



INTERNATIONAL COMMISSION OF JURISTS' RESPONSE TO THE QUESTIONNAIRE ON CULTURAL RIGHTS AND PUBLIC SPACES BY THE UN SPECIAL RAPPORTEUR IN THE FIELD OF CULTURAL RIGHTS IN VIEW OF HER FORTHCOMING REPORT TO THE GENERAL ASSEMBLY ON HOW ACTORS FROM ACROSS THE CULTURAL ECOSYSTEM ACCESS AND USE PUBLIC SPACES, IDENTIFY THE CHALLENGES THEY FACE AND THE STRATEGIES THEY DEVELOP TO OVERCOME THEM, AND ANALYSE THE IMPACT THIS HAS ON THEIR CULTURAL RIGHTS.

Submitted on 20 May 2019

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INTERNATIONAL COMMISSION OF JURISTS' RESPONSE TO THE QUESTIONNAIRE ON CULTURAL RIGHTS AND PUBLIC SPACES BY THE UN SPECIAL RAPPORTEUR IN THE FIELD OF CULTURAL RIGHTS IN VIEW OF HER FORTHCOMING REPORT TO THE GENERAL ASSEMBLY ON HOW ACTORS FROM ACROSS THE CULTURAL ECOSYSTEM ACCESS AND USE PUBLIC SPACES, IDENTIFY THE CHALLENGES THEY FACE AND THE STRATEGIES THEY DEVELOP TO OVERCOME THEM, AND ANALYSE THE IMPACT THIS HAS ON THEIR CULTURAL RIGHTS.

Introduction

The International Commission of Jurists (ICJ) welcomes the opportunity to respond to the questionnaire on cultural rights and public spaces put forth by Ms. Karima Bennouna, the United Nations Special Rapporteur in the field of cultural rights ("Special Rapporteur"). The ICJ's submission focuses on the relevant challenges faced by lesbian, gay, bisexual, transgender and queer individuals (LGBTQ),¹ and more specifically by the transgender persons and non-binary persons,² from across India.

The submission draws on the ICJ's ongoing work on the human rights of LGBTQ persons in India and includes findings from the ICJ's forthcoming report on the rights of LGBTQ persons in the home, at work and in public spaces.³ The report, drawing on the testimonies provided in 65 interviews conducted by the ICJ,⁴ concludes that LGBTQ persons' rights to adequate housing, decent work, and equal access to public spaces are frequently violated throughout India despite the Supreme Court's groundbreaking decisions in *NALSA*⁵ and *Navtej*.⁶

With regard to discrimination in access to public spaces the interviews conducted by the ICJ reveal that LGBTQ persons still have challenges in accessing a variety of public spaces including streets, public transport, sanitation facilities cultural and religious events, parks and shopping malls, challenges which are not faced by, or not faced in the same way by, non-LGBTQ persons. These findings, which the ICJ submits are in contravention of Indian constitutional law and international human rights law, are directly relevant to the Special Rapporteur's report on

¹ The term "LGBTQ" refers to any individual who identifies with a non-normative sexual orientation 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 categories.

² "Non-binary persons", sometimes also referred to as gender non-conforming individuals, are people who have a gender identity or gender expression that does not subscribe to the binary male or female gender.

³ A copy of the report will be forwarded to the special rapporteur on its launch on 8 June, 2019.

⁴ This research drawn on in this submission is based on 65 qualitative interviews conducted with LGBTQ persons, activists, and lawyers from six states: Delhi, Gujarat, Manipur, Tamil Nadu, Kerala and Karnataka, as well as 67 Right to Information applications filed with various state departments to obtain information relating to: a) implementation of state level schemes formulated for the welfare of transgender persons, b) reservations for transgender persons in public institutions, c) government-run shelter homes for transgender persons, d) availability and accessibility of toilets for transgender persons in public transport, and e) legal gender recognition for transgender persons. The ICJ has also relied on secondary research and literature focused on these and other states. In this submission, the names of the interviewees have been withheld to maintain confidentiality. The research findings outlined in this submission will be published by the ICJ later in 2019.

⁵ Supreme Court of India, National Legal Services Authority. v. Union of India, (2014) WRIT PETITION (CIVIL) NO.604 OF 2013.

⁶ Supreme Court of India, Navtej Singh Johar & others. v. Union of India, (2018) 10 SCC1.

accessing public spaces. They also provide the ICJ with a useful position from which to suggest strategies to overcome challenges in accessing public spaces for LGBTQ persons in India.

1. What are the various existing definitions of "public spaces" used in national legislation or proposed by international mechanisms, experts and civil society organizations? Are other terms used such as "civic space" and "public domain"? What is the scope of the concept of such public spaces?

