of one's sense of being, as well as an integral part of a person's identity, recognition of one's gender identity lies at the heart of one's fundamental right to dignity.

⁸ Note by the Secretary-General, Extreme poverty and human rights, 9 August 2012, A/67/278, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N12/458/06/PDF/N1245806.pdf?OpenElement>

categories.⁹ For the purposes of this report, “queer” should be read to include other people who 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 terms other than “queer”.

The legal system has great potential to be transformative in ensuring justice. For example, as this report describes in later sections, Indian human rights lawyers and activists have successfully invoked the law in several instances and recent judgments and laws have tried to incrementally secure greater protection of the rights of queer people. At the same time, it is crucial to note that queer persons have a tenuous relationship with the law.

On the one hand, they are vulnerable to harassment and persecution under a range of criminal laws, and are denied equal standing before the law at many levels. Instead of bringing queer persons closer to any understanding of justice, India’s laws, the police, who are charged with enforcing those laws, and the courts often fail them and operate to systematically undermine and violate the human rights of queer people in the country. The reference to “Unnatural Offences” in the title of this report therefore is not restricted to the impact of section 377.¹⁰ Instead, it seeks to make a broader point about how certain identities and behaviors are treated as “unnatural”, both, in the text of the law as well as in how it is implemented, thus resulting in queer persons experiencing violence and discrimination based on their sexual orientation and gender identity in the legal system.

On the other hand, where beneficial laws have come into force, systemic problems in the operation of the justice system - including the biases of government officials, lack of access to lawyers and police violence - erect a range of barriers that prevent queer persons from enjoying their human rights fully on the basis of equality and non-discrimination, and from being able to access an effective a remedy in cases of violations of their rights. Lawyer Sudha Ramalingam told the ICJ that even when she appeared in court to invoke the law to argue for the individual autonomy of queer persons, she faced a sharp reprimand from the judge: “*Don’t talk law*”.¹¹

The existence of those barriers, a widespread disenchantment with the legal system, as well as gaps in legal knowledge, all result in queer persons not approaching the justice system, even when legal remedies exist. As Kerala based activist V told the ICJ, “*the majority of what we do is outside the formal process of the law – the idea of engaging with a law that favours us is*

⁹ As the editors of India’s first anthology on queer rights note: “The term queer ... speaks ... of communities that name themselves (as gay or lesbian for example), as well as those that do not, recognizing the spaces for same-sex desire and sexuality that cannot be captured in identities alone.” See “Because I Have a Voice: Queer Politics in India” (ed. Arvind Narrain and Gautam Bhan, 2006).

¹⁰ IPC Section 377. Unnatural offences. Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section. See Chapter II for a more detailed discussion of section 377.

¹¹ ICJ Interview, Chennai, July 2016.

a very new thing.”¹² Similarly, Kartik Bittu, who identifies as a gender queer transboi, said “My understanding of how trans and working class LGBT persons have dealt with the police is how most vulnerable communities deal with the police which involves negotiating directly with them at the level of money or possible sexual favours in order to avoid being marginalised by the law or lawmakers. There is very little negotiation that revolves around what is in the law and what isn’t”.¹³

C. Discrimination and Violence based on Sexual Orientation and Gender Identity

While the context and experiences of queer people in India today may vary considerably across different socio-economic lines, it is safe to generalize that they face stigma, harassment and violence in their everyday lives, in private and public spaces, motivated in whole or in part by ignorance of, prejudice and hatred against their real or imputed sexual orientation and gender identity. ICJ spoke with many people who described the discrimination and violence they had faced from families, government officials and other actors. As one transgender woman told the ICJ:¹⁴

My parents thought I had a sickness and took me to a doctor. They put me on hormone supplements for a long time. My family used to beat me up and cut my hair. There was a lot of harassment. They would stop giving me food, kick me in the chest ... If my family doesn’t support me, then the society wouldn’t either.

This context of widespread human rights abuses is significant to how queer persons experience the justice system. Starting from childhood, for the vast majority of queer people stigma and prejudice across the board increase the risk that they would fall victims to violence and abuse and, therefore, their need for protection. S, a transgender woman, told the ICJ: “When I was in class 8, seven boys raped me in the school premises. I complained to the teachers and they justified it to my mother saying the boys raped me because I am so feminine.”¹⁵

The fact that institutions like the family, schools and hospitals often perpetuate discrimination and are frequently the sites of abuse increases the risk that queer people will be subjected to human rights abuses. J, an intersex person who identifies as gender fluid,¹⁶ told the ICJ about the humiliation and harassment that he suffered in school. “When I was in the 8th standard, I participated in a state level 100 metre race. The teachers asked me lots of questions and were confused about my gender. They said they will need to do a confirmation test. I ran out of the ground and never participated

¹² ICJ Interview, Thrissur, July 2016.

¹³ ICJ Interview, Delhi, October 2016.

¹⁴ ICJ Interview, Kolkata, May 2016.

¹⁵ ICJ Interview, Thrissur, July 2016.

¹⁶ Term used to describe gender identity that is non-binary and could vary over time as male, female or fluid.

*in sports again,*¹⁷ A, a transgender man, recounted his experience when he went to a hospital for a routine medical check up as intimidating and discriminatory. *"The doctors at government hospitals are very unaware. They require the "patient" to remove his or her clothes to verify the "case". This happened to me on the first visit. I was told to take off my clothes to prove my masculinity. When I refused to do so, the doctor said that the fact that you can't take off your clothes proves that you are not a boy. So he did not even start the treatment.*"¹⁸

This discrimination often continues into adulthood, and is carried forward in other avenues, ultimately exposing queer persons to an even greater risk of becoming victims of violence and abuse. In order to secure their livelihoods, queer people are exposed to an increased risk of human rights abuses based on sexual orientation and gender identity. The testimony of a group of *launda* dancers - men and transgender women who perform at weddings in certain Indian states - is an illustration of the risks faced. They told the ICJ of incidents of violence against the young dancers in the villages where they perform: *"At every wedding I have been tortured. People rape [me] after the wedding [was] over - once I was running away from a group of men and this half cut sugarcane went into my foot and I have forever been limping since then. Once a launda dancer was picked up by 25 people and taken to a field. All of them raped her and stubbed 25 cigarettes on her body. Then the last one stabbed her with a corn cob.*"¹⁹

Even public spaces are often sites of violence and hostility. A, a transgender man, told the ICJ that accessing public toilets was a huge problem for him. *"If I go to the Men's toilet I'm told to go to the Ladies. If I go to the Ladies I'm sent back to the Men's. So every time I go out I stop drinking water and control my bladder till I am home or at a known space. Once I had entered men's toilet and then I could hear them talk about me and get agitated. I was scared they might attack me.*"²⁰

In addition, discrimination and marginalization often drive queer people to engage in activities that make them more likely to fall foul of the criminal law. For example, lack of access to education and economic marginalization means that many rely on sex work and begging as a means of livelihood.²¹ The police often harass *Hijras*²² and transgender sex workers for soliciting or begging on the street. Owing to the intolerance they often face from their families and communities, transgender persons often use public spaces like parks and toilets for sex work, where the risk of being caught and being

¹⁷ ICJ Interview, Kolkata, May 2016.

¹⁸ ICJ Interview, Kolkata, May 2016.

¹⁹ ICJ Interview, Kolkata, May 2016.

²⁰ ICJ Interview, Kolkata, May 2016.

²¹ See, for example, "Hijras/ Transgender Women in India: HIV, Human Rights and Social Exclusion" UNDP Issue Brief 2010, available at: http://www.undp.org/content/dam/india/docs/hijras_transgender_in_india_hiv_human_rights_and_social_exclusion.pdf

²² A socio-cultural category of transgender persons assigned gender male at birth.

subjected to violence, inflicted largely by the police, is greater. Simultaneously, as this report describes in more detail in Chapters II, III and IV, the same prejudices and discriminatory attitudes mean that legal and judicial institutions also fail to offer adequate, if any, protection to queer persons.

While queer persons in India face particular challenges with respect to the legal and justice system, other marginalized groups also face significant difficulties in this regard. For example, research from 2016 demonstrated the financial barriers people living in poverty faced while trying to access justice.²³ Similarly, data has shown that religious minorities and persons from indigenous communities form a majority of the pre-trial detainee population.²⁴ While this report focusses on the experiences of queer persons, the intersections between being queer and other identities based on gender, caste, economic status, religion, age, etc. that might complicate and exacerbate the difficulties an individual might face cannot be ignored.

D. Summary and recommendations

This report is based on a study of how queer people in India experience the country's laws and engage with the justice system. Chapter II describes how people in India are criminalized based on their real or imputed sexual orientation and gender identity. Beyond focussing on laws that criminalize queer people, the chapter also looks at laws that regulate legal gender recognition. Section 377 of the IPC and some broad and vaguely worded laws, such as those that criminalize sex work and begging, allow law enforcement officials to persecute people, including through spurious criminal charges and prosecutions, based on their real or imputed sexual orientation and gender identity. Meanwhile, even as legal gender recognition has attained constitutional protection through case law, this Chapter outlines the ICJ's concerns about the implementation of the law. While provisions for the rights of transgender people are being made, a range of difficulties continue to affect their enjoyment.

Chapter III focusses on harassment, violence and abuse against queer people at the hands of the police, the concomitant lack of accountability, as well as the refusal of the police to file, let alone investigate, abuse complaints brought by queer people. It also describes how human rights violations committed by the police against queer communities - and police behaviour more generally - has a profoundly detrimental effect on the ability and willingness of queer persons to resort to legal avenues to obtain justice and redress for the range of human rights abuses they experience.

²³ Samarth Bansal "Legal system too expensive for most: Study" *The Hindu* 24 April 2016, available at: <http://www.thehindu.com/news/national/legal-system-too-expensive-for-most-study/article8514566.ece>

²⁴ "India: More than half of undertrials are Dalits, Muslims and tribals" *Al Jazeera* 1 November 2016, available at: <http://www.aljazeera.com/blogs/asia/2016/11/trial-india-dalits-muslims-tribals-161101150136542.html>

Chapter IV describes queer persons' experiences with lawyers and courts. It also outlines the challenges faced by lawyers assisting and representing queer individuals. It discusses the importance of a network of lawyers able and willing to represent queer persons, legal aid, and the power of courts.

Chapter V outlines India's international legal obligations in this regard, and analyses the degree to which they have been met.

In this report, the ICJ offers recommendations to the Indian authorities with a view to ending discrimination and violence on the basis of sexual orientation and gender identity, and bringing India in line with its obligations under international human rights law. The main recommendations are set out immediately below (a fuller set of recommendations appears in the Conclusion of this report).

The Indian government must ensure that laws, policies and practices fully comply with international human rights law and standards on access to justice, in particular the right to a remedy and reparation, the prohibition of discrimination on the basis of SOGI, the right to equality before the law and equal protection of the law, and take into account the needs of queer people and their experiences, including the specific obstacles they face in seeking and obtaining justice and redress. More specifically, the Government must:

- Ensure that police officers promptly register and investigate any complaint regarding violence or any other criminal act filed by a queer person and/or on their behalf;
- Provide legal and sensitization training relating to sexual orientation and gender identity to lawyers and judges under the State and District Legal Services Authority along with outreach programmes to facilitate queer individuals' access to the justice system;
- Repeal section 377 of the Indian Penal Code and vaguely worded criminal laws that invite discriminatory application or otherwise provide scope for arrests solely based on prejudice – including those mentioned in Chapter II – or substantially revise them to ensure there is no scope for abuse in enforcing them;
- Withdraw the Transgender Persons (Protection of Rights) Bill 2016 as currently drafted, and engage in meaningful and substantial public consultation with members of the transgender community;
- Ensure that any process introduced for the legal recognition of gender identity is consistent with international human rights law and the *NALSA* decision; and fully respects the principle of self-identification of gender identity.

E. Methodology

This report is based on research conducted in India from January to October 2016. The core structure of the report and much of its findings have been derived from a series of qualitative interviews that took place across a period of 10 months. In all, ICJ interviewed 150 persons. The interviews were conducted with individuals who identified as gay,²⁵ lesbian,²⁶ bisexual²⁷ and transgender,²⁸ including trans-men and trans-women, along with non-binary individuals.²⁹ Despite concerted efforts, intersex³⁰ persons were unfortunately under-represented in the research. Interviews were also conducted with lawyers and activists, some of whom identified as queer themselves.

In-person interviews were conducted across nine cities, reflecting geographical diversity: Delhi in the north; Kolkata, Guwahati and Shillong in the east; Mumbai and Pune in the west; and Bangalore, Kochi and Chennai in the south. The choice of these cities was also based on access to activist networks. Most interviews involved conversations with a single individual or a group of two or three persons. In some instances, the interviews took the form of a focus-group discussion. The interviews were largely conducted in a

²⁵ This report follows the understanding of these terms as contained in the 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, 23 October 2012, HCR/GIP/12/01 (hereafter: the UNHCR SOGI Guidelines). Gay 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).

²⁶ Lesbian is a woman whose enduring physical, romantic and/or emotional attraction is to other women. Lesbians often suffer multiple discrimination due to their gender, social and/or economic status, coupled with their sexual orientation. See: the UNHCR SOGI Guidelines.

²⁷ Bisexual 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. See: the UNHCR SOGI Guidelines.

²⁸ Transgender describes people whose gender identity and/or gender expression differs from the biological sex they were assigned at birth. Transgender is a gender identity, not a sexual orientation and a transgender individual may be heterosexual, gay, lesbian or bisexual, NB: the term transgender may include, but is not limited to, transsexuals (an older term which originated in the medical and psychological communities), cross-dressers and other gender variant people. See: the UNHCR SOGI Guidelines.

²⁹ Non-binary is a term used to denote gender identities that do not fit within or challenge the conventional binary gender identity notions of male and female.

³⁰ This report uses the understanding of intersex as developed by the UN Office of the High Commissioner of Human Rights. Intersex is an umbrella term used to describe a wide range of natural bodily variations in sex characteristics. Some persons, including those with intersex traits, use other terms. In medical contexts, the term 'disorders of sex development', also abbreviated as DSD, is also frequently used, by medical professionals as well as by parents of intersex persons and some intersex persons themselves. This term is objected to by many intersex persons and organizations as inaccurate since intersex people may not have health issues or pathological disorders and as pathologising, stigmatizing and encouraging medically unnecessary surgeries and treatment on the sex characteristics of intersex children/adults. The word 'hermaphrodite' is used by some intersex persons, though rejected by others as offensive and inaccurate. Some persons refer to their specific diagnostic or chromosomal label for their variation and may or may not use the term intersex as well. The terms intersexual and intersexuality are sometimes used, particularly in other languages, though they are rejected by many intersex organizations as feeding the misconception that intersex refers to sexual orientation rather than biological and/or physical characteristics. Intersex persons may have any sexual orientation or gender identity.

mix of English and Hindi, with the help of interpreters when participants spoke in other languages.

The participants were asked a set of questions that followed a previously prepared template; however, the content of the interviews expanded beyond the template whenever relevant. In addition to the interviews, Right to Information (RTI) applications were filed requesting information from various government departments, both on the enforcement of the law against queer individuals and on gauging how legal entitlements have operated. Specifically, RTIs were filed to obtain information relating to: a) cases filed under Section 377 and Section 389 of the Indian Penal Code, b) civil and criminal cases more broadly where the accused, victim or complainant was an LGBTI identifying person, c) implementation of the *NALSA* judgment which guarantees a range of rights for transgender persons d) statistics on transgender detainees in prison along with information on arrest and detention of transgender sex workers under the Immoral Trafficking Prevention Act. As the report notes in greater detail in Chapter II, the RTI application process has not yielded the expected results for a range of reasons and, therefore, it has proven less reliable. Nevertheless, the applications have provided some useful information to better understand the extent of prosecution under Section 377.

In this report, the ICJ has withheld the names and, in some cases, other identifying details (e.g. location or organizational affiliation), of some of the people who shared their stories with us, to avoid their being identified. Instead, initials have been used.

II. Relevant criminal laws and the laws facilitating legal gender recognition

This chapter focuses on the two significant types of law that impact queer persons in India. The first is a set of laws that are used to criminalize queer persons on the basis of their real or imputed sexual orientation and /or gender identity. Part 1 examines section 377, and a range of vaguely worded laws that effectively criminalize queer lives and identities in India. The second are laws that purportedly facilitate legal gender recognition and provide for welfare measures. Part 2 considers the Indian Supreme Court's seminal judgment in *NALSA v UOI*, as well as subsequent efforts at drafting legislation to give effect to the human rights of transgender people, including, chiefly, the right to legal recognition of the gender identity of one's choice. It also examines the difficulties that people seeking to change gender identity in India have faced thus far.

