



National Human Rights Commission of India

**REPORT TO THE REGIONAL NATIONAL HUMAN RIGHTS
INSTITUTIONS PROJECT ON INCLUSION, THE RIGHT TO
HEALTH AND SEXUAL ORIENTATION AND GENDER IDENTITY**





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This Report was prepared for the Regional National Human Rights Institutions Project on Inclusion, the Right to Health, and Sexual Orientation and Gender Identity (SOGI), implemented by the International Development Law Organization (IDLO) and the United Nations Development Program (UNDP) in partnership with the Asia Pacific Forum and SAARCLAW (the Regional NHRI SOGI Project). The Project was designed to build an understanding of the response of National Human Rights Institutions (NHRIs) in South Asia and Southeast Asia to SOGI-related human rights issues.

The Project advocates for greater employment of the Yogyakarta Principles; builds upon the outcomes of the South Asia Roundtable Dialogue: Legal and Policy Barriers to the HIV Response (Kathmandu, 2011); and supports the commitments of the Economic and Social Commission for Asia and the Pacific (ESCAP) under Resolutions 66/10 and 67/9.

The Project is a direct response to the recommendations of the Report of the Asia Pacific Forum (APF) Advisory Council of Jurists: Human Rights, Sexual Orientation and Gender Identity, 2010 (ACJ Report). Specifically, the ACJ Report recommends that NHRIs:

- undertake an internal dialogue on issues relating to the human rights of people of diverse SOGI and build the capacity of the institution to understand the issues and to react appropriately;
- build relationships with people of diverse SOGI, including civil society organizations, in order to inform the work of the NHRI; and
- research, identify and document human rights violations against people of diverse SOGI, and the impact of discriminatory laws and practices.

National report prepared by: Ms. Laya Medhini, Centre for Legal Aid and Rights.

Terminology

The terms sexual orientation and gender identity have been defined by the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles) as follows:

- Sexual orientation refers to each person's capacity for profound emotional, 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 refers 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;

While sexual orientation and gender identity (SOGI) are the two terms which have broad acceptance, it is useful to note other accepted terms used to describe diverse sexual orientation and gender identity.

Bisexual: a person who is emotionally/ sexually/ physically attracted to both men and women.

Gay: a man who is emotionally/ sexually/ physically attracted to men.

Lesbian: a woman who is emotionally/ sexually/ physically attracted to women.

Intersex: a general term used for a variety of conditions in which a person is born with a reproductive or sexual anatomy that does not fit typical definitions of female or male reproductive or sexual anatomy.

LGBT: an acronym for lesbian, gay, bisexual and transgender, taken to include intersex people.

MSM: an acronym for men who have sex with men. This term is used in the HIV sector to denote a vulnerable population of men who have sex with men that may or may not identify as homosexual or bisexual.

Sexuality minorities: people discriminated against due to their sexual orientation or gender identity. This includes gay men, lesbians, bisexuals, transgender and other traditional gender identities from around the world like *hijras*, *kothis*, *warias*, *katoye*, or *berdache*.

Transgender: a person born anatomically with a certain sex, but who is more comfortable with a different gender or sexual identity. The term transgender is generally used to describe individuals who transgress social gender norms or who defy rigid, binary gender constructions, and who express or present a breaking and/or blurring of culturally prevalent stereotypical gender roles. Transgender people may live full time or part-time in the gender role different to their biological sex.

This report will use these terms as relevant.

1. INTRODUCTION

Sexual minority groups in India have long been subject to criminalisation, discrimination, virulent social stigma and harassment. Numerous reports, accounts, and narratives document the wide range of human rights violations faced by MSM and transgender people in India. These violations increase manifold the vulnerability of these groups to HIV. Additionally, the criminalisation, discrimination, stigma faced by MSM and transgender are major barriers to HIV prevention, treatment, care and support.