"Public spaces" are not defined in Indian law. Other terms such as "civil space" and "public domain" have also not been used in the national laws. However, Article 15(2) of the Indian Constitution guarantees a fundamental right to access public spaces without discrimination on prohibited grounds. It prohibits discrimination by State as well as private actors in "access to shops, public restaurants, hotels, and places of public entertainment" or in "the use of wells, tanks, bathing ghats,⁷ roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public", on the basis of religion, caste, race, sex, place of birth.⁸

Sex has been interpreted by the Indian Supreme Court to include gender identity and sexual orientation.⁹ Moreover, the Supreme Court has also interpreted the term "shop" broadly as a "generic term" referring to "a place where the owner is prepared to offer his service to anybody who is prepared to go there seeking his

⁷ "Ghat" refers to a series of steps leading down to a body of water. Bathing ghats are common areas used for bathing.

⁸ Constitution of India, article 15(2) states, "No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to (a) access to shops, public restaurants, hotels and palaces of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public."

⁹ Supreme Court of India, *National Legal Services Authority v. Union of India*, (2014)5SCC438, (NALSA), para 66 states: "Articles 15 and 16 sought to prohibit discrimination on the basis of sex, recognizing that sex discrimination is a historical fact and needs to be addressed. Constitution makers, it can be gathered, gave emphasis to the fundamental right against sex discrimination so as to prevent the direct or indirect attitude to treat people differently, for the reason of not being in conformity with stereotypical generalizations of binary genders. Both gender and biological attributes constitute distinct components of sex. Biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes include one's self image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of 'sex' under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity"; Supreme Court of India, *Navtej Singh Johar & others. v. Union of India*, (2018) 10 SCC 1, (Navtej Singh) para 393 states: "A provision challenged as being ultra vires the prohibition of discrimination on the grounds only of sex Under Article 15(1) is to be assessed not by the objects of the state in enacting it, but by the effect that the provision has on affected individuals and on their fundamental rights. Any ground of discrimination, direct or indirect, which is founded on a particular understanding of the role of the sex, would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex."

service”.¹⁰ The scope of this prohibition on discrimination therefore potentially covers a comprehensive range of publicly used spaces whether or not they are privately or publicly owned.

The Charter of Public Space, a document collectively elaborated by civil society organizations at the second Biennial of Public Spaces in 2013 has become a key policy reference for organizations working on the right to public spaces. It defines “public spaces” as: “all places publicly owned or of public use, accessible and enjoyable by all for free and without a profit motive.”¹¹ The Charter provides an indicative list of public spaces, namely streets, sidewalks, squares, gardens, and parks, public libraries and public museums.¹²

A recent judgment of Delhi High Court also suggests that the “right to the city” is protected in terms of the Indian Constitution’s right to life with dignity. This, in terms of the Court’s interpretation of international standards, includes rights to: “a city free of discrimination”, “a city with quality public spaces for enhancing social interaction” and “a city with cultural diversity”.¹³ This finding suggests that a definition of public spaces consistent with the right to the city is required by the Indian Constitution and international law.

2. What are the diverse legal frameworks, trends and practices at the national level that either promote or impede actors from across the cultural ecosystem, including women and persons with disabilities, from accessing and using public spaces? What strategies are most useful in overcoming such challenges?

In India, various legal frameworks criminalize sex work and begging; furthermore, legal and procedural barriers in changing gender identity impede transgender and non-binary persons’ access to use of public spaces, in particular, streets, parks, and public transport. Transgender persons and non-binary persons are often stereotyped as sex workers or beggars, which makes them vulnerable to police action when accessing public spaces like streets and public parks under laws that criminalize sex work¹⁴ and begging,¹⁵ as well as under the Indian Penal Code through provisions that criminalize public nuisance in a highly vague and overbroad manner enabling their arbitrary application.¹⁶ Official responses to such discriminatory targeting have been inadequate.

¹⁰ Supreme Court of India, *Indian Medical Association v. Union Of India* (2011)7SCC179 para 111-114.

¹¹ The Charter of Public Space was prepared at the second Biennial of Public Spaces, in 2013. It is available at http://www.inu.it/wp-content/uploads/Inglese_CHARTER_OF_PUBLIC_SPACE.pdf, principle 6.

¹² Charter of Public Space, principle 8.

¹³ High Court of Delhi, *Ajay Maken v Union of India*, W.P.(C) 11616/2015. Paras 80-4.

¹⁴ Immoral Traffic Prevention Act, 1956.

¹⁵ 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.

¹⁶ Section 268 of IPC states “Public nuisance.—A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the

A, a transwoman and activist from Bangalore told the ICJ that the police “picked up” transgender persons from the street and filed false cases against them in order to meet their daily targets of cases based on stereotypes of sex work and begging.¹⁷

The specter of criminality around LGBTQ identities fosters violence, discrimination and harassment by private actors even after the Supreme Court declared laws criminalizing LGBTQ persons unconstitutional.¹⁸

In addition, identity documents are required to access travel by airways and railways, wherein they are required for booking tickets, entering the airport or railway station, obtaining one’s boarding pass for air travel, and during immigration checks. Incongruence between the name and gender stated on the identity document, and one’s preferred name, gender identity, and gender expression, create barriers to accessing these modes of transport.