A. Use of Criminal Law against Queer Persons

The use of laws to criminalize, imprison and persecute people on the basis of their real or perceived sexual orientation and gender identity has obvious and serious impacts on people's enjoyment and exercise of the full range of their human rights. Laws like section 377 of the Indian Penal Code which penalize "carnal intercourse against the order of nature" are inconsistent with the rights to privacy, equality, dignity, freedom of expression, and also impact access to health care.

Furthermore, law enforcement officials throughout India use other laws, such as those relating to beggary and public nuisance, to harass or detain people in connection with their real or purported sexual orientation and / or gender identity. These laws either criminalize livelihoods on which some queer persons depend (e.g. begging or sex work), or are vaguely worded (e.g. public nuisance), making it easier for law enforcement officials to act on their prejudices and use these criminal provisions to harass or otherwise abuse people on the basis of their real or imputed sexual orientation and / or gender identity.

i. Section 377

Of the laws that impact queer individuals, the most widely known is Section 377 of the Indian Penal Code. Section 377 states:

Unnatural offences.

Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

Section 377 was introduced in India through the IPC in 1860, when India was still a British colony. The intent behind the provision was clearly to criminalize individuals whose real or imputed sexual relations the colonial government found to be “unnatural” and undesirable.³¹ The IPC was the template for penal legislation introduced in other British colonies. As a result, several countries inherited some version of section 377 in their penal codes.³² The United Kingdom has since decriminalized same-sex conduct, however, several ex-colonies continue to grapple with the impact of such laws.

In 2001, the constitutionality of section 377 was challenged before the Delhi High Court on the grounds that it violated the right to health by impeding HIV/AIDS prevention efforts; that it violated the right to equality through the persecution and prosecution of LGBT individuals under the guise of a seemingly neutral law; and that it violated the right to privacy through controlling the intimate personal lives of individuals. In the landmark 2009 case of *Naz Foundation v Govt. of NCT of Delhi*, the Delhi High Court read down the application of section 377, holding that, “*We declare that Section 377 IPC, insofar it criminalizes consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution*”.³³

The Court accepted that sexual conduct was about identity as well as privacy. Relying on a variety of sources, the Court noted “*the sense of gender and sexual orientation of the person are so embedded in the individual that the individual carries this aspect of his or her identity wherever he or she goes*”. The Court concluded that Section 377 “*denies a person’s dignity and criminalises his or her core identity solely on account of his or her sexuality*”. This criminalisation of identity denied “*a gay person a right to full personhood which is implicit*” in the notion of life under Article 21. The Court was concerned with the stigmatising effects of Section 377 even when it was not enforced. Referring to evidence that showed Section 377 was used to brutalise and harass, the Court compared the criminalisation of identity to the Criminal Tribes Act 1871, saying “*These communities and tribes were deemed criminal by their identity, and mere belonging to one of those communities rendered the individual criminal.*”

However, various non-state groups appealed this ruling before the Supreme Court. While it was on appeal, lawyers used the *Naz* ruling to try to push for greater recognition of the rights of queer persons in Court, including in the

³¹ See for example HRW, “This Alien Legacy” December 2008, available at: <https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism>; and Arvind Narrain, *Queer- Despised Sexuality, Law and Social Change*, Books for Change, 2004.

³² This included Australia, Bangladesh, Bhutan, Brunei, Fiji, Hong Kong, India, Kiribati, Malaysia, Maldives, Marshall Islands, Myanmar (Burma), Nauru, New Zealand, Pakistan, Papua New Guinea, Singapore, Solomon Islands, Sri Lanka, Tonga, Tuvalu, Western Samoa, Botswana, Gambia, Ghana, Kenya, Lesotho, Malawi, Mauritius, Nigeria, Seychelles, Sierra Leone, Somalia, Swaziland, Sudan, Tanzania, Uganda, Zambia, and Zimbabwe. See HRW, “This Alien Legacy” December 2008, available at: <https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism>

³³ *Naz Foundation v Govt. of NCT of Delhi*, 160 Delhi Law Times 277 (hereinafter: *Naz Foundation*).

case of Dr. Siras's suspension.³⁴ With the *Suresh Kumar Koushal* decision in December 2013, the Supreme Court reversed the 2009 Delhi High Court ruling, effectively recriminalizing homosexuality.³⁵ The petitioners have challenged this ruling since, and on 2 February 2016, the Indian Supreme Court referred a "Curative Petition"³⁶ in this case to a five-judge bench of the same Court.³⁷ At the time of writing this report, this case is still pending and the new bench has not been constituted.

Section 377 has been used to prosecute and persecute people for their real or purported engagement in consensual same-sex sexual conduct since its introduction in 1860.³⁸ The section below explains in more detail how section 377 operates in this manner, assessing its use to prosecute, to persecute, and as a barrier to accessing justice.

Prosecution: In assessing how section 377 is used to prosecute queer persons, the ICJ examined available court records,³⁹ academic writing, records of the National Crime Records Bureau (NCRB), and media reports. Additionally, the ICJ filed right to information applications at several police stations to find out how many cases had been filed under section 377, and which ones amongst these related to consensual, adult sexual conduct.

The media has reported on instances of queer persons being prosecuted for consensual sexual encounters.⁴⁰ In 2013, 13 men were arrested under section 377 in Hassan.⁴¹ In July 2014, the Bangalore police arrested eight people under section 377.⁴² In this case, seven men were blackmailing the eighth

³⁴ For example, the case of Dr. Shrinivas Ramchandra Siras v. Aligarh Muslim University, challenged the suspension of a professor on allegations of "immoral sexual activity", as well as other actions taken by the university in the course of this suspension. The petitioners used the Naz Foundation judgement to argue that the petitioner is entitled to the fundamental rights to his privacy, dignity, equality and non-discrimination on the basis of sexual orientation. On this issue, the Court held that "The question of the applicability of the judgment of Naz Foundation Vs. Union of India (Supra) does not presently arise in the case as the allegations are not the basis of any criminal offence, charge or conviction". The order is available here: <http://www.lawyerscollective.org/files/Siras'%20Order.pdf>

³⁵ (2014) 1 SCC 1.

³⁶ A curative petition is a judicial remedy developed by the Indian Supreme Court, which may be used in certain specific circumstances. For more information about curative petitions, and the specific curative petition in the section 377 matter, please see: ICJ "Briefing Paper: The Section 377 Curative Petition" available at: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2016/03/India-QA-art-377-Advocacy-Analysis-brief-2016-ENG.pdf>

³⁷ "Five-judge Constitution Bench to take a call on Section 377" *The Hindu* 2 February 2016, available at: <http://www.thehindu.com/news/national/supreme-court-refers-plea-against-section-377-to-5judge-bench/article8183860.ece>

³⁸ Human Rights Watch, *This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism*, available at <https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism>

³⁹ This analysis was restricted to judgments from the high courts and Supreme Court in India, and does not include the lower courts. This was largely due to difficulties in comprehensively accessing judgments from all lower courts in India.

⁴⁰ For more details on these cases, see *Dignity First: One Year of Resistance to Recriminalization of LGBT lives*, available at <http://altlawforum.org/campaigns/dignity-first-one-year-of-resistance-to-re-criminalisation-of-lgbt-lives/>.

⁴¹ For more details about the case, see: <http://altlawforum.org/gender-and-sexuality/13-people-arrested-under-section-377-of-the-indian-penal-code-in-november-2013/>

⁴² For more details about this case, and why the use of 377 was so problematic, see page 26 of CSMR, "Dignity First" available at <https://www.scribd.com/document/249770116/Dignity-First-One-Year-of-Resistance-to-Re-Criminalisation-of-LGBT-Lives>.

after having sex with him. In October 2014, a man in Bangalore was arrested under section 377 after his wife caught him having an affair with another man on camera.⁴³

Most cases involving section 377 in the high courts and Supreme Court involve the prosecution of child sexual abuse and rape. During their arguments in the *Naz Foundation* case, the Government had sought to justify “the retention of Section 377 IPC on the statute book broadly on the reason that it has been generally invoked in cases of allegation of child sexual abuse and for complementing lacunae in the rape laws”.⁴⁴ However, with the enacting of the Protection of Children from Sexual Offences Act in 2012 and the amendment to India’s rape laws in 2013, reliance on section 377 is unnecessary for the prosecution of child sexual abuse and rape.

Given that the appellate courts represent only a fraction of cases registered or prosecuted under section 377, the ICJ also examined the complaints filed under section 377 at police stations. The NCRB, which compiles data on the use of criminal laws in India, only began publishing information on section 377 in 2014. The ICJ filed a right to information application requesting this information in respect of the period between 2005 and 2015. In response, the ICJ was told that this information had not been collected prior to 2014.⁴⁵ According to the NCRB, 1279 persons in 2014 and 1491 in 2015 were arrested under section 377. However, it is not clear how many of these cases involve real or purported consensual sex and how many involve non-consensual sex.

The ICJ filed RTI applications requesting information about the use of section 377 in 4 States (Punjab, Haryana, Uttar Pradesh and Delhi) at the start of 2015. The RTIs requested information about the number of complaints filed and arrests made under section 377 across the period of 2005-2015, along with the gender of the accused and alleged victims involved. These efforts were complementary to similar requests filed by other groups, including by the Alternative Law Forum in 2014 in Karnataka, and by the Varta Trust in 2015 in Kolkata. However, this exercise presented two main challenges, making it difficult to draw any conclusion on the use of section 377 to prosecute queer persons for their real or imputed consensual sexual conduct.

First - Each State the ICJ approached collected, compiled and released this information differently. Many police stations simply did not respond. Others provided data about numbers of people charged and arrested but refused to provide additional details. The fragmented nature of the response and available data make it difficult to provide a conclusive statement about use of section 377. The ICJ’s experience is consistent with the experience of the other groups conducting a similar exercise.

⁴³ See: <http://www.firstpost.com/living/booked-under-section-377-bangalore-techies-story-gets-extra-punch-thanks-to-outdated-law-1780029.html>.

⁴⁴ Para 11, *Naz Foundation*.

⁴⁵ Response on file with the ICJ.

Second – Section 377 contains no requirement for consent, meaning that there is no requirement to make a note of consent or the lack thereof while framing a complaint. The State of Haryana was the only State where nine districts sent the ICJ copies of First Information Reports providing factual details of the offences in question. While the description of some of the offences clearly indicated rape, there was another element of the complaints that was of note. A number of these complaints were filed by a third party, often the father of the victim, in cases where the victim was well above the age of consent or between the ages of 16 and 18. In the complaint, there would be no analysis of voluntariness or consent. The father would simply state in the FIR that accused “*ne galat kaam kiya*” or “*ne dushkarm kiya*” [he did a “wrong” or a “bad” act as opposed to using the term “*balaatkaar*” which would mean rape]. While there is no way of establishing what actually happened in these cases, they do point to an ambiguity around the question of establishing consent in a 377 case.

Persecution: The use of section 377 to persecute queer persons has been well established. As Arvind Narrain has noted, 377 has a “significant role in perpetuating a certain kind of discourse about queer people which classifies groups as criminal and stigmatizes sexual behaviour ... The discourse which constructed queer people as ‘unnatural’ and ‘perverted’ therefore has the effect of legitimizing violence against all queer people.”⁴⁶

It is the perception of criminality under Section 377 that is particularly pervasive, and appears to legitimize discriminatory and violent treatment of queer persons. As a lawyer, Sandhya, told the ICJ in an interview, even when the police do not actually use 377, “*it is like a Damocles sword*”.⁴⁷ The Supreme Court in the *NALSA* decision also confirmed this, when it stated “*Section 377, though associated with specific sexual acts, highlighted certain identities, including Hijras and was used as an instrument of harassment and physical abuse against Hijras and transgender persons*”.⁴⁸

S, a transgender woman, told the ICJ that when she went to the police to get permission for a pride parade, “*The police asked me why we are doing this and told us that 377 is non-bailable. They gave us permission but they were mocking us during the pride*”.⁴⁹ And to the extent that section 377 is a valid law, it is difficult to conduct trainings with police on the rights of queer persons and how they should not be harassed.

The stereotypes and perceptions fostered by section 377 also have an impact on how other individuals, and non-state institutions, treat queer persons. Several people gave the ICJ examples of section 377 being used to blackmail and extort money from queer persons.⁵⁰ While this behavior is not sanctioned

⁴⁶ Arvind Narrain, *Queer- Despised Sexuality, Law and Social Change*, Books for Change, 2004.

⁴⁷ ICJ Interview, Kochi, July 2016.

⁴⁸ Para 18, *NALSA v UOI*.

⁴⁹ ICJ Interview, Thrissur, July 2016.

⁵⁰ This has also been recorded in several media reports and other public documents. See, for example: <https://scroll.in/article/700121/arrests-for-unnatural-sex-soar-so-do-cases-of-gay-people-being-blackmailed>; <http://www.caravanmagazine.in/vantage/how-section-377-became-payday->

by section 377, the provision facilitates it, by perpetuating homophobic attitudes and making it almost impossible for victims of this abuse to access justice. One person told the ICJ how section 377 came up indirectly in his work with respect to queer women.⁵¹ In one specific instance a queer woman was refused housing, with the landlord citing the existence of section 377. In another incident, two women wanted to live together, but their families threatened them, saying they would file a case under section 377.

Access to Justice: The fact that section 377 exists also operates as a threat that prevents people from accessing rights and protections that they are entitled to. For example, section 377 stops queer individuals from approaching the police when they are the victims of criminal acts. Two notable instances are that of blackmail and intimate partner violence. Queer individuals subjected to intimate partner violence or otherwise assaulted or harassed following same-sex encounters are unable to report it to the police because of fears of effectively exposing themselves to charges under section 377.

Poongkhulali, a lawyer, has worked on cases where married couples want a divorce because one of the partners identifies as queer. *"In the matrimonial cases I handle, 377 is very much in the air ... it's always that threat looming"* she told the ICJ. She spoke about marriages where the man was gay but was forced to marry. *"No one will ever have enough evidence, but they will use [377] against him to shame him. It allows people to bargain for higher settlements than even what they would have gotten in court. People will take big loans just to end this"*. She told the ICJ of a case where a gay man had been married against his wishes. The wife's family suspected he was gay, and used material from gay dating sites to gather evidence regarding this. *"Then they brought all the transcripts as "proof" and asked him to pay up and get out of the marriage"*.⁵²

Section 377 also makes it impossible for queer persons to rely on legal provisions that could potentially protect and support them. As per section 389 of the Indian Penal Code:

Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of an accusation, against that person or any other, of having committed, or attempted to commit an offence punishable with death or with imprisonment for life, or with imprisonment for a term which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if the offence be punishable under section 377 of this Code, may be punished with imprisonment for life.

extortionists-and-police-alike; <http://www.hindustantimes.com/india/decoding-section-377-how-the-verdict-erased-basic-human-rights/story-cFZKIOXvsyiHjL1yoz9dXN.html>.

⁵¹ ICJ Interview, Kolkata, May 2016.

⁵² ICJ Interview, Chennai, July 2016.

Section 389 makes it an offence to blackmail people based on allegations that they engage in conduct that is punishable under section 377. Potentially, it provides a clear remedy for instances in which queer persons are blackmailed or otherwise the victims of extortion. However, this provision is rarely if ever used. ICJ filed RTI applications in police stations in Delhi, asking how many complaints had been filed under this provision regarding section 377. No such cases had been filed, as per the response from police stations.

Vinay Chandran, Executive Director of Swabhava Trust (an organization working on the rights of queer persons in Bangalore), told the ICJ that he had referred cases of blackmail to lawyers, but they were afraid to take it forward because they would put the client at risk under section 377. He said he was *"in a quandary about it since lawyers don't seem to be helping"*.⁵³ He told the ICJ about a case where an individual was accosted by a group of men while having sex with another man in a hotel. They barged into the room and beat him up and robbed him. The victim was in shock and did not take any legal action since he did not want any more attention. In Pune, Maharashtra, N, a gay man, also noted that lawyers in many cases discourage victims from filing a complaint under this section due to fear of exposing themselves to charges under section 377.⁵⁴ One lawyer in Chennai told the ICJ *"One time we came close to filing [a case on extortion], but as a matter of strategy, no one wants to admit they are gay"*.⁵⁵ This was also echoed in ICJ interviews with organizations working with queer communities, like SAATHII, who told the ICJ that in cases of blackmail and extortion, while lawyers suggested they approach the police, they advised them to keep the question of sexuality out of the picture.

