

Rainbows shall not fade away!

Wherever you are
The Law Protects You

A PUBLICATION OF TAMIL NADU STATE JUDICIAL ACADEMY

Rights and Protection of LGBTQIA+ Community

STUDY MATERIAL

NOVEMBER 2021

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Director's Note

This Study Material is prepared by the Tamil Nadu State Judicial Academy [TNSJA], under the guidance and as per the directions of the Hon'ble Patron-in-Chief, TNSJA / Hon'ble the Chief Justice of the Madras High Court; the Hon'ble President and Hon'ble Members of the Board of Governors, TNSJA.

This publication is brought out on the occasion of the Sensitization programme on Rights and Protection of LGBTQIA+ Community, in association with UNICEF, for Civil Judges and Assistant Public Prosecutors by engaging to enhance the knowledge of the various stakeholders and participants dealing with Transgender Persons (Protection of Rights) Act 2019.

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14th November 2021

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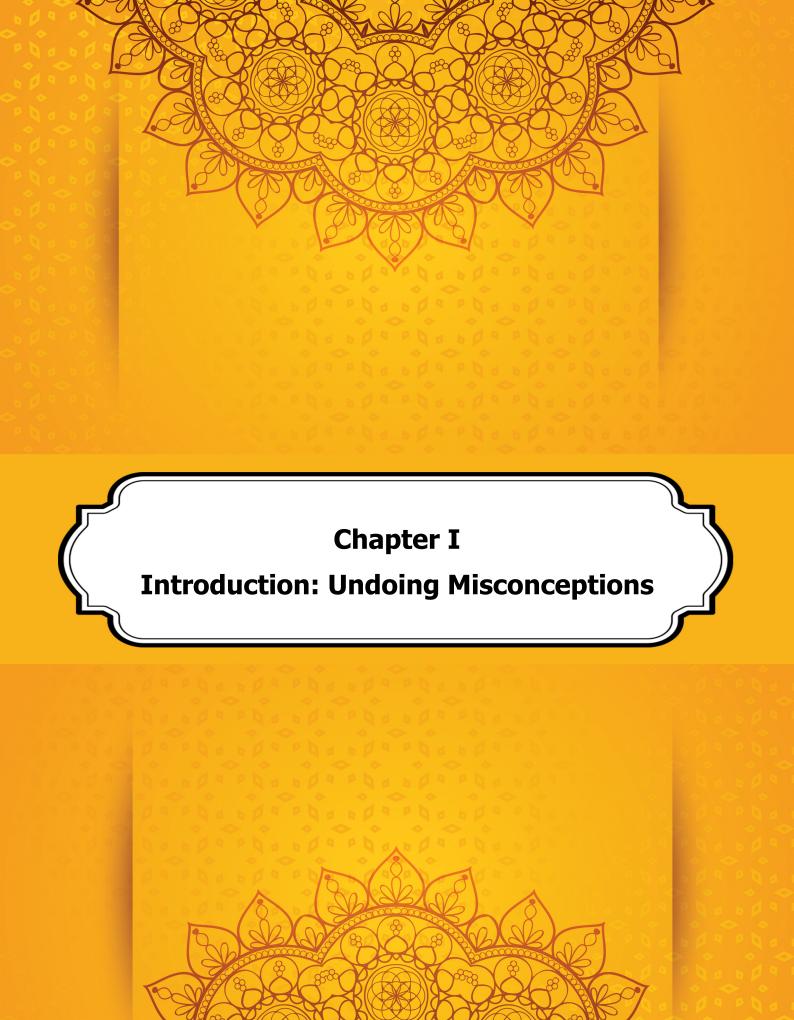
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59	V.G. Row Vs. State of Madras	AIR 1951 Mad 147
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61	Vyjayanti Vasanta Mogli Vs. State of Telangana	2020 SCC OnLine TS 440



Chapter I - Introduction: Undoing Misconceptions

In the pursuit of justice, one must ensure that no individual is left out or is made to feel left out. Gender justice espouses the principles of equality and non-discrimination. Gender justice also reinforces the principle that diverse human identities continue to exist, and are entitled to equal rights, regardless of their social validation. Throughout history there are several instances of how science and morality were employed to promote hatred and systemic oppression of gender and sexual minorities. Understanding gender and sexuality as a spectrum and not in binary terms¹, is essential to overcome the limitations of biological essentialism, which refers to the idea that every aspect of one's sexual and gender identity, as well as their behaviour and capabilities, is pre-determined biologically, by their sexual anatomy.

Gender and sexual characteristics are not just a phase and are not induced by external stimuli or by imitating another person's behaviour, it is inherent. For most people, sexual orientation and gender identity are shaped at any early age. While research has not determined a cause, homosexuality and gender variance are not the result of any one factor.² Thus, gender and sexuality are determined by a complex combination of genetics, biology, psychological and social factors. Gender and sexual identities existing outside the binary are not immoral and are indeed natural. Gender fluidity and intersex variations are very much prevalent in the animal kingdom, for instance in black bears, spotted hyena, clownfish

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¹ See Jeremy Colangelo, The myth that gender is binary is perpetuated by a flawed education system, QUARTZ, 21st June 2017 (Available at: https://qz.com/1007198/the-myth-that-gender-is-binary-is-perpetuated-by-a-flawed-education-system/)

² Orinam.net

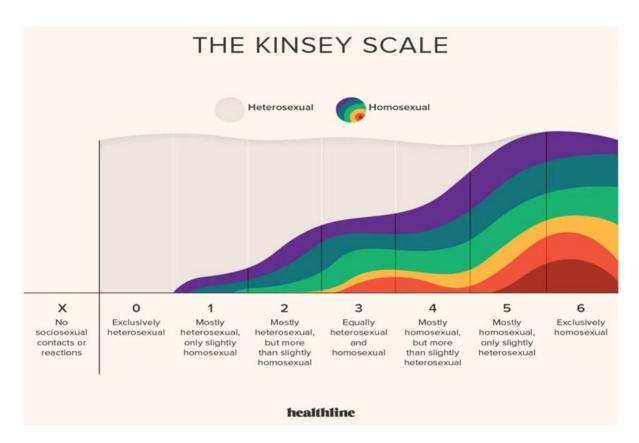
and certain worms.³ Homosexual behaviour has been extensively documented in non-human species, including among wild animals and birds⁴, which reiterates that procreation is not the sole purpose of sexual partnerships.

