

Constitutionalism and Human Rights: A Critical Analysis of the Rights of Transgender People in India

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ABSTRACT: The movement for decriminalizing homosexual relations and the human rights of the LGBT community has gained momentum in the last decade. In India, various NGOs and LGBT society have fought a long battle demanding the decriminalization of homosexuality and declaring sexual orientation as part of the fundamental right to life under Article 21 of the Indian Constitution. This paper explored the Indian legislative framework dealing with transgender people. Furthermore, it extensively covered the landmark judgments delivered by the Indian judiciary on the subject matter and highlighted that these judgments had played an essential role in uplifting the cause and protecting the fundamental rights of transgenders. Using doctrinal research as its methodology, this study showed that the Indian Constitution essentially provides a fundamental right to equality under Article 14, whereas Articles 15 and 16 outline that no one shall be discriminated on the ground of sex. Also, the Indian judiciary had decriminalized Section 377 of the Indian Penal Code, considered as part of landmark judgments that recognize transgender people as a third gender. India also enacted the Transgender Protection Act 2019 to ensure the rights of transgenders. However, this Act failed to address the issue of forced sex-reassignment surgeries, which had been imposed upon transgender people against their consent. On the other hand, while transgenders are legally protected, gaining acceptance from society is another arduous task in which transgenders have struggled to realize an all-inclusive and non-judgmental environment towards persons with different sexual orientations.

KEYWORDS: Constitutionalism, Human Rights, Transgenders.



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I. INTRODUCTION

Historically, human rights are considered quite ancient in origin. However, with the establishment of the United Nations, they are recognized at the international level and accepted across the world. It is a well-known principle that human rights are inherent and available to all. In this context, the human rights of persons belonging to the transgender community, one of the most vulnerable and marginalized groups, have been grossly violated for centuries almost all over the world. Suzanne observes that LGBT people are subjected to discrimination, abuse, torture, and sometimes state-sponsored execution.¹ For many human rights violations, there exist laws under which countries punish perpetrators of such abuses.² She emphasizes that LGBT people in most countries experience abuses, and these responses are not viewed as human rights violations.³ However, the movement for preventing the human rights abuse of the LGBT community and decriminalizing homosexual relations has gained momentum in the last decade.

At the international level, United Nations adopted a resolution entitled "*Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity*" on 30th June, 2016.⁴ Simultaneously, in Yogyakarta, Indonesia, a group of human rights experts drafted a document containing certain principles to recognize and protect the human rights of transgenders. In 2017, supplementary provisions were added to this document. At present, this document, called *Yogyakarta Principles*, contains ten principles in total.⁵

¹ Suzanne M Marks, "Global Recognition of Human Rights for Lesbian, Gay, Bisexual, and Transgender People" (2006) 9:1 Health and Human Rights at 34.

² *Ibid.*

³ *Ibid.*

⁴ UN Human Rights Office, "Council establishes mandate on protection against violence and discrimination based on sexual orientation and gender identity," online: <<https://www.ohchr.org/en/press-releases/2016/06/council-establishes-mandate-protection-against-violence-and-discrimination>>.

⁵ The Yogyakarta Principles are a set of principles on applying international human rights law in relation to sexual orientation and gender identity. The Principles affirm binding international legal standards with which all States must comply. They promise a different future where all people born free and equal in dignity and rights

In the ILGA's Report on State-sponsored Homophobia, 2020,⁶ 124 UN members had completely decriminalized homosexual activities, while 67 UN members still criminalized same-sex.⁷ Furthermore, capital punishment is still prescribed for these acts in Yemen, Iran, Saudi Arabia, Mauritania, Nigeria, and Brunei.⁸ The Report further highlights that in 42 UN members, there is a prohibition on freedom of expression in matters relating to transgender people. In 11 UN members and 1 non-UN member, their constitution safeguards are provided to prevent discrimination based on sexual orientation. In respect of same-sex marriages, laws in 28 UN members, 1 non-UN member, and 30 non-independent territories allow such marriages.⁹

Neela Ghoshal draws attention to Argentina, which "broke ground in 2012 with a law that is considered the gold standard for legal gender recognition."¹⁰ Anyone over the age of 18 can choose their gender identity, undergo gender reassignment, and revise official documents without any prior judicial or medical approval, and children can do so with the consent of their legal representatives or through summary proceedings before a judge.¹¹ Neela emphasizes that "gender development should have no bearing on whether someone can enjoy fundamental rights, like the ability to be recognized by their government or to access healthcare, education, or employment."¹² However, transgenders encounter a humiliating, violent, and sometimes lethal degree.¹³ As grouped into part of LGBT, they also face problems of access to health, which the government should provide

can fulfill that precious birthright. For details, see Yogyakarta Principles, "About the Yogyakarta Principles," *Yogyakarta Principles*, online: <<https://yogyakartaprinciples.org/principles-en/about-the-yogyakarta-principles/>>.

⁶ *State-Sponsored Homophobia 2020: Global Legislation Overview Update*, by Lucas Ramon Mendos et al. (Geneva: ILGA World, 2020).

⁷ *Ibid.*

⁸ *Ibid.*

⁹ For details, see *Ibid.*

¹⁰ Neela Ghoshal & Kyle Knight, *Rights in Transition: Making Legal Recognition for Transgender People a Global Priority*, by Neela Ghoshal & Kyle Knight (Human Rights Watch, 2016) at 22.