The fact that section 377 exists means that queer people often fear going to court or reporting crimes, since they face the threat of criminalization themselves. Lawyers are also aware of this. *"If you go to court, you are exposing them to 377, to street harassment, legal harassment. There is very little you can do with courts in so far as the identity [i.e. being queer] is taboo and illegal,"* one lawyer told the ICJ.⁵⁶ Other lawyers have also said that section 377 prevents the development of possibly helpful precedent in courts.⁵⁷

One notable exception to the non-use of Section 389 comes from the account of Vijay Hiremath, a lawyer based in Mumbai.⁵⁸ He noted how in a recent case he filed for a client under the section that a charge-sheet was eventually framed by the Magistrate. As he noted, usually the magistrates do not frame charges under the Section, possibly because it is not well understood, and instead opt to frame the case as a robbery matter. In this particular case, the

⁵³ ICJ Interview, Bangalore, July 2016.

⁵⁴ ICJ Interview, Pune, September 2016.

⁵⁵ ICJ Interview, Chennai, July 2016.

⁵⁶ ICJ Interview, Chennai, July 2016.

⁵⁷ ICJ Interview, Chennai, July 2016.

⁵⁸ ICJ Interview, Mumbai, September 2016.

lawyers of the accused opposed the magistrate's order, which was then upheld by the Sessions court, and now stands pending before the Bombay High Court. Even as the matter is pending before the Court, Vijay noted he was quite hopeful that prosecution would take place under section 389. While the possibility of using section 389 to prosecute persons for blackmail and extortion is a step forward, it cannot be the ultimate solution to protecting queer persons. This is only possible if section 377 is repealed, and the stereotypes and persecution fostered by section 377 are challenged.

The ICJ considers that laws criminalizing real or purported engagement in consensual sexual relations, including extramarital sex and premarital sex - whatever the sexual practice, proclivity and the gender identity or expression and/or sexual orientation of the persons concerned - contravene international human rights law and standards, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Legal provisions criminalizing consensual sexual relations necessarily result in violations of, and generally impair the exercise of, a number of rights. These include the rights to dignity; equality, including equality before the law and equal protection of the law; non-discrimination; liberty and security of person; privacy; opinion and expression; association and peaceful assembly.

Criminalization of some forms of sexual conduct is not inconsistent with human rights law, e.g. non-consensual sexual activity, criminalization of sexual acts in public. Having said that, it is crucial that the relevant criminal provisions be non-discriminatory and be applied in a non-discriminatory fashion, i.e. they would apply irrespective of SOGI. UN human rights Treaty Bodies and independent human rights experts have repeatedly urged States to repeal laws criminalizing homosexuality.⁵⁹ Further, they have called attention to the ways in which the criminalization of consensual same-sex sexual conduct legitimizes prejudice and exposes people to hate crimes and police abuse, and have recognized that it can lead to torture and other ill-treatment.⁶⁰ Laws and regulations that directly or indirectly criminalize consensual same-sex sexual orientation or conduct provide State actors with the means to perpetrate human rights violations, and enable non-State actors

⁵⁹ E.g., Human Rights Committee, *Toonen v Australia* (Communication 488/1992, 4 April 1994), UN Doc. CCPR/C/50/D/488/1992. The 2015 OHCHR SOGI Report, UN Doc. A/HRC/29/23, notes: "States have an obligation to protect the rights to privacy, liberty and security of the person, including the right not to be subjected to arbitrary arrest and detention. United Nations mechanisms have called upon States to fulfill these obligations by repealing laws used to punish individuals based on their sexual orientation and gender identity, including laws criminalizing homosexuality and cross-dressing, and have rejected attempts to justify such laws on grounds of the protection of public health or morals. States must refrain from arresting or detaining persons on discriminatory grounds, including sexual orientation and gender identity" and that "States that criminalize consensual homosexual acts are in breach of international human rights law since these laws, by their mere existence, violate the rights to privacy and non-discrimination. Arrests and the detention of individuals on charges relating to sexual orientation and gender identity - including offences not directly related to sexual conduct, such as those pertaining to physical appearance or so-called 'public scandal' - are discriminatory and arbitrary".

⁶⁰ E.g., see *Born Free and Equal, Sexual Orientation and Gender Identity in International Human Rights Law*, Office of the High Commissioner for Human Rights, HR/PUB/12/06, 2012, p. 33; and the Report of the UN Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc.: A/56/156, 3 July 2001, para. 20 and, generally, paras 18-25.

to persecute individuals on account of their real or imputed sexual orientation and/or gender identity with impunity.⁶¹

ii. Other laws used to criminalize queer persons

Section 377 is not the only provision used to detain and harass queer persons. ICJ's interviews with members of the queer community in India and with lawyers, as well a review of media reports and academic literature, indicate that other legal provisions are used to harass, blackmail, extort money from, arbitrarily arrest, detain and prosecute people on the basis of their real or imputed sexual orientation or gender identity. These include laws that do not expressly refer to sexual orientation or gender identity – but whose provisions are drafted in a vague and broad manner (e.g. nuisance laws), allowing the police to rely on them to target queer persons wholly or in part because of their prejudice. These laws often end up being abused and are used to effectively criminalize queer people simply for their presence in a particular “public space”, or because of their engagement in certain activities (e.g. sex work and begging).

A non-exhaustive list of these laws is below:

Anti-Beggary laws: Several Indian laws criminalize beggary. Begging is a significant source of livelihood for many transgender persons given that they are often discriminated against and are often unable to secure alternative forms of employment. As a result, transgender persons who earn their income through begging are more vulnerable to abuse and harassment by the police through such anti-beggary laws. For example, the Indian Railways Act punishes begging in a railway carriage or station with imprisonment for up to a year or with a fine of INR 2000 [approximately US\$ 30].⁶² Several people told the ICJ of instances where the police had harassed or extorted money from them when they were begging on trains.⁶³ Similarly, the Bombay Prevention of Begging Act allows a police officer to “*arrest without a warrant any person who is found begging*”.⁶⁴ In November 2014, over 150 transgender persons were arrested under the Karnataka Prohibition of Beggary Act, 1975 and sent to a “beggars colony”. Activists stated that most

⁶¹ As the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has noted: “sanctioned punishment by States reinforces existing prejudices, and legitimizes community violence and police brutality directed at affected individuals.” See Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, A/HRC/14/20, 27 April 2010. The UN Special Rapporteur on extrajudicial executions noted that criminalization increases social stigmatization and made people “more vulnerable to violence and human rights abuses, including death threats and violations of the right to life, which are often committed in a climate of impunity”, A/HRC/57/138, para. 37.

⁶² Section 144, The Railways Act, 1989, available at: http://www.indianrailways.gov.in/railwayboard/uploads/codesmanual/Railway_Act.PDF.

⁶³ ICJ interviews in Guwahati and Shillong, May 2016.

⁶⁴ This Act also applies to Delhi: <http://delhi.gov.in/wps/wcm/connect/f2214e0043383b63b2d1f3cf71a315bd/THE+BOMBAY+PREVENTION+OF.pdf?MOD=AJPERES&lmod=-1362869004&CACHEID=f2214e0043383b63b2d1f3cf71a315bd>

of those arrested were not even begging at the time of their arrest.⁶⁵ It is for this reason that transgender rights activists have strongly opposed a provision in the latest draft of the transgender rights bill, which also specifically criminalizes begging [please see later in this section for more information about the draft transgender rights bill].⁶⁶

Nuisance laws: Section 268 of the IPC states: “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”. Section 290 sets out the punishment for those found guilty of the offence. As per this section, those found guilty can be fined up to INR 200 [approximately US\$ 7]. As the above example shows, “nuisance laws” often feature vague concepts and are phrased quite broadly, and thus are open to abuse. Section 290, cited above, for example, appears to effectively allow arrest simply for causing “*annoyance to the public*”; as a result, it is often used against queer persons. For example, ICJ interviewed F, whose testimony was recounted in the beginning of this report, who was arrested under this provision. Similar provisions are also found in several State level police acts.

Immoral Trafficking Prevention Act: While Indian laws do not criminalize sex work *per se*, they do criminalize several aspects of it, including “*soliciting*” and “*living on the earnings of prostitution*” through the Immoral Trafficking Prevention Act [“ITPA”].⁶⁷ Many transgender persons rely on sex work as a means of livelihood. There is also a perception that transgender persons are involved in sex work, even when they may not be. The police often use legal provisions designed to regulate sex work against transgender persons, to arrest and detain them. A fact finding report by the People’s Union for Civil Liberties (Karnataka) in 2004 noted the human rights violations faced by transgender sex workers, and stated that the ITPA has “*provided the legal basis for arrest and intimidation of the transgender sex worker population*”.⁶⁸

Laws regulating the police: Police often rely on provisions in state-level police laws to harass queer persons. These state-level police laws are the legal basis for certain police powers, and also set out specific, state-level criminal offences and their punishments. The ICJ interviewed two transgender

⁶⁵ A Report on Human Rights Violations against Transgenders in Karnataka (2014), available at: <http://orinam.net/content/wp-content/uploads/2015/08/FINAL-REPORT-ON-HUMAN-RIGHTS-VIOLATIONS-OF-TRANSGENDER-PERSONS.pdf>

⁶⁶ Laws that criminalize begging include: The Bombay Prevention Of Begging Act, 1959 [Delhi Extension]; 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

⁶⁷ For example: Section 4 punishes “Punishment for living on the earnings of prostitution”; Section 7 punishes “Prostitution in or in the vicinity of public place”; and Section 8 punishes “Seducing or soliciting for purpose of prostitution”.

⁶⁸ Human Rights Violations against the Transgender Community: A PUCL Report, 2004, available at: <http://www.pucl.org/Topics/Gender/2004/transgender.htm>

women and one gay man who were arrested in April 2016 only because they were inhabiting a public space at a late hour, on the wrongful allegation of causing a “public nuisance” under the Meghalaya Police Act. They were arrested at 10 pm and held in police custody overnight; eventually, they told the ICJ they had to pay a fine of INR 5000 [approximately US\$ 74] each to be released. One of the transgender women arrested was 17 years of age.⁶⁹ Another person was similarly subject to wrongful arrest for ‘riotous behavior’ under the Kerala Police Act.

In some cases, such police acts have expressly given the police broad powers to regulate queer persons. For example, in 2012, the government of the State of Karnataka amended its police act to add section 36A. This provision gave the commissioner of police the power to “regulate eunuchs”, which included “preparation and maintenance of a register of the names and places of residence of all eunuchs residing in the area under his charge and who are reasonably suspected of kidnapping or emasculating boys or of committing unnatural offences or any other offences or abetting the commission of such offences”.⁷⁰ In January 2016, the Karnataka Sexual Minorities Forum approached the High Court of Karnataka arguing that the provision was unconstitutional.⁷¹ In the course of these hearings, the government agreed to amend section 36A, drop the word “eunuch” from the provision, and replace it with “person”. In February 2017, newspapers reported that the word “eunuch” was replaced with “person” through a gazette notification.⁷²

In many instances, such laws violate the right to freedom from arbitrary deprivation of liberty. The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity clearly say that states must eliminate “*vaguely worded criminal law provisions that invite discriminatory application or otherwise provide scope for arrests based on prejudice*”.⁷³

Furthermore, the 2015 Report of the Office of the UN High Commissioner for Human Rights has noted that, “[h]uman rights mechanisms continue to emphasize links between criminalization and homophobic and transphobic hate crimes, police abuse, torture, family and community violence and stigmatization, as well as the constraints that criminalization puts on the work of human rights defenders. The Special Rapporteur on freedom of religion or belief has noted that these laws may give a pretext to vigilante groups and

⁶⁹ ICJ Interview, Shillong, May 2016.

⁷⁰ This provision of the Karnataka Police Act is similar to provisions in the Criminal Tribes Act of 1871, a colonial law like section 377, which amongst other things contained provisions for the regulation of “eunuchs” in part II. The Act declared as criminal “classes of persons” who it assumed were predisposed to the “systematic commission of non-bailable offenses”. The Criminal Tribes Act was heavily criticized and finally repealed in 1949.

⁷¹ “Revoke Section 36 (A) of Police Act” *The Hindu* 7 November 2013, available at: <http://www.thehindu.com/news/cities/bangalore/revoke-section-36-a-of-police-act/article5322743.ece>

⁷² “Govt to HC: word ‘eunuch’ removed from Police Act” *Deccan Herald* 7 February 2017, available at: <http://www.deccanherald.com/content/595200/govt-hcamp8200word-eunuch-removed-police.html>

⁷³ Principle 7, The Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (hereinafter: Yogyakarta Principles).

other perpetrators of hatred for intimidating people and committing acts of violence".⁷⁴ Particular attention should be paid to the lack of equality before the law and equal protection of the law, as well as access to justice, including to an effective remedy, arising as a consequence of criminalization.

The OHCHR has stated that "*States have an obligation to protect the rights to privacy, liberty and security of the person, including the right not to be subjected to arbitrary arrest and detention. United Nations mechanisms have called upon States to fulfil these obligations by repealing laws used to punish individuals based on their sexual orientation and gender identity ... States must refrain from arresting or detaining persons on discriminatory grounds, including sexual orientation and gender identity.*"⁷⁵

B. Legal Gender Recognition

The legal recognition of a person's chosen gender identity is crucial to ensuring their full citizenship and to ensuring access to and enjoyment and exercise of a range of human rights. It is integral to their personality and is recognized as being one of the most basic aspects of self-determination, dignity and freedom. Failure to provide for full legal recognition of one's chosen gender identity has meant that transgender persons have often been denied the full enjoyment and exercise of several human rights, including the right to vote (article 25, ICCPR),⁷⁶ education (article 13, International Covenant on Economic, Social and Cultural Rights, ICESCR),⁷⁷ work (article 6, ICESCR),⁷⁸ non-discrimination,⁷⁹ privacy,⁸⁰ freedom of expression,⁸¹ and access to accurate identity documents. The judgment of the Indian Supreme Court in the case of *NALSA v UOI* of India was seminal in upholding transgender persons' right to their chosen, self-identified gender identity, as

⁷⁴ 2015 OHCHR SOGI Report.

⁷⁵ 2015 OHCHR SOGI Report.

⁷⁶ Article 25: Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions ... (b) To vote and to be elected at genuine periodic elections, which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

⁷⁷ Article 13 (1): The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

⁷⁸ Article 6: The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

⁷⁹ Article 2 (2), ICESCR: The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

⁸⁰ Article 17 (1), ICCPR: No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

⁸¹ Article 19 (2), ICCPR: Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

well as putting in place other essential welfare measures. However, noted in this chapter, gaps in legal knowledge and lack of access to lawyers and legal aid mean that transgender persons have faced problems in accessing these entitlements.

i. National Legal Services Authority v. Union of India

On 15 April 2014, the Indian Supreme Court took an important step towards ensuring legal recognition of gender identity with the delivery of its landmark judgment in the case of *NALSA v UOI*. The Court upheld transgender persons' right to their chosen, self-identified gender identity, and declared that

Hijras, Eunuchs, apart from binary gender should be treated as the third gender by the government, and that state governments and the Central government must uphold transgender persons' right to decide their self-identified gender, and grant legal recognition of the same.⁸²

The Court grounded its reasoning on the fundamental rights to equality, non-discrimination, freedom of expression and dignity. The Court held that non-recognition of their gender identity denied transgender persons equal protection of the law. Discrimination is prohibited under the Indian Constitution on a number of specified grounds, which includes "sex", and the Court read the term "sex" to include "gender identity"; it interpreted the right to freedom of speech and expression as including the right to expression of one's self-identified gender, which could be expressed through dress, words, action, behavior or any other form; and the Court found that since gender constituted the core of one's sense of being, as well as an integral part of a person's identity, recognition of one's gender identity lies at the heart of one's fundamental right to dignity.

Specifically, the Court directed the Central and state governments to: (1) establish affirmative action measures (e.g. quotas) with a view to increasing the presence of transgender persons in educational institutions and public appointments; (2) operate separate HIV Sero-surveillance Centres for transgender persons; (3) make it illegal to require sex reassignment surgery and akin medical procedures as necessary to assert one's gender identity; (4) address the problems transgender persons face, such as "*fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma*"; (5) provide medical care for transgender persons in hospitals, and separate toilets; (6) frame social welfare schemes for their benefit; (7) implement public awareness schemes so transgender persons feel "*that they are also part and parcel of the social life and be not treated as untouchables*", and take measures to "*regain their respect and place in the society*".