Gender and sex are related but distinct concepts, and it is incorrect to use both interchangeably. Understanding gender and sexuality as a spectrum began with the Kinsey Scale, which is a scale used to determine how heterosexual or homosexual a person is on a scale of 1 to 6. In 1948, Dr. Alfred Kinsey, Dr. Wardell Pomeroy, and Dr. Clyde Martin developed the Heterosexual-Homosexual Rating Scale, also known as the "The Kinsey Scale," in order to account for research findings that showed that people did not fit into exclusive heterosexual or homosexual categories.⁵ The Kinsey team interviewed thousands of people about their sexual histories. Research showed that sexual behavior, thoughts, and feelings towards the same or opposite sex were not always consistent across time.

³ See Scishow: Intersex Across the Animal Kingdom, NERDFIGHTERIA WIKI (Available at: https://nerdfighteria.info/v/Jxs2yHP6K2E)

⁴ See Arash Fereydooni, Do Animals Exhibit Homosexuality?, YALE SCIENTIST, 14th March 2012 (Available at: https://www.yalescientific.org/2012/03/do-animals-exhibit-homosexuality/)

5 Kinsov Scala Test 100 Less (A. 1111)

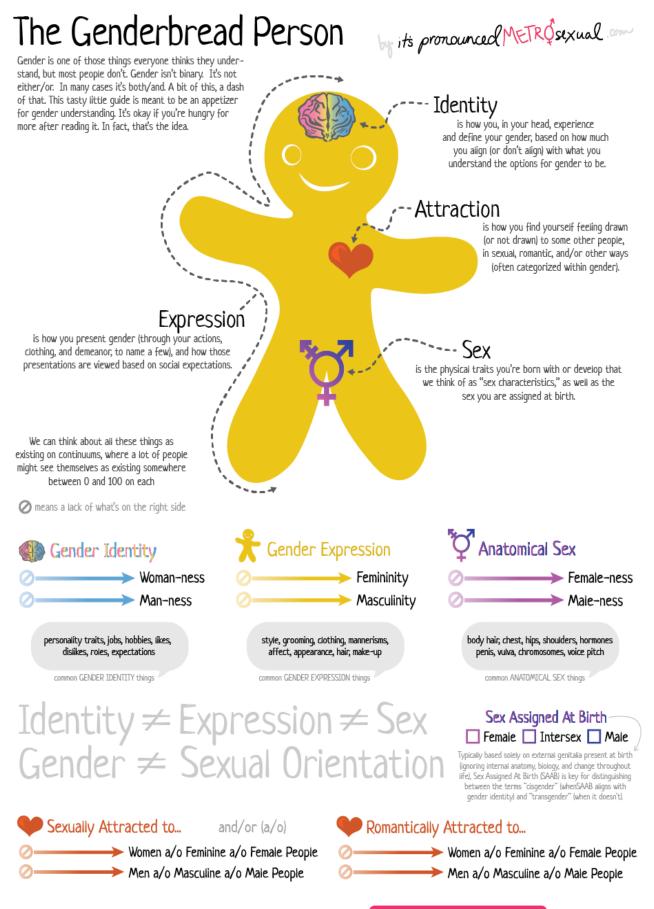


The Kinsey Scale is now outdated and does not address all possible sexual identities. Now, a person's gender and sexuality can put them on a number of places on the spectrum, which is what makes it so complex.⁶ The following is an infographic⁷ by Sam Killermann, which can be used as a tool to understand the basic concepts pertaining to gender and sexuality.

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⁶ Gender and Sexuality Spectrum, 18th February 2014 (Available at: https://sites.psu.edu/imanscib/2014/02/18/gender-and-sexuality-spectrum/)

⁷ Sam Killermann, IPM (Available at: https://www.itspronouncedmetrosexual.com/2018/10/thegenderbread-person-v4/)



Gender

Gender is one of the several aspects of an individual's identity. It refers to the behavioural characteristics of an individual based on social categories of feminine or masculine. Gender is therefore commonly understood as a social construct, and also has cultural variations. However, in reality, what constitutes feminine or masculine does not have an objective definition but is predominantly derived from social conventions and expectations. Contrary to the popular misconception, one's gender identity and expression need not correspond to their biological sex. For instance, a person whose biological sex is female is attributed the feminine gender and is expected to appear, dress and behave in a manner that society determines and accepts as feminine, which leads to gender stereotyping. While one's biological sex, through hormones, does influence one's gender identity, the two need not necessarily align.

Gender identity is self-perceived, and encompasses all identities "that exist within and outside binary constructions of femininity and masculinity"⁸. It is internal and psychological, and is determined based on one's own feelings and experiences. Theories of child psychology attribute formation of one's gender identity from early childhood years.⁹ Children, particularly prepubescent children whose behaviour does not conform to the conventional expectations of their gender assigned at birth, are commonly referred to as Gender Non-conforming Children [GNC]. The gender non-conforming child who is not transgender just prefers clothing and toys of the gender other than the one assigned to them at birth.

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⁸ Recent Legal Reforms on Gender Recognition: A Global Review, Centre for Health Ethics and Technology, Jindal Global Law School (2020) (Available at: https://jgu.s3.ap-south-

^{1.}amazonaws.com/cjls/Recent+Legal+Reforms+on+Gender+Recognition.pdf)

⁹ Aidan Sammons, Gender: cognitive theory (Available at: http://www.psychlotron.org.uk/newResources/developmental/AS_AQB_gender_CognitiveBasics.pdf)

Trying to force them to conform can cause a lot of emotional pain and stress for that child.¹⁰

The Gender identity of a person could be cisgender, transgender, or non-binary. A **cisgender person** refers to a person who identifies with the gender they were assigned at birth. A **transgender person** refers to a person whose gender identity differs from their biological sex and gender assigned to them at birth. For example, it could refer to individuals assigned male, who are actually women or non-binary, or to individuals assigned female, who are actually men or non-binary. The term transgender is considered to be an umbrella term, inclusive of binary trans men and women, non-binary people, genderqueer persons and gender non-conforming persons.¹¹ In India, transgender persons also have specific socio-cultural identities. Depending on their cultural and geographical location, transgender persons may identify as Aravani or Thirunangai in Tamil Nadu; Jogti, Hijra in Maharashtra and Karnataka; Kinnar in Chattisgarh; Aradhi in Maharashtra, etc.¹²