¹¹ *Ibid.*

¹² *Ibid* at 21.

¹³ *Ibid.*

them the human rights protection.¹⁴ Several countries, including Malaysia, Kuwait, and Nigeria, enforce laws that prohibit "posing" as the opposite sex—outlawing transgender people. In scores of other countries, transgender people are arrested under laws that criminalize same-sex conduct.¹⁵ This issue reflects cases in which several Global South countries tend to be reluctant to recognize and protect transgenders.

Nevertheless, homophobia is prevalent in India, although attitudes towards homosexuality have shifted slightly in recent years. In particular, there have been more depictions and discussions of homosexuality by the Indian media.¹⁶ According to the 2020 USSD report, "Lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons faced physical attacks, rape, and blackmail."¹⁷ Various NGOs and LGBT societies have fought a long battle demanding the decriminalization of sodomy and declaring sexual orientation as part of the fundamental right to life under Article 21 of the Indian Constitution. Indian Constitution provides a fundamental right to equality under Article 14. Furthermore, Articles 15 and 16 outline that no one shall be discriminated on the ground of sex. However, "lesbians, gays, bisexuals and transgender individuals are out rightly denied these basic rights and put at risk for abuse, poor health, discrimination, and even death."¹⁸ Indian society neither realizes the trauma, agony, and pain the transgender community undergoes nor appreciates the innate feelings of the members of the transgender community whose mind and body disown their biological sex.¹⁹ It is pertinent to note here that in 2012, the Supreme Court of Pakistan issued a landmark judgment in *Muhammad Aslam Khaki*

¹⁴ Dewi Rokmah, Khoiron Khoiron & Ristya Widi Endah Yani, "Outlining Gay's Right to Health in Jember, Indonesia: Challenges and Opportunities" (2020) 7:2 *Lentera Hukum* 137–152 at 144.

¹⁵ Neela Ghoshal & Kyle Knight, *supra* note 10.

¹⁶ Aditya Saurabh, "Human Rights Violations of LGBTQI Community in India: Analysis" (2020) 107 *All India Reporter* at 154

¹⁷ Indian Human Rights Report, 2019, 11 March 2020 at 56

¹⁸ Pallavi Hooda, "The Transgender Persons Act- A Misguided Attempt in the Pursuit of Human Rights for All" (2020) 47:4 *Indian Bar Review*.

¹⁹ Ali Badruddoja Molla, "Emerging Challenges to the Rights of the Transgender Persons in India" 105 *All India Reporter* at 138.

v S.S.P. (Operations) Rawalpindi, which gives legal recognition to the transgender community in Pakistan as belonging to the 'third sex.'²⁰

This paper explores India's current legislative framework comprehensively dealing with transgender people. It extensively covers the landmark judgments delivered by the Indian judiciary on the subject matter. Also, it highlights that these judgments have played an essential role in uplifting the cause and protecting the fundamental rights of transgender people.

II. METHODS

This paper used doctrinal and analytical methods of research. It critically analyzed the pathway of recognizing the rights of the transgender community in India. It specifically focused on the judicial activism of the Indian judiciary delivering landmark judgments for the betterment and welfare of the LGBT community, thereby expanding the horizon of fundamental rights to take within its scope the transgender people. Through this methodology, this paper critically evaluated the constitutional provisions, the Indian Penal Code, and the Transgender Persons (Protection of Rights) Act 2019 passed by the Indian Parliament.

III. TRANSGENDERS IN INDIA: ANCIENT VIS A VIS PRESENT

A. Basic Terminology

Before delving into the in-depth discussion of the subject matter, it is crucial to comprehend the important terminology involved. First, it provides an understanding of the difference between gender and sex. Sex is a biological concept, while gender is a social concept. Sex refers to an individual's biological and physiological features, like the genital, chromosomal, and hormonal composition of a person. Gender is a broader term. Gender means how a person identifies himself or herself. A person born as a male sex may identify himself with the feminine gender and vice versa. A person may not identify with his or her biological sex and may

²⁰ PLD 2013 SC 188 quoted in Asad U Khan, "Gendered Justice: Constitutions, Trans-genders, and Equality" (2019) 3 LUMS Law Journal at 69.

have different sexual inclinations. The term gender is also associated with the societal norms and roles assigned to a particular sex.

The term 'transgender people' generally describes those who transgress social gender norms.²¹ Transgender is an umbrella term used for all those persons who do not fit in the binary gender division of males and females and whose gender identity is different from their natal sex. In contrast, the term cisgender includes all those persons whose gender identity matches their natal sex. A female who has sexual attraction towards females is called lesbian, and similarly, a male having a sexual interest in males is called gay. Here other two terms come into the picture vis. homosexual, i.e., a person having a sexual orientation towards the same sex. The opposite of it is referred to as heterosexual. Then, there are bisexuals, who are known to have an interest in both males and females, and asexuals, who have no sexual attraction towards any sex generally. The terms above are only inclusive and not at all exclusive.

Furthermore, sexual orientation and gender identity are often used interchangeably. However, they are not the same. Gender identity may be defined as a person's internal sense of being male, female, some combination of male and female, or neither male nor female.²² Cambridge Dictionary defines gender identity as “a person's feeling of having a particular gender.”²³ Thus, sexual orientation is an attraction of a person towards a particular sex, while gender identity may be a person identifying himself as masculine or feminine.

