

EXECUTIVE SUMMARY

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

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

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

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

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

and social rights. It also highlights the need for rights protections to be enforced in relation to both private and public spaces if such individuals are to effectively enjoy the full range of rights protected under Indian and international law.

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

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

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

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

Housing

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

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

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

Lack of Security of Tenure and Forced Evictions. Property owners and landlords often discriminate against LGBTQ persons, particularly transgender

persons, by assuming that they are involved in illegal activities – such as sex work. Prejudice against LGBTQ persons frequently results in denial of rental accommodation, and targeted harassment and abuse resulting in voluntary or forced eviction from their homes and accommodation. LGBTQ activists have been evicted at times in retaliation for their activism.

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

Work

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

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

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

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

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

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

Public Spaces

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

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

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

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

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

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

Recommendations

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

To the Parliament of India

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

To the Central Government of India

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

To the State and Central Governments

- Ensure that all administrative bodies set up under the central

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

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