This independent research (conducted on the basis of publicly available information) documents how the National Human Rights Commission of India and a number of State Human Rights Commissions have responded to SOGI-related human rights issues. Rights violations against sexual minorities involve both state

and non-state actors. People from the MSM and transgender populations face gross violations of human rights in the area of civil, political, economic, social and cultural rights, and are the target of discrimination by government, law enforcement groups, media, the community and medical agencies. When sexual minorities experience violence and discrimination by state institutions or the police, they lose several inter-related rights such as freedom of expression, right to health, and effective legal remedies.

MSM and transgender people are often singled out because they are seen as a 'deviant' section of the population. The National AIDS Control Programme, Phase III 2007 - 2012 (NACP-III), Strategy and Implementation Plan states "[i]t is clear from the experience gained so far that the social marginalisation and disempowerment that characterise [High Risk Groups (HRGs)] are the key vulnerabilities that need to be addressed before any interventions related to HIV/AIDS can be successfully adopted by them."

Safeguarding and strengthening human rights is essential to combating India's HIV epidemic. Over time, communities have rallied and assumed the role of custodians in the struggle for basic human rights of its constituencies. Sustainable community actions towards monitoring and challenging human rights violations are crucial in pushing towards a less oppressive socio-legal environment within which sexual minorities can claim their rights from human rights commissions and other access to justice mechanisms.

The Special Rapporteur on Human Rights Defenders, Ms Margaret Sekaggya, conducted a mission to India from 10 -21 January 2011, to assess the current situation of human rights defenders in India. During this time the Special Rapporteur met with senior officials at the central and state levels, and human rights defenders. The Special Rapporteur details the current challenges faced by human rights defenders in India in their legitimate activities, including by defenders working on economic, social and cultural rights and defenders working for the rights of marginalized people, amongst others.

On the issue of sexual minorities, the report of the Special Rapporteur provides:

"Defenders engaged in promoting and defending the rights of lesbian, gay, bisexual and transgender (LGBT) persons face discrimination, stigmatization and threats reportedly from many parts of society, especially in rural areas. On some occasions, the police attacked LGBT activists for raising issues pertaining to the situation of the LGBT community. In 2008, five LGBT defenders were falsely charged with extortion and unlawful assembly. In 2009, one LGBT activist was arrested in Orissa and detained for one day because of his advocacy work. He was insulted by police officers in the course of his arrest and detention. In West Bengal, an LGBT activist stated that she has faced public harassment, emotional violence and beatings."¹

2. BACKGROUND

International human rights law protects and promotes the rights of all humans on the basis of equality, without discrimination. The Yogyakarta Principles clarify and affirm States' human rights obligations, by setting out the application of international human rights law to SOGI.

MSM and Transgender People in India

Prevalence of HIV within the MSM and transgender sexual minority groups is the highest of any population group in India.² Until recently, HIV programs in India included transgender people under the epidemiological and behavioural term of MSM, although many transgender people do not identify as MSM. Increasingly, it is

¹ Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya; UN General Assembly, Human Rights Council 19th Session (6 Feb 2012), Agenda item 3 Addendum at p18 www.ohchr.org/Documents/Issues/Defenders/A-HRC-19-55-Add1.pdf

² <http://www.worldbank.org/en/news/feature/2012/07/10/hiv-aids-india>

recognised that transgender people have unique needs, behaviours and concerns, and that from both a public health and social perspective, it is not appropriate to group transgender people under the rubric of MSM.³

At both a global level and in India, transgender people, MSM and people of diverse SOGI face stigma, discrimination and oppression. These factors exacerbate health and economic vulnerability, reduces access healthcare facilities, public goods and services and access to justice mechanisms.

People Living with HIV

Despite great strides being made in the prevention of HIV and in the treatment and care of people living with HIV (PLHIV) through innovative programming and inclusive policies; large numbers of PLHIV in India still have to live with the reality of stigma and discrimination. Studies conducted in India point to the prevailing notions of morality and misperception of the transmissibility of HIV, as triggers of stigma and discrimination.⁴

Jurisprudence

A recent victory in the struggle for human rights for LGBT populations came through the reading down of Section 377 of the Indian Penal Code (IPC) in 2009. Previously, the IPC criminalised certain sexual acts between consenting adults, jeopardising the self-respect, dignity and safety of sexual minorities in particular. The process of challenging the constitutional validity of this law began with the public interest litigation filed by Naz Foundation India in the Delhi High Court in 2001, and culminated in a judgement in favour of Naz Foundation on 2 July 2009. The judgement represents a significant victory in the protection of human rights of sexual minorities in India. Significantly, this case opened up the subject of sexual minorities to the media and brought it into the realm of public discussion and dialogue. Sexual minority communities were highly instrumental in galvanising members and contributing to the legal process that led up to the Delhi High Court judgement.