This feeling of misalignment between one's gender identity and the gender and sex assigned to them at birth causes what is called 'gender dysphoria'. It refers to the discomfort or distress that arises from the incongruence of gender identity and gender assigned at birth. The reason for such dysphoria is assigning the wrong gender at birth, which is again due to a narrow and misconceived understanding of gender and sex. Dysphoria is further caused by society's imposition of norms pertaining to

See Supporting Your Young Gender Non-Conforming Child, Human Rights Campaign (2020)
 (Available at: https://www.hrc.org/resources/supporting-your-young-gender-non-conforming-child)
 Terminology, Orinam (Available at: http://orinam.net/resources-for/friends-and-family/terminology/)

¹² Recent Legal Reforms on Gender Recognition: A Global Review, Centre for Health Ethics and Technology, Jindal Global Law School (2020) (Available at: https://jgu.s3.ap-south-1.amazonaws.com/cjls/Recent+Legal+Reforms+on+Gender+Recognition.pdf)

gender and sexuality, which forces people to suppress or hide their true identities.

A transgender person may or may not opt for gender affirming surgery, and could have any sexual orientation. It is important to note that 'transgender' is an adjective not a noun. Therefore, in referring to trans person, the term "transgender people" must be used and not "transgenders". A transgender person opting to take steps to affirm their gender identity is said to be in 'transition'. **Transitioning** refers to any step(s) a person takes to affirm their gender identity; this may or may not include changes in one's name, pronouns, physical appearance, taking hormones, undergoing surgery, among many other things. 13 There is no single way of transitioning, nor is transition defined by medical steps someone has or has not taken. 14 "Transition is not about changing genders, it is about shifting presentation to match the already **existing identity.**"¹⁵ It is for this reason the phrase 'gender-affirming surgery' is used in place of 'sex reassignment surgery'. Transphobia refers to the "irrational fear, hatred or aversion towards transgender people".16

A **non-binary person** is someone who does not identify within the gender binary. For some persons this means identifying somewhere between the binary "ends" (male and female), for some it means identifying as a combination of genders, and for others it means feeling a complete lack of a gender. For many individuals, being nonbinary entails

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¹³ Terminology, Orinam (Available at: http://orinam.net/resources-for/friends-and-family/terminology/)

¹⁴ Recent Legal Reforms on Gender Recognition: A Global Review, Centre for Health Ethics and Technology, Jindal Global Law School (2020) (Available at: https://jgu.s3.ap-south-1.amazonaws.com/cjls/Recent+Legal+Reforms+on+Gender+Recognition.pdf)

¹⁵ Terminology (Available at: http://pinkmantaray.com/terminology)

¹⁶ Recent Legal Reforms on Gender Recognition: A Global Review, Centre for Health Ethics and Technology, Jindal Global Law School (2020) (Available at: https://jgu.s3.ap-south-1.amazonaws.com/cjls/Recent+Legal+Reforms+on+Gender+Recognition.pdf)

liberation from the stereotypes and gender roles attached to the gender they were assigned at birth.¹⁷

Another aspect of one's gender is **gender expression**, which refers to the ways in which one externally manifests their gender, such as through clothing, appearance, use of pronouns etc. Pronouns form part of one's gender expression and need not correspond with one's sexual and gender identity. Pronouns are words that a person may use to identify themselves instead of their name. For example, she/her/hers and he/him/his are typically feminine and masculine pronouns, respectively. However, some feel more comfortable with gender-neutral pronouns. The most common gender-neutral pronouns are they/them/theirs, used in the singular to refer to an individual in a way that isn't gendered.¹⁸ Recent years have witnessed some people preferring to be addressed by neopronouns, which are gender non-specific and gender neutral, such as 'xe/xir', 'ze/zir', etc., and use gender neutral prefixes such as 'Mx.' instead of 'Mr.' and 'Ms.'. One may also choose to go by multiple sets of pronouns.¹⁹

Often, people make assumptions about the gender of another person based on a person's appearance or name. Whether or not these assumptions are correct, the very act of making an assumption can send a potentially harmful message- that people have to look a certain way to demonstrate the gender that they are or are not. ²⁰ Gender expression need not always correspond with one's gender identity. For instance, a person may identify as masculine gender but may prefer to wear clothing that is

¹⁷ Terminology (Available at: http://pinkmantaray.com/terminology)

¹⁸ Neopronouns explained (Available at: https://intercultural.uncg.edu/wp-content/uploads/Neopronouns-Explained-UNCG-Intercultural-Engagement.pdf)

¹⁹ Wren Sanders, How To Affirm the People in Your Life Who Use Multiple Sets of Pronouns, THEM., 5th March 2021 (https://www.them.us/story/multiple-sets-of-pronouns)

²⁰ Neopronouns (Available: https://www.mypronouns.org/neopronouns)

conventionally considered to be feminine, and may prefer to go by gender neutral pronouns. In this context, a cross-dresser refers to a person who wears clothing that is conventionally associated with members of a different sex or gender.

