

# GENDER JUSTICE IN THE CONTEXT OF RIGHTS OF TRANSGENDERS – A MYTH

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## INTRODUCTION

Almost everyone is aware about the term LGBTQ but not everyone having the courage to accept them as a community. Many a times the society even denies accepting them as a normal human being. The major problem that arises is with the sexual orientation of people belonging to this community. Many historians accepted there was a evidence of homosexuality or same sex relationship in ancient Greece. Homosexuality or transgender is not newer concept, its originated in ancient era and mythological scripture. However, LGBTQ is the new tag which evolved with the time. But constitution and law makers are still silent on this aspect of gender. It is obligation of judiciary in such cases has to maintain balance between conflicting interests.

The categories that were classified in the LGBTQ category currently include the terms:

1. **Lesbian:** It is a homosexual woman.
2. **Gay:** It is a homosexual person. Generally, it is used for homosexual men but it can also be used for both homosexual woman and man.
3. **Bisexual:** It refers to both who are attracted to both male and female. or who are attracted to more than one sex or gender.
4. **Transgender:** It refers those who are not exclusively masculine or feminine.
5. **Queer:** It refers all the people who are not heterosexual.
6. **Questioning:** It refers those who are unsure of their sexual identity.

## CONSTITUTIONAL PERSPECTIVES

The Constitution of India, from the perspectives of gender-neutral laws, needs to be understood *vis-a-vis* the doctrine of reasonable classification. The promise of equality and equal protection under the Article 14 of the Constitution gives equal treatment to all citizens before the law. It also allows the distinction between different categories of individuals only based on the intelligible differentia with its reasonable nexus with the object. Article 14

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ensures that the State cannot discriminate any citizen only on the grounds of sex, religion, race, caste, or place of birth.<sup>2</sup>

Further, under Article 19, freedom of speech and expression is guaranteed to all citizens. Over the period the Supreme Court has interpreted Article 21 to include right to live with dignity, right to privacy and right to autonomy. Constitution guarantees above rights, but it lost its significance over the period and while making gender neutral laws.<sup>3</sup>

The Fundamental Rights guaranteed under the part III of the Indian Constitution are corresponding to the basic human rights. Of all the human rights, the most significant is the Right to Constitutional Remedies under the Articles 32 and 226 of the Indian Constitution.<sup>4</sup> Those persons whose fundamental or human rights have been violated, have the right to approach the High Courts or Supreme Court of the country directly for judicial rectification, redressal of grievances and enforcement of Fundamental Rights.<sup>5</sup> The question is constitution provides a redress mechanism but is unable to recognize the right. Since the personhood of the LGBTQ community itself is not acknowledged, the application of redress rights also become questionable.

## LEGISLATIVE PERSPECTIVES

### Indian Penal Code, 1860

**Section 377:** It criminalizes homosexual activity and all other sexual activities which were not connected to procreation. It also criticized for discriminating against and disproportionately affecting the LGBTQ community and it is not being in tune with modern morality.

Before scrapping of section 377 of the Indian Penal Code, 1860 the community face long legal battle for almost two decades for the traditional binary of sexuality and gender. Beginning of LGBT rights movement traced back in the 90s but most of the major development happens after scrapping the section 377 of Indian Penal Code, 1860 in 2018.

There were almost three bills are rejected before the passing of Transgender Persons (Protection of Rights) Bill, 2019:

#### 1. Rights of Transgender Persons Bill, 2014

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<sup>2</sup> Lachhman Das v State of Punjab (1963) 2 S.C.R. 353 (India)

<sup>3</sup> M.P.Jain, Indian Constitutional Law

<sup>4</sup> Constituent Assembly Debate, Vol.VIII,953

<sup>5</sup> RomeshThappar v Union of India AIR 1950 SC 124 (India)

2. The Transgender Persons (Protection of Rights) Bill, 2016
3. The Transgender Persons (Protection of Rights) Bill, 2018

### **The Transgender Persons (Protection of Rights) Act, 2019<sup>6</sup>**

The Parliament has passed the Transgender Persons (Protection of Rights) Bill 2019 which has been criticized for its poor understanding of gender and sexual identity.

**Section3:** It prohibits any kind of discrimination against them in respect of employment, education, housing, healthcare, and other services for the basic requirements of human life.