The landmark High Court judgement is currently under appeal in the Supreme Court, challenged by conservative sections of society who seek its reversal. The judgement has not been stayed. The State abdicated its role to defend the judgement in the Supreme Court, relegating defence to civil society. On 23 February 2012, the Additional Solicitor General, representing the GoI, called homosexuality “immoral” before the Supreme Court.⁵ Later, on 28 February 2012, the GoI stated that it did not find any legal error in the judgement of the Delhi High Court decriminalising homosexuality and “accepts the correctness of the same.”⁶ The Supreme Court noted that the GoI was making a mockery of the system and wasting the court’s time by adopting contradictory stands on the issue.⁷

There is still much to be done to address the stigma and discrimination faced by LGBT communities, notwithstanding the abovementioned jurisprudence. The persistence of stigma and discrimination is a clear indicator that there are many gaps in the response to HIV.

3. MANDATE AND POWERS

The National Human Rights Commission is an expression of India’s concern for the protection and promotion of human rights. Set up in October 1993 under the *Protection of Human Rights Act*, 1993 (PHR Act), the

3 Background paper: UNDP- National Consultation on Issues of Transgender/Hijra Community

4 <http://www.stigmaactionnetwork.org/atomicDocuments/SANDocuments/20120315163004-Stigma%20Index%20India%20Tamil%20Nadu.pdf>

5 Lawyers Collective, *News from Section 377 Arguments before the Supreme Court*, available at: <http://www.lawyerscollective.org/news/141-news-from-section-377-arguments-before-the-supreme-court.html> Access to Justice

6 Lawyers Collective, *Anti-gay law is offshoot of British Colonialism: Centre to Supreme Court*, available at: <http://www.lawyerscollective.org/news/149-anti-gay-law-is-offshoot-of-british-colonialism-centre-to-supreme-court.html> 388

7 Lawyers Collective, *News from Section 377 Arguments before the Supreme Court*, available at: <http://www.lawyerscollective.org/news/141-news-from-section-377-arguments-before-the-supreme-court.htm>

Commission undertakes many functions, including inquiring into human rights violations, intervening in court proceedings and undertaking human rights education.⁸

The PHR Act defines human rights to include rights relating to life, liberty, equality and dignity of the individual guaranteed under the Constitution of India 1949 (Constitution), or embodied in the International Covenants and enforceable by courts in India.⁹ This broad definition places the Commission in a strong position to call upon national and international human rights statutes to achieve its mandate. This would include the provisions of international conventions which are construed to protect or guarantee the rights of sexual minority groups.

Under Chapter III of the PHR Act, the NHRC is mandated to perform the following functions:

- proactively or reactively inquire into violations of human rights or negligence in the prevention of such violation by a public servant;
- by leave of the court, to intervene in court proceeding relating to human rights;
- visit any jail or other institution under the control of the State Government, where persons are detained or lodged for purposes of treatment, reformation or protection, for the study of the living conditions of the inmates and make recommendations;
- review the safeguards provided by or under the Constitution or any law for the time being in force for the protection of human rights, and recommend measures for their effective implementation;
- review the factors, including acts of terrorism that inhibit the enjoyment of human rights and recommend appropriate remedial measures;
- study treaties and other international instruments on human rights and make recommendations for their effective implementation;
- undertake and promote research in the field of human rights;
- engage in human rights education among various sections of society and promote awareness of the safeguards available for the protection of these rights through publications, the media, seminars and other available means;
- encourage the efforts of NGOs and institutions working in the field of human rights; and
- such other function as it may consider it necessary for the protection of human rights.