Several transgender persons told the ICJ about the beneficial impact of the *NALSA* decision on their day-to-day life. The Supreme Court's acknowledgment of transgender persons' rights to be free from discrimination, to equality and to dignity meant that people felt an increased

⁸² Para 129, *NALSA v UOI*.

sense of confidence in asserting themselves in public spaces. Anandam, a sex workers collective based in Kolkata, for example, told the ICJ of an incident involving transgender sex workers from the collective. *"During a festival, we were at a temple. There were two lines - one for men and one for women. If we stood in the line for men, they would harass us, if we stood in the line for women they also look at us in disgust. So we went to the temple authorities and told them about the judgment"*. S, a transgender woman, said *"We have used the NALSA judgment when we were negotiating with the Police once when they were arresting us. We asked for female police to arrest us."*

Notwithstanding the *NALSA* judgment's groundbreaking acknowledgment of the human rights of transgender people, the decision is silent with respect to ongoing criminalization of people for their engagement in consensual same-sex relations in India under section 377 of the IPC.⁸³

Thus, while the *NALSA* judgment guarantees transgender persons the full range of their rights, their right to freely engage in consensual sexual relations remains restricted by section 377, notwithstanding India's obligations under international human rights law to decriminalize consensual sexual relations. As M, a transgender woman, told the ICJ *"See, we have got the gender right. But [it's as if] we've got our hands but we won't be able to do any work. Gender right is there, [but] sexual right is not there. So, are we expected to live a life of an ascetic, lost in meditation?"* Since then, a group of transgender persons have also joined the curative petition against section 377 as affected parties.⁸⁴

ii. Transgender Rights Legislation

There have been some advances toward implementing the *NALSA* decision, but nearly three years have gone past since the judgment and some of its core promises remain unrealized. Central and State governments have taken steps towards the implementation of the judgment.⁸⁵

⁸³ In para 18 of the judgment, in *NALSA v UOI*, the Supreme Court stated: "A Division Bench of this Court in *Suresh Kumar Koushal and another v. Naz Foundation and others* [(2014) 1 SCC 1] has already spoken on the constitutionality of Section 377 IPC and, hence, we express no opinion on it since we are in these cases concerned with an altogether different issue pertaining to the constitutional and other legal rights of the transgender community and their gender identity and sexual orientation."

⁸⁴ This case is discussed in detailed in Chapter II (i) of this report.

⁸⁵ Agencies of the Central Government have put in place measures on transgender rights following the *NALSA* decision. For example, the Ministry of Social Justice and Empowerment constituted an Inter-ministry Coordination Committee, which was primarily responsible for coordinating actions on the recommendation of the Expert Committee on Transgenders. The Ministry of Information and Broadcasting advised their media units to publicize transgender issues while disseminating their support programmes. The Ministry of Labour and Employment directed all states in the country to provide vocational training to transgender individuals under a Skill Development Initiative Scheme. State governments have also taken some steps. For example, Chhattisgarh announced a two per cent housing quota for transgender persons. Chhattisgarh and West Bengal have also announced plans to set up a Transgender Welfare Board. Kerala released its 'State Policy for Transgenders in Kerala' in 2015. The policy reaffirms the right to self-identification, and seeks to ensure equal access to social and educational policies, to legal institutions, and freedom from violence to transgender persons. It also envisages the setting up of a Transgender Justice Board. The state of Maharashtra also announced a Transgender Welfare Board to, among other things, provide access to education, employment, health and legal aid for the transgender community.

However, the passage of comprehensive transgender rights legislation that respects, protects and fulfills the full range of transgender persons' human rights, including the right to self-identified gender identity, is key to achieving the full implementation of the directions and promises in the *NALSA* judgment.

In April 2015, the Rajya Sabha, the Upper House of Parliament, unanimously passed a private members Bill introduced by MP Tiruchi Siva. The "Rights of Transgender Persons Bill" articulated a range of rights for the community, based on the *NALSA* judgment.⁸⁶ Later in 2015, the Ministry of Social Justice and Empowerment made available another draft of a union (i.e. central government) Bill on the same subject on its website, with a number of crucial amendments.⁸⁷ The ensuing public consultation on the draft resulted in wide criticism of both its content and the inadequate time provided for the actual consultation.

Subsequently, in 2 August 2016 the Transgender Persons (Protection of Rights) Bill 2016 was introduced in the Lok Sabha (Lower House of Parliament); since then Bill has been referred to a Parliamentary Standing Committee. This draft of the Bill gives rise to several concerns and risks undermining the promises of the *NALSA* judgment; if enacted and enforced in its current form, the Bill would also contravene India's human rights obligations, including in respect of its limited definition of who a transgender person is;⁸⁸ its failure to make adequate provisions on employment, education and anti-discrimination measures; and with respect to the penalties for relevant offences.⁸⁹

The manner in which the Bill is drafted assumes that transgender persons can only identify as "transgender" and not as "male" or "female". For many transgender people the decision to change official name and gender, and what to change it to (that is, to the category of "transgender" or "other", or to either "male" or "female"), is a political decision. Some transgender

⁸⁶ The Bill recognized and protected the rights of transgender persons to equality, to life, to free speech, to integrity, to family life?? , along with the right to be free from torture and other abuse. It provided for the right to equality of transgender children, and established measures regarding transgender persons' access to education, employment, social security and health. The Bill established National and State Commissions for Transgender Persons, and an exclusive transgender rights court within each district to adjudicate suits filed on behalf of transgender persons.

⁸⁷ It put in place a structure for legal gender identity recognition. It deleted, both, the provisions establishing National and State Commissions for Transgender Persons and those designating exclusive transgender courts.

⁸⁸ Section 2 (i) of the Bill defines a transgender person as someone who is: "(A) neither wholly female nor wholly male; or (B) a combination of female or male; or (C) neither female nor male; and whose sense of gender does not match with the gender assigned to that person at the time of birth, and includes trans-men and trans-women, persons with intersex variations and gender-queers". Using language like "wholly male" or "wholly female" to define a transgender person inaccurately assumes that gender identity is the same as biological sex. The terms "wholly male" and "wholly female" also reinforce harmful stereotypes and are at odds with transgender persons' dignity and integrity. For example, they further the misconception that a "wholly male" or "wholly female" identity exists, and that such an identity does not encompass transgender persons. The definition in the Bill also wrongly conflates the definition of an intersex person with that of a transgender person.

⁸⁹ For more details on the current draft of the Bill, see ICJ Briefing Paper "India: The Transgender Persons (Protection of Rights) Bill, 2016", available at: <https://www.icj.org/wp-content/uploads/2016/08/INDIA-TG-BILL-CRITIQUE-Advocacy-Analysis-brief-2016-ENG.pdf>.

persons told the ICJ that they chose the “male” or “female” category because doing so meant that it was more convenient or easier for them to negotiate public spaces. For example, one person described how having documentation saying they were “transgender” was a problem at airports, for example, because it was unclear which line they needed to stand in, how they would be screened at security, etc. For others, however, identifying as “transgender” was a very important political statement.

Furthermore, the Bill puts in place a process for legal gender recognition that undermines one of the core promises of the *NALSA* decision: the right to self-identified gender identity. This process puts the decision for gender change before two different sets of authorities, each of which is empowered to issue a “Certificate of Identity”. The identity certificate then serves as official proof of the individual’s gender identity, entitling people to change their details in other official identity documents, as well as serving as a tool through which to access rights and entitlements that might accrue to them as transgender individuals.⁹⁰ The recognition process set out in the Bill does not explicitly prescribe the requirements for recognition of gender change. The ensuing vagueness increases the discretion of the bureaucratic authorities responsible for issuing the certificate of identity. Furthermore, the draft recognition process does not clarify on what grounds the Screening Committee should issue its recommendation; it does not clarify the grounds on which the Magistrate’s decision is to be made; it does not give a timeframe within which the Magistrate must make this decision; and it does not specify how the applicant can challenge this decision.

While there is a need for strong and progressive legislation that respects, protects and fulfills the full range of human rights of transgender persons, the Bill, as presently formulated, can do more harm than good if it is adopted without certain necessary amendments.

iii. Problems changing Gender Identity

The legal recognition of a person’s chosen gender identity is crucial to ensuring their full citizenship and ensuring access to a range of human rights. It is integral to their personality and is recognized as being one of the most basic aspects of self-determination, dignity and freedom of expression. Failure to ensure legal recognition of a person’s chosen gender identity has meant that transgender persons have often been denied the full enjoyment and exercise of several human rights, including the right to vote, to education, to employment and access accurate identity documents.

Following the decision of the Supreme Court in the *NALSA* case, and in the absence of clear legislative guidance on this issue, transgender persons in India continue to have to navigate a myriad of unclear administrative barriers to achieve basic legal recognition of their gender. There is no national uniform

⁹⁰ Under the Bill, a transgender person may make an application to the District Magistrate for a certificate of identity as a transgender person. On receiving this application, the District Magistrate will refer the application to a District Screening Committee. The Committee makes its recommendations on the application following which the Magistrate will issue the certificate of identity to the applicant.

system in place to issue a new identity card or make changes in existing identity cards. Instead, the department in charge of each identity document put in place its own process for this. There are several options for identity documents in India: passports, *aadhar* cards,⁹¹ ration cards,⁹² pan cards,⁹³ school certificates, driving licenses, and voter identity cards. There is technically no requirement for all identity cards to carry the same name and gender. In fact, one transgender woman showed the ICJ the several identity documents she possessed, showing different names and gender identities, depending on what changes she had been able to make.⁹⁴ People can decide to make changes depending on which document they use most. However, transgender persons told the ICJ that they would prefer to have consistency across all documents, which they considered desirable as it would reduce administrative confusion and make the resort to using each relevant identity document easier for the person in question.

The process to issue new IDs or make changes to existing IDs, however, differs depending on the document in question. There are substantive differences across documents. For some documents – like the voter ID – people must register as “other” if they do not want to identify as “male” or “female”. For other documents – like the passport and *aadhar* card – the option given is “transgender”, not “other”. These processes often differ across states as well. In most cases, the process for changing the name and gender on a document involves making an affidavit stating the individual’s preferred name and gender identity; publishing the fact that individuals are changing their name and gender identity, and the preferred name and gender in a local paper; and notifying this in the gazette.

It has been almost three years since the *NALSA* decision. Reports suggest that several people have already acquired identity cards that reflect their preferred name and gender.⁹⁵ This is also corroborated by ICJ interviews with organizations working on these issues, such as Lawyers Collective and SAATHII. However, many people also told the ICJ they have either decided not to change their documents or have found it difficult to for a variety of reasons. Any future legislation on this issue must acknowledge and address these issues to ensure that all persons are able to fully exercise their right to legal recognition of their chosen, self identified gender identity.

⁹¹ *Aadhar* is a 12-digit unique identity number issued by the Unique Identification Authority of India (UIDAI), a governmental agency, which is becoming increasingly necessary to access a range of government welfare schemes.

⁹² A ration card is a government-issued document, which entitles people to food subsidies and other benefits.

⁹³ A PAN, or Personal Account Number, is an identification code required by everyone paying tax in India. It is also necessary for a range of other financial transactions.

⁹⁴ ICJ Interview, Thrissur, July 2016.

⁹⁵ See: “In a first, Aadhar recognises 1,600 transgender persons”, 27 August 2013, *Hindustan Times*, available at: <http://www.hindustantimes.com/delhi/in-a-first-aadhar-recognises-1-600-transgender-persons/story-Geb68xqQ8KiVT1cyUeqLxL.html>; “Kerala elections: Transgenders vote for the first time” 16 May 2016, *Indian Express* available at: <http://indianexpress.com/article/elections-2016/india/india-news-india/kerala-elections-transgenders-vote-for-the-first-time-2804041/>

The lack of clarity around how to officially change name and gender has inhibited people from accessing the process. ICJ was told that in some states, people were told that every gazette notification of a name and gender identity change had to be approved by the state cabinet, which is unnecessarily cumbersome.⁹⁶ In another state, people were asked for a residential certificate for any documentation.⁹⁷ Residential certificates are usually issued by the village headman, a customary administrative head, and attest to the fact that an individual resides in a certain location. The ICJ was told that village headmen often would refuse to grant residential certificates to transgender individuals, who on many occasions did not have an alternative proof of residence. Furthermore, the requirements differ across documents. For some documents – like passports, *aadhar* cards, and voter IDs – the process to change gender identity is set out. Others do not – like school certificates – and people found it harder to obtain the desired changes in those.

This lack of clarity has also made it easier for certain authorities to supplement the process with additional, problematic requirements. In one city, the ICJ was told that the authorities were asking for a “gender certificate”, which was being issued for a fee by a private hospital, before allowing for a gender change on documents.⁹⁸ In addition to not being officially mandated in any rule, this requirement is inconsistent with the principle of self-recognition. In other states, the ICJ was told that officials were still asking for medical certificates and evidence of sex reassignment surgery, despite the decision in *NALSA*.⁹⁹

Government officials and lawyers are also not informed about the fact that people are now entitled to their self-identified gender identity, and are therefore unable or unwilling to facilitate changes on documents. A, a transgender man, told the ICJ of his experience trying to change his name and gender identity on documents after making an affidavit: *“An officer there laughed at me and asked me if it’s possible for someone to change their gender. I told them that I was called [previous name] earlier and I have changed it to A now and that these transitions are now possible. I told them I had documents to show them. This happened at the District Magistrate’s office. I couldn’t meet the District Magistrate but officers outside told me to leave since they had no information regarding this and they made fun of me. I was trying to talk to them in hushed tones but they spoke loudly and everybody got to know of my issue. I showed them my affidavit and they told me to come back after a month. Like that, an entire year went by and nobody helped me out.”*¹⁰⁰ In some cases where people have been unable to get their

⁹⁶ ICJ Interviews, 2016.

⁹⁷ ICJ Interview, Guwahati, May 2016.

⁹⁸ ICJ Interview, Bangalore, July 2016.

⁹⁹ ICJ Interview, Chennai, July 2016.

¹⁰⁰ ICJ Interview, Kolkata, May 2016.

name and / or gender changed in official documents, they have approached courts for relief.¹⁰¹

Officials' attitudes are also not encouraging and do not help facilitate the process. T, a transgender woman, told the ICJ of her experience getting her voter ID issued as a transgender person: *"I went to the magistrate. The magistrate looked me up and down. I got a little scared. But then he processed it. Lots of people there were staring at me. They were wondering where I had come from"*.¹⁰² In another case, a notary making the affidavit questioned the person as to why he wanted to have his name and gender changed. J, an intersex person, told the ICJ: *"Government officials are not aware and ask a lot of uncomfortable questions ... anyway, I don't think I am trans. But there is no provision as intersex, that's why I'm opting for transgender"*.¹⁰³

Some people are unsure of what benefits would accrue to them as a result of changing their name and gender identity on their documents. They see it as an additional bureaucratic process, which may not be of any concrete assistance. This is particularly true in states where the *NALSA* judgment did not lead to any concrete welfare schemes for the benefit of transgender persons. As one transgender person told the ICJ, *"Some of our friends have started the process [to change their documents]. We haven't done it yet, as we are not sure of what are the rights and provisions after getting my gender change. Once I see TG people getting education and jobs as third gender, only then we will change our gender there are no government jobs for TG persons, any faculties, benefits or welfare schemes. If we see any changes happening then we will pay money and get it changed."*¹⁰⁴

Several people expressed concern about whether officially changing their name and gender identity would have a negative impact on their existing legal entitlements. For example, would people be able to access property that was registered in their birth name and gender? Would they be able to easily access property they would inherit in the future, which would be left to them in their birth name and gender?¹⁰⁵ People who had accessed entitlements based on one gender were worried about losing them if they identified as "transgender", "other" or a different gender.¹⁰⁶ Some transgender men had a

¹⁰¹ See for example, *S. Swapna (Transgender) v. The State Of Tamil Nadu*, in the Madras High Court, where the Court ordered the concerned authority to make the necessary changes, saying "When a transgender undergoes a sex reassignment surgery and makes an application thereafter for change of name and sex in the relevant records on the basis of various documents including the certificate issued by the Medical Officer, the concerned authorities are expected to verify the records and make consequential changes in the concerned records. The petitioner cannot be dragged from pillar to post on the ground that there are no rules permitting such changes in educational records. The petitioner has produced sufficient documents to prove her identity", available here: <https://indiankanoon.org/doc/125208179/>. The Delhi High Court is also currently hearing a similar case, more details are available here: <http://www.dnaindia.com/india/report-states-uts-have-to-certify-person-as-transgender-delhi-hc-told-2259360>

¹⁰² ICJ Interview, Guwahati, May 2016.