Misgendering and **deadnaming** amount to invalidation of the identity of transgender and non-binary persons and denial of their existence as they are. Misgendering means referring to a person in a way that does not reflect their gender identity. For example, using incorrect pronouns, calling someone by an old name (a deadname), using an incorrect prefix (Mx., Ms., or Mr.). Deadnaming means addressing or referring to someone by the name they were given or used before they transitioned and/or discovered their true gender identity. This term is an adjustment to the term, 'birth name' for a few reasons, namely that these names are dead. Deadnames are also referred to as 'old names'. Misgendering and deadnaming often drag forth a great deal of pain and trauma for queer individuals as they are forced to live as someone they are not.²¹

Sex

Sex, as opposed to gender identity, usually refers to one's biology. Most people reduce this to chromosomes and genitalia, but the reality is that biological sex is a spectrum and not a binary. Most people fall into two prototypical categories of male and female, i.e., most people with XX chromosomes have internal female genitalia (uterus, ovaries, cervix, etc.), external female genitalia (vagina, clitoris), estrogen as their primary hormone, and identify as female. Most people with XY chromosomes have internal male genitalia (testicles, vas deferens, etc.), external male

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²¹ Terminology (Available at: http://pinkmantaray.com/terminology)

genitalia (penis, scrotum), testosterone as their primary hormone, and identify as male.²²

However, not everyone falls within the above two categories of male and female, and such persons are called "intersex," meaning, "between sex." **Intersex people** are born with physical or biological sex characteristics that are more diverse than the binary definitions of male or female bodies. With around 40 different recognized types of intersex variation, there is a huge diversity among intersex people. Intersex variations can be picked up on at any time during one's life, and are not always evident at birth. There is no singular intersex experience.²³ Schuyler Bailar briefly explains the five main factors of biological sex²⁴:

- 1. <u>Sex Chromosomes:</u> generally, this means XX or XY, but there is also XXY, XXX, XYY, X. These are called sex chromosomal abnormalities, but that doesn't mean there is anything wrong with their bodies, this is just a normal and natural expression of human biological diversity. Sex chromosomal abnormalities are common and the results are far less severe than non sex chromosomal abnormalities such as Trisomy 21 (Down Syndrome.) For example, individuals with XXX chromosomes are fertile and healthy. Some individuals are also born with "Mosaic Genetics" wherein some cells are XY and some are XX.²⁵
- 2. <u>Hormones:</u> usually testosterone and estrogen, including their derivatives like estradiol and progesterone, dihydrotestosterone and other androgens. (Androgens are the class of hormones that include

²² What is biological sex? (Available at: https://pinkmantaray.com/sexed)

²³ Recent Legal Reforms on Gender Recognition: A Global Review, Centre for Health Ethics and Technology, Jindal Global Law School (2020) (Available at: https://jgu.s3.ap-south-1.amazonaws.com/cjls/Recent+Legal+Reforms+on+Gender+Recognition.pdf)

²⁴ What is biological sex? (Available at: https://pinkmantaray.com/sexed)

²⁵ See Chromosomal Abnormalities, Understanding Genetics: A New York, Mid-Atlantic Guide for Patients and Health Professionals (2009) (Available at: https://www.ncbi.nlm.nih.gov/books/NBK115545/)

testosterone, and testosterone is probably the main hormone in this group, and certainly the most well-known, but it is only one of several androgens that are usually considered the main "male" sex hormone.)

- 3. Expression of hormones: in order for the effects of a hormone to take place, you need to have the proper and functioning hormone *receptors* for that hormone. Some individuals do not have these. For example, there is a syndrome called Complete Androgen Insensitivity Syndrome [CAIS] in which a person who is born with XY chromosomes does not have any androgen receptors which means the person receives no effects of testosterone whatsoever.
- 4. <u>Internal genitalia:</u> these generally include testes, vas deferens, fallopian tubes, uterus, ovaries, etc. In order to have testes, you have to have a Y chromosome.
- 5. External genitalia: these generally include penis, vagina, clitoris, scrotum (not necessarily with descended testes. Testes remain internal until puberty when, most natal males, they descend. However, sometimes they do not and they remain internal.)

Anatomical sex is different from the sex assigned at birth. The binary (male or female) identification usually given to a child at birth, is most often based on the child's external anatomy. A child could be Assigned Female At Birth [AFAB] or Assigned Male At Birth [AMAB].

Sexual Orientation

Sexual orientation refers to an enduring pattern of romantic or sexual attraction, or a combination of both, to persons of other sex or gender, the same sex or gender, to no sex or gender, or to more than one sex or gender. In other words, it refers to an individual's attraction to men,

women, and/or non-binary people. The sexual orientation of a person could be heterosexual, homosexual, bisexual, pansexual, or asexual. The sexual orientation of a person need not correspond or conform to their gender identity or sex assigned at birth. Heterosexuality refers to attraction to members of the other gender/sex. In this context, heteronormativity refers to the predominance of social norms of heterosexuality. Homosexuality refers to exclusive or predominant same-gender/sex attraction. The term 'homosexual' was often used in a derogatory manner and is now commonly replaced with 'gay'.

There is no consensus in the scientific community on the reasons for diverse sexual orientations. Some scholars attribute it to unknown biological factors over which individuals have no control, just as individuals do not decide whether they are left-handed or right-handed. Supporting this view, many gays say they realized they were gay during adolescence, just as straights would say they realized they were straight during their own adolescence. Other scholars say that sexual orientation is at least partly influenced by cultural norms, so that individuals are more likely to identify as gay or straight depending on the cultural views of sexual orientation into which they are socialized as they grow up. ²⁶

Gay: A sexual identity term adopted by some (but not all) people who are exclusively or predominantly attracted to those of the same gender/sex. Usually, but not always, this term is used by men. Sexual identity does not necessarily reflect sexual orientation or behaviour. ²⁷

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²⁶ Understanding Sex and Gender, Sociology (Available at:

https://open.lib.umn.edu/sociology/chapter/11-1-understanding-sex-and-gender/) ²⁷ Terminology, Orinam (Available at: http://orinam.net/resources-for/friends-and-

Lesbian: A sexual identity term adopted by some (but not all) women who are exclusively or predominantly attracted to other women.²⁸

Bisexuality: Bisexuality refers to attraction towards males and females. It does not imply equal degree of attraction, simply significant attraction towards both.²⁹

Pansexuality: Pansexuality refers to attraction that includes men, women and non-binary people.³⁰

Asexuality: Asexuality refers to the lack of sexual attraction to anyone, or low or absent interest in sexual activity³¹

Queer: Used to collectively refer Lesbians-Gays-Bisexuals-Transgender people. It is an umbrella term for sexual and gender minorities who are not heterosexual or cisgender. Originally meaning "strange", queer was used pejoratively against those with same-sex desires or relationships. However, since the 1980s, many LGBTQIA+ individuals have begun to reclaim the word.³²

Closeted: Hiding one's gender and/or sexual identity from their family and public, due to fear for their safety and well-being. It is a huge psychological burden and affects the mental and physical health of the person whose true identity is suppressed.