The NHRC consists of:

- A Chairperson who has been a Chief Justice of the Supreme Court of India.
- One Member who is, or has been, a Judge of the Supreme Court of India.
- One Member who is, or has been, the Chief Justice of a High Court.
- Two Members to be appointed from among persons having knowledge of, or practical experience in, matters relating to human rights.¹⁰

⁸ <http://nhrc.nic.in/>

⁹ <http://nhrc.nic.in/>, link: <http://nhrc.nic.in/documents/Publications/HRActEng.pdf>

¹⁰ Note, the Chairperson of the National Commission for Minorities, the National Commission for the Scheduled Castes, the National Commission for the Scheduled Tribes and the National Commission for Women are deemed to be Members of the NHRC for the purpose of the NHRC's discharge of certain functions.

While inquiring into complaints, the Commission has all the powers of a civil court trying a suit under the *Code of Civil Procedure* 1908, including:¹¹

- summoning and enforcing the attendance of witnesses and examining them on oath;
- discovery and production of any document;
- receiving evidence on affidavits;
- requisitioning any public record or copy thereof from any court or office; and
- issuing commissions for the examination of witnesses or documents.

The PHR Act also provides for the establishment of State Human Rights Commissions (SHRCs).¹² The SHRC may inquire into violation of human rights only in respect of matters relatable to any of the entries enumerated in List II and List III in the Seventh Schedule to the Constitution.¹³ Within these parameters, the SHRC has the same functions and powers as the NHRC.¹⁴

4. INDEPENDENCE AND AFFILIATIONS

The NHRC India holds an 'A' ranking with the International Coordinating Committee of National Human Rights Institutions and full membership of the Asia Pacific Forum.

The NHRC India has committed to providing bilateral technical support to other national human rights institutions in the Asian region.¹⁵

5. THE NHRC ENGAGEMENT WITH INTERNATIONAL HUMAN RIGHTS MECHANISMS

The NHRC submitted reports under India's first and second Universal Periodic Reviews (UPR) (the 1st Session in 2008 and the 13th Session in 2012). In its second UPR submission, the NHRC admitted that while there was some amount of progress in terms of its work, the unique nature of the Commission in responding to a population of India's size was creating some difficulties.¹⁶ The Commission observed that "public spending on health continues to be abysmally low, at about 1 % of GDP, despite Government's commitment to raise it to 2-3%. The public health system is riddled with problems; vast numbers in the villages get little or no medical care. A performance audit by the Auditor General and an evaluation done for the Planning Commission have both found serious deficiencies in the National Rural Health Mission."¹⁷

6. THE NHRC ENGAGEMENT WITH NATIONAL MECHANISMS

In a 2012 Shadow Report under the UPR process, the NHRC was noted for holding regular training programmes on human rights; and sensitizing Government officials, armed forces, prison officials and law

¹¹ <http://nhrc.nic.in/>

¹² Section 21 PHR Act

¹³ Section 21(5) PHR Act

¹⁴ Section 29 PHR Act

¹⁵ <http://www.thefreelibrary.com/NHRC-India,+UNDP+sign+capacity+development+pact+with+Afghan+rights...-a0255595866>

¹⁶ NHRC-India Submission to the UN Human Rights Council for India's Second Universal Periodic Review

¹⁷ www.wghr.org/pdf/NHRC.pdf

officers on human rights. The Commission was also commended for integrating human rights education into the school curricula.¹⁸

7. POLICY AND INITIATIVES RELATED TO SOGI AND HIV

The NHRC specifically recognises the need to protect the human rights of those affected/infected by HIV. The NHRC website states it is “deeply concerned about the need to protect the human rights of those affected/infected by HIV, the Commission has been redressing individual cases relating to discrimination faced by [PLHIV].” In addition, the Commission has launched a multi-media campaign to disseminate information on human rights and HIV to various target groups.¹⁹ The NHRC website indicates that a Member of the Commission has been designated to serve as the Focal Point on HIV-related matters.²⁰

NHRC Convening Power, Consultations and Publications

The NHRC commenced work on the right to health, HIV-related rights, and the enabling legal environment more than a decade ago, with HIV-related rights issues first appearing in NHRC Annual Reports in 1997-1998. The Commission recognises the importance of the link between health and human rights. The NHRC website states “when linked together, more can be done to advance human well-being than when health and human rights are considered in isolation.” The Commission’s commitment to the right to health is evidenced by a number of activities, including those listed below.