¹⁰³ ICJ Interview, Thrissur, July 2016.

¹⁰⁴ ICJ Interview, Kolkata, May 2016.

¹⁰⁵ ICJ Interview, Kolkata, May 2016.

¹⁰⁶ ICJ Interview, Kolkata, May 2016.

job as a result of being considered as falling within the “women quota” or had received a bank loan at special rates given to women. Furthermore, accessing their “Provident Fund” [a provision for post-retirement savings] was a problem.¹⁰⁷ Some employers refused to allow employees access to their savings if they changed their name and gender. People would have to first withdraw their savings and then initiate the process. And in some instances, it is not possible to withdraw one’s retirement savings unless the concerned employee is actually leaving the organization, which meant that people had to quit their job to ensure they could access their savings after they changed their name and gender.

One person also told ICJ that people who had changed their name and gender on their official documents faced several difficulties in terms of employment, and getting hired.¹⁰⁸ Other people, who already received certain affirmative action benefits based on their caste or other status, were worried about how these entitlements would intersect with what they might be entitled to as transgender persons once they changed their gender.¹⁰⁹ Other questions included: what tax bracket would people fall under after the gender change? In instances where personal laws provide different entitlements based on gender (e.g. under Muslim law in India, gender impacts the fraction of property share one is entitled to if parents die intestate), how would people’s rights be understood if they identified as transgender?

¹⁰⁷ ICJ Interview, Bangalore, July 2016.

¹⁰⁸ ICJ Interview, Delhi, October 2016.

¹⁰⁹ ICJ Interview, Bangalore, July 2016.

III. Police Violence and Harassment

For many people, the police represent the first point of contact with the criminal justice system. The attitude and behavior of the police is one of the biggest barriers to queer persons' access to the justice system in India. Several people spoke to the ICJ about the violence, abuse and harassment they suffered at the hands of the police. Furthermore, in several cases, the police have refused to file complaints submitted by queer persons owing to bias or stereotypes. In light of this, the ICJ is concerned that the police's negative attitude towards queer people in India puts them at an increased risk of violence from non-State actors as well.¹¹⁰

The purpose of this chapter is to describe how real or perceived sexual orientation or gender identity affect interactions with the police; what particular experiences people interviewed for this report have had; and how such experiences have in turn had an impact on the willingness and ability of queer communities in India to seek justice and redress through formal institutions.

Other marginalized groups in India - including religious minorities and indigenous communities - are also adversely impacted by negative stereotypes and biased attitudes on the part of law enforcement officials. Class and caste perceptions play a large role on the nature of the experience one has with law enforcement. By analogy, women's rights groups have advocated for police procedures to be more responsive to the needs and realities of women who interact with the justice system. Often, the intersections of these multiple identities can mean that certain persons have particularly bad and extreme experiences with the police.

Not all queer persons would necessarily have the same experience with the police. For example, a person who identifies as transgender in India might have a different experience with the police than someone who identifies as gay, or bisexual, or lesbian would. Police behavior also changes, for example, depending on the region; the perceived class and caste of the queer person involved; and the language used. This section attempts to describe some of these experiences, but it is not exhaustive.

The information reflected in this section is largely anecdotal, and is based on ICJ's interviews with people, media monitoring and a thorough literature review. A lot of the information relevant for this study is either not documented or is not systematically collected by local, state or the Union governments. For example: when police officers threaten queer persons using certain provisions of the law, their complaints, if any, are rarely officially recorded and indeed often no actual complaint is filed. However, one way to

¹¹⁰ For example, see UNDP, *HIV/Transgender Women in India: HIV, Human Rights, and Social Exclusion, Issue Brief*, 2010, "Even from police, they face physical and verbal abuse, forced sex, extortion of money and materials; and arrests on false allegations. Absence of protection from police means ruffians find Hijras/TG people as easy targets for extorting money and as sexual objects", available at: http://www.undp.org/content/dam/india/docs/hijras_transgender_in_india_hiv_human_rights_and_social_exclusion.pdf

document what is happening is by recording the testimonies of the affected individuals. In the context of transgender persons specifically, data on how many transgender persons are detained and under which provisions is not recorded by the National Crimes Records Bureau. As the Expert Committee formed by the Ministry of Social Justice and Empowerment stated, “Cases of atrocities by Police against Transgenders have been highlighted in media and brought to the notice of Courts, although no separate data is maintained by National Crime Record Bureau (NCRB)”.¹¹¹

A. Police Abuse

For harassment [of queer persons] you don’t really need a law. You just need the threat of the uniform.

Kaushik Gupta, lawyer based in Kolkata¹¹²

Reports and studies have used qualitative data to document the extent of police abuse and violence against queer persons for several years now. For example, a People's Union for Civil Liberties (PUCL), Karnataka report from 2001 recorded instances of police extorting money from, abusing, and illegally detaining persons identifying as gay, bisexual and transgender in Bangalore.¹¹³ A 2003 report by the PUCL also documented similar allegations of police abuse and violence against transgender sex workers.¹¹⁴ In turn, the Supreme Court acknowledged the existence of a pattern of human rights violations against transgender persons at the hands of the police in its decision in the case of *NALSA v UOI*,¹¹⁵ and identified how the lack of legal gender recognition increased the risk that transgender people would become victims of abuses perpetrated by the police as well as by private individuals. In this context, *NALSA* noted that

Non-recognition of the identity of Hijras/transgender persons denies them equal protection of law, thereby leaving them extremely vulnerable to harassment, violence and sexual assault in public spaces, at home and in jail, also by the police ... Some of the common and reported problem that transgender most commonly suffer are: harassment by the police in public places, harassment at home, police entrapment, rape, discriminations, abuse in public places.¹¹⁶

In 2015, the State of Kerala released a document entitled “State Policy for Transgenders in Kerala”. It included findings from surveys the government

¹¹¹ Report of the Expert Committee on the Issues relating to Transgender Persons, available at: <http://socialjustice.nic.in/writereaddata/UploadFile/Binder2.pdf>

¹¹² ICJ Interview, Kolkata, May 2016.

¹¹³ Human rights violations against sexuality minorities in India, A PUCL-K fact-finding report about Bangalore, available at: <http://www.pucl.org/Topics/Gender/2003/sexual-minorities.pdf>

¹¹⁴ Human Rights Violations against the Transgender Community: A PUCL Report, available at: <http://www.pucl.org/Topics/Gender/2004/transgender.htm>

¹¹⁵ National Legal Services Authority v. Union of India, (2014) 5 SCC 438.

¹¹⁶ Para 55 and 112, National Legal Services Authority v. Union of India, (2014) 5 SCC 438.

had conducted, stating that “52% of the TGs [transgender people] are facing harassment from the police. 70.3% are not confident to face the police” and that “96% do not raise complaints against violence because of their gender identity”.¹¹⁷ The policy proposed that, “Every police station should amend forms to record and compile statistics of crime against TGs”.

Reports in the media have also documented the reality of police violence and abuse against queer people in India.

Despite these acknowledgements, incidents of police violence and abuse against queer persons continue. Several transgender sex workers shared harrowing stories of police violence and abuse with ICJ, some lasting for many years. For example, one transgender woman who engaged in sex work told the ICJ about an incident where she reported to the police that she was being chased by a gang of seven men and feared being assaulted by them. A police officer offered to provide protection to her from her attackers if she agreed to have sex with him. *“Better to be with one man than 7”*, she said while describing the incident. *“We do this whenever necessary. We keep the policemen pleased so that they look out for us in case we get attacked or if we our out at night for sex work.”*¹¹⁸ In June 2016, Kochi the police brutally beat two transgender women who were waiting at a bus station. Both of them had to be hospitalized as a result of their injuries.¹¹⁹ Some people have alleged that the police beat them assuming they were sex workers.

S, a transgender woman who works with a sex worker group,¹²⁰ told the ICJ: *“I was raising questions about why sex workers are arrested but not the client. I was beaten up by the police and brought to the police station. They told me to be more like a man. They told me to call my father and then they told him false things. If they hate anyone, they bring them to the police station. After that my father cried and asked me to leave the house.”*

T, another transgender woman, told the ICJ, *“Several years ago, my brother was involved in a murder case. The police came to our house, to look for him. In the process they arrested me. They came and picked me out of my house in the middle of the night. The constables said ‘this is a hijra, this is his brother. Lets take him’. They kept me in lock up [police custody] for two days. They never gave me any food or water. For two nights they assaulted me”*. T was raped and tortured at the police station. *“I can never forget that day. I don’t wish them any ill will – but if my brother was wrong, why did they arrest me, torture me, beat me, have sex with me?”*¹²¹

For some people, the existence of laws like section 377 means that their ability to negotiate with the police and assert their rights and/or to file

¹¹⁷ Page 9 of policy, on file with the ICJ. Department of Social Justice, Government of Kerala “State Policy for Transgenders in Kerala 2015”

¹¹⁸ ICJ Interview, Delhi, April 2016.

¹¹⁹ “Kochi police brutally attacks transgender people” 3 July 2016, *Indian Express* available at: <http://indianexpress.com/article/india/india-news-india/transsexuals-allege-they-were-attacked-by-police-in-kochi-2892004/>

¹²⁰ ICJ Interview, Thrissur, July 2016.

¹²¹ ICJ Interview, Shillong, May 2016.

complaints, for example in cases of police harassment, is nearly non-existent. Y, a gay man, told the ICJ *"I was caught making out in the car with my boyfriend and the police asked us for money and harassed us for some time. I didn't know what to do so I had to pay them"*.¹²²

Reluctance to approach the police also stems from the fact that many queer persons have either not revealed their gender identity or sexual orientation to their families, and/or do not want to their families to become involved. Lawyers have told the ICJ that queer people are reluctant to approach the legal system to seek justice and redress for the abuses they suffer because they know that filing a complaint would lead to unwanted questions being asked about them. For people whose families are not aware of their sexual orientation and gender identity, seeking justice and redress therefore presents additional risks.

B. Refusals to file complaints by the Police

Queer people's trust in the police is further eroded by the frequency of their negative interactions with police, for instance, when attempting to register complaints regarding violence and other crimes against them at the hands of private individuals. The police's refusal to file such complaints has a seriously detrimental impact on queer persons' access to justice and redress.

i. Police Stereotypes and Prejudices

The police are often reluctant to file queer people's complaints because of prejudices, preconceptions and stereotypes. C, a transgender man, told the ICJ about an experience he had while on a public bus. *"People on the bus started to ask me whether I was a boy or girl, and threatened to take my clothes off. I had to get off,"* he said. C went to the police station to file a complaint and to seek protection. However, the police refused to register a complaint. *"They asked me questions like 'did you know the people on the bus', 'where are your parents', and 'why are you dressed like this?'"* Finally, C had to call a lawyer he knew to get the complaint registered, and even then, he was not given a copy of the complaint. *"I have no idea what happened to that case,"* he said.¹²³ The ICJ was also informed about a case in 2013, when four men raped a transgender woman one evening. When she tried to file a complaint at the police station, the police asked her questions like *"Have you really been raped? How can you be raped?"*¹²⁴

In cases involving lesbian couples wishing to live together, families often attempt to end the relationship by holding their relative captive to prevent her from leaving with her partner. In ordinary cases, such captivity would constitute criminal behaviour, potentially involving the commission of serious criminal offences, since it involves the unlawful confinement of someone

¹²² ICJ Interview, Pune, September 2016.

¹²³ ICJ Interview, Bangalore, July 2016.

¹²⁴ ICJ Interview, Chennai, July 2016.

against their will.¹²⁵ However, when attempts are made to file cases with the police against family members responsible for holding relatives against their will and to demand that they be freed, the police have often refused to take any action. Sunil, a gender-queer activist, described an experience with one such case where the mother and husband of a woman were forcibly holding her captive at home to prevent her from leaving with her partner. Sunil told the ICJ: *"We went to the police station to file a complaint, first stating that the mother and husband had kidnapped her. They refused to file that case so we changed tracks and tried to file it as a missing persons complaint, which was also refused ... We willfully kept the partner out of the scene, because didn't want the "lesbian" allegations to overwhelm the case"*.¹²⁶ Writing elsewhere about this case, Sunil and Sumathy, another gender-queer activist, described what happened in this case, saying *"the police refused to take the complaint stating that a mother and husband cannot abduct their own girl"*.¹²⁷

In one State, a queer group approached the police for permissions to hold a Pride event. *"When we went for pride permission to the police station, the response of one of the officers was an expression of disgust. He was just mocking us. Then we realized sensitization of police is a really important thing we need to do"*.¹²⁸ In another, an activist told the ICJ *"While organizing the pride parade, we went for police permission. The police asked me why we are doing this and told us that 377 is non-bailable. They gave us permission but they were mocking us during the pride"*.¹²⁹

Furthermore, approaching the police to file a complaint can also put the complainants at some personal risk, including of arrest and criminal charges, because of police stereotypes regarding queer persons. For example, in July 2016, a group of 11 transgender persons visited a police station in Kochi to file a complaint against a group of people who had assaulted them. Instead of recording this complaint, the police arrested them, charging them with offences under sections 394¹³⁰ and 395¹³¹ of the Indian Penal Code. Their

¹²⁵ E.g., Section 340 of the IPC states: Whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said "wrongfully to confine" that person. And Section 343 of the IPC states: Whoever wrongfully confines any person shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

¹²⁶ ICJ Interview, Bangalore, July 2016.

¹²⁷ Sunil Mohan and Sumathi Murthy "Towards Gender Inclusivity: a study on contemporary concerns around Gender" at page 42.

¹²⁸ ICJ Interview, Guwahati, May 2016.

¹²⁹ ICJ Interview, Kerala, July 2016.

¹³⁰ 394. Voluntarily causing hurt in committing robbery.—If any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with 1[imprisonment for life], or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

¹³¹ 395. Punishment for dacoity.—Whoever commits dacoity shall be punished with imprisonment for life], or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine. Dacoity is defined in section 391 as follows: When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity".

lawyer told the ICJ the charges were unfounded. After 14 days in detention, they were released on bail.

Very often in cases of petty harassment by law enforcement, people are not told why they have been detained or under what provision. ICJ spoke with H, a transgender woman, who has encountered the police often while begging on a train. Once she was arrested on the train with some friends, taken to the police station, and produced before the magistrate. She was never told under what provision she was arrested or why she had been taken to court. *"The magistrate asked us if we did something wrong, if we did some harassment of public. We said no, but we don't know why this case was brought. Then the magistrate just told us, don't do this again"*. She has been arrested on other occasions as well, and has sometimes paid a fine. But she has no paperwork explaining why she was arrested or what the fine was for. *"Sometimes people get off running trains for fear of the police"*, she said.¹³² Others with whom the ICJ spoke had similar experiences with police harassment and no proof or paperwork.

The fact that queer people often fear being arbitrarily arrested and detained, charged and prosecuted or otherwise harassed, abused and persecuted by the police has negative ramifications on the ability of the police themselves to effectively investigate crimes, since the very people who probably have the most valuable information about the said crimes are unlikely to cooperate in the investigation. Kaushik, a lawyer who handles several cases involving queer people, described a case where a transgender person was murdered, but no one from the transgender community was willing to assist the police in their investigation because they were afraid of being implicated in the case.¹³³

In some instances, people had more success getting the police to file complaints when they approached the police as a collective, instead of as individuals alone. For example, Anandam told the ICJ about a case where a transgender woman was robbed of her jewelry.¹³⁴ The police initially refused to register a First Information Report for robbery after she complained. She then contacted Anandam following which her complaint was eventually registered but only after several members of the group spoke to the police. While ultimately the fact that the complaint was registered is a positive sign, this case illustrates how difficult access to justice and redress may be for those queer persons with no links to civil society organizations.

ii. Accountability for Police Abuse

Demands for justice and accountability for police abuses have led to direct forms of reprisal by the police against those denouncing their abuses. On 9 November 2016, Tara, a 28-year-old transgender woman, was found severely burned outside a police station in Chennai, in the Indian State of Tamil Nadu.

¹³² ICJ Interview, Guwahati, May 2016.

¹³³ ICJ Interview, Kolkata, May 2016.

¹³⁴ ICJ Interview, Kolkata, May 2016.