B. Then and Now

Nowadays, many taboos and stigmas are attached to the transgender community in Indian society. Most people hold mixed feelings of fear and respect toward them. They strongly believe these persons have a mysterious and mystical power to bless or curse anyone, especially newborns. However,

²¹ Shobharam Sharma, “Transgender in India: Human Rights and Social Exclusion” (2013) 100 All India Reporter at 87.

²² See online: <<https://www.merriam-webster.com/dictionary/gender%20identity>>.

²³ See online: <<https://dictionary.cambridge.org/dictionary/english/gender-identity>>.

in ancient India, the community of transgender was not only properly recognized but duly respected. In Vedic literature, they have been termed *tritiya prakriti*²⁴ that is the third gender. Kamasutra provides a vivid description of the sexual relationship of people with 'third nature' (*tritiya prakriti*).²⁵

Shiva Prakash Srinivasan mentions, "The first reference of transgender is the female avatar of *Vishnu* as *Mohini*."²⁶ *Mohini* means an enchantress. The Mahabharata describes the first appearance of *Mohini* when *devas* and *asuras* had churned the ocean with the assistance of *Vishnu* as the *Kurma* (tortoise) avatar to acquire Amrita (the elixir of immortality).²⁷ He further conveys, "*Mohini* made a re-appearance in the *Vishnu Purana* when she used guile to save Shiva who had just given a boon to *Bhasmasura* that would incinerate anyone whose head he touches."²⁸ The origins of *Shankara* – *Narayanan (Haribaran)* in the *Linga Purana* are attributed to the merging of *Shiva* and *Mohini (Vishnu)*.²⁹

In the story of Ramayana, another ancient Indian epic whereby Lord Rama, on reaching the banks of the Sarayu River, asked men and women to return to their homes. However, the third gender, neither men nor women, stayed there and waited for Lord Rama till he returned from his fourteen years of exile. The community earned a respectable position in Indian society. However, with the passing centuries, their position has degraded to a great extent. Furthermore, in the great epic of Mahabharata, we find the reference to *Shikhandi*, considered to be a transgender person, who was a prince, and a great warrior. *Arjuna*, during his stay in *swarga* (heaven), assumed the identity of a transgender person. His great son *Aravan*, from a princess in Eastern India, is revered as a God of Hijras or transgenders. Even the *Ardhanarishwara* avatar of Shiva is another form of transsexualism. Thus, in ancient India, transgender persons enjoyed almost

²⁴ It means third nature in the context of sexual orientation.

²⁵ Shobharam Sharma, *supra* note 20.

²⁶ *Ibid.*

²⁷ Shiva P Srinivasan & Sruti Chandrasekaran, "Transsexualism in Hindu Mythology" (2020) 24:3 Indian Journal of Metrocinology and Metabolism.

²⁸ Aditya Saurabh, *supra* note 16.

²⁹ *Ibid.*

equal status with the male and female gender. Sunil Kumar rightly puts that "not always there existed discrimination with the transgenders."³⁰ Mahabharata includes an episode in which *Arjun*, a hero of the epic, is sent into exile. He assumes an identity of a eunuch-transvestite and performs rituals during weddings and childbirths that the hijras now perform.³¹

Michelraj, in exploring the historical evolution of the transgender community in India, observes that "hijras played a famous role in the royal courts of the Islamic world, particularly in the Ottoman empires and the Mughal rule in Medieval India."³² They rose to prominent positions as political advisors, administrators, generals, and guardians of the harems. Hijras were considered clever, trustworthy, and fiercely loyal. They had free access to all spaces and sections of the population, thereby playing a crucial role in the politics of empire-building in the Mughal era. The Hijras also occupied high positions in the Islamic religious institutions, especially in guarding the holy places of Mecca and Medina, the person of trust. They could influence state decisions and received a large amount of money to have been closest to kings and queens."³³

Prem Kumar Aggarwal accentuates that "we can find examples of archaic laws since the time of British rule whereby the community has been subjected to restrictions and prohibitions."³⁴ The prominent examples of such laws are first, *The Criminal Tribes Act* of 1871 (repealed in August 1949) and second, Section 377 of the IPC."³⁵ He further highlights that "Section 26 of this Act specifically targeted *Hijra* practice by providing:

³⁰ Sunil Kumar, "Rights of Transgender Community in Conglomerate of Human Rights Regime" (2020) 47:4 Indian Bar Review at 331.

³¹ S. Nanda, "Hijras and Sadhin," in S. La Font; ed., *Constructing Sexualities* (New Jersey: Pearson Education, 2003) quoted in Chandreshwari Singh, "A Humanist Exposition of Rights of Transgender and the Indian Law" (2017) 44:4 Indian Bar Review at 4-5.

³² M Michelraj, "Historical Evolution of Transgender Community in India" (2015) 4:1 Asian Review of Social Sciences at 18.

³³ *Ibid.*

³⁴ Prem Kumar Agarwal, "Rights of Third Gender in India and Recent Developments: Special Reference to NLSA Judgment" (2016) 7:1 Indian Journal of Law and Justice at 5.

