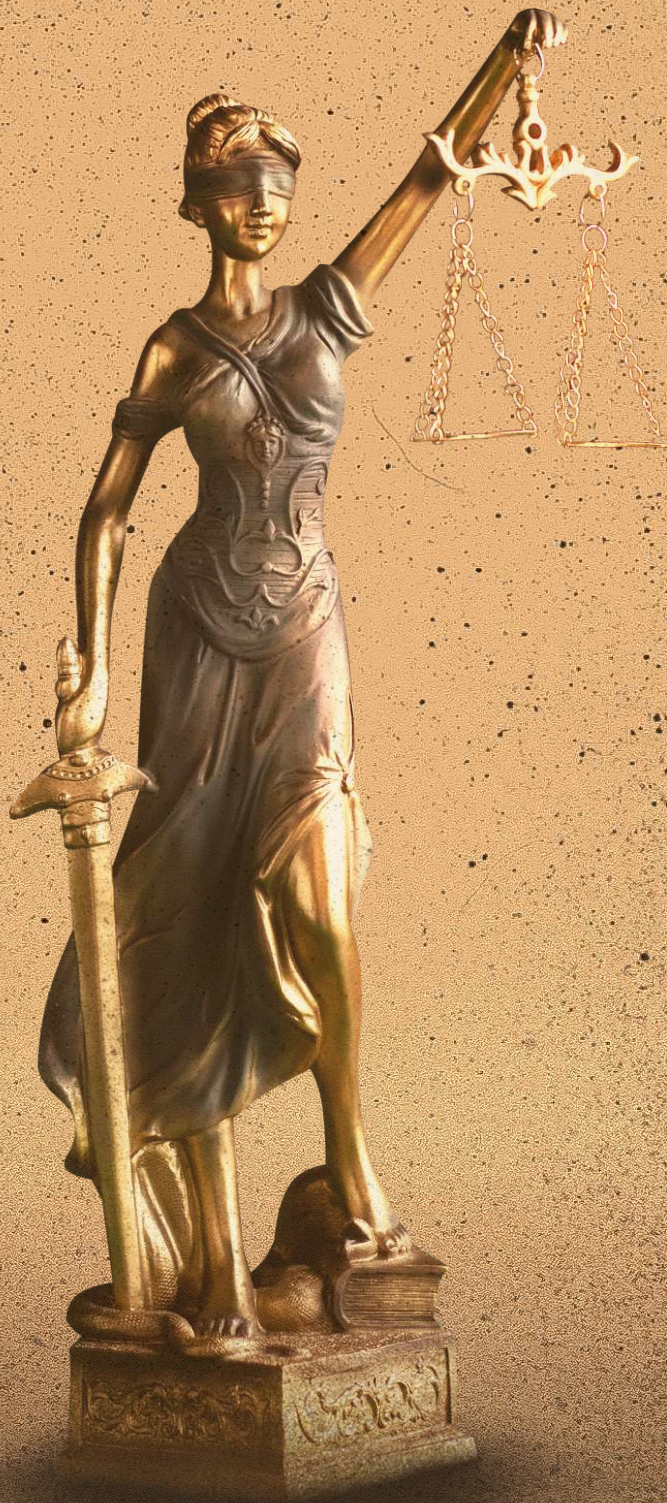


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LGBTQA+ RIGHTS AND CULTURE OF SCIENTIFIC TEMPERAMENT

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ABSTRACT

LGBTQA stands for lesbian, gay, bisexual, transgender, and queer individuals. Recently their community got the title of the "Third Gender" in the case of **National legal service authority Vs. Union of India 2014**. Under this case, Supreme Court decriminalized homosexuality by striking down section 377 of the Indian penal code 1860. When they fight for their rights, some politicians said this is an American game because the term homosexuality or the relation between the same sex, is not applicable in Indian society. For getting the rights, they did struggle a lot and their struggle somewhere ended by decriminalizing homosexuality but till now they haven't had full rights towards their community. Behind the rights, there is a huge history that how they got their rights.