She succumbed to her injuries and died in hospital very soon after. Transgender groups in the city demonstrated outside the police station, demanding accountability for her death, and asserting that police harassment and abuse had driven her to kill herself. In response, the police filed charges, including for "rioting", against the protestors.¹³⁵ The investigation and case are still on-going.

M's Case

M's experience with the police is an example of how pressure and mobilization can sometimes lead to police accountability.¹³⁶

In October 2015, M – a transgender woman - was traveling on a metro train in Kolkata, a town in the Indian State of West Bengal, with four other friends, two of whom were transgender persons as well. Four men harassed them on the train, including by calling them names and demanding sex. M asked them to stop. On exiting the train, M was attacked by the same men. "*They pounced on me because I had been vocal on the metro. They slapped me, and dumped me on the ground*", M told the ICJ. M managed to escape, and approached a police officer near by with her friends. The police officer told her that the police station with jurisdiction over the offence was Bhawanipore [a near by area, in Kolkata], and asked her to go there to lodge a complaint. They went to Bhawanipore police station, and told the officer on duty their story. However, at this police station the police officers also refused to lodge a complaint and asked them to go to the police station in Tollygunge [another area near by, in Kolkata]. They reached Tollygunge police station at 2:00 am. The police officer called M and her friends "beggars" and "snatchers". "He talked in a way that made it seem as though the transgender community was responsible for all the crimes in Kolkata". He was initially reluctant to register an FIR, but after a lot of insistence from M, finally did. However, no arrests were made that night. Six months later, M was asked to provide a description of her attackers to the police. To date, there has been no progress with the investigation.

M narrated her experience to friends and other activists, which led to mobilization and protests against the attitudes of the police. They were recently informed that the officers on duty that night have been disciplined, and one of them has been demoted.

Jayalakshmi v Tamil Nadu is an example of a case where a demand for police accountability was successful.¹³⁷ Pandian, a transgender person, was repeatedly raped and tortured by the police during the course of an investigation. One day, Pandian attempted suicide by trying to immolate themselves. They were treated for burn injuries at a nearby hospital but succumbed to them later. Pandian's family filed a writ petition at the High Court for compensation from the police for the wrongful death of Pandian,

¹³⁵ <http://www.thenewsminute.com/article/chennai-transgender-woman-immolation-police-file-cases-against-protesters-community-52726>

¹³⁶ ICJ Interview, Kolkata, May 2016.

¹³⁷ <https://indiankanoon.org/doc/1373799/>

and also asking the police to initiate disciplinary action against the perpetrators. The Court found that Pandian had tried to kill himself because *"the Sub-Inspector of Police ... has tortured him by inserting the lathi [a wooden stick] inside his anus and few other police personnel including respondents 3 to 8 have forced him to have oral sex and this was going on for the past two weeks"*.

While the Court eventually found that the case of police harassment was made out, ordering that Pandian's family be paid compensation, and that disciplinary action be taken against the police officers responsible, the actions of the police as found by the Court in the above-mentioned judgment amount to egregious human rights violations, disclosing evidence of serious crimes such as torture and rape, which have gone unpunished under ordinary criminal procedure.

Like in many other cases in India, even when complaints are filed, it is not clear whether any follow up or investigation is ever carried out.

Queer groups that approach the police for assistance when faced with intimidation from non-state actors are also often not supported by the police. When the first pride in Assam was organized a few years ago, a sexual health organization (which was working with groups at high risk of HIV, including transgender sex workers and gay men) hosted a meeting for the organizers. On hearing about this meeting, a right-wing student group ransacked the office and held protests outside it. The organization filed a complaint with the police regarding this, but nothing was done.¹³⁸

Very often, queer persons' social and economic marginalization makes it harder for them to follow through on a case they have filed, which can take years in the Indian legal system. C told the ICJ of a case in Bangalore, Karnataka where a transgender sex worker was assaulted, and he accompanied her to the police station to lodge a complaint. The police asked her questions like "what are you", "why are you out so late" and "why do you do sex work". *"They also pressured her into not pursuing the case,"* C said. *"She was worried about her safety, so she just took some money from her attacker to pay medical bills. She didn't want to keep it going. She was scared and said she didn't want to run from police station to court. It takes very long, how long can we wait? People feel it is not worth the pain"*.¹³⁹

iii. Police behavior when cases are filed against queer persons

Part of the mistrust that some queer persons displayed towards the police has to do with the discriminatory attitude and behaviour of law enforcement officials in dealing with cases involving queer persons. There have been several instances of adult lesbian couples running away from home and their families to start a life together. In such cases, their families usually file "missing persons" complaints with the police, or even accuse one of the

¹³⁸ ICJ Interview, Guwahati, May 2016.

¹³⁹ ICJ Interview, Bangalore, July 2016.

partners of “kidnaping” or “abduction” their missing relative.¹⁴⁰ The police have a duty to inquiry into the veracity of these claims. In cases where the women have been found, the attitudes and biases of the police have often meant that police officers have insisted that each woman should return to her “home” and her family, even when they individuals in question were adults and clearly stated that they would not wish to live separately from one another. Sunil noted, *“In the case of a missing persons case that is filed, if it is an adult person, the police’s responsibility is to find that person. If the person says they don’t want to come back, the case is closed. Or should be. But if it is a lesbian woman, the police will insist that the person has to go back to the family”*. In a similar case in a different state, despite the woman repeatedly telling the police that she was an adult and wanted to live away from her parents, the police kept sending her back to her parents.¹⁴¹

In another case, a prominent sexual health organization was assisting a lesbian couple who wanted to move to a different city to live together. At one point, because the family of one of the two women involved was holding her captive, the organization concerned brought a case seeking her release. The police searched the office of the organization. *“They accused us of running a ‘lesbian mafia’”,* one staff member told the ICJ. Similarly, when two women ran away from home, the father of one of the women filed a case of theft against his daughter. The police followed the two girls from Mumbai to Delhi, and brought them back home, even though they knew that the theft claim was spurious.¹⁴²

C. Other Experiences with the Police

People have also said that police are not adequately sensitized to interact with queer persons, and are lacking in basic diversity training and failing to adopt and implement protocols and procedures that respect and take account of their human rights. For example, a lawyer defending a trans-woman accused of raping her female partner told the ICJ that the police disregarded her client’s self-identified gender. Despite her lawyer’s protests, for example, she was placed in the male section of the prison.¹⁴³

In another case, Ketki Ranade, a queer feminist activist told the ICJ of her experience with the police in a case where a lesbian couple had tried to commit suicide together. One of the women died and the other survived. The police had been called to the scene. *“We went to inquire about this case and tried to speak to the girl who survived saying that she might be in need of mental health support,”* Ketki Ranade said. *“The police said that it would be great if we could use counseling to correct her. They said they would be*

¹⁴⁰ IPC Section 362. Abduction: Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person.

¹⁴¹ ICJ Interview, Thrissur, July 2016.

¹⁴² ICJ Interview, Mumbai, September 2016.

¹⁴³ ICJ Interview, Kolkata, May 2016.

*obliged if we could cure them.*¹⁴⁴ This comment from the police to “correct” and “cure” her is particularly concerning in this instance, since the woman who survived was obviously distressed and in need of care and support.

An inability to communicate in English is often a limitation for individuals in successfully approaching the police throughout the country. As much is true for queer persons who do not speak English, and are therefore often twice discriminated against in their interactions with the police. M a transgender woman who had gone to the police to file a complaint and who was accompanied by some friends of hers who were also transgender women noted how the police treated her very badly at first and refused to register her complaint, apparently because she and her friends spoke in Bengali and not in English. It was only when M began addressing the policemen in English that their behaviour changed and the complaint was eventually filed.

Members of Anandam recounted a similar experience where, in approaching the police to report an incidence of violence against a transgender person, the Bengali-speaking group was told off by the police and in turn blamed for the incident. This attitude changed completely when a friend accompanying them spoke up in English. The police then began to address the group with respect and registered the case. Organizations that provide legal training to queer communities, like SAATHII, also told the ICJ that basic knowledge of the law was key: knowing the law gave people confidence to push back when they were being harassed by the police.¹⁴⁵

¹⁴⁴ ICJ Interview, Mumbai, September 2016.

¹⁴⁵ ICJ Interview, Chennai, July 2016.

IV. Experiences with Lawyers and Courts

Thus far, this report has looked at the substantive laws that impact queer persons in India, and queer persons' experiences with the police. This chapter examines what experiences queer persons have had when they have tried to access courts and lawyers. The first part of this section will look at issues that emerge around legal representation and interactions with lawyers. The next section looks at challenges that arise within the courtroom, as well as their potential to be transformative in ensuring justice. It ends with looking at a few emerging questions, including the difficulty of establishing precedent.

A. Existence of Queer Friendly Lawyers

The availability of queer friendly lawyers providing high quality legal assistance, advice and representation to queer individuals is critical in obtaining access to justice and effective remedies for the human rights abuses they suffer. ICJ interviews demonstrate that cities that have robust legal networks, or even well known individual lawyers, witness a higher degree of engagement with the justice system. On the other hand, where those networks have not emerged, the consequence is an inability to access justice and legal remedies.

Bangalore, Delhi and Mumbai play host to at least one larger collective of human rights lawyers that extensively work on cases concerning the human rights of queer people along with other individual queer friendly lawyers who have independently worked on this type of cases on their own. Many of the other cities feature individual lawyers who handle a large volume of queer clients, along with larger organizations that do some amount of work on queer issues.

The existence of Lawyers Collective (LC) - a network of public interest lawyers formed in 1981 whose work spreads across multiple cities in India - is an example of the importance of queer-friendly lawyers. LC has spearheaded major litigation on the rights of queer persons in India. For example, they filed the *Naz Foundation* petition in 2001, and continue to represent the petitioners, Naz Foundation in the curative petition before the Supreme Court. They were amongst the primary lawyers in the *NALSA* case (see Chapter II for more details about these cases).

Beyond these two major constitutional litigations, the organization has also argued several habeas corpus petitions involving queer persons (see the box below for more details on these petitions) and been part of litigation and advocacy efforts on legal gender recognition, with a number of cases in this report having been initiated by them or featuring their inputs. The organization also provides legal advice and representation to queer persons in India on issues around discrimination; violence and safety; access to health; and when queer persons are arrested or detained by police. LC's current work spreads across litigation, advocacy and trainings on queer rights issues. The fact that the organization is either present in or has strong links with lawyers

in several Indian cities has allowed their expertise on these issues to be used broadly.¹⁴⁶

Taking Bangalore as another example of the value of robust queer friendly lawyering networks: The Alternative Law Forum (ALF) in Bangalore is a collective of human rights lawyers that has been actively working on issues of queer rights for the past 15 years.¹⁴⁷ The Centre for Law and Policy Research (CLPR), a relatively new organization, has also entered the fray, providing legal support particularly for transgender individuals.¹⁴⁸ This is in addition to a number of other queer friendly lawyers and activist groups that have engaged with the lawyers in these organizations over the years.

In the case of ALF, it has allowed the organization to become a facilitating centre for transgender individuals aiming to obtain legal recognition of their gender identity, as well as providing a crucial support system when it comes to legal support for intervention in emergency cases. When it comes to gender recognition, ALF lawyers have created a standard form affidavit to facilitate the administrative requirements for transgender clients, along with assisting them in approaching different authorities. Other groups in the city, in turn, have started approach ALF as a focal point for such work. Together with the People's Union for Civil Liberties, ALF was also behind a fact-finding report on a range of human rights violations perpetrated against the transgender community, which was relied upon by the Delhi High Court in the constitutional challenge to Section 377. ALF has been a member of the litigation team to this challenge, which CLPR joined in 2016 at the curative stage.¹⁴⁹

In the context of this litigation (i.e. the ongoing case focusing on the constitutionality of Section 377), CLPR represents a group of transgender petitioners who argue that the continued existence of section 377 violates their constitutional rights. CLPR also represented transgender individuals in the constitutional challenge to section 36-A of the Karnataka Police Act in 2015 (for more information about this case, see Chapter II of this report). Both constitutional challenges are linked to CLPR's work with queer communities in Bangalore, Karnataka.

Of the cities where the ICJ conducted interviews, Guwahati in Assam stood out in terms of a lack of available lawyers. Interviews with activists working at Xukia, a queer collective in the city, noted how they did not know of a single queer friendly lawyer in their immediate networks. This was echoed by another activist who recounted an incident, where a queer friend of his, was unable to find legal representation after he was blackmailed. The activist in question told the ICJ that he did know of a few lawyers generally, but nobody

¹⁴⁶ For more information, see: <http://www.lawyerscollective.org/vulnerable-communities/lgbt/lgbt.html>

¹⁴⁷ For more information, see: <http://altlawforum.org/>

¹⁴⁸ For more information, see: <http://clpr.org.in/>

¹⁴⁹ See chapter II of this report for more details of this case. See also the International Commission of Jurists Briefing Paper on 377 Curative, available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2016/03/India-QA-art-377-Advocacy-Analysis-brief-2016-ENG.pdf>

who practised human rights law. Pune in Maharashtra emerged as another city where relevant lawyer networks do not exist or are difficult to locate. As one activist noted, the distance from Mumbai, the nearest city where legal support is available, hinders dealing with matters of urgency. In both cities, the unavailability of queer friendly lawyers means that resort to legal avenues of redress tends to be delayed or is simply not an option.

The importance of creating larger networks of queer friendly lawyers – as well as the challenges inherent in such an undertaking – are illustrated by the experience of Kaushik Gupta, an advocate at the Calcutta High Court who organizes trainings where the State Legal Services Authority lawyers train the District Legal Services Authority Lawyers. He noted how he had led a training session in 2016 in West Bengal for about 125 lawyers, where not a single lawyer was aware of the *NALSA* judgment. During a workshop he organized in Delhi, one of the lawyers from the state of Haryana refused to refer to the *NALSA* judgment as an example in his presentation, stating – “*no, how can we do that, they are illegal, they can’t marry, we can’t do this, it is wrong*”. During the questions and answers session, Kaushik relayed a question that a transgender client of his had put to him, where she had asked about how she could be protected from harassment since people abused her for dressing like a woman, even at police stations. A lawyer from Chennai answered: “*the only advice that can be given is: stop dressing like that*”.

Sometimes, even knowing that their lawyers are biased against them, queer individuals find themselves without a choice when it comes to legal representation. In one instance in Coimbatore, Tamil Nadu in 2007, for example, two lesbian women were accused of murdering another lesbian woman. Queer activists supporting the two women enlisted the help of a senior lawyer from Bijapur, Karnataka. Initially, however, he maintained that he did not know anything about “homosexuals” and “could not handle this case”. On being presented a range of information about homosexuality and the facts of the case he agreed to act as the women’s defense counsel, while noting: “*You people are freaks. But freaks have human rights, so I’m going to fight this case*”.

Several people also told the ICJ that they believed that a lack of willing and experienced lawyers who were sensitive to issues of gender, sexuality, and queer rights in India hindered the possibility of obtaining justice in courts. Pawan Dhall, a gender and sexuality activist and writer associated with Varta Trust in Kolkata gave the ICJ an illustrative example. In 2005, a group working on the rights of queer persons in the State of West Bengal participated in a book fair and distributed books on HIV, sexual health and sexuality. A few days into the fair, the organizers forced the group out of the fair, saying they were distributing “adult material”. The group challenged their removal from the fair in court. Pawan told the ICJ that they only knew one lawyer at the time, who did not understand the links between issues of stigma around homosexuality and HIV vulnerability. Eventually, the court ruled against the group, saying they only had permission to distribute books on “HIV/Health” whereas the books they were distributing were largely about

“homosexuality”. This outcome might have been different if the lawyer understood the links between sexuality, stigma, and HIV, and was able to explain this to the court.

The existence of networks of experienced legal professionals who make themselves available to advise and represent queer individuals to assist them in accessing justice and redress for the human rights violations to which they are subjected is however only the first step. The next sets of challenges arise when queer-friendly lawyers themselves attempt to navigate a legal system that is biased against them and ignorant about the fact that the rights of queer people are human rights.

B. Challenges Faced in Courts

Lawyers and queer persons face a new set of challenges once they are in court. Here, several persons told the ICJ about harassment in the form of remarks made by judges and public prosecutors, which undermines the foundations of the justice system. A number of instances show how transgender persons are particularly at risk of discrimination in these spaces, which, in turn, seriously undermines their chances of obtaining justice and redress.