³⁵ *Ibid.*

Any eunuch so registered who appears, dressed or ornamented like a woman, in a public street or place, or any other place, to be seen from a public street or place, or who dances or plays music, or takes part in any public exhibition, in a public street or place or for hire in a private house may be arrested without a warrant and shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.³⁶ Both these laws set the stage for harassment and surveillance by the police of the community.”³⁷ Prem Kumar Agarwal finds that "in 1994, the passport Authority of India proposed to include the third gender as distinct gender identity."³⁸

IV. INDIAN CONSTITUTIONAL MANDATE

In India, the pathway of the rights of transgenders can be traced back to the constitution. The doctrine of social engineering propounded by Roscoe Pound holds great significance in the 21st century. The theory advocates that the laws of the state shall be the means of satisfying maximum human needs. The laws shall work for the welfare of all sections of society. The principle of social engineering is best reflected in the Indian Constitution, as it has always championed the cause of vulnerable sections of society. Chapter III of the Constitution provides Fundamental Rights to all the citizens of India.

The concept of equality serves to accord the highest respect for human worth and dignity without discrimination on the grounds of caste, religion, creed, race, color, sex, or place of birth.³⁹ Article 14 enshrines in it the principle of the rule of law.⁴⁰ Article 14 of the Indian Constitution provides

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ Mamta Srivastav, “Concept and Development of Human Rights” (2015) 102 All India Reporter at 17.

⁴⁰ K C Joshi, *The Constitutional Law of India* (Allahabad: Central Law Publications, 2016) at 124.

a fundamental right to equality to all the citizens of India.⁴¹ It provides that every citizen is entitled to equality before the law and equal protection of laws. However, transgender persons have suffered from grave inequality, injustice, and discrimination in education, healthcare, and employment opportunities. The most disturbing fact is that the reason for the inequality meted out to them is not based on their mental or physical capacity or educational qualification but their sexual orientation.

Furthermore, Article 15⁴² and 16⁴³ specifically provide that no citizen shall be discriminated against on the grounds of sex by the state. While Article

⁴¹ *The Constitution of India*, Part III, Article 14, Equality before Law: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

⁴² *The Constitution of India*, Part III, Article 15, Prohibition of discrimination on the grounds of religion, race, caste, sex, or place of birth:

- (1) The State shall not discriminate against any citizen based on religion, race, caste, sex, place of birth, or any of them.
- (2) 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 places 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.
- (3) Nothing in this article shall prevent the State from making any special provision for women and children.
- (4) Nothing in this article or clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or the Scheduled Castes and the Scheduled Tribes.

⁴³ *The Constitution of India*, Part III, Article 16, Equality of opportunity in matters of public employment:

- (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
- (2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence, or any of them, be ineligible for or discriminated in respect of any employment or office under the State.
- (3) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

15 deals with discrimination in general, Article 16 deals with discrimination in matters relating to employment.⁴⁴ M.P. Jain explains that on a comparative basis, Article 16 deals with a minimal subject, vis., public employment.⁴⁵ On the other hand, Article 15 is much wider as it covers the entire range of state activities.⁴⁶ The term 'sex' used in these two articles cannot be said to be restricted to male and female sex only. A person who belongs to the third gender is also granted the protection of these constitutional provisions. Unfortunately, despite the availability of constitutional protections, the transgender community has been the victim of innumerable atrocities in the name of the 'sex' itself. Not only this, the transgender community has been blatantly refused the right to freedom of expression and right to privacy as a part of fundamental right available to every citizen of the Indian Democracy under Article 19(1)(a)⁴⁷ and 21⁴⁸ of the Constitution. B. Kumar rightly emphasizes that "to sustain democracy, liberty, freedom to dissent, the rule of law and all other rights must constitute the real democracy."⁴⁹

A. Section 377 of the Indian Penal Code 1860

This Section deals with unnatural sexual offenses and provides that "whoever voluntarily has carnal intercourse against the order of the nature

⁴⁴ It is noted that while Article 14 is available to both citizens and non-citizens, Articles 15 and 16 are available to citizens only.

⁴⁵ M P Jain, *Indian Constitutional Law* (Gurgaon: Lexis Nexis, 2014) at 965.

⁴⁶ M P Jain, *Indian Constitutional Law* (Gurgaon: Lexis Nexis, 2014) at 965.

⁴⁷ *The Constitution of India*, Part III, Article 19(1), All citizens shall have the right:

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India;

(g) to practice any profession or to carry on any occupation, trade, or business.

For details, see Article 19 of the Constitution of India.

⁴⁸ *The Constitution of India*, Part III, Article 21, Protection of Life and Personal Liberty: No person shall be deprived of his life or personal liberty except according to a procedure established by law.

⁴⁹ B Kumar, "Human Rights Development and Democracy" (2011) 38:1 & 2 Indian Bar Review.

with any man, woman or an animal, shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine."⁵⁰ The Explanation to the Section reads, "Penetration is sufficient to constitute the carnal intercourse necessary of the offense described in this section."⁵¹ Sodomy means anal intercourse by a man with a man, a woman, or an animal.⁵² Bestiality means sexual intercourse by a man or a woman with an animal.