B, a transwoman from Bangalore, who has not changed her name and gender identity on her identity documents, reported that she avoids air travel because she is required to furnish identity proof to access this mode of transport, which forces her to identify in her “dead name”.¹⁹

3. What are the specific characteristics of public spaces that either are conducive to the realization of cultural rights, including of women and persons with disabilities, or are an impediment to them, including in relation to issues of discrimination, equal access, accessibility, availability, and adequacy?

Discrimination, a lack of accessibility and general inadequacy, all contribute to insufficient enjoyment of public spaces by LGBTQ persons, including particularly as regards public toilets, public transport and places of worship. Many such places and/or facilities in them are constructed and administered on a male-female gender binary, which restricts the ability of LGBTQ persons who do not identify or express squarely on either end of this binary participation in cultural life.²⁰

vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.”; IPC section 294 states “Whoever, to the annoyance of others; (a) Does any obscene act in any public place, or. (b)Sings, recites or utters any obscene song, ballad or words, in or near any public place, Shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.”

¹⁷ ICJ interview, Bangalore, September 2018; Police stations have to meet targets of number of cases reported in their jurisdiction in a given period of time.

¹⁸ For Instance, a private association based in Delhi filed a criminal complaint against gay men for allegedly engaging in “immoral” activities in the park, a few days after the decriminalization of same-sex intercourse by the Supreme Court. See: Rohith B R and Santosh Kumar, “Cubbon Park walkers file plaint against homosexuals,” The Times of India, 13 September 2018, <https://timesofindia.indiatimes.com/city/bengaluru/cubbon-park-walkers-file-plaint-against-homosexuals/articleshow/65791008.cms> (Accessed 12 May 2019).

¹⁸ *Navtej Singh Johar v. Union of India*, Supreme Court of India, (2018)10SCC1,

¹⁹ “Dead name” is a term used to refer to the birth name of a person who has changed their gender identity and name. ICJ interview, Bangalore, September 2018.

²⁰ ICESCR, Article, 15(a).

For example, public transportation, which is a major source of transport in India, is typically gendered on a male-female binary due to gendering of ticket booking forms, security screening and toilets. Inaccessibility of toilets, in particular, compels LGBTQ persons to avoid drinking water, and to hold urine for long periods of time or avoid using public transport.

T, a transman and activist from Bangalore told the ICJ that he avoids long distance bus travel due to the unavailability of adequate sanitation facilities and acknowledged that when he travels, he has to urinate on the seat, due to lack of options, and was considering using adult diapers.²¹

O, a transman from Chennai, was unable to enter a women's toilet at Tirupati Temple, a prominent place of worship in India, due to abuse from cis-women when he tried to gain access.²²

Gendered security screening by security officials (whether publicly or privately employed) typically make no provision for accommodating transgender persons and create barriers in accessing other public spaces, such as public monuments.

D, a transman and activist from Delhi told the ICJ about difficulties faced in visiting a national monument, wherein the security guard put her hands in his pants because she was uncertain about his gender expression.²³

4. What could be the contents and contours of a possible "right to public spaces", and of legitimate restrictions that could be made to it, in accordance with international standards? Is this concept employed in your country or in your work? Is it helpful?

Without taking a position on development or recognition of a possible "right to public spaces" or "legitimate restrictions" under international standards, the ICJ emphasizes that a range of already-recognised human rights already place positive and negative international legal obligations on States, which in turn may have indirect implications for private actors, when it comes to any person's access to public spaces. Existing rights to non-discrimination across many different treaties, instruments and other standards are of particular relevance to access to such public spaces as may already exist, while a range of other provisions create obligations for States to preserve, maintain, or create public spaces. Both the obligations of non-discrimination, and the already prescribed limited scope for restriction of existing rights such as movement, assembly, and expression, are relevant when assessing the compatibility of any restrictions imposed on access to public spaces.

While Indian law does not currently recognize a "right to public spaces" per se, as was described earlier article 15(2) of the Constitution, as interpreted and applied by the Supreme Court, it does in practice ensure non-discrimination on certain grounds in access to a wide range of public spaces. The Indian Constitution also obligates the State in article 48A to protect and improve the environment and safeguard forests and wildlife and in article 49 to protect monuments of and places and objects of national importance.

²¹ ICJ interview, Bangalore, September 2018.

²² ICJ interview, Chennai, August 2018.

²³ ICJ interview, Delhi, August 2018.

Based on ICJ's interviews with LGBTQ persons in India, and following the Committee on Economic, Social and Cultural Rights' standard approach to describing the components of ESCR, the ICJ considers that non-discrimination in access to public spaces in India would for example be improved through legislative, administrative, and judicial measures that may *include* the following components:

- a) **Availability:** States should ensure and facilitate the availability of a full range of public spaces (such as streets, side walks, parks, gardens, museums, public transport, shopping malls) and services (including sanitation and other services) that are open to and designed for the enjoyment of all persons including vulnerable and marginalized persons.
- b) **Accessibility:** States should ensure that public spaces are accessible to all persons. Accessibility includes: 1) non-discrimination in access; 2) economic accessibility; 3) physical accessibility; and 4) information accessibility. Temporary or other special measures may be necessary to ensure equality of access to public spaces for vulnerable persons, including LGBTQ persons. In addition, in law and policy, provision should be made and budgeted for, for the reasonable accommodation of such persons where the need arises. Equal physical accessibility will require the sensitization of state and non-state actors relating to the rights of LGBTQ persons.
- c) **Acceptability and Quality:** Legally enforceable guarantees should exist for public spaces of an adequate and acceptable quality, including ensuring adequate maintenance of public spaces and services. For vulnerable persons, including the LGBTQ persons, this requires consideration of the principles of universal design and accessibility in the planning and construction of public spaces and facilities.
- d) **Adaptability:** All design and implementation of law and policy relating to public spaces should be flexible and continuously reviewed to enable the full consideration of developments in international human rights law generally and the needs of vulnerable and marginalized groups in particular.
- e) **Appropriateness:** The cultural appropriateness of public spaces and facilities should be determined in consultation with individuals and groups including vulnerable and marginalized persons such as LGBTQ persons. Public spaces should be made available for cultural and expressive activities for vulnerable and marginalized persons in particular for events peculiar to celebrating and protecting their interests, rights and identities (for example, LGBTQ pride events). States should legally protect such events and consider them as a part and parcel of LGBTQ persons right to cultural expression.

5. What is the role of cultural rights in ensuring the existence, availability, accessibility, and adequacy of public spaces that are conducive to widespread participation in cultural life, the realization of citizenship, cultural democracy, as well as the realization of other human

rights?

Please refer to responses 2, 3, 4.

6. What is the impact on the enjoyment of cultural rights of trends regarding privatization, which may affect a variety of public spaces?

Taking part in cultural life requires availability of social, cultural and religious goods, services and spaces open to everyone to enjoy fully. Such spaces include cinemas, libraries, theatres, literature and art forms; shared open spaces that facilitate cultural exchange such as parks and streets; lakes, rivers, and forests; and intangible cultural goods, such as customs, traditions, and the values that make up identity and contribute to communities' cultural diversity.²⁴

For LGBTQ persons, as for any other persons, cultural rights includes the right to access all aspects of social and cultural life without discrimination,²⁵ which includes access to privately owned places that are open to the public, such as shopping malls and hotels among others.

The increasing trend towards the privatization of access to and enjoyment of public spaces places obstacles in the way of LGBTQ persons' enjoyment of public spaces. Privatization contributes to: 1) outright denial of entry to public spaces for LGBTQ persons, 2) denial of services in such spaces, 3) absence of adequate and appropriate services in such spaces, 4) surveillance of the activities and movements in such spaces

Transgender persons are often presumed to be sex workers or beggars, and thus suspected of carrying out illegal activities inside shopping malls.

N, a transwoman and activist from Bangalore told the ICJ that they are not allowed into malls, as the security guards assume that they will create a nuisance, and when they are allowed inside, they are tailed by the security guards throughout their visit.²⁶

Direct discrimination from private businesses based on LGBTQ identity or expression is also common.²⁷

D, a transwoman and activist from Delhi said that several beauty salons had refused to provide services to her in the past due to her gender identity.²⁸

²⁴ ICESCR, General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1(a) of the Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/21, (2009) at para 16.

²⁵ ICESCR, General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1(a) of the Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/21, (2009), at para 3.

²⁶ ICJ interview, Bangalore, September 2018.

²⁷ It is pertinent to mention the "cake shop" case of *Masterpiece Cakeshop v. Colorado Civil Rights Commission* 584 U.S.) 138 S. Ct. 1719 decided by the Supreme Court of the United States, which famously dealt with the issue of refusal to provide services to gay customers. In *Masterpiece Cakeshop*, a Christian baker was accused of violating anti-discrimination law by refusing to make a cake for a gay wedding. The Supreme Court held in favour of the baker on the grounds that "religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression."

F, a transwoman and activist from Kochi was also denied entry into a hotel and the owners told her, “that cross-dressers are not allowed.”²⁹ She also mentioned that hotels charge transgender persons more than the standard rent.³⁰

7. What recommendations should be made to States and other stakeholders?

Based on its experience in the Indian context, in order to ensure the full and equal access of LGBTQ persons to public spaces, the ICJ submits that the Special Rapporteur makes the following recommendations to States:

1. **Legal Reform and Recognition:** States, including judicial, executive, administrative and judicial organs, should, by all appropriate measures, ensure the full recognition of LGBTQ persons as holders of all constitutional rights. This may be achieved, as examples, through amendment of relevant constitutional provisions, expansion of existing interpretations of constitutional rights and legislative enactments.
2. **Identity Documentation and Recognition:** States should ensure that, by law and in practice, all persons can access identity documents, passports, social security documents and any other documentation necessary for enjoying any rights (including access to public spaces) reflecting their own self-determined gender expression. Such documents should provide a means for transgender persons to identify for all legal and administrative purposes outside of the gender binary of “male” and “female”
3. **Legislative Review:** States should review and, where required by international human rights law, repeal or amend legislation and policies criminalizing the activities of vulnerable persons including LGBTQ individuals and sex workers in public spaces. Such laws may, in particular, include:
 - a. Laws criminalizing and/or regulating public nuisance,
 - b. Laws criminalizing and/or regulating begging and/or loitering,
 - c. Laws criminalizing and/or regulating informal trade and/or hawking;
 - d. Laws criminalizing and/or regulating sex work.
4. **Guidance for Public Officials:** States should establish clear guidance for the human rights compliant treatment of LGBTQ persons in any public places where public and/or private officials are charged with the regulation of entry and/or enjoyment of such spaces and services available therein. Such guidance should be widely publicized and directly communicated to such officials through training. Such training should include, for example, the sensitization of security guards, immigration and custom officials to LGBTQ rights.