During the period 2000-2004, the Commission organized a number of major national consultations on human rights, HIV, and access to healthcare.

The NHRC constituted a Core Advisory Group on Health in 2002 (reconstituted in 2010), comprising of eminent medical experts with a request to prepare a plan of action for systemic improvements in the health delivery systems of the country.

The following publications and initiatives demonstrate the NHRC’s competency and leadership in the field of HIV and human rights:

- National Conference on Human Rights and HIV/AIDS (2000) and the Report of the National Conference on Human Rights and HIV/AIDS;
- Recommendations on HIV/AIDS (Annual Report, 2001-2002); and
- Know Your Rights: Human Rights and HIV/AIDS (2011).

The NHRC lists its other HIV-related initiatives on its website.²¹

The NHRC in partnership with National AIDS Control Organisation, the Lawyers Collective, the UN Children’s Fund and the Joint United Nations Programme on HIV/AIDS, organized a National Conference on Human Rights and HIV/AIDS in New Delhi in November 2000. The Conference was a part of a series of consultations on health and human rights planned by the NHRC, which elicited broad-based participation and enabled participants to scrutinize the status of HIV protection, control and healthcare within the framework of human rights. Based on the deliberations of the National Conference, systemic recommendations on various aspects of human rights and HIV were sent to the relevant authorities in the Central Government and in various States. Recommendations covered consent and testing, confidentiality, discrimination in health care, discrimination in employment, women in vulnerable environments, children and young people, PLHIV

18 http://lib.ohchr.org/HRBodies/UPR/Documents/session13/IN/JS18_UPR_IND_S13_2012_JointSubmission18_E.pdf

19 <http://nhrc.nic.in/hrissues.htm#no19>

20 <http://nhrc.nic.in/hrissues.htm#no19> – note this information may be dated.

21 http://nhrc.nic.in/bib_hiv_aids.htm

and marginalised populations. Notably, the Recommendations in relation to marginalised populations state: “legalise any sexual activities undertaken with consent between adults, and in connection with this adopt a clearly defined age for sexual consent.”²²

The NHRC Annual Report (2001-2002) included the recommendations of the National Conference on Human Rights and HIV/AIDS²³ and expresses that the recommendations represent a series

of action points that seek to feed into the response to HIV both on national and state levels, and in reference to all partners (including the international and domestic non-governmental organisations, foreign governments and multilateral agencies, credit institutions, the business community/private sector, employers’ and workers’ associations, religious associations and communities). The Annual Report (2001-2002) further states that a secondary purpose of these action points is to complement the International Guidelines on HIV/AIDS and Human Rights with practical solutions in Indian context.

The 2011 NHRC publication Know Your Rights: Human Rights and HIV/AIDS recognises MSM and transgender people as vulnerable to HIV, and details the nexus between HIV and human rights. This publication includes the recommendation of the National Conference on Human Rights and HIV/AIDS.

The NHRC does not have a focal point or work stream on SOGI, however, through its work on HIV, there has been some NHRC engagement on the rights of vulnerable populations.

In June 2012, the NHRC participated in a National Stakeholder Consultation with the Centre for Legal Aids and Rights (CLAR), the International Development Law Organization (IDLO), United Nations Development Programme (UNDP), INFOSEM²⁴ and representatives of sexual minority communities.²⁵ The NHRC Secretary General encouraged community representatives to use all available mechanisms to advance human rights, including the State Human Rights Commissions, the NHRC online complaints process and Court legal aid mechanisms.