Keywords: LGBTQA+, Homosexuality, NASLA case, LGTBQ rights.

INTRODUCTION

Mohan Bhagwat who is the leader of RSS gave a statement about the rights of the LGBTQ community and he said that "this community is part of **MAHABHARAT**", indirectly he said that this community is on the earth and nature gave birth.

Transgender is one of the most neglected classes of citizens in India. The community of LGBTQ+ is one of those communities that face much discrimination from time to time. No one fought for their rights and for their protection and they are struggling for getting their rights. And we can say that in some instances they got their rights but still, they have to fight for a long

for getting normal people's rights because in India they think that this is something very unnatural and the acts which are committed by them like same-sex marriage, sexual intercourse with each other these all things are criminal behaviour and section 377 of Indian penal code 1860 have the proof that this is criminal behaviour.

WHO IS TRANSGENDER?

Justice K.S.P. Radhakrishnan defined the term Transgender by observing that "*Transgender is generally described as an umbrella term for persons whose gender identity, gender expression or behaviour does not conform to their biological sex*"

The term Transgender is used in the wider sense, like for gay, lesbian, bisexual and many more. This word is derived from two words "TRANS" and "GENDER".

HISTORY

The historical background of transgender in India is from the Ramayan period till date. Back 4th century AD, in KAMASUTRA, it is mentioned that sexual intercourse between male-male was a kind of pleasure⁹³ and one other text of 14th-century BENGAL FOLKLORE, tells a story of widow's intercourse.

One more example of BHAKTI SAINTS in medieval India and some NAWAB also dress as women at some festivals.

Those were some common practices but the change came in the British era when *Thomas Macaulay* introduced **section 377** into the Indian

⁹³ KAMASUTRA.

Penal code 1860, which means that homosexuality was an offence and the British had the mindset that same-sex relationship is the unnatural thing which should not be done.

After all these many Bollywood films made by the people but gain they have to take any kind of criticism which laid to be an unnatural thing which eventually not before the introduction of section 377 of the Indian penal code 1860.

LEGAL BATTLE OF RIGHTS OF LGBTQA+

There were many cases related to their rights and many activities were also involved here:

1. Naz Foundation Vs. NCT Delhi⁹⁴
2. Suresh Kumar Kaushal Vs Naz Foundation⁹⁵
3. National Legal Service Authority Vs. Union of India⁹⁶
4. K.S. Puttaswami Vs. Union of India⁹⁷
5. Navtej Singh Johar Vs. Union of India⁹⁸

Naz Foundation Vs. NCT Delhi 2009:

Naz foundation deals with HIV and AIDS. So in this case the issue raised that "Should we remove section 377 of IPC 1860?".

Court revied this issue from two angles, firstly, under article 21 of the Indian constitution, every citizen has the right to life with dignity and privacy without these two no one can enjoy their fundamental rights and secondly, section 377 of IPC is violative to the article 14 and 15 of Indian constitution because it is unreasonable discriminatory and it discriminates homosexual as a class and it criminalizes their consensual sex. And as under article 15, there is a prohibition of discrimination on the bases of sex. Delhi High Court held that part of section 377 which criminalizes homosexuality should declare unconstitutional.

Suresh Kumar Kaushal Vs Naz Foundation 2013:

⁹⁴ (2009) SSC.

⁹⁵ (2013) SSC.

⁹⁶ (2014) 5 SSC 438.

⁹⁷ (2016) SSC.

⁹⁸ (2018) SSC.

In this case, mainly court discussed two arguments:

1. Homosexuality is a criminal offence and only parliament has the power to decriminalize it and courts can not interfere in it.
2. Right to privacy which is given under article 21 of the Indian constitution, we cannot extend that to the extent that we commit an offence under that. And the right to privacy will not cover homosexual acts.