**Section4:** It mandates the recognition as a “Transgender”. District Magistrate is the authority who issued the certificate of identity but again this clause was amended and makes it optional.

It also prohibits the family or parent to discriminate or ignore their child on the ground of being a transgender. Also, transgender can be treated equally like anyone’s.

**Section 16:** This Act framed the advisory body i.e., National Council for Transgender Person who advise the central Government for making policy and legislation.

**Section18:** If any person discriminates and abuses any transgender, it is recognized as an offence and its punishable with six months to two years punishment and a fine as per the nature of the offence.

In India, the rights of transgender persons are governed by the **Transgender Persons (Protection of Rights) Act, 2019** and the **Transgender Persons (Protection of Rights) Rules, 2020.**<sup>7</sup>

- Under the Rules, **an application to declare gender is to be made to the District Magistrate.** Parents can also make an application on behalf of their child.
- There will be **no medical or physical examination** for procedures for issue of certificate of identity/change of gender.

<sup>6</sup> <https://prsindia.org/billtrack/the-transgender-persons-protection-of-rights-bill-2019>

<sup>7</sup> [https://thc.nic.in/Central%20Governmental%20Rules/Transgender%20Persons%20\(Protection%20of%20Rights\)%20Rules,%202020.pdf](https://thc.nic.in/Central%20Governmental%20Rules/Transgender%20Persons%20(Protection%20of%20Rights)%20Rules,%202020.pdf)



## ROLE OF JUDICIARY

On 6<sup>th</sup> September 2018, the Supreme Court of India struck down the part of section 377 of the Indian Penal Code, 1860 i.e., section 377, which criminalized sexual intercourse against the order of nature. Finally, this historic judgment belatedly puts India into the list of almost 150 countries where homosexual activity is legal. And it is the first step towards recognizing the rights of the LGBT community in India.

Before this, there were almost four separate concurring judgments which struck down section 377 to the extent that it criminalizes consensual sex between adults on the primary grounds of the constitution, i.e., Article 14, 15, 19 and 21.

High court of Delhi held that section 377 imposed unreasonable restrictions over the adults who are engaging in a consensual intercourse in private and that's why it is a direct violation of fundamental rights which are given in Article 14, 15, 19, 21.<sup>8</sup> But various individuals and faith-based groups criticized decriminalizing section 377 because it is against India's glorious ethics and morality and appealed in Supreme Court to reconsider it. After the long battle, the Supreme Court overturned the judgment of Delhi High Court in 2013 and decriminalized homosexuality and court also quoted LGBTQ community did not deserve the constitutional protection. In this judgment the court suggested that section 377 is not unconstitutional because LGBTQ persons constituted only a "minuscule minority"<sup>9</sup>. This judgment led to LGBTQ activism and faced immense criticism in a public discourse.

In 2014, another judgment brought a new ray of hope to the LGBTQ community and first time they were recognized as third gender for the purposes of various schemes i.e., public health, employment, reservation, and other welfare schemes. Court also quoted that non-recognition of identities is the violation of Article 14, 15, 16 and 21. Further court directed to the government of India that the members of third gender category need to be considered as economically and socially backward class and should make proper policies for the transgender community to ensure equality of opportunity in education and employment.<sup>10</sup>

After this judgment, transgender can change their gender without undergoing sex reassignment surgery.

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<sup>8</sup> Naz Foundation v. Government of NCT Delhi (2009)

<sup>9</sup> Suresh Kumar Koushal v. Naz Foundation (2013)

<sup>10</sup> National Legal Services Authority v. Union of India (2014)

Justice Chandrachud said that sexual orientation also comes under the right to privacy and rejected the minimis hypothesis principle, interpreting the same in the Koushal judgment. Further minuscule population of LGBTQ cannot be the ground to deprive from the fundamental right. The Supreme Court ruled the right to privacy as an inherent part of the Article 21.<sup>11</sup>

After overruling the judgment of Delhi High Court in 2013, several NGO's and high profiles from that community come into front and filed petition before the Supreme Court for challenging the constitutional validity of section 377, in opposition to the continued criminalization of people belonging to diverse sexual orientation. Court finally gives its verdict on 6<sup>th</sup> September 2018 and struck down section 377, which became revolutionary judgment. It provided them a very much needed right and after this verdict many came forward to accept their sexual identity publicly and became part of LGBTQ community.<sup>12</sup>. The SC stated that the '**Yogyakarta Principles on the Application of International Law in Relation to Issues of Sexual Orientation and Gender Identity**' should be applied as a part of Indian law.