F, a transgender man in Thrissur, Kerala, spoke about how when he used to appear in the Court of a judicial magistrate for a case he had filed, everybody including the judge would stare and laugh at him. This experience was echoed by S, a transgender woman in Kochi in the same state, when she was summoned as witness in a case involving a motor vehicle accident. W, a lawyer based in Bangalore who represents transgender persons in a number of cases, noted that while she did not think the Courts in the city were actively discriminatory, during one court hearing when she had her transgender clients come to court, the judge told her to inform her clients that “they create a lot of nuisance”. Rajesh, an activist based in Bangalore, told the ICJ about a case involving two lesbian women who wanted to live together in Kerala against the wishes of their families.¹⁵⁰ In Court, the public prosecutor often argued “there are no lesbians in the state of Kerala”, and the presiding judge did not correct or challenge this. Facing these attitudes in Court dissuades queer persons from accessing courts.

Several lawyers also told the ICJ that they face a number of basic, procedural issues in cases involving the rights of queer persons that they may not otherwise encounter. While some of these may appear to be minor, they point to the additional difficulties that queer persons, who have already likely experienced grave human rights violations, and their lawyers face when they try to enforce their right to remedy. For example, Kaushik discussed his experience in 2002 representing a transgender woman who had been charged

¹⁵⁰ Their parents had filed a writ of habeas corpus [the use of *habeas corpus* petitions in cases involving the human rights of queer persons is explained in more detail below], asking for the women to be “found” and brought home. The two women argued that they wanted to live together.

with defamation.¹⁵¹ He faced very basic procedural problems such as how to draft submissions in the case, which require individuals to be addressed as “son of/ daughter of” or husband of/ wife of” another person. He was not certain how to refer to a transgender woman in this situation, especially when her identity documents did not reflect her name or gender identity of choice. He improvised referring to the client as “X, wife of Y, earlier son of Z”. While accurate, this drafting was unconventional and prompted a judge to enquire angrily whether Kaushik even knew how to draft, while another judge refused to touch the brief.

C. The Court as an Empowering Space

Beyond these accounts, Courts can and do stand as crucial forums where acknowledgement of the human rights violations faced by queer persons, and the crafting of positive legal remedies, create a positive impact that reverberates far beyond the immediate case. When Courts deliver justice in cases raising the human rights of queer people, they often create the space for a more inclusive interpretation of the law. This report has already discussed the decision in the *NALSA* case in detail in Chapter II, which expanded the range of prohibited discrimination under the Indian Constitution. In this case, the Court expanded the prohibition against discrimination based on sex in Article 15 to include discrimination based on gender identity as well.

The reasoning in the *NALSA* decision was accompanied by equally welcome language: the judgment began with a sentence acknowledging the trauma that members of the transgender community undergo. The Court said that:

Seldom, our society realizes or cares to realize the trauma, agony and pain which the members of Transgender community undergo, nor appreciates the innate feelings of the members of the Transgender community, especially of those whose mind and body disown their biological sex. 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.¹⁵²

This acknowledgement and sensitivity is also evident in other appellate court judgments dealing with transgender and intersex rights following *NALSA*. The week after the *NALSA* judgment was handed down, the Madras High Court passed an order setting aside the dismissal of a female-identified individual with an intersex variation from the police services in Karur district in Tamil Nadu. Here the judgment began by an implicit acknowledgment of righting past wrongs, with the judge cautioning that nothing in his order should have,

¹⁵¹ Defamation exists as both a civil and criminal offence under the Indian legal system. Section 500 stipulates imprisonment of up to 2 years for someone held guilty of criminal defamation.

¹⁵² Para 1, *NALSA v UOI*.

even remotely, “a semblance of tendency to hurt the feelings and sentiments of the transsexuals”.¹⁵³ In September of 2015, the Delhi High Court passed an order safeguarding the autonomy of a female to male transperson who was held captive against his will by his parents. Again, the judge displayed a remarkable understanding of transgender oppression starting the judgment with an acknowledgment of the strength of the petitioner in deciding to approach the court: “*Shivani is a braveheart*”.¹⁵⁴ Later in the judgment there is a further acknowledgment of the struggles faced by transgender persons: “*they have for too long had to endure public ridicule and humiliation; have been socially marginalized and excluded from society, their basic human rights have been severely denuded*”. In *Pinki Pramanik vs State Of West Bengal*, the Calcutta High court quashed charges of rape, and other criminal offences, against an intersex person, accepting the petitioner’s argument that these charges were “vexatious and male fide”.¹⁵⁵

Use of *habeas corpus* petitions

Several people told the ICJ of the use of *habeas corpus* petitions in cases involving the human rights of queer persons. Traditionally, *habeas corpus* petitions are a writ remedy in several common law systems, which allows people to challenge an unlawful arrest or detention in a court, so the court can decide without delay on the lawfulness of the detention and order release if the detention is not lawful.¹⁵⁶ In India, *habeas corpus* petitions are also used in some instances to locate persons who are considered “missing” or who have been held captive by non-state actors. In such cases, families or concerned persons file a *habeas corpus* petition, asking for the person in question to be produced in Court. The Court asks the police to produce the person, and the police then begin to look for this person, and bring them to Court.

Habeas corpus petitions are used in cases involving the human rights of queer persons in two main ways: first, when two queer persons decide to live together against the wishes of their families, families use *habeas corpus* petitions to ask police to bring the queer person back to the family. Second, people may hold their family members against their will, to prevent them from joining their partner. In such cases, the partner or organization working on the rights of queer persons may file a *habeas corpus* petition stating that someone has been unlawfully detained, asking the Court and police to intervene. *Habeas corpus* petitions provide insight into how issues involving

¹⁵³ I. Jackuline Mary v The Superintendent Of Police, available at: <https://indiankanoon.org/doc/144523857/>.

¹⁵⁴ Shivani Bhat vs State Of Nct Of Delhi & Ors, available at: <https://indiankanoon.org/doc/10525112/>.

¹⁵⁵ Pinki Pramanik vs State Of West Bengal, available at: <https://indiankanoon.org/doc/149648431/>. The lawyers for the petitioner (an intersex person who identifies as female) in this case also pointed out other procedural violations that had occurred in the course of police investigations, including that the petitioner was held in the male prisoners cell of the correctional center, despite her self-identified gender identity.

¹⁵⁶ Human Rights Committee, General Comment No. 35, Article (Liberty and Security of Person). UN Doc: CCPR/C/GC/35 para.39.

queer persons are dealt with in Courts, and how women in particular, find it harder to have their autonomy respected.

Sudha Ramalingam, a lawyer in Chennai, told the ICJ of one such case. P, an adult lesbian woman, was detained at home by her family to prevent her from leaving the city with her partner. The partner approached Sudha Ramalingam, asking her to file a *habeas corpus* petition for P to be produced in court. When P was produced in Court, the judge asked her if she preferred to stay at home with her parents or to leave with her partner. P said clearly that she wanted to leave and live with her partner. The judge called P “a person with different values” in open court. Instead of respecting her autonomy, the judge sent her to a government-run “shelter” home for women, to think about her decision and adjourned the case. Sudha told the ICJ that P was worried that she would have to live in the government-run “shelter” home for a long period of time. Therefore, the next time her case was heard in Court, P agreed to remain with her family. It is telling that the court did not ask P to think further about her decision to remain with her family, ask why she changed her mind, or make any effort to assess whether this decision was voluntary and non-coerced. Instead, the Court supported a decision they felt was more appropriate and conventional, notwithstanding what the woman wanted. Sudha Ramalingam has been involved in several such cases. She told the ICJ that in these cases, “there is no constitution, no law, only morality”.

On the other hand, the ICJ interviewed a couple in Kerala - a woman and a transgender man - who wanted to leave the city to live together in Bangalore. The woman was held captive by her family to prevent her from leaving. Her partner, the transgender man, filed a *habeas corpus* petition asking for the woman to be produced before the Court. Like in the case of P, when the woman was produced before Court, she said clearly that she wanted to leave and live with her partner. However, her wishes were ignored, and she was placed in a government-run “shelter” home for women. Her case dragged on for a long time, and she repeatedly stated she wanted to live with her partner, till the Court agreed. The ICJ was also told of a similar case in Delhi.

As the examples above indicate, in some cases, *habeas corpus* petitions have served as valuable legal tools to access courts when the liberty and autonomy of queer persons is denied. In other cases, these petitions have facilitated harassment and denied queer persons’ autonomy. In both instances, proceedings in *habeas corpus* petitions are illustrative of the additional challenges queer persons face within the legal system to have their autonomy respected, and the wide discretion that courts have to interfere with the personal decisions queer persons take regarding who they want to live with, where they want to live, etc.

Habeas corpus petitions of this nature are not confined to cases involving queer persons. They have also been used, for example, when a woman wanted to marry a man from a different caste and her family disapproved. However, since the scope of this report is limited, the other nuances of its use are not discussed here.

D. Emerging Issues and Difficulties Establishing Precedent

There are very few cases in the appellate courts in India about the issues faced by queer persons. A point that a number of lawyers made was the difficulty of establishing precedent through taking cases to the court. This is because in a number of instances, lawyers themselves counsel clients against initiating the court process because of the risk of criminalization and broader stigma, and the fear that discriminatory attitudes around the client's sexual orientation or gender identity, including judicial bias, will impact the possibility of getting justice in court. For example, one lawyer told the ICJ that she didn't file cases when queer clients were involved to the extent possible, and advised them to resolve the issue outside the court process. Where cases are filed, lawyers often prefer to keep the sexuality of their clients out of the court record. Instead, arguments are based simply on the right to autonomy. Where necessary, sexual partners are referred to as "best friends". While the tactic of not talking about sexuality in Court or resolving matters outside the Court may help individuals, it also means that cases do not become valuable guiding precedent.

Furthermore, there are few legal remedies in the law for the violence and discrimination faced by queer persons. This also makes it difficult to approach the court with cases. For example, Kaushik, a lawyer from Kolkata, noted an instance where a person in a same sex relationship was blackmailed by an ex partner who threatened to 'out' the person. His conflict about what advice to give is revealing: he felt that if the client went to the police to complain in any manner, it would essentially amount to an extra judicial confession about the person being gay. Another lawyer told the ICJ that activating the legal process means exposing clients to the risk of legal harassment, whether under Section 377 or broader legal provisions. There is little, she noted, that could be done with courts when the identity in question was taboo.

Some lawyers have tried to use existing legal provisions in innovative ways to protect queer persons. However, this also has risks. Amritananda Chakravorty, Senior Legal Officer, Lawyers Collective discussed how the Lawyers Collective has been trying include transgender women under women-specific laws such as sexual harassment and domestic violence. Currently, it is unclear if these laws protect transgender women. She told the ICJ about other complexities in doing so, as it leaves transgender men in a situation where it would go against their gender identity to seek protection under the domestic violence act, because in order to do so, they would have to claim that they are "women". *"The discussion hasn't even started properly and the women's groups need to be on board. We also have not comprehended all the implications in such situations and can only imagine the complexities,"* she said.

V. International Legal Standards

Protections for the rights of queer persons are enshrined in several human rights instruments that the Indian government has ratified, including: (1) the International Covenant on Civil and Political Rights (ICCPR);¹⁵⁷ (2) the International Covenant on Economic, Social and Cultural Rights (ICESCR);¹⁵⁸ (3) the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);¹⁵⁹ (4) the Convention on the Rights of the Child (CRC),¹⁶⁰ and (6) the Convention on the Rights of Persons with Disabilities (CRPD).¹⁶¹

India must implement its treaty obligations in good faith and may not invoke provisions of its domestic law to justify non-compliance with its treaty obligations. This includes respecting, protecting and fulfilling the full range of human rights of queer persons. Furthermore, State agents must refrain from violating these rights either by act or omission. They must also protect queer persons from actions of third parties, including private actors, which may impair their human rights.

A. *Non-Discrimination*

The human rights treaties India is signatory to require States parties to protect the guarantee the rights to equality before the law, equal protection of the law and freedom from discrimination. For example, article 2 of the ICESCR requires states to ensure

the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁶²

The Committee on Economic, Social and Cultural Rights - the body mandated by the ICESCR to monitor States Parties' implementation of the treaty - has stated that "other status" in article 2 (2) includes sexual orientation, and reaffirmed that "gender identity is recognized as among the prohibited grounds of discrimination", as "persons who are transgender, transsexual or

¹⁵⁷ *International Covenant on Civil and Political Rights* (ICCPR), 999 UNTS 171, entered into force 23 March 1976, India acceded on 10 April 1979.

¹⁵⁸ *International Convention on Economic Social and Cultural Rights* (ICESCR), 993 U.N.T.S. 3, entered into force 3 January 1976, India acceded on 10 April 1979.

¹⁵⁹ *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), 1249 U.N.T.S. 13, entered into force 3 September 1981, India ratified 9 July 1993.

¹⁶⁰ *Convention on the Rights of the Child* (CRC), 1577 U.N.T.S. 3, entered into force 2 September 1990, India acceded 11 December 1992.

¹⁶¹ *Convention on the Rights of Persons with Disabilities* (CPD), 2515 U.N.T.S. 3, entered into force 3 May 2008, India ratified 1 October 2007.

¹⁶² Other instruments also contain similar provisions. For example, Article 2 of the ICCPR: "respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"; Article 2 (1) of the CRC: "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status".

intersex often face serious human rights violations".¹⁶³ Similarly, in *Toonen v Australia*, the UN Human Rights Committee stated that "sex" in articles 2 and 26 of the ICCPR should be read as including "sexual orientation".¹⁶⁴

Discrimination based on sexual orientation or gender identity is usually compounded by discrimination on other grounds including gender, race, age, religion, disability, health and economic status. Individuals who experience such multiple and intersecting forms of discrimination often face particularly severe challenges. In designing measures to address discrimination based on sexual orientation and gender identity, States must take into account the impact of this intersectionality.¹⁶⁵

The obligation to prevent discrimination includes the duty to "*prohibit and prevent discrimination in private and public spheres, and to diminish conditions and attitudes that cause or perpetuate such discrimination*".¹⁶⁶ States must adopt measures to ensure that individuals and entities in the private sphere do not discriminate on prohibited grounds.¹⁶⁷ Under international law, such actions must include "*programmes of education and training, with a view to achieving the elimination of prejudicial or discriminatory attitudes or behaviours which are related to the idea of the inferiority or the superiority of any sexual orientation or gender identity or gender expression*".¹⁶⁸ In 2015, the UN High Commissioner for Human Rights recommended that States enact comprehensive anti-discrimination legislation that includes sexual orientation and gender identity as protected grounds.¹⁶⁹

B. Criminalization of Sexual Orientation and Gender Identity

Several UN Treaty Bodies and a number of Special Procedures of the UN Human Rights Council have recognized that the criminalization of same-sex conduct violates the rights to privacy, liberty and security of the person, including the right not to be subjected to arbitrary arrest and detention. UN human rights Treaty Bodies and independent human rights experts have repeatedly urged States to repeal laws criminalizing homosexuality.¹⁷⁰

¹⁶³ Para 32, Committee on Economic, Social and Cultural Rights, "General Comment 20, Non-discrimination in economic, social and cultural rights" E/C.12/GC/20, 2 July 2009.

¹⁶⁴ *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

¹⁶⁵ Principle 2 (e), Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity.

¹⁶⁶ Para 16, Discrimination and violence against individuals based on their sexual orientation and gender identity, Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/29/23, 4 May 2015.

¹⁶⁷ Para 11, Committee on Economic, Social and Cultural Rights, "General Comment 20, Non-discrimination in economic, social and cultural rights" E/C.12/GC/20, 2 July 2009.

¹⁶⁸ 2 (f), Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity.

¹⁶⁹ Para 16, Discrimination and violence against individuals based on their sexual orientation and gender identity, Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/29/23, 4 May 2015.

¹⁷⁰ E.g., Human Rights Committee, *Toonen v Australia* (Communication 488/1992, 4 April 1994), UN Doc. CCPR/C/50/D/488/1992. The 2015 OHCHR SOGI Report, UN Doc. A/HRC/29/23, notes: "States have an obligation to protect the rights to privacy, liberty and security of the person, including the right not to be subjected to arbitrary arrest and detention. United Nations mechanisms have called

Further, they have called attention to the ways in which the criminalization of consensual same-sex sexual conduct legitimizes prejudice and exposes people to hate crimes and police abuse, and have recognized that it can lead to torture and other ill-treatment.¹⁷¹ Laws and regulations that directly or indirectly criminalize consensual same-sex sexual orientation or conduct provide State actors with the means to perpetrate human rights violations, and enable non-State actors to persecute individuals on account of their real or imputed sexual orientation and/or gender identity with impunity.¹⁷²

The UN Working Group on Arbitrary Detention has concluded that detaining someone under laws criminalizing consensual same-sex sexual activity in private breaches international law.¹⁷³ This would also be true of vague and less well defined offences - such as those discussed in Chapter II of this report - when they are used to target people solely because of their real or purported sexual orientation or gender identity, expression or intersex status. Principle 7 of the Yogyakarta Principles, which addresses the right to freedom from arbitrary deprivation of liberty, requires states to take all necessary legislative, administrative and other measures to ensure that sexual orientation or gender identity may under no circumstances be the basis for arrest or detention. This includes the repeal of vaguely worded criminal law provisions that invite discriminatory application or otherwise provide scope for arrests based on prejudice.