The severe punishment of imprisonment for life or imprisonment up to ten years and a fine makes it evident that the acts of sodomy and bestiality are considered to be grave offenses. Furthermore, homosexual relations are covered as criminal acts under Section 377. The expression against the 'order of nature' has not been explained but includes acts of sodomy and bestiality. The expression is used to prosecute homosexual relationships on the ground that their relationship is against the so-called 'order of nature.' This Section was challenged before the courts, and the landmark decisions have substantially changed its application. Aditya Saurabh strongly advocates that "like heterosexuality, homosexuality is an orientation, which should not be considered unnatural."⁵³

B. Transgender Persons (Protection of Rights) Act 2019

Law does not work in a vacuum. Society and law are closely related to each other.⁵⁴ In 2008 "the government of Tamil Nadu has taken the bold step of officially recognizing transgender as a separate sex. For the first time in the country, a government order has been issued by an education department of a state government, creating a third gender category for admission in educational institutions. Government and aided colleges will have to admit transgender people (*'hijras/aravanis/alis'*), who will share 30 percent of the

⁵⁰ *Indian Penal Code*, 1860, C 16, s 377

⁵¹ *Ibid.*

⁵² K D Gaur, *Textbook on Indian Penal Code* (Gurgaon: Universal Law Publications, 2016) at 933.

⁵³ Aditya Saurabh, *supra* note 15 at 160.

⁵⁴ Uday Veer Singh, "Law and Modernisation in India" (2016) 103 All India Reporter at 177.

seats reserved for women. A newly designed application form for the undergraduate courses will include transgender as a separate category, thus permitting these students to join any college of their choice - co-educational, men's or women's colleges."⁵⁵ Another leading development in the protection of homosexual rights in India is the enforcement of the *Transgender Persons (Protection of Rights) Act, 2019*, by the Parliament of India. The Act was passed to comply with the directions issued by the Supreme Court of India in its milestone judgment *National Legal Services Authority v Union of India*. The Act is consisting IX Chapters and 23 Sections. The key provisions of the Act are discussed as follows:

1. Important definitions

The Act defines "a person with intersex variations" as a person who at birth shows variation in his or her primary sexual characteristics, external genitalia, chromosomes or hormones from the normative standard of a male or female body."⁵⁶ A transgender person is defined as "a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as *kinner*, *hijra*, *aravani* and *jogta*."⁵⁷

2. Prohibition of gender-based discrimination

The Act ensures that the transgender shall not be discriminated, threatened, or treated unfairly in educational institutions, places of employment, healthcare, and public services. The system should be sensitive to their needs.⁵⁸ They cannot be denied, like the other citizens of

⁵⁵ Editorial, "Gender Rights" (2008) 43:25 Economic & Political Weekly at 7.

⁵⁶ *Transgender Persons (Protection of Rights) Act, 2019*, C I, s 2(i)

⁵⁷ *Ibid*, s 2(k)

⁵⁸ *Ibid*, C II, s 3. No person or establishment shall discriminate against a transgender person on any of the following grounds, namely:—

India, the right to move freely, the right to reside at any place or property, and the right to enjoy any goods, services, and accommodation available to the public.⁵⁹

3. Certificate of gender identity

Chapter III of the Act specifically deals with recognizing the identity of such transgender individuals. He can apply to the District Magistrate to issue an identity certificate.⁶⁰ In the case of a minor such application can be moved by his guardian.⁶¹ The identity certificate issued by the District Magistrate helps the transgender to entail the rights conferred to him under the law. Furthermore, if such a transgender person undergoes sex change surgery, he or she can again apply before the District Magistrate for the revised gender identity certificate.⁶² Such a person is also entitled to change his or her first name on the birth certificate and all official documents.⁶³

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- (a) the denial or discontinuation of, or unfair treatment in, educational establishments and services thereof;
 - (b) the unfair treatment in, or in relation to, employment or occupation;
 - (c) the denial of, or termination from, employment or occupation;
 - (d) the denial or discontinuation of, or unfair treatment in, healthcare services;
 - (e) the denial or discontinuation of, or unfair treatment about, access to, or provision or enjoyment or use of any goods, accommodation, service, facility, benefit, privilege, or opportunity dedicated to the use of the general public or customarily available to the public;
 - (f) the denial or discontinuation of, or unfair treatment with regard to the right of movement;
 - (g) the denial or discontinuation of, or unfair treatment with regard to the right to reside, purchase, rent, or otherwise occupy any property;
 - (h) the denial or discontinuation of, or unfair treatment in, the opportunity to stand for or hold public or private office; and
 - (i) the denial of access to, removal from, or unfair treatment in government or private establishments in whose care or custody a transgender person may be.

⁵⁹ *Ibid.*

⁶⁰ Prem Kumar Agarwal, *supra* note 34.

⁶¹ *Ibid.*

⁶² *Ibid.*, s 7(1)

⁶³ *Ibid.*, s 7(3)

4. Obligation of the government

To ensure full participation and the inclusion of transgender in society, the Act requires the appropriate government to ascertain some provisions. First, welfare policies made for transgender are implemented expeditiously and are transgender sensitive, and do not stigmatize them in society. It shall take all the required steps for their rescue and rehabilitation.⁶⁴ Second, the government shall formulate welfare schemes and programs which will help transgender in securing a livelihood. They can be given vocational training and support in case of self-employment.⁶⁵

4. Rights relating to employment

The Act prohibits discrimination against transgender in matters relating to employment like appointment and promotion. This legal provision applies to all governmental, government-aided, or private establishments.⁶⁶ Every establishment must designate a complaint officer to hear the complaints relating to the violation of any rights of a transgender person.⁶⁷