Coming Out: Coming out is the process by which individuals accept their own homosexual or bisexual orientation or transgendered nature, and

²⁸ Terminology, Orinam (Available at: http://orinam.net/resources-for/friends-and-family/terminology/)

²⁹ Terminology, Orinam (Available at: http://orinam.net/resources-for/friends-and-family/terminology/)

³⁰ Terminology, Orinam (Available at: http://orinam.net/resources-for/friends-and-family/terminology/)

³¹ Terminology, Orinam (Available at: http://orinam.net/resources-for/friends-and-family/terminology/)

³² Recent Legal Reforms on Gender Recognition: A Global Review, Centre for Health Ethics and Technology, Jindal Global Law School (2020) (Available at: https://jgu.s3.ap-south-1.amazonaws.com/cjls/Recent+Legal+Reforms+on+Gender+Recognition.pdf)

then let friends and family members know about this aspect of themselves.³³

Challenges faced by Queer People

It is important to note that people may choose to keep their identities private, i.e., many people don't proactively share their gender or sexual identity, just as many people don't proactively share their caste or class with mere acquaintances. Therefore, care and caution must be taken to avoid intruding someone's privacy and asking potentially private information about their gender and sexual identity.

Most queer people realise they are queer only when they are at the end of their teenage years or are well into their adulthood. The reason for such delayed realisation, which is often preceded by years of confusion and turmoil, is the lack of awareness. The LGBTQIA+ community suffers from disability not due to biological reasons but due to social factors, which affects their health, dignity, education, livelihood etc. A person whose gender identity and gender expression does not conform to societal expectations is subject to ridicule, harassment and even abuse and violence. Societies imposition of expectations based on gender and sex results in suppression of identities, which further perpetuates gender dysphoria and their trauma of living closeted lives. The LGBTQIA+ community is also victim to 'othering' which refers to alienation, which is a form of discrimination.

The Tamil Nadu State Judicial Academy held a consultation meeting with members of the LGBTQIA+ community, prior to this publication. The discussion highlighted the main problems that are being faced by the

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³³ Terminology, Orinam (Available at: http://orinam.net/resources-for/friends-and-family/terminology/)

transgender community are of discrimination, unemployment, lack of educational facilities, homelessness, lack of medical facilities like HIV care and hygiene, depression, drug abuse, tobacco and alcohol abuse, problems related to marriage and adoption. They also suffer harassment at the hands of law enforcement authorities, and are subject to constant scrutiny which is violative of their right to privacy. Further, LGBTQIA+ people are harassed and shun by their own parents and family members. Homosexual individuals still face discrimination in access to employment and housing and the law is yet to enable their realisation of family life i.e., civil union, parentage and inheritance.

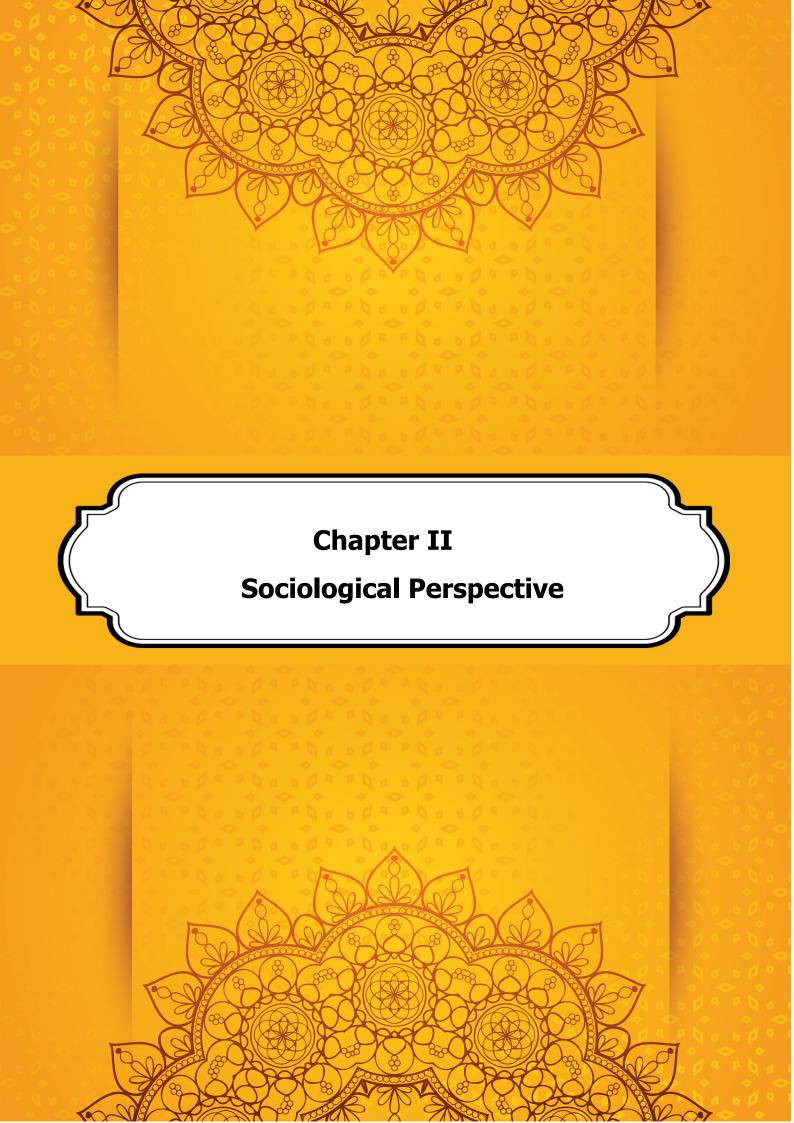
Queer individuals are also victim to honour killing, forced marriage, and are forced to undergo conversion therapies, which are illegal and fake. Intersex persons, particularly intersex children, often undergo forced surgeries in order to confirm to the sex binary of either male or female. Non-binary gender and sexual identities are not disorders to be cured, but are diversities which are to be respected.

During the consultation meeting at TNSJA, it was stated that many gender non-conforming children dropout from schools due to bullying and harassment. This disenfranchises them from any further opportunities for education and livelihood, and they are faced with no other option but to go for begging or sex work. Even in cases where queer individuals manage to secure a stable job, they are either forced to mask their identity, or quit the job due to an unfavourable and intolerant workplace environment.