As a collaboration, the NHRC and the Centre for Advanced Studies in Human Rights (CASHIR) at Rajiv Gandhi National University of Law (RGNUL), organised a National Seminar on **‘Gender Issues In India: Sensitisation, Reflection And Solutions’** from 6 -7 October 2012 at RGNUL in Patiala, Punjab, India.²⁶ The aim and objective of this seminar was primarily to sensitize people on gender issues. Furthermore, it was an effort to reflect and examine issues relating to gender issues and to come up with solutions to these issues. The agenda included transgender rights.

8. THE COMPLAINTS SYSTEM AND RIGHTS REPORTING MECHANISMS

Since its inception, the Commission has handled complaints against law enforcement agencies including complaints for failure to take adequate action, unlawful detention, false implications, custodial violence, and illegal arrests. Transgender people and other sexual minority groups report they commonly experience police harassment, police violation, and unlawful detention. The Commission’s capacity and experience in this area may be of value in protecting and promoting the rights of sexual minority communities.

The NHRC has an accessible complaints procedure; complaints can be submitted online or in person at the NHRC or one of the 23 State Human Rights Commissions. Complaints can be submitted by a second party

²² <http://nhrc.nic.in/documents/AR01-02ENG.pdf> p357

²³ <http://nhrc.nic.in/documents/AR01-02ENG.pdf>

²⁴ INFOSEM is the India Network for Sexual Minorities. INFOSEM is a collective national effort by sexual minorities to ensure equality for themselves in all spheres of life, free from discrimination. <http://www.infosem.org/>

²⁵ This National Stakeholder Consultation was conducted as part of the Regional National Human Rights Institutions Project on Sexual Orientation and Gender Identity (IDLO/ UNDP/ APF/ SAARCLAW).

²⁶ <http://studentatlaw.in/national-seminar-gender-issues-rgnul-nhrc/>

on behalf of the complainant of a rights violation. Once lodged in the system, complainants can track their complaint via an online system.

The NHRC online complaint form asks complainants to indicate whether they are men or women. There is no separate box for transgender people. The online complaint form also disaggregates data by religion, caste, age and disability. Arguably, complaints made by LGBT individuals related to their sexual orientation or gender identity would be categorised under the category of rights violation related to sex. This has the potential to conflate SOGI-related rights violations with violations of women's rights.

The NHRC complaints data is not publicly available.

9. CASE STUDIES FROM STATE HUMAN RIGHTS COMMISSIONS

State Human Rights Commissions have demonstrated accessibility and a commitment to human rights of all citizens of India, in receiving and responding to complaints lodged by transgender individuals. A number of these complaints are discussed as case studies below. These examples are sourced from media reports, the full details of final outcomes of these cases were not readily available.

Maharashtra State Human Rights Commission

Laxmi Narayan Tripathi - the right to vote (2009)

In 2009, Ms Laxmi Narayan Tripathi moved the Maharashtra State Human Rights Commission in Mumbai on the matter of the right to vote for transgender people (in the State Assembly polls). Terming the denial to vote as a "gross violation of human rights" Ms Tripathi lodged a complaint demanding the government extend the fundamental right to vote to eunuchs and transgender people. She notes in her complaint "[T]here is a gross violation of the human rights of eunuchs in Maharashtra. We are not provided with ration cards and not permitted to vote."²⁷ In lodging her complaint, Ms Tripathi was supported by four law students.

In response, the Maharashtra SHRC issued notices to the Chief Secretary of the Maharashtra State Government with a direction to ensure that departments concerned with ration cards and voter ID cards. The Maharashtra SHRC also directed the State Government to note in their reply, steps being taken or to be taken in this regard.

West Bengal State Human Rights Commission

Pinki Pramanik - discrimination on the basis of gender identity (2012)

In June 2012, Ms Pinky Pramanik was arrested and remanded in custody after her live-in partner filed a police complaint against her. A video clip of Ms Pramanik was leaked on the internet, showing her in an unclothed state undergoing a gender test.

Ms Pramanik appeared before a panel of the West Bengal SHRC. In her submission to the Commission, she alleged discrimination on the basis that the police forced her to undergo the gender determination test, kept her in a prison cell meant for male inmates, and was escorted to court by male police personnel.