Furthermore, the criminalization of sexual orientation and gender identity also creates an environment and supports prejudices and stereotypes that facilitate other human rights abuses, violence, and discrimination. As the Special Rapporteur on torture and other ill-treatment noted

A clear link exists between the criminalization of lesbian, gay, bisexual and transgender persons and homophobic and

upon States to fulfill these obligations by repealing laws used to punish individuals based on their sexual orientation and gender identity, including laws criminalizing homosexuality and cross-dressing, and have rejected attempts to justify such laws on grounds of the protection of public health or morals. States must refrain from arresting or detaining persons on discriminatory grounds, including sexual orientation and gender identity" and that "States that criminalize consensual homosexual acts are in breach of international human rights law since these laws, by their mere existence, violate the rights to privacy and non-discrimination. Arrests and the detention of individuals on charges relating to sexual orientation and gender identity - including offences not directly related to sexual conduct, such as those pertaining to physical appearance or so-called 'public scandal' - are discriminatory and arbitrary".

¹⁷¹ E.g., see Born Free and Equal, Sexual Orientation and Gender Identity in International Human Rights Law, Office of the High Commissioner for Human Rights, HR/PUB/12/06, 2012, p. 33; and the Report of the UN Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc.: A/56/156, 3 July 2001, para. 20 and, generally, paras 18-25.

¹⁷² As the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has noted: "sanctioned punishment by States reinforces existing prejudices, and legitimizes community violence and police brutality directed at affected individuals." See Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, A/HRC/14/20, 27 April 2010. The UN Special Rapporteur on extrajudicial executions noted that criminalization increases social stigmatization and made people "more vulnerable to violence and human rights abuses, including death threats and violations of the right to life, which are often committed in a climate of impunity", A/HRC/57/138, para. 37.

¹⁷³ WGAD Opinion 7/2002 (Egypt) UN Doc. E/CN.4/2003/8/Add.1 (2002) pp. 68-73, Opinion 22/2006 (Cameroon), A/HRC/4/40/Add.1, adopted (2007) pp. 91-94, Opinion 42/2008 (Egypt), UN Doc. A/HRC/13/30/Add.1, adopted (2008) pp. 195- 201.

transphobic hate crimes, police abuse, community and family violence and stigmatization ... The criminalization of same-sex relationships and pervasive discrimination against lesbian, gay, bisexual, transgender and intersex persons lead to the denial of health care, information and related services, including the denial of HIV care.¹⁷⁴

In 1994, the UN Human Rights Committee held that Tasmania's sodomy laws violated the rights to privacy and non-discrimination in the ICCPR.¹⁷⁵ Since then, the Human Rights Committee and other UN Treaty Bodies have repeatedly urged States to decriminalize consensual same-sex sexual conduct.¹⁷⁶

States must repeal any law used to punish individuals based on their sexual orientation and gender identity. In its second UPR review, Argentina asked the Indian government to "Study the possibility of eliminating any criminalization of same sex relations".¹⁷⁷ India accepted this recommendation, but laws penalizing queer persons for their sexual orientation and gender identity remain on the books.

C. Protection from Violence and Abuse

International human rights treaties by which India is bound guarantee the right to life, to freedom from torture and other ill-treatment, and to liberty and security of the person. Everyone, regardless of sexual orientation or gender identity, has the right to protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual or group.¹⁷⁸

The Office of the High Commissioner of Human Rights has noted that "Hate-motivated violence against LGBT people is typically perpetrated by non-State actors ... failure by State authorities to investigate and punish this kind of violence is a breach of States' obligation to protect everyone's right to life, liberty and security of person".¹⁷⁹ Therefore, police violate these basic rights when they refuse to register complaints or conduct investigations regarding complaints of violence and abuse against queer persons in India.

¹⁷⁴ Para 15 & 48, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/31/57, 5 January 2016, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/000/97/PDF/G1600097.pdf?OpenElement>

¹⁷⁵ Human Rights Committee, Views of 4 April 1994, *Toonen v. Australia*, Communication No. 488/1992.

¹⁷⁶ International Commission of Jurists, "SOGI Casebook" available at: <https://www.icj.org/sogi-casebook-introduction/>.

¹⁷⁷ Report of the Working Group on the Universal Periodic Review, A/HRC/21/10/Add.1, 17 September 2012, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/167/57/PDF/G1216757.pdf?OpenElement>

¹⁷⁸ Principle 5, Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity.

¹⁷⁹ Born Free and Equal, Sexual Orientation and Gender Identity in International Human Rights Law, available at: <http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf>

Twelve UN agencies recently released a joint statement asking states to “protect LGBTI persons from violence, torture and ill-treatment”, including by “investigating, prosecuting and providing remedy for acts of violence, torture and ill-treatment against LGBTI adults, adolescents and children, and those who defend their human rights” and “Strengthening efforts to prevent, monitor and report such violence”.¹⁸⁰

The Indian authorities must put in place measures that prevent violence against queer persons in India, both by state and non-state actors. Where such violence has occurred, incidents must be promptly investigated and prosecuted.

Principle 7 of the Yogyakarta Principles requires states to undertake training and awareness-raising programs to educate police and other law enforcement personnel regarding the arbitrariness of arrest and detention based on a person’s sexual orientation or gender identity. In India’s UPR in 2012, the government of Canada recommended that the Indian government “Take measures to address violence and discrimination directed towards persons based on their sexual orientation, especially related to employment”. India did not accept this recommendation.

D. Legal Gender Recognition

Each 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.¹⁸¹

States must “take all necessary legislative, administrative and other measures to fully respect and legally recognize each person’s self-defined gender identity” and “take 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”. States must facilitate this process, removing financial and other barriers people might face, including requirements for medical intervention or surgery before gender can be officially changed. Procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned.¹⁸²

In their statement on this issue, the 12 UN agencies also noted that “Ensuring legal recognition of the gender identity of transgender people without abusive

¹⁸⁰ United Nations entities call on States to act urgently to end violence and discrimination against lesbian, gay, bisexual, transgender and intersex (LGBTI) adults, adolescents and children, available at: http://www.ohchr.org/Documents/Issues/Discrimination/Joint_LGBTI_Statement_ENG.PDF

¹⁸¹ Principle 3, Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity.

¹⁸² Principle 3, Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity.

requirements” was part of the obligation to prevent discrimination and ensure equality.¹⁸³

E. Access to Justice

The CEDAW Committee has noted that the right to access justice is multidimensional. It encompasses justiciability, availability, accessibility, good quality and accountability of justice systems, and provision of remedies for victims.¹⁸⁴ Access to an effective remedy is an important aspect of access to justice. The right of victims to a remedy for human rights violations is guaranteed in human rights treaties¹⁸⁵ and is reflected in other international standards.¹⁸⁶ Often, queer persons are unable to access effective remedies or justice.

In 2016, the Report of the Special Rapporteur on torture considered the prohibition against torture and other ill-treatment in light of the unique experiences of women, girls, and lesbian, gay, bisexual, transgender and intersex persons. The report noted that victims of violence “face significant hurdles in accessing justice and reparations, including absence of or shortcomings in domestic legal frameworks to hold perpetrators accountable, and practical obstacles such as the significant expense involved in accessing court”, and suggested that “All victims must be granted access to effective judicial and administrative remedies. This entails the dismantling of discriminatory barriers and the provision of support to victims at all stages of the legal process”.¹⁸⁷ The UN Human Rights Committee has recommended that states must ensure “LGBT persons have access to justice, and that all

¹⁸³ United Nations entities call on States to act urgently to end violence and discrimination against lesbian, gay, bisexual, transgender and intersex (LGBTI) adults, adolescents and children, available at: http://www.ohchr.org/Documents/Issues/Discrimination/Joint_LGBTI_Statement_ENG.PDF

¹⁸⁴ Para 1, Committee on the Elimination of Discrimination against Women, General recommendation on women’s access to justice, CEDAW/C/GC/33, 23 July 2015, available at: http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_33_776_7_E.pdf

¹⁸⁵ Article 2.3 of the ICCPR; Article 13 of the CAT; Article 6 of the *International Convention on the Elimination of All Forms of Racial Discrimination*; Article 12, 17.2(f) and 20, *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006 (*International Convention for the Protection of All Persons from Enforced Disappearance*)

¹⁸⁶ Article 6.2 of the *Universal Declaration of Human Rights*; Article 9 and 13 of the *Declaration on the Protection of All Persons from Enforced Disappearances*, U.N.G.A. resolution 47/133, UN GAOR Supp (No. 49) at 207, UN Doc. A/47/49 (1992) (*Declaration on the Protection of All Persons from Enforced Disappearance*); Principles 4 and 16 of the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, recommended by Economic and Social Council resolution 1989/65 of 24 May 1989 (*UN Principles on Extra-Legal Executions*); Principles 4-7 of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*; Article 27 of the *Vienna Declaration and Programme of Action*; Article 13, 160-162 and 165 of the *Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*; Article 9 of the *Declaration on Human Rights Defenders*; Article 13 of the *European Convention on Human Rights*; Article 47 of the *Charter of Fundamental Rights of the European Union*; Article 7.1(a) and 25 of the *American Convention on Human Rights*; Article XVIII of the *American Declaration of the Rights and Duties of Man*; Article III(1) of the *Inter-American Convention on Forced Disappearance of Persons*; Article 8.1 of the *Inter-American Convention to Prevent and Punish Torture*; Article 7(a) of the *African Charter of Human and Peoples’ Rights*; Article 9 of the *Arab Charter on Human Rights*.

¹⁸⁷ Para 65, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/31/57, 5 January 2016, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/000/97/PDF/G1600097.pdf?OpenElement>

allegations of attacks and threats against individuals targeted because of their sexual orientation or gender identity are thoroughly investigated.”¹⁸⁸

In its General Recommendation on Access to Justice in 2015, the CEDAW Committee noted: “discrimination against women is compounded by intersecting factors”, one of which was “being lesbian, bisexual, transgender women or intersex persons. These intersecting factors make it more difficult for women from those groups to gain access to justice”.¹⁸⁹

In India’s UPR in 2012, the government of the USA recommended that the Indian government “Ensure that laws are fully and consistently enforced to provide adequate protections for members of religious minorities, scheduled castes, and adivasi groups, as well as, women, trafficking victims, and LGBT citizens”.¹⁹⁰ India did not accept this recommendation.

¹⁸⁸ Concluding observations of the Human Rights Committee on Mongolia (CCPR/C/MNG/CO/5), at para. 9; Mexico (CCPR/C/MEX/CO/5), at para. 21

¹⁸⁹ Para 8, Committee on the Elimination of Discrimination against Women, General recommendation on women’s access to justice, CEDAW/C/GC/33, 23 July 2015, available at: http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_33_7767_E.pdf

¹⁹⁰ Report of the Working Group on the Universal Periodic Review, A/HRC/21/10/Add.1, 17 September 2012, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/167/57/PDF/G1216757.pdf?OpenElement>

VI. Conclusions and Recommendations

The legal system has great potential to be transformative in ensuring justice for queer persons in India. As this report has noted, courts have been crucial fora in the fight for the rights of queer persons in India, and recent decisions by Indian courts offer hope. The decision in the *NALSA* case, for example, was an important affirmation of the basic fundamental rights of transgender persons and should be the foundation of future transgender rights legislation. The Supreme Court is also currently considering the *Suresh Koushal* curative petition, challenging the constitutionality of section 377.

However, in recent years, India's legislature and executive have lost several opportunities to reaffirm and strengthen rights protections for queer persons, both, in India and globally. Two efforts to repeal section 377 in Parliament were unsuccessful. As this report has described in detail in chapter III, present drafts of transgender rights legislation risk undermining the decision in the *NALSA* case. Globally, India abstained on resolutions to set up an Independent Expert on Sexual Orientation and Gender Identity at the UN Human Rights Council.¹⁹¹

In describing the challenges that queer persons in India face while accessing justice, this report makes a number of arguments: *First* - laws which must guarantee and facilitate the full range of queer persons' human rights, instead, operate to hinder or inhibit queer persons from accessing justice and seeking redress. *Second* - The attitude and behavior of police is one of the biggest barriers to queer persons' access to the justice system in India. Not only do police officers commit acts of violence and discrimination against queer people, but they also refuse to file complaints by queer persons as a result of their bias or stereotypes. *Third* - the lack of queer friendly lawyer networks, combined with the range of challenges lawyers face and the biases of officials in the formal system, add to difficulties queer persons face while trying to access the justice system. The manner in which the legal and justice system operate in India is inconsistent with the obligations that the Indian state has under international human rights law to prevent violence and discrimination based on sexual orientation or gender identity.

The ICJ recommends that the Indian government should:

- Ensure that laws, policies and practices fully comply with international human rights law and standards on access to justice, in particular the right to a remedy and reparation, the prohibition of discrimination on the basis of SOGI, the right to equality before the law and equal

¹⁹¹ In 2016, at the 32nd session of the UN Human Rights Council, members of the Council voted on the establishment of an Independent Expert on sexual orientation and gender identity. An Independent Expert would focus urgent, systematic and comprehensive attention to the range of human rights violations committed on grounds of sexual orientation and gender identity, and encourage timely and necessary attention and dialogue on this by countries, UN entities, and other stakeholders. India abstained during this vote. However, the resolution passed, and the position of the Independent Expert was established.

protection of the law, and take into account the needs of queer people and their experiences, including the specific obstacles they face in seeking and obtaining justice and redress;

- Repeal section 377 of the Indian Penal Code;
- Adequately define and fully criminalize all acts of rape and sexual assault in line with international standards, including by ensuring that the legislation caters for all circumstances where the victims' prior, free and informed consent was absent as a result of coercion through "fear of violence, duress, detention, psychological oppression or abuse of power", or "by taking advantage of a coercive environment";
- Study and monitor the criminal justice system to understand which legal provisions are used most often by police to harass and detain queer persons;
- Repeal vaguely worded criminal laws that invite discriminatory application or otherwise provide scope for arrests based on prejudice – including those mentioned in this section – or substantially revise them to ensure there is no scope for their abuse;
- Withdraw the Transgender Persons (Protection of Rights) Bill 2016 as currently drafted, and engage in meaningful and substantial public consultation with members of the transgender community;
- Meaningfully consult with people who have already tried to or changed their name and gender on official documents, on what barriers they faced, with a view of designing a system that addresses these issues;
- Ensure that any process introduced for the legal recognition of gender identity is consistent with international human rights law and the *NALSA* decision; and fully respects the principle of self identification of gender identity;
- Raise awareness among all government officials – especially those responsible for the issuance of identity cards – of the rights granted by the *NALSA* judgment, and of any new process in place to change name and gender on identity cards;
- Ensure that all police officers are trained to respect the rights to equality and non-discrimination of all persons, including on grounds of sexual orientation and gender identity, in the performance of their functions;

- Ensure that police officers refrain from detaining and harassing persons on the basis of their real or perceived sexual orientation or gender identity and that officers who abuse or harass queer persons are investigated and subject to disciplinary action or to prosecution, as is relevant;
- Ensure that police officers promptly register and investigate any complaint regarding violence or any other criminal act filed by a queer person and/or on their behalf, and initiate prosecutions where necessary in accordance with established rules of criminal law;
- Ensure that all human rights abuses against queer persons are investigated, the perpetrators are brought to justice, and that the persons experiencing the abuse are able to access prompt and adequate reparation and compensation, in line with international human rights law.
- Put in place standard operating procedures that ensure that police treat people of diverse sexual orientations and gender identities with the fullest respect for their dignity, privacy, and self expression, including during arrest and detention;
- Provide legal and sensitization training relating to sexual orientation and gender identity to lawyers and judges under the State and District Legal Services Authority, along with outreach programmes to facilitate queer individuals' access to the justice system;
- Set up legal aid clinics and outreach programmes to ensure queer individuals are able to access legal support.

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