National Legal Service Authority Vs. Union of India 2014:

Our laws only talk about two genders which are "Male" and "Female" not another and due to this behaviour of our law third gender is considered as criminals or unnatural. And due to this, the community of transgenders is constantly discriminated against by people.

So taking into consideration SC recognize the multi rights of transgender:

- Under article 14, every person's rights are protected either male or female or any other gender, everyone is included in this.
- Under articles 15 and 16, discrimination on the basis of gender is prohibited and if any discrimination is on the ground of sexual orientation then that is violative of articles 15 and 16.
- Under article 19, privacy, and gender identity integrity is protected under article 19(1)(a).
- And last but not least Article 21 includes the right to live with dignity which includes choosing gender as well.

This case gave the legal recognition of the right to self-identify the gender and equal treatment of all genders.

K.S. Puttaswami Vs. Union of India 2016:

This case is related to the right to privacy and says that sexual orientation is an essential

attribute of privacy which is protected by many articles of part III of the Indian constitution.

Navtej Singh Johar Vs. Union of India 2018:

In this case section 377 was declared unconstitutional partially. Justice DY Chandrachud gave many reasons:

- By taking the support of article 14 SC said, sexual activity becomes civilized because it is done by the same gender person because of that they are homosexual, that reason is neither intelligible differentia nor any rational nexus.
- By giving the reference of Naz foundation case SC said that under article 15 which is prohibiting discrimination on the ground of sex which is biological sex and sexual orientation, that was the right approach to solve this matter.
- By giving reference to the NALSA judgment, human sexuality cannot define narrowly and discrimination against LGBTQ is unconstitutional article 19 protects every individual right to enjoy their identity freely.
- By taking the support of article 21, that right to life and liberty includes privacy, dignity and autonomy. We can use reasonable restrictions to curtail the rights but those should be reasonable.

Finally held that section 377 of the IPC is violative of the fundamental right of an individual hence that section was held unconstitutional.

GUIDELINES ISSUED BY THE MADRAS HIGH COURT⁹⁹

S. Sushma Vs. Comm. Of Police¹⁰⁰, for uplifting the rights transgender community, the court realized some guidelines:

- A. The police shall close the missing cases of consenting adults of the LGBTQIA+ community after receipt of their

statement that their relationship is consensual.

- B. NGOs shall be promoted so that they safeguard and protect the rights of the LGBTQIA+ community.
- C. NGOs shall address the LGBTQ people's problem with the best-suited methods lie counselling, monetary support, legal assistance with the support of the District Legal Service Authority, or coordinating with law enforcement agencies about offences committed against any person belonging to the LGBTQIA+ community.
- D. Proper accommodation facilities shall be provided.
- E. Police shall ensure that transgender prisoners are housed separately.
- F. Issues faced by the LGBTQIA+ community shall be included on Lok Adalat.
- G. Punishment of medical professionals who involve themselves in the new form of "conversion therapy".
- H. Education about the LGBTQIA+ community shall be made part of school and college.
- I. Awareness programmes.

HISTORY OF TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

As our history is divided into three eras which are ancient, medieval and modern, the identity of transgender also changed over time. In Ancient and medieval times transgenders were considered normal male and female persons.

But in the British era means when modern times started by the Britishers then the whole perception changed towards them because the Britishers brought an act called as "Criminal Tribe Acts". Under this act, they deemed the entire community of transgender as criminals and should be punished for their work.

Thereafter, when the constitution of India came into force in 1950 then everyone, every citizen got equal rights. But as Indian society had its mind since British times so it is really tough to

⁹⁹ Dr G.B. Reddy, Transgenders and the law, 7, (2022).

¹⁰⁰ S. Sushma Vs. Comm. Of Police, W. P. No. 7284 of 2021.

change but after 70 years of long struggle transgender community got their **TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019** rights. **TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019, (TPPR ACT 2019)** this act is the result of one landmark judgment of *National Legal Service Authority Vs. Union Of India*.