6. Right to residence

In Indian society, transgender is either abandoned by their own family. In the case of eunuchs, they are taken away by the local eunuch groups, sometimes even forcefully. To prevent this grave violation of transgender children, the Act provides that⁶⁸ such children cannot be taken away from parents except with the permission of a competent court. Every transgender person has the right to reside and enjoy all the facilities in their parents' house without gender-based discrimination.⁶⁹ The competent Court shall

⁶⁴ *Ibid*, C IV, s 8

⁶⁵ *Ibid*, C VI, s 14

⁶⁶ *Ibid*, C V, s 9

⁶⁷ *Ibid*, s 11

⁶⁸ *Ibid*, s 12

⁶⁹ Prem Kumar Agarwal, *supra* note 34.

ensure the rehabilitation of such transgender in case of parent's disability to care for such person.⁷⁰

7. Healthcare facilities

The Act mandates the government to ensure that separate human immunodeficiency virus Sero-surveillance Centers conduct sero-surveillance for such persons per the guidelines issued by the National AIDS Control Organization on this behalf.⁷¹ It is further provided that the sex-reassignment surgeries shall be conducted following World Profession Association for Transgender Health guidelines.⁷²

Law by itself is not enough. In order to become an instrument of transformation, it must be effectively used.⁷³ Even with legal provisions and safeguards, fundamental transformation starts at homes where children are taught to respect transgender people and treat them equally.⁷⁴ It is submitted that it is indeed breakthrough legislation that will help improve the condition of transgender persons. It can be essential in assimilating the ostracized transgender community into mainstream society. However, the Act fails to address the issue of forced sex-reassignment surgeries, which are imposed upon transgenders against their consent. Strict provisions should be included to prevent such abuse of the human rights of such persons. Furthermore, if the District Magistrate refuses to issue a certificate of identity, the aggrieved applicant shall have the right to appeal before an appropriate authority. For more effective implementation, the Act should include stringent penal provisions to redress sexual offenses against transgender people.

⁷⁰ *Ibid*

⁷¹ *Ibid*, C VI, s 15(a)

⁷² *Ibid*, s 15(d)

⁷³ Namita Rani Panda, "Gender Equality: A Hallmark of Social Development" (2014) 41:3 Indian Bar Review at 134.

⁷⁴ Pallavi Hooda, *supra* note 17 at 450.

V. LANDMARK DECISIONS ON LGBT RIGHTS

The judiciary is the protector and guarantor of citizens' civil liberties under the Constitution of India. There are many instances where the active role of the judiciary could be seen in protecting and promoting human rights.⁷⁵ Soli J. Sorabjee highlights that the endeavor of the judiciary in India has been to achieve an acceptable accommodation of the conflicting interests of the individual, society, and the state.⁷⁶ A fair assessment would be that despite occasional aberrations, our judiciary has been a good sentinel on the *qui vive* in the protection of the fundamental rights of our people.⁷⁷ Time and again, the movement for the rights of the LGBT community has gained momentum owing to the decisions of the Supreme Court and the High courts. Robert Wintemute very pertinently remarks that “nearly seventeen years later, after two decisions of the Delhi High Court, and five decisions of the Supreme Court of India, the criminal law that continued to stigmatize more queer persons than any other in the world, has ceased to apply to consenting adults in private.”⁷⁸ The role of the judiciary in protecting the rights of the LGBT community can be better understood with the help of some of its breakthrough decisions:

A. Naz Foundation v Government of NCT of Delhi and others, 2009

Naz Foundation, an NGO, filed a writ petition. This organization worked in HIV/AIDS prevention, before the Delhi High Court challenging the constitutional validity of Section 377 of the Indian Penal Code, which criminalizes homosexual relations.⁷⁹ The main grievance of the petitioner was that Section 377 is unconstitutional to the extent it criminalizes the consensual sexual acts between two adult homosexuals and violates their

⁷⁵ Sunil Kumar, *supra* note 29 at 5.

⁷⁶ Soli J Sorabjee, “Creative Role of Indian Judiciary in enlarging and Protecting Human Rights” (2019) 106 All India Reporter at 2.

⁷⁷ *Ibid* at 4.

⁷⁸ Robert Wintemute, “Lesbian, Gay, Bisexual and Transgender Human Rights in India: From Naz Foundation to Navtej Singh Johar and Beyond” (2019) 12:3–4 NUJS Law Review at 1.

⁷⁹ *Naz Foundation vs Government of Delhi*, 2009 Delhi High Court.

fundamental rights given under Articles 14, 15, 19, and 21 and makes them the victim of abuse and harassment at the hands of public and private authorities. The section shall apply only to non-consensual homosexual relations and relations involving minors. It was contended by the petitioner that this section is based upon Judeo-Christian moral philosophy, which believes that the primary purpose of sexual relations is procreation only. Any non-procreative sexual relation is considered to be against the order of nature. Furthermore, homosexuality is no longer considered to be a disease under psychology and psychiatry. Section 377 has a detrimental effect on the lives of homosexuals as it results in social stigma, aversion, and harassment of them in society. It adversely affects the prevention and control of HIV/AIDS amongst homosexuals, and decriminalizing consensual homosexual relations will help to control HIV/AIDS in the community. The petitioner categorically pleaded that the right to privacy is an integral part of the fundamental right to life under Article 21, which covers within its ambit any private, intimate and sexual activity between any two adults. The term used under Article 15 of the Constitution covers not only gender but also sexual orientation.