²⁸ ICJ interview, Kochi, October 2018.

²⁹ ICJ interview, Kochi, October 2018.

³⁰ ICJ interview, Kochi, October 2018.

5. **Formulation and Implementation of Sanitation Policy:** States should elaborate policies ensuring the availability of accessible toilets for gender non-binary and transgender persons. Merely permitting, without more, such persons to use *either* male or female toilets, or toilets for persons with disability, is not sufficient to ensure equal and effective access.
6. **Access to public spaces – Security Screening:** States should take steps to ensure LGBTQ persons are able to use the security and screening queues of their choice and that they are screened by a person of the individual's preferred gender in all public spaces, in particular, while accessing public transport including busses, trains and airways. Such persons undertaking screening and security checks must be required to respect the validity and privacy of LGBTQ individuals' self-determined identities and expression.
7. **Access to public spaces – Religious spaces:** States must ensure that all places of worship and cultural events prohibit discrimination in access and participation based on sexual orientation, gender identity, gender expression, and sex characteristics.

Annexure I: Interviewees' Narratives provided to ICJ on violations faced in public spaces including streets and parks, public toilets, security queues, and cultural spaces and public events from the ICJ's forthcoming report on the rights of LGBTQ persons in the home, at work and in public spaces.³¹

Streets and Parks

1. L, a transwoman and activist from Bangalore told the ICJ that the police 'picked up' transgender persons from the street and filed false cases against them in order to meet their daily targets of cases. She said:

"...they take us to the police station and write false cases against us. They tell us that, 'we need 4 cases today, so we have arrested you'. They fine us for Rs. 500 and we are made to stay at the police station for the whole night."³²

2. Transgender and non-binary persons are often stereotyped as sex workers or beggars, making them vulnerable to police action under other provisions in the Indian Penal Code such as provisions that criminalize public nuisance and obscenity.³³ N, a transwoman and activist from Bangalore described such an incident to the ICJ. She said:

"In 2014, transgender persons were arrested across Bangalore city. The policemen came and told all the community people that "sahab bula rahe hain" (senior police have called for you) and we thought maybe it's only for record keeping or some information that we are being called to the police station for... Some people who were arrested were in their nightwear and had been picked up while buying vegetables. They still had the vegetables in their hands when they were taken into the colony. We asked them what was the reason behind arresting people who weren't even doing sex work or begging at that point of time. We asked them to please tell us the reason and show us the order so that we can then inquire further with the respective authority who has sent that order. But they didn't show it to us...Later, they said that "upar wale sahab se order aaya hai ki sex work or begging nahi karna" (senior officer has sent an order to curb begging and sex work)."³⁴

³¹ A copy of the report will be forwarded to the special rapporteur on its launch on 8 June, 2019.

³² ICJ interview, Bangalore, September 2018.; Police stations have to meet targets of number of cases reported in their jurisdiction in a given period of time.

³³ Section 268 of IPC states "Public nuisance.—A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right."; IPC section 294 states "Whoever, to the annoyance of others; (a)Does any obscene act in any public place, or. (b)Sings, recites or utters any obscene song, ballad or words, in or near any public place, Shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both."

³⁴ ICJ interview, Bangalore, September 2018.

Public Toilets

3. T, a transman and activist from Bangalore, reported the difficulties they faced in accessing sanitation facilities during long distance travel by bus:

“Most problems happen in buses because they stop at random *dhabas* (local eateries). There aren’t too many washrooms for boys, just washrooms for girls. The boys just relieve themselves on the road. It is difficult for me in that situation because I don’t know what to do. Hence, I just don’t use the washroom at all. Even if there is something for boys then there aren’t separate cubicles, they are just open. There are no doors and if doors are there then they are not functional. Sometimes the boys just open the door and then I have to stand up really fast. The washrooms for boys are also very dirty.”³⁵

4. Q, a transman, said that even after having undergone phalloplasty, he still found public toilets that do not have private stalls inaccessible, due to the lack of privacy.