This act is the result of the NALSA case, wherein SC stated transgender as "Third gender" and gave the guidelines for protecting their rights and their welfare. Then after this landmark judgment parliament passed the "Transgender persons (protection of rights) act 2019".

Section 3 of the Transgender Persons (Protection Of Rights) Act, 2019 explains about the prohibition against discrimination, denial, and unfair treatment. This section stated that no person or any establishment shall discriminate or deny or treat an unfair manner, a transgender person in the field of:

- **Education:** Education is one of our fundamental rights under article 21A for 6 to 14 years child but the discrimination against transgenders they are not getting this right hence their fundamental right is also violated, so under this act, it is clearly mentioned that no one can discriminate them because of there third gender. In the *Anuradha Bhasin Vs Union of India*¹⁰¹, SC held that article 21A of the constitution confers a positive right which should provide to every single child of the country.
- **Employment:** Section 3(b) of the TPPR act 2019, envisages that the transgender shall not be treated in an unfair manner in public employment or in occupations. Treating in an unfair manner is like:
 - giving less salary to the transgender person in comparison to the other genders
 - taking more working hours

- giving much work to them
- a person shall not deny working or a job just because they are transgender or we can call them the third gender.

- **Health care services:** About health care service section 3 (d) talks about which says,
 - a transgender shall not deny to any public or private health care facility
 - a transgender person shall not discontinue from their health care service
 - they should not be treated in an unfair manner in healthcare services provided by any healthcare institution either public or private.
- **Access to a public place:** just because they are transgender or more specifically third gender, that does not mean that their right to move is not for them. They can access any goods which are generally provided to normal people. They also avail of any services which are provided to the general public. they can move freely from one place to another as the right to movement is our fundamental right under part III of the Indian constitution it is guaranteed under article 19 as well as under article 21.
- **Access to the property:** section 3 of the TPPR act prohibits denial or discontinuation of the right of the transgender person to reside in any property, purchase any property or rent any property or occupy any property by lawful means. The right to property is a constitutional right as well as a human right.
- **Access to any public and private office**
- **Any many more**

RECOGNITION OF SAME-SEX MARRIAGE

¹⁰¹ (2020) INDIAN KANOON.

India does not recognize same-sex marriage and India thinks that this is something which is unnatural. In the present case scenario, we can see that not the perception is also changed not same-sex marriage can be seen but still not very common and still, those who are getting same-sex marriage have to face some different kinds of issues like there are many same-sex marriage petition files before the court and court also unable to decide about this because any specific provision is not there for the same. It may be not legal or making sexual intercourse with same sex people are also not protected under the law.

ORDER/DIRECTION BY THE COURT¹⁰²

The duty of the constitution is to provide rights to transgender which are given as fundamental rights as every other people are getting the same as they are also. After the NALSA case and other cases certain guidelines were issued for the government of India, those are:

- a) Hijras, eunuchs apart from binary genders, be treated as third gender for the purpose of safeguarding the rights which are provided under part III of the Indian constitution and other laws made by parliament and the state legislature.
- b) "Transgender person" right to decide their self-identified gender is also upheld and the Centre and state government are directed to grant legal recognition of their gender identity such as male and female and third gender.
- c) Centre and state government should provide them with the reservation in the educational and job opportunities as normal people.
- d) Centre and state government should seriously address the issue related to the problems which are faced by transgenders like they feel shame, fear, social pressure etc.

- e) Centre and state governments should provide separate toilets to them because when they are using normal public toilets then many times they also face discriminatory behaviour there.

CONCLUSION

People around the globe are facing discriminatory behaviour by people because of whom they love, how they love and how they look. This happens because sexual orientation and gender specification are essential and integral parts of human life but sometimes not disclosing it is result to the discrimination or abusive behaviour of the other is very common.

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¹⁰² Dr G.B. Reddy, Transgenders and the law, 3, (2022).

¹⁰³ (2014) SSC.

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