The major hurdle that the LGBTQIA+ community face is bureaucratic hurdles. For instance, transgender persons are made to run pillar to post, for availing their transgender identity card, which availing social welfare benefits. Struggling at every stage for every single small task, and

protecting themselves against exploitation, drains their energy physically and psychologically, which in turn affects their productivity and contribution to society and economy. Time, energy and efforts spent on routine part of everyday lives, that non-queer (cisgender and heterosexual) people take for granted could be avoided and diverted to their education and self-improvement.

The need of the hour is to normalise the complex queer lives, in order to undo the social stigma. In the words of Justice P. Sathasivam, "All the laws of the land should be applied to them like any other person. They should be treated equally, respectfully and without any discrimination."



Chapter II – Sociological Perspective

The concept of multi-sex is not a 21st century phenomena and has existed since ages across the globe and we find traces of accommodative and all-inclusive society in every documented culture across the globe. Two-Sex notion is an imposed ideology of colonialists who enforced gender rigidities on their subjects on the pretext of "Civilising". The cultural belief and integration of multi genders still exist in many traditional societies around the world. Such society classifies their gender on the basis of Gender identity and does not differentiate their people on sexual identity. These societies assign unique and supernatural powers to LGBTQ persons and are inclusive in all respects. Samoan Culture is one fine example of such an existing cultural society. In Samoan culture, there are four recognized genders:

- Male
- Female
- Fa'afatame
- Fa'afafine

The third and fourth genders are fluid gender roles and exist with all due rights and respects in the like their male and female counterparts. Their Prime Minister is their patron of their association. Secondly, Muxes of Mexico is another Society where they have a recognized Third Gender among the Zapotec People in Oaxaca. Lastly, Mapuche of Chile have non binary individuals who take the role of Healer. They flow between genders and are religious authorities. The fluidity of their gender is what provides them the ability to interact with the spiritual realm. These indigenous

societies believe that, transgender persons are part of their culture and existence and not separate from it.

During colonization era, the notion of sexuality received attention from western psychologists and sociologists. Theories on Sexuality were propounded and disputed by one after another and lack of sensitivity of these studies was obvious. Let us look into the much talked theories on sexuality.

Nature Vs. Nurture In Psychology

Nature Vs Nurture discourse was taken by psychologists and scientists who used this debate to argue and validate their stance with regard to transgender persons and gender fluidity persons. It is concerned with the contribution that both influences make to human behaviour.

Takers of 'Nature' argue that, human behaviour is pre-wiring and passed down by genes and biological make up. They say that occurrence of gender fluidity is because of the genetic make-up of oneself and such behaviour is "wired in", characteristics and differences that emerge later in life are regarded as product of maturation. On the contrary, takers of 'Nurture' propose that, our environment and upbringing are the cause of non-binary and gender fluidity.

Social Learning Theory

It says that, behaviour is acquired by observing, interacting and imitating others. Learning occurs through observation of rewards and punishments, a process known as "Vicarious Reinforcement".

Social Learning Theory firmly believes that a person identifies their gender by observing and imitating others. Gender identity is driven by rewards and punishments that one receives from their environment. It also

states that "Innate Feelings" as such is non-existent and it is very much feasible to reverse one's gender by social conditioning and upbringing. It states that, biological factors are important but are not dominant while facing social learning in gender development.

In 19th Century, western society coined the word "Inverts" to refer people who did not conform to the social standards. They were viewed as people with disorders and lot of therapies were prescribed for non-conforming people. The prime object of these therapies were to push non-conforming people back to their roles and discourage people who felt opposite to what they were conditioned.

The term "Gender Role" and "Gender Identity" were coined by American Sexologist Dr. John Money who was a staunch believer of biological theory. Though his studies were disproved, he is credited for inventing the terminology.

The famous case of David Reimer disproved that social conditioning can change one's gender. David Reimer, otherwise known as "John/Joan", as a baby, Reimer went through a faulty circumcision, losing his male genitalia. Psychologist John Money convinced Reimer's parents to raise him as a girl. Reimer grew up as a girl, dressing in girl clothes and surrounded by girl toys, but never felt like a girl. This caused him mental trauma and he tried to commit suicide at age 13. His panicked parents revealed him the truth and he underwent surgery to reconstruct. This disproved the thoughts that social conditioning plays a role in one's sexual orientation.

Judith Butler, American Philosopher and gender theorist says "Sex" and "Gender" are socially constructed. In the name of science, the past generations have done injustice to a whole lot of humans who were ripped of their identity and subjugated. Modern theorists like Judith Butler feel

that, assignment of Sex and Gender is not the concern of the society rather atrocious invasion of one's privacy.

References in Indian Context

The recent perspective of the society on the LGBTQIA+ communities is more accepting and adoptive, compared to a decade ago. This acceptance and inclusiveness did not change overnight. There were massive struggles and protests by the persons belonging to the LGBTQIA+ communities for mere acceptance of them as human beings and providing them their basic rights.

The history of India has recognized homosexuality, bisexuality and transgender persons. There are several stories in the mythology that shows that India was an inclusive country. LGBTQIA+ was a part of the Indian society till the pre-British era. In the British era, the LGBTQIA+ communities were not recognized and they were seen as a threat to the society and considered as criminals.