On this occasion, the West Bengal SHRC determined that since the Cyber Crime Cell of the Kolkata Police had started investigation into the circulation of the video, the Commission would not conduct an inquiry.

West Bengal State Human Rights Commission

Manabi Banerjee - discrimination and the right to employment (2003)

²⁷ <http://news.outlookindia.com/items.aspx?artid=666036>

Ms Manabi Banerjee is a transgender person who lives as a woman in her private life and as a man in public. Ms Banerjee was employed as a college professor and lived on campus, in teachers' quarters. In 2003, teachers forced Ms Banerjee to move out of the teachers' quarters on the basis of her gender identity, called her a *hijra*, and accused her of child abuse. Ms Banerjee approached the West Bengal SHRC with a complaint against this discrimination by college teachers.

The West Bengal SHRC served a show-cause notice on the college.

Karnataka State Human Rights Commission

Representatives of the hijra community and Sangama - Illegal detention and police abuse (2008)

In late 2008, five *hijras* were arrested by the police and taken to the Girinagar Police Station. At the station, they were assaulted by the police, including the Assistant Commissioner of Police. Charges of wrongful restraint and extortion were laid against the *hijras*. The group appeared before a magistrate on the same night and were remanded in custody. All through the process, the *hijras* were handled by male police. No medical treatment was offered for injuries caused by police assault.

While in custody, the *hijras* sought help from an NGO called Sangama.²⁸ When the Sangama crisis team members reached the police station, they claim they were verbally and physically assaulted by the police officers. Charges were also laid against the Sangama crisis team (related to unlawful assembly, rioting and obstructing government officials in performing their duty). The NGO crisis team members were produced before the magistrate, and also remanded in custody.

Around 150 human rights activists and lawyers from various organizations gathered outside the police station on the first day and attempted to negotiate the release of the *hijras* and the Sangama crisis team. The *hijras* and the crisis team were eventually released on bail two days later.

A complaint was made to the Karnataka State Human Rights Commission who ordered a detailed report from the Commissioner of the Police within 6 weeks.

10. ALTERNATIVE MECHANISMS FOR ADDRESSING ISSUES RELATED TO SOGI AND HIV

A. Court Action

Indian Courts have generated some jurisprudence on SOGAI-related issues, including harassment by law enforcement personnel and the right to choose sex reassignment surgery.

Jayalakshmi vs The State Of Tamil Nadu; Madras High Court 10 July 2007

Pandian, a transgender person, was harassed by the law enforcement personnel. Following this harassment, he set himself on fire, and after a few days succumbed to the injuries. In his dying declaration, he stated that he had wanted to end his life because of the harassment he faced from the police. Jayalakshmi, Pandian's older sibling, brought a legal case against the law enforcement personnel and the State. Pandian's final statement was recorded and admitted in Court. The Court passed an order against the law enforcement personnel and the State. The Court ordered:

- The State Government pay compensation of INR500,000 to the petitioner for the harassment meted out to Pandian.
- The State Government initiate disciplinary action against the involved law enforcement personnel for the treatment meted out to Pandian.

²⁸ Sangama works on rights and health issues for the SOGI communities in Karnataka.

Bidhan Baruah aka Swati Baruah vs Supti Ranjan Barua & Ors; the High Court of Judicature at Bombay, Writ Petition (Lodging) No. 1092 of 2012

Ms Baruah is a transgender whose family opposed his proposed sex reassignment surgery. Ms Baruah's parents blocked Ms Baruah's bank accounts and threatened legal action against the hospital and the doctors involved in performing the sex reassignment surgery. Ms Baruah challenged his parents' actions in Court.

The Court made it clear that "neither the Union of India nor the State of Maharashtra has any objection to the petitioner undergoing the surgery that he wishes to undergo. They state that as far as they are aware, there is no law that prohibits the same."²⁹

B. State Government Initiatives

Tamil Nadu Aravanigal Welfare Board

In a pioneering effort to address the issues faced by transgender people, in April 2008, the Government of Tamil Nadu established a transgender welfare board (Tamil Nadu Aravanigal Welfare Board).³⁰ It is the first of its kind by any state government in India. The Social Welfare Minister serves as the President of the Board. The Board is intended to address the concerns of transgender people, including education, income generation and other social security measures.