“It’s been ten years since I underwent surgery [phalloplasty]. But still, before using toilets I check that there is no one inside and no one is waiting after me. Whenever I use the washroom, I go to the men’s washroom but I fear that someone might come inside at any time. Many a times when I am inside the cubicle sitting and peeing and I get to know that someone is outside using urinals, I sit there till the time that person leaves. So many people working with me in fact tease me like, ‘this Pallav, doesn’t urinate in-front of any of us.’”³⁶

5. E, a transman and activist from Imphal, Manipur, said in reference to the newly built toilet for transgender persons in Imphal describing his discomfort:

“No one uses it, not even men and women. People would’ve used it if it was a little on the side, but it’s right on the road. Going there would mean announcing [one’s gender identity] to the world. Who’d want to do that?”³⁷

Transgender persons are also sometimes unable to access toilets reserved for women, due to hostile reactions from cis-gendered women.³⁸

6. D, a transman from Delhi reported that he was harassed and humiliated for using the women’s washroom:

“Once I, along with another trans-man friend of mine, went to Haridwar. We took a dip in the river and were changing clothes when suddenly the security guard came and started shouting at us, suggesting that men had entered the women’s washrooms. They came with a stick and the situation became very hostile. We had to tell them we are women and that pacified them but it was very painful and humiliating for the both of us.”³⁹

³⁵ ICJ interview, Bangalore, September 2018.

³⁶ ICJ interview, Baroda, December 2018.

³⁷ ICJ interview, Kochi, October 2018.

³⁸ Ministry of Social Justice and Empowerment, “Report of The Expert Committee on Issues relating to Transgender Persons”, (2014), <http://www.socialjustice.nic.in/writereaddata/UploadFile/Binder2.pdf> (Accessed 12 May 2019), pp. 43 – 47, states “Some of the key challenges faced by transgender youth, can be summarized as .. Lack of access to appropriate restroom facilities—Transgender people often lack safe access to public restrooms. They may be assaulted if they use the restroom that conforms to their gender identity or forced to use a restroom that does not conform to their gender identity...”

³⁹ ICJ interview, Delhi, August 2018.

7. O1, a transman from Chennai, was denied entry to a women's toilet at Tirupati Temple, a prominent place of worship in India. He recounted:

"When I had gone to Tirupati, I wanted to pee and I hadn't had the top [breast removal] surgery at that time, so I went to the ladies' toilet. But everyone in the ladies' toilet started questioning as to why I wanted to go there. They were all shouting and were almost about to hit me. I didn't know Telegu [the local language], but my sister knew and had to explain to everyone that I was her sister. She told them that I had to dress this way because I work in an office and asked them not to panic or worry. This is why they didn't hit me, otherwise they were all screaming like anything."⁴⁰

Inaccessibility of toilets compels LGBTQ persons to avoid drinking water, and to avoid long distance travel.

8. T, a transman and filmmaker from Bangalore said that he avoids drinking water to avoid going to public toilets.

"I have long work hours and shoot days so I just avoid drinking too much water. That helps me not use the washroom. If I have to urgently use it, then I try to see if there is someone I know who can look out for my safety, then I go with them."⁴¹

9. T, a transman and activist from Bangalore said that he avoids long distance bus travel due to the unavailability of adequate sanitation facilities. He told the ICJ,

"Sometimes when I am in the bus and I really have to use the washroom, then I just pee on the seat, I have no other option for myself. I now think that maybe I will use adult diapers."⁴²

Public Transport

A. Gendered nature of security screening

Entry to public transport facilities such as local trains or metros,⁴³ railways, and air travel is usually regulated through security screening at train stations and airports respectively. There are usually two queues – one for men and another for women – with women security guards in charge of frisking women, and men in charge of frisking men. Often, transgender persons are expected to justify their presence in one queue or the other, leading to a public negotiation around their gender identity.

10. E, a transman from Manipur, recounted being publicly called out and asked to stand in the men's queue, and felt uncomfortable getting frisked by men:

"Once, a security guard called out from the back, asking me what I was doing at the women's queue and telling me to join the men's queue. Then I told them that I was female, because I couldn't have gone to the men's queue [and be frisked by men]."⁴⁴

⁴⁰ ICJ interview, Chennai, August 2018.

⁴¹ ICJ interview, Bangalore, September 2018.

⁴² ICJ interview, Bangalore, September 2018.

⁴³ Several cities in India have local trains, also referred to as "metros" – that are regulated by government owned corporations, or Public Sector Undertakings.

⁴⁴ ICJ interview, Kochi, October 2018.

11. W, a transman from Delhi:

"It is horrible to access metros. If I'm wearing a good binder,⁴⁵ then I go ahead and get frisked by a male security guard and it doesn't bother me. I am often loudly called out if I'm perceived to be in the wrong queue, they direct me to join the other queue – based on their assessment of my gender. Somebody or the other figures out and makes it difficult. Airports have always been worse than metros because they feel like they have more security concerns. In metros because there are so many people, you just get patted down quickly and you can pass if you are wearing a good binder."⁴⁶

12. N1, a transwoman from Delhi was forced to stand in the men's queue at a metro station in Delhi and was sexually assaulted. She said:

"There was a lot of rush. I was just about to get checked [in the women's queue], there must be some 2-3 women in the queue before me. They called me once to the gents' queue, I refused to go. Then they called out very loudly and told me to stand in the men's queue. I didn't go, I opposed it, but then they forced me. At the security check, he pressed my breast. When I complained about that, his senior came and apologized."⁴⁷