In response, Section 377 is constitutional and is not violative of Articles 14 and 21 of the Indian Constitution as it criminalizes unnatural sexual offenses, which are against the order of nature. It does not follow the notion of procreative and non-procreative sexual relations. Such homosexual relations cannot be legalized on the ground of the consent of the parties. The Section does not work arbitrarily and is applied on the ground of the victim's complaint.

While delivering the path-breaking judgment, Chief Justice S. Murlidhar observed that inclusiveness is deeply embedded in the Indian Constitution. Therefore, homosexuals can be ensured a life of dignity and non-discrimination.⁸⁰ The Court held that Section 377 would no longer criminalize homosexual relations between consenting adults. However, it will continue to cover non-consenting homosexual relations. The remarkable decision of the Indian judiciary, with its widest interpretation in

⁸⁰ *Ibid.*

observance of human rights, has contributed to the nation's progress and the goal of creating India as a vibrant state.⁸¹

B. Suresh Kumar Koushal and another v NAZ Foundation and others, 2013

Several writ petitions were filed by various organizations and individuals, challenging the decision of the division bench of Delhi High Court in the Naz Foundation case, whereby consensual homosexual relations between two consenting adults were decriminalized.

The petitioner filed a few affidavits and some unverified reports of NGOs claiming that discriminatory treatment was meted out to homosexuals because of the prosecution of homosexuals under Section 377. It was contended that the Delhi High Court had seriously erred in declaring Section 377 unconstitutional based on inadequate evidence produced by the petitioners in the *Naz Foundation case*. The evidence produced by the petitioners was insufficient to prove that Section 377 adversely affects the prevention and control of HIV/AIDS amongst homosexuals. The High Court has wrongly relied upon a few reports of academicians that Section 377 prevents proper personality development of homosexuals.⁸²

The Petitioners further argued that the impugned order of the Delhi High Court does not make it clear how Section 377 violates the right of privacy of homosexuals under Article 21 of the Constitution. According to their submission, the right to privacy does not allow a person to commit an offense under Section 377. Section 377 aims to protect our society's social and moral values, and the order of the High Court will adversely affect the social structure of Indian society. It will encourage the youth towards homosexual relationships. Section 377 criminalizes sexual activity against the order of nature independently of the sexual orientation of a person, and sexual orientation can be restricted based on morals and health reasons.⁸³

⁸¹ Justice P Sathasivam, "Role of Courts in Protection of Human Rights" 99 All India Reporter at 69.

⁸² *Ibid.*

⁸³ *Ibid.*

The Supreme Court observed that High Court has primarily relied upon the judicial decision of other jurisdictions in order to protect the "so-called rights of LGBT persons"⁸⁴ and blindfold reliance upon them to decide the constitutionality of a law framed by the Indian Legislature. Upholding the contentions raised by the petitioners in the present writ, the Court held that "Section 377 IPC does not suffer from the vice of unconstitutionality, and the declaration made by the Division Bench of the High court is legally unsustainable."⁸⁵

C. National Legal Services Authority v Union of India and others, 2014

In this case, while recognizing the rights of transgender persons, the Supreme Court, for the first time, considered the concept of human dignity on a jurisprudential basis as a constitutional value.⁸⁶ A writ petition was filed by the members of the transgender community praying for a legal declaration of their gender identity as a third gender with all the legal and constitutional protection. The main contentions put forth by the petitioners were that every member of the transgender community has the right to determine their gender identity as per their sexual orientation. They are treated as neither a male nor a female by society. Without their gender identity, they are deprived of the legal rights provided to every citizen of India. They are deprived of full access to educational and healthcare facilities, a gross violation of their fundamental right to equality and equal protection of laws.

The main legal issue before the Court was whether transgender persons, who are neither males nor females, have a right to be identified as the third gender. The Court answered the same in the affirmative. It held that transgender people have the right to be identified as 'third gender' and all the fundamental rights provided under the Constitution of India. The Court directed the central and state governments to recognize transgender

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ A K Sikri, "Growing Significance of Dignity Jurisprudence in the world of Ascending Human Rights" (2019) 4:3 SCC Journal at 18.

people as a third gender and to frame welfare schemes for their betterment. The LGBT community highly welcomed the decision of the Court as it paved the path for their separate identity.

D. Navtej Singh Johar v. Union of India, Ministry of Law and others, 2018

M. V. Pylee vehemently supports the overall development of an individual and emphasizes that 'the personality of the individual is inseparably bound with his liberty.'⁸⁷ In 2016, a writ petition was filed before the Supreme Court of India. The first prayer in the writ was that right to sexuality, the right to sexual autonomy, and the right to choice of a sexual partner should be declared to be part of the fundamental right to life, and Section 377 of the Indian Penal Code shall be declared unconstitutional. The petitioners contended that sexual orientation and the right to privacy of an individual need to be protected as they are part of the fundamental rights provided under Articles 14, 19, and 21. Homosexual orientation is as natural as heterosexual orientation. Treating it as a criminal offense is a grave violation of the rights to privacy and life under Article 21. Petitioners argued that the natural desires of homosexuals are trampled upon in the name of the conservative approach to the order of nature. The criminalization of their desire to form a relationship violates the right to freedom of speech and expression under Article 19(1)(a). The criminalization of homosexuals under Section 377 of the Indian Penal Code results in their lifelong stigma, abuse, and discrimination. They must live in continuous fear of prosecution for choosing a same-sex partner, which impedes their growth and personal liberty. The Section violates various fundamental rights of the LGBT community. Every individual shall have sexual autonomy to choose the partner of their choice.