- Yogyakarta Principles recognize freedom of sexual orientation and gender identity as part of Human Rights.
- They were outlined in 2006 in Yogyakarta, Indonesia by a distinguished group of International Human Right experts.

In February 2021, the **Central Government opposed same-sex marriage** in Delhi High Court stating that a marriage in India can be recognized only if it is between a "**biological man**" and "**biological woman**" capable of producing children<sup>13</sup>

## CONCLUSION AND SUGGESTIONS

It is responsibility of a government to give them equal status and make gender neutral laws for protecting their rights such as marital laws, existing marriage laws cannot apply in case of LGBTQ community. Make a new law for same sex marriages to ensure the equality in marriages or can be amend or modify the existing laws. As per the Special Marriage Act/Hindu Marriage Act there are certain prohibited degrees of relations between marriages cannot takes place. This term needs to be redefined. Personal laws also need to redefine or

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<sup>11</sup> K.S. Puttaswamy v. Union of India (2017)

<sup>12</sup> Navtej Singh Johar v. Union of India (2018)

<sup>13</sup> <https://indianexpress.com/article/india/same-sex-marriages-legal-recognition-centre-7204303/>

amend for LGBTQ community in respect of adoption regulation, guardianship, inheritance laws, protection against discrimination at workplace and educational institution etc. Recently new surrogacy bill passed in parliament, LGBTQ couple and single person are prohibited to have their own child through surrogacy. The bill is worthy in other aspect, but this community should be granting the right of surrogacy with conditions.

During COVID-19 pandemic many children lost their parents, and they are available for adoption. So, this will be the better option for those who are willing to adopt from this community to allow them with rules and regulations. Basically, it is need of our society to educate and create awareness about LGBTQ community and their rights as a human being.



9	The Role of Linguistic Rights in Ensuring Development and Realization of Fundamental Rights of Indigenous Tribal Minorities Communities (ITM) By- Sheikh Sultan Aadil Huque	99-112
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## CHAPTER 2

113

### CHILD WELFARE AND LAW; AND WOMEN EMPOWERMENT AND GENDER JUSTICE

1	A Need for Reforms in Child Rights in 21st Century in India By- Aatmajaa	114-127
2	The Defence of Provocation and Battered Woman Syndrome in India By- Aradhya Singh	128-137
3	Child Rights and Education in India: A Critical Legal Analysis By- Homa Bansal	138-147
4	A Study on the Impact of the Proposed Raising in the Legal Age of Marriage for Women in India By- Prof. Mihir Dash and Anusha K.	148-165
5	Judiciary and Gender Justice By-Remya R.	166-171
6	Law and Social Transformation on Evolution and Concept of Child Rights Under Legal Aid Services, with Special Reference to Bangalore District By- Shilpa BP	172-183
7	A Systematic Literature Review on the Role of Education on Women Empowerment in India By- Dr. Shilpi Sharma and Pooja P Parikh	184-192
8	A Comparative Analysis of Mechanism of Care and Protection of Child in India, United States of America, United Kingdom, Singapore and Canada By -Shivangi and Dr. Ashok Kumar	193-211
9	Empowering Her with Education By- Shubhankar Kaushal and Priyanka Bhasin	212-220
10	Gender Justice in The Context of Rights of Transgenders -A Myth By- Sonal Pandhare	221-226
11	Framework for Juvenile Justice Committees of High Courts By- Vilasini. K	227-234

## CHAPTER 3

235

### BALANCING IP RIGHTS AND PUBLIC INTEREST DURING THE PANDEMIC; AND SCIENCE, TECHNOLOGY, AND LAW

1	A Critical Study on Children's Exposure to the cyber-World and Laws in Need of the Hour By- Aishwarya Suresh and Mahesh Singh G	236-250
2	Legal Implications of Internet Connectivity in the Digital Era By- Dhanyakesari Rao Gurpur	251-262