13. Some interviewees reported being sexually assaulted by security guards and being forced to strip due to security concerns about their binder. D, a transman and activist from Delhi:

"When I started expressing as a 'tomboy' pre-surgery, the security checks became very difficult. The guards would scan me and look at my breasts touch me inappropriately to figure out what I am. At metro stations also it is very difficult to navigate the security check. Once my binder got detected [by the metal detector] at the airport and they took me inside for more scrutiny. I told them it's a medical thing, but they insisted on me stripping down. I had no choice but to strip down."⁴⁸

14. Some transmen use a toy penis, or a folded cloth placed on the crotch to pass as cis-men. T, a transman and activist from Bangalore said that:

"Basically, their fear is that people will get to know of their transgender identity, so in response to that fear, they fold cloth and keep it in the crotch to make it look like one has a penis. When going through security that creates trouble because it gets detected and then the security guards ask a lot of questions and can even make them undress."⁴⁹

15. Gendered security screening, which has no provision for accommodating transgender persons, creates barriers for accessing other public spaces as well, such as public monuments. D, a transman and activist from Delhi said:

"Once, I was at the Red Fort and the female security guard was scrutinizing me. As she wanted to figure out what I am, suddenly she put her hands in my pants to check if I am a man or woman. I was too shocked to respond to the situation."⁵⁰

⁴⁵ Binders, which may include metal parts, are used for chest binding by transmen. Chest binding helps in flattening breast tissue to create a male-appearing chest.

⁴⁶ ICJ interview, Delhi, August 2018.

⁴⁷ ICJ interview, Delhi, August 2018.

⁴⁸ ICJ interview, Delhi, August 2018.

⁴⁹ ICJ interview, Bangalore, September 2018.

⁵⁰ ICJ interview, Delhi, August 2018.

Incongruence between the name and gender stated on the identity document, and one's preferred name, gender identity, and gender expression can create barriers to accessing these modes of transport.

16. P1, a transwoman from Bangalore, who has not changed her name and gender identity on her identity documents, reported that she avoids air travel because she is required to furnish identity proof to access this mode of transport.

"even while booking flight tickets, I have to get my tickets booked in a different name [dead name]⁵¹."

17. A, a transwoman and activist from Delhi, told the ICJ that even though an option "T" for transgender persons has been introduced in the Indian Passport, she continues to face more scrutiny than others at the immigration counter at airports. She said:

"I face a lot of problems when I travel across the border from Delhi because Delhi customs doesn't have 'T' as an option, they have binary. The government doesn't have that system within the immigration department."⁵²

B. Inaccessibility of public transport due to discrimination, harassment and violence

LGBTQ persons often deal with verbal abuse and harassment from co-passengers in public transport. Sometimes, they ask transgender persons uncomfortable, private questions about their gender identity, and at other times, mock and jeer at them.

18. L, a transwoman and activist from Bangalore, said of the sexual harassment experienced by her in public transport:

"Even on the trains there are no reserved seats for transgenders. If we sit in [seats reserved for] women, then they get uncomfortable and if we sit in men's coach then they keep their hands on us or sit very close [to us]."⁵³

19. Interviewees also reported being spoken to in a derogatory sexual tone, as if to proposition sex, with the assumption that all transgender persons are sex workers. N1, a transwoman and activist from Delhi, described her experience:

"People comment in a very different tone like *kaisi hai janemam, kaha rahti ho* [how are you darling, where do you live?]. While giving money they end up touching my body, that happens a lot. I handle that in a calm manner. Two days ago, when I was begging, a man grabbed both of my hands, he said *madam sacchi aaj kuch nahi hai mere paas* [I don't have any money to give to you today]. I got my hand free and told him to not touch me again."⁵⁴

20. N, a transwoman and activist from Bangalore spoke of the stigma associated with transgender identities that creates barriers for accessing public transport:

"Our trans community does not use the public transport usually as we face a lot of stigma and discrimination there. If we sit next to men, they look at us in a sexual manner and it is very uncomfortable, and we feel unsafe. If we

⁵¹ ICJ interview, Bangalore, September 2018; "Dead name" is a term used to refer to the birth name of a person who has changed their gender identity and name.

⁵² ICJ interview, Delhi, August, 2018.

⁵³ ICJ interview, Bangalore, September 2018.

⁵⁴ ICJ interview, Delhi, August, 2018.

sit next to women, they also mistreat us, they tell us to sit on the last seat and they also assume that we are thieves.”⁵⁵

21. Q1, a gay man based in Delhi explained how his choice of clothes and gender expression affected how freely he was able to access public transport.

“I usually get some stares if I wear something overtly printed or brightly coloured in the metro. I have noticed that since I started going to my new job in formals and all, none of that happens.”⁵⁶

Cultural places and public events

LGBTQ persons often experience exclusion from cultural places and events, in the form of denial of entry and participation due to SOGIESC-based discrimination.