The Court observed that the latter should win in the conflict between social and constitutional morality. The LGBT community has suffered a lot in the name of social morality. It emphasized that the Constitution makers developed an inclusive constitution to uplift all the weaker sections of society. The constitutional validity of Section 377 shall be tested about

⁸⁷ M V Pylee, *India's Constitution* (New Delhi: S. Chand & Company, 2022) at 53.

the right to privacy inherent under the fundamental right to life. While accepting that history owes an apology to the LGBT community, the Court overruled the decision of Suresh Kaushal's case and held that they are entitled to the protection of equal laws and treated in society as human beings without any stigma attached to any of them. Remarkably, the Court declared that Section 377 is unconstitutional in criminalizing homosexual relations between consenting adults.

Tanya Singh et al. have rightly observed that they "breathed life in the LGBTQ+ community, which has been the downtrodden section of society for decades. The community released the shackles of boundaries set during the colonial era for more than 200 years."⁸⁸

E. Sushma and other v Commissioner of Police, Chennai, and others, 2021

The decision of the present case begins with a quote, "There are many branches on the tree of life. There is no one way to be, and there is room for everyone to be who they are."⁸⁹ The petitioners, a lesbian couple, ran away from their homes in Madurai. Their parents filed a missing report with the police. After the police interrogated the petitioners, a writ petition was filed before the Madras High Court to direct the Police authorities to inquire and restrain the petitioners' parents from interfering with their lives. They also prayed for their protection and security. The approach of the Court in the present case, in respect of same-sex orientation, was very sensitive and empathetic. It referred the petitioners and their parents to a counseling psychologist, Vidya Dinakaran, an expert in the psychology of LGBT individuals. The Counselor's Report also highlighted the falsified notions of sex, gender, and sexual orientation. The forceful separation of petitioners from each other may cause mental trauma to them. In respect of the parents, the Report of the counselor observed that the parents were worried about the social stigma and the security of their daughters. Furthermore, it stated that parents believed that a celibacy life is better

⁸⁸ Tanya Singh & Kush Kakkar, "LGBTQIA+ Civil Rights in India" (2021) 2:1 Jus Corpus Law Journal at 633.

⁸⁹ *Sushma & Seema vs. Commissioner of Police, 2021 High Court of Judicature Madras.*

than living. The Court ordered the police authorities to provide adequate protection to the parties.

The petitioners' counsel also prayed before the Court the issue directions for same-sex couples. Interestingly, Justice N. Anand Venkatesh himself underwent sessions with the psychologist Vidya Dinakaran to understand the psychological issues involved in same-sex relationships. He also interacted with the members of the LGBT community in order to understand their perspectives.

The Court directed the State to close any missing complaint filed against persons belonging to the LGBT community if it is found that they are living together based on mutual consent. Further, the Ministry of Social Justice & Empowerment (MSJE) was directed to publish and revise periodically a list of non-governmental organizations (NGOs) having expertise in handling matters relating to the LGBT community. The Court held that any aggrieved member of such a community might approach any of the enlisted NGOs about any issue they faced. With the support of the District Legal Services Authority, counseling, monetary and legal assistance shall be provided to such persons. Their basic needs for food, accommodation, and medicine shall also be taken care of. All the NGOs shall prepare a date record of all such cases and submit the same to the Ministry of Social Justice & Empowerment (MSJE) biannually. The concerned Ministry shall arrange to provide training for capacity building and skill development to these persons so they can live a life of dignity.⁹⁰

The Court further directed that the Union and State Governments adopt measures necessary to remove discrimination against such persons. Awareness and sensitization programs shall be arranged at law enforcement authorities, educational institutions, public and private establishments, physical and mental health professionals, health workers, and parents of transgenders.⁹¹

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

VI. CONCLUSION

The Indian Constitution essentially provides a fundamental right to equality under Article 14, whereas Articles 15 and 16 outline that no one shall be discriminated against on the ground of sex. Indian judiciary decriminalized Section 377 of the Indian Penal Code, considered part of landmark judgments recognizing transgender people as a third gender. The Court also declared that these persons have a fundamental right to equality, protection against discrimination, the right to freedom of expressing their sexual identity and sexual orientation, as well as the right to privacy under Article 21. These legal provisions and judgments have been hailed by the majority of Indian citizens, especially by the transgender community. However, the battle is still half-won because there is a long road ahead till complete protection, acceptance, and equal status is granted to transgender people. Society should be an all-inclusive and non-judgmental environment towards persons with different sexual orientations. Societal norms in India created over centuries cannot be easily changed, but a beginning has to be made.

In addition, India enacted the Transgender Protection Act 2019 to ensure the rights of transgender people. However, the problems remain. The Act fails to address the issue of forced sex-reassignment surgeries, which are imposed upon transgender people against their consent. Upon this enactment, the government should do a lot to protect transgender people. It shall include regulating comprehensive welfare policies in discussion with the members of the transgender community and the organizations working for their cause for their betterment and integration into society.

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COMPETING INTEREST

The author declared that she has no competing interests.

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