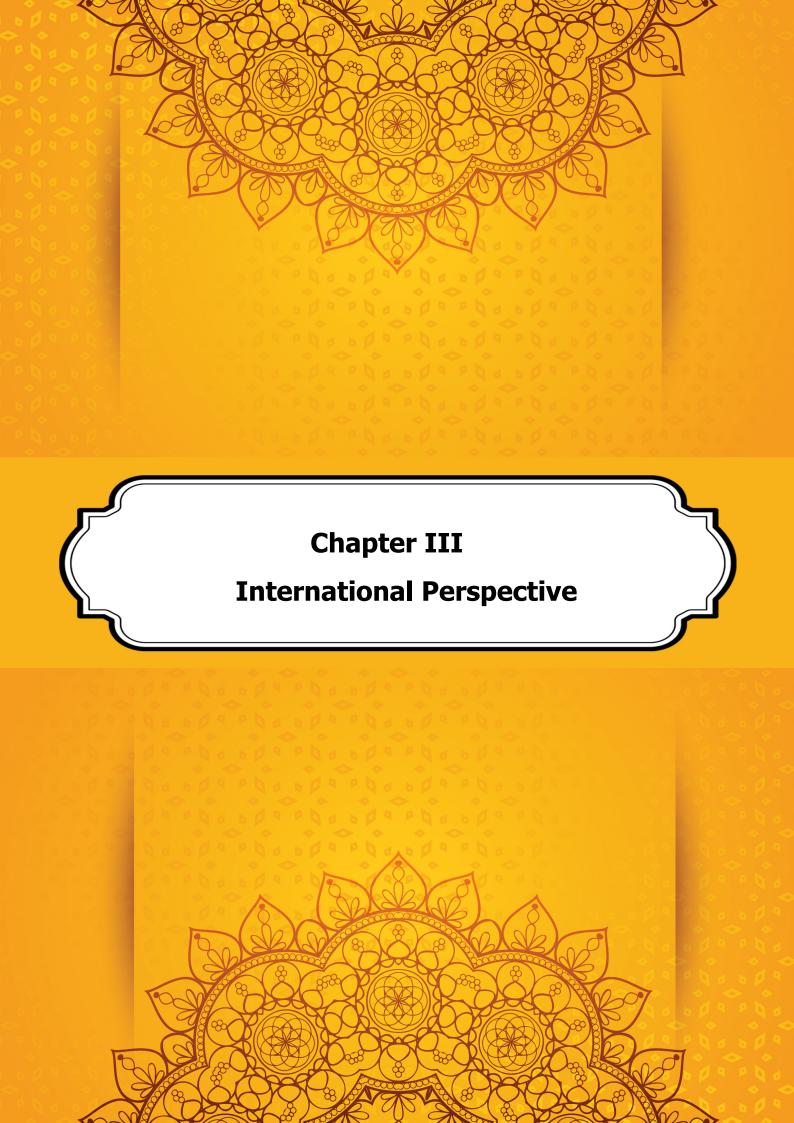
There are numerous instances mentioned in the Mythology about queer persons and many Gods being genderfluid. When we speak about the medieval times, yet again we find many visual references that suggest that queer is not modern but ancient. These visual references include books and monuments.

Let us now see the story of *Shikhandi, Aravan and others* mostly from the Hindu mythologies. Most of us in India have either read or have been told several stories of from the great epic *Mahabharatam*. One such story is the story of *Shikhandi*. *Shikhandi* is none other than the reincarnation of *Amba*, who takes a vow to kill *Bheeshma*, who abducts her for marrying her to his brother *Vichitravirya*. Amba was very upset since she was in love with the prince of *Salwa*, who refused to marry her

doubting her chastity. An irate Amba took an oath to kill Bheeshma. Since Bheeshma was very mighty, Amba being a woman could not kill a man, prayed to Lord Karthikeya, who gave her a garland and told her that only the person who wears this garland could kill *Bheeshma*. No man was ready to wear the garland, since it would lead to the death of Bheeshma. Angered by it Amba threw the garland which fell on the pillar post in Panchala and Amba ended her life too. Amba was reborn as Shikhandini to King Drupada of Panchala. When Shikhandini, the daughter of the King *Drupada* was born, the garland thrown by *Amba* fell from the pillar around the neck of Shikhandini. Shikhandini was raised as male, Shikhandi by King Drupada as requested by the gods, since only a man could kill Bheeshma. *Shikhandi* is also the brother of *Draupadi*, the wife of the Pandavas. Shikhandi was married to the daughter of Hiranyavarna of Dasarna, who was very upset knowing that Shikhandi was a woman. To satisfy the princess of *Dasarna*, Shikhandi approaches *Yaksha* named *Stuna* and becomes a man. In the great war of Kurukshetra, Shikhandi tries to kill Bheeshma. Bheeshma on seeing Shikhandi immediately recognises him to be the reincarnation of *Amba* and chooses to die.

Yet another famous story from the epic *Mahabharatam* is that of the great warrior prince *Aravan*. The story of *Aravan* from the *Tamil Mahabharatam folklore*. *Aravan* is the mighty warrior prince of the *Pandiyan* clan who aided the *Pandavas* in the *Kurukshetra* war. Sometimes, *Aravan* is also referred as the son of *Arjuna* and *Uloopi*, the serpent princess. To succeed in the war of *Kurukshetra*, a human sacrifice of a mighty warrior had to be made (*narabali/kalabali*), in order to appease the goddess *Kaali*. *Aravan*, a mighty warrior came forth to sacrifice himself on behalf the *Pandavas* for their success. But there was a problem *Aravan* though was a mighty warrior could not be sacrificed unless he was

married. Arrangements were made for *Aravan's* marriage, but no women were ready to step into widowhood just a day after her marriage. Then, *Lord Krishna* decided to take feminine form of *Mohini* and marry *Aravan*, so that he could be sacrificed the next day. The day after the marriage between *Aravan* and *Mohini*, *Aravan* was sacrificed and *Mohini* wept aloud breaking her bangles, wiping off the *kungumam* (Vermilion) from her forehead, ripping the flowers from her hair and pulling her *thali* off her neck. This story is re-enacted at Koovagam Koothandavar Temple festival at Villupuram district Tamil Nadu. This story from one of the great epics shows that, gender fluidity was widely acknowledged in the ancient days.



Chapter III - International Perspective

United Nations and the rights of the LGBTQIA+ communities

The United Nations Human Rights Committee had rendered a resolution in the case of *Toonen Vs. Australia*³⁴, where the sodomy laws of Australia which criminalised, homosexuality was repealed. This was the beginning of a new change, the era of abolishment of sodomy in many countries, paving the way for equal rights to all individuals irrespective of gender identity and sexual orientation.

In 1995, 'sexual orientation' was much debated topic of negotiations while drafting the Beijing Platform for Action for the 4th World Conference on Women. Though the sexual orientation did not make a part in the text, it gave way for World Governments to take a stance for inclusion and recognition of sexual orientation as part of women's right.

In the year 2003, Brazil presented a resolution which covered human rights and sexual orientation called The Brazilian resolution to the Economic and Social Council of the United Nations.

At the Commission on Human Rights in December 2006, Norway presented a joint statement on behalf of 54 Countries on the human rights violations based on sexual orientation and gender identity. This joint statement made way to another joint statement on behalf of 66 Countries presented by Argentina to the General Assembly in 2008 in support of the

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³⁴ Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994)

LGBT Rights. This joint statement was opposed by The Vatican, Arab League and Organisation of Islamic Cooperation.

A resolution was led in United Nation Human Rights Commission by South Africa in 2011, requesting the **Office of the High Commissioner for Human Rights** to draft a report which documents the discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity and urged to implement the Vienna Declaration and Programme of Action.

The High Commission for Human Rights in 2011, gave several recommendations, firstly, to protect people from homophobic and trans phobic violence, to include sexual orientation and gender identity as protected characteristics in hate crime laws, to establish effective systems to record and report hate-motivated acts of violence, to ensure effective investigation and prosecution of perpetrators and redress for victims of such violence. This also affirmed that, asylum laws and policies should recognize that persecution on account of one's sexual orientation or gender identity may be a valid basis for an asylum claim.

Secondly, to prevent the torture and cruel, inhuman and degrading treatment of LGBT persons in detention by prohibiting and punishing such acts and ensuring that victims are provided with redress, to investigate all acts of mistreatment by State agents and bring those responsible to justice, and provide appropriate training to law enforcement officers and ensure effective monitoring of places of detention.

Thirdly, to repeal laws criminalizing homosexuality, including all laws that prohibit private sexual conduct between consenting adults of the same sex, to ensure that individuals are not arrested or detained on the basis of their sexual orientation or gender identity, and are not subjected to

baseless and degrading physical examinations intended to determine their sexual orientation.

Fourthly, to prohibit discrimination on the basis of sexual orientation and gender identity, to enact comprehensive laws that include sexual orientation and gender identity as prohibited grounds of discrimination. In particular, to ensure non-discriminatory access to basic services, including in the context of employment and health care, and provide education and training to prevent discrimination and stigmatization of LGBT and intersex people.

Lastly, to safeguard freedom of expression, association and peaceful assembly for LGBT and intersex people, any limitations on these rights must be compatible with international law and must not be discriminatory. And to protect individuals who exercise their rights to freedom of expression, association and freedom of assembly from acts of violence and intimidation by private parties.³⁵

As an Employer, the United Nations in 2014 announced that, it would extend equal benefits to employees in same-sex unions entered into in jurisdictions where they are legal.

An update on the report of the 2011 resolution on 'sharing good practices and ways to overcome violence and discrimination, in application of existing international human rights law and standards', was presented to the United Nations Human Rights Council in 2015.

The United Nations Human Rights Council passed a resolution in 2016 to appoint an Independent Expert for finding various causes of violence and discrimination against people due to their gender identity and

³⁵ https://www.ohchr.org/documents/publications/bornfreeandequallowres.pdf

sexual orientation and discuss on how to protect them with the governments.

UNICEF and LGBTQIA+

The United Nations International Children's Fund (UNICEF) also protects the interest of Children and the parents who belong to the LGBTQIA+ community by aiding in eliminating discrimination against children and parents based on sexual orientation and/ or gender identity.³⁶ Ending violence and discrimination against lesbian, gay, bisexual, transgender and intersex people is one of the agendas of UNICEF.

The Rights LGBTQIA+ communities across the Globe

The LGBTQIA+ communities across the Globe are not recognised everywhere. Even today, there are many countries that still penalises homosexuality. On the other hand, there are countries which have recognised that homosexuality in an integral part of the society.

Canada

The Canadian government was one the first in the world to decriminalise homosexuality through an Amendment to their Criminal Law known as *Bill C-150* in the year 1969. In 1992, Canadian government has made it legal for LGBTQIA to serve in the military. In the year 2005, Samesex marriage in Canada became legal with The Civil Marriage Act. The non-binary genders are legally recognised in Canada and the Canadian Federal Government since 2017 allows individuals to put "X" on their passport to indicate an unspecified gender. Some provinces in Canada allows people to put "X" on their drivers' licence too. In 2017, an amendment was brought to

³⁶ https://www.unicef.org/media/91126/file

the Canadian Human Rights Act called the Bill C-16, which prohibits discrimination against the LGBTQIA. Canada has recently in 2019 banned the Conversion Therapy.

<u>Ireland</u>

Ireland decriminalised homosexuality vide The Criminal Law (Sexual Offences) Act passed through the Oireachtas on 24 June 1993. The age of consent in Ireland is 17 for all individuals. The Thirty-fourth Amendment of the Constitution (Marriage Equality) Bill 2015, legalised same-sex marriage and same-sex adoption in Ireland. It also allows adult individuals to change their legal gender without a surgery. However, for individuals between the age group of 16-18, there is a "route to recognition" of their identity. Ireland's Employment Equality Act, 1998 and the Equal Status Act, 2000 prohibited any discrimination on the basis of sexual orientation in 2011.

Germany

The East Germany decriminalised homosexuality in 1968 and West Germany in 1969. In 2017, Germany legalised same-sex marriage after the Bundestag passed legislation giving same-sex couples full marital and adoption rights. Germany also allows individual to change their gender without surgery since 2011 after the German Constitutional Court found that, the provision that required surgery to change one's legal gender to be unconstitutional. Previously when Transsexuellengesetz (Transsexuals Act of 10 September 1980) was enacted, there was a legal impediment that only those who undergo gender affirming procedure could change their gender. Germany being a Federal Republic many states have had anti-discrimination laws as early as 1992, by signing the Treaty of Amsterdam

(EU) Germany amended its National Anti-Discrimination laws to include sexual orientation.

South Africa

Homosexuality was recognised legal in South Africa in the year 1998 after the Court held a ruling recognising homosexuality as legal retrospectively from the year 1994. It is legal in South Africa to change the gender, but surgery is essential. Since 2006, South Africa recognises samesex marriages. Same-sex adoption is made legal through the Consolidated Children's Act. The age of consent is equal for all individual.