22. In Manipur, transgender persons are denied the right to participate in the *Thabal Chongba* – a Manipuri cultural event. R1, a *nupi-manbi*⁵⁷ and activist from Imphal, Manipur talked about her lack of access to the festival:

“So strict is this segregation maintained that once a transgender person was brutally beaten up by some men while entering the Chongba. Sometimes, when a transgender person is spotted in the crowd, the organizers ask them to leave over the public announcement system. Because of such blatant discrimination and exclusion some transwomen from the *nupi-maanbi* community have now started organizing their own Thabal Chongba.”⁵⁸

23. E, a transman and activist from Imphal, talked about the struggles of transmen in navigating gendered spaces in public events. He shared the story of another transman who faced sexual harassment in the men’s queue:

“He had gone to a Manipuri festival celebration with his cousins. They were being frisked while returning from there at 11:30 PM in the night. His cousin’s brother asked the police to not check the trans-man, saying he was a woman. The policemen on night duty are generally drunk and do whatever they want. These men were drunk and refused to believe the trans-man’s words. Moreover, that trans-man’s voice is not like a woman’s, he sounds like a male. So the police said they thought that the trans-man was lying and that he was a man. One of the policemen from the back also suggested tearing all his clothes in order to check if he was actually a man or a woman. After that, we advise everyone to just keep themselves safe, not to venture out with a male late at night, be back at home by 5 PM in the evening, etc., so as to avoid such crimes or crises.”⁵⁹

24. S1, a *nupi-manbi* from Imphal, Manipur told the ICJ that transgender and non-binary persons were excluded from a temple in Imphal. She said:

“a local temple for the *Puthiba* god doesn’t allow transgender persons from entering or participating in religious activities. The temple authorities insist that in order to be able to offer prayers, “women should behave like women, and men should behave like men. Women should only enter in women’s clothing,”⁶⁰

⁵⁵ ICJ interview, Bangalore, September 2018.

⁵⁶ ICJ interview, Delhi, November 2018.

⁵⁷ “Nupi-manbi” is a Manipuri term used to refer to transwomen.

⁵⁸ ICJ interview, Imphal, October 2018.

⁵⁹ ICJ interview, Imphal, October 2018.

⁶⁰ ICJ interview, Imphal, October 2018.

Denial of entry and refusal to provide services

25. T1, a transwoman and activist from Delhi, recounted an incident of being denied entry to a shopping mall in the following words:

“A colleague and I had gone to Epicuria Mall [in New Delhi]. We had been there several times. This time, we were stopped by the security persons, and asked to wait. They let people behind us enter the mall. When we asked why we were not being allowed to enter, they asked us why we wanted to go inside. I told them that we just wanted to eat at the food court. He allowed us to enter. Soon after, we realized that we were being followed. That is when we took action and complaint to the Chief of security.”⁶¹

26. Transgender persons are often presumed to be sex workers or beggars, and thus suspected of carrying out illegal activities inside shopping malls. N, a transwoman and activist from Bangalore told her story:

“Transwomen who work on streets all day or who have been seen on streets as sex workers or beggars will never be allowed into malls. They think we will create nuisance inside the malls, or solicit or beg, so they don’t allow us. If they do allow us, a security guard will follow us inside to each and every shop or food court where we go.”⁶²

27. A, a transwoman from Delhi, told the ICJ that she was suspected without reason of shoplifting in a shopping mall in Delhi and tailed by security persons. She said:

“There was this one instance where me and another trans-woman were at Saket City Mall [a shopping centre]. There was a guard there who kept following us and checking that we don’t shoplift something.”⁶³

28. A, a transwoman and activist from Delhi said that several salons had refused to provide services to her in the past due to her gender identity.

“A lot of beauty parlours are also not available for us. When we enter, the owner of the parlor will say ‘sorry Ma’am, we don’t provide services to you.’ So, we have to go to selective parlours. In Delhi, I go to this parlor called Images, which is in Lajpat Nagar. That’s the only parlor I go to.”⁶⁴

29. S, a transwoman from Delhi, spoke of how she was denied entry to a hotel in Surat because of her gender identity and expression.

“I had gone to Kozhikode for official purpose with a colleague, but our stay hadn’t been pre-booked. We went to several hotels but did not allow us to enter on the pretext that they did not have any vacant rooms. Some asked for residential proofs. We were not able to get a room until 1 AM the next morning. I suggested to my colleague [a cis-gendered man] that I will go and stay with my relatives, as it was possible that we were not being given a room because of me.”⁶⁵

30. F1, a transwoman and activist from Kochi was also denied entry into a hotel.

⁶¹ ICJ interview, Delhi, August 2018.

⁶² ICJ interview, Bangalore, September 2018.

⁶³ ICJ interview, Delhi, August 2018.

⁶⁴ ICJ interview, Delhi, August 2018.

⁶⁵ ICJ interview, Delhi, August 2018.

"When I went to Kozhikode, I was stopped from entering a hotel. They said that cross-dressers are not allowed. They were not ready to give [me] a room."⁶⁶

⁶⁶ ICJ interview, Kochi, October 2018.