As a first step, the Board conducted a census of transgender populations in all 32 districts of Tamil Nadu. The Board further caused identity cards specifying gender as *aravan*³¹ to be issued in some districts.³² The Tamil Nadu government has also started issuing ration cards (for buying food and other items from government-run fair price shops) for transgender people.

In May 2008, the Tamil Nadu State Government issued a government order to enrol transgender people in government educational institutions and to explicitly include 'other' or 'third gender' category in the admission forms.³³ This appears to be a result of advocates lobbying for better access to education as well as the work of the transgender community who are a part of the Transgender Welfare Board.

In Tamil Nadu, in collaboration with the Tamil Nadu Aravanigal Welfare Board, free sex reassignment surgery is performed for *hijras* and transgender people in select government hospitals.³⁴

11. CHALLENGES

The National Human Rights Commission and State Human Rights Commissions face structural and practical limitations in implementing their functions.

In terms of structural limitations, the Commission can make recommendations to the government but has no power to enforce its recommendations. The Commission may make recommendations for: payment of compensation to the victim or to her/his family; disciplinary proceedings against delinquent officials; the registration of criminal cases against those responsible; instructions to take particular action to protect human rights and/or to refrain from actions that violate human rights. The Commission's lack of authority to ensure

²⁹ Ibid.

³⁰ <http://southasia.oneworld.net/archive/Article/first-ever-welfare-board-for-transgenders#.UNczksWEHxo>; announced by the Governor in Jan 2008.

³¹ Hijras in Tamil Nadu identify as "Aravani". Tamil Nadu Aravanigal Welfare Board, a state government's initiative under the Department of Social Welfare defines Aravanis as biological males who self-identify themselves as a woman trapped in a male's body. Some Aravani activists want the public and media to use the term 'Thirunangi' to refer to Aravanis.

³² <http://www.medindia.net/news/Southern-Indian-State-to-Conduct-First-Ever-Census-of-Transgenders-37201-1.htm>

³³ Admission to colleges, The Hindu, 5 May 2008.

³⁴ Background paper: UNDP- National Consultation on Issues of Transgender/Hijra Community

compliance weakens its impact as recommendations may be rejected, partially complied with, or delayed in implementation.³⁵

Practical limitations faced by the NHRC and SHRCs include:

- A time bar on complaints: Under the PHR Act, the National and State Human Rights Commissions cannot investigate an event if the complaint is made more than one year after the incident. Therefore, a large number of genuine grievances go unaddressed.
- Lack of human resources (failure to fill vacancies): SHRCs or the NHRC may function with less than the prescribed number of Members. This limits the Commissions' capacity to deal promptly with complaints.
- Lack of financial resources: Scarcity of resources significantly impedes upon the capacity of the NHRC and SHRCs to fulfil their mandate.³⁶

The Special Rapporteur on Human Rights Defenders recommends the NHRC establish a focal point or an entity dedicated to human rights defenders with specific attention to groups of defenders at particular risk, including those working on the rights of LGBT communities. The Special Rapporteur further states that "this entity must be adequately resourced in order to respond promptly to reported violations and to offer necessary protection."³⁷

12. CONCLUSION

The NHRC demonstrated significant leadership on the issue of HIV and human rights during the period 2000-2003. However, with the exception of the 2011 Know Your Rights: Human Rights and HIV/AIDS publication, there is little publicly available information on the NHRC's more recent efforts to advance this important rights agenda.

Media reports and anecdotes from the community indicate the State Human Rights Commissions have great potential to play a role in responding to rights violations related to SOGI and HIV.

³⁵ Needed: More Effective Human Rights Commissions in India, Mandeep Tiwana, Access to Justice Program, CHRI, 2004

³⁶ Ibid.

³⁷ Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya; UN General Assembly, Human Rights Council, 22nd Session (16 Jan 2013) Agenda item 3 at p21. http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.47_en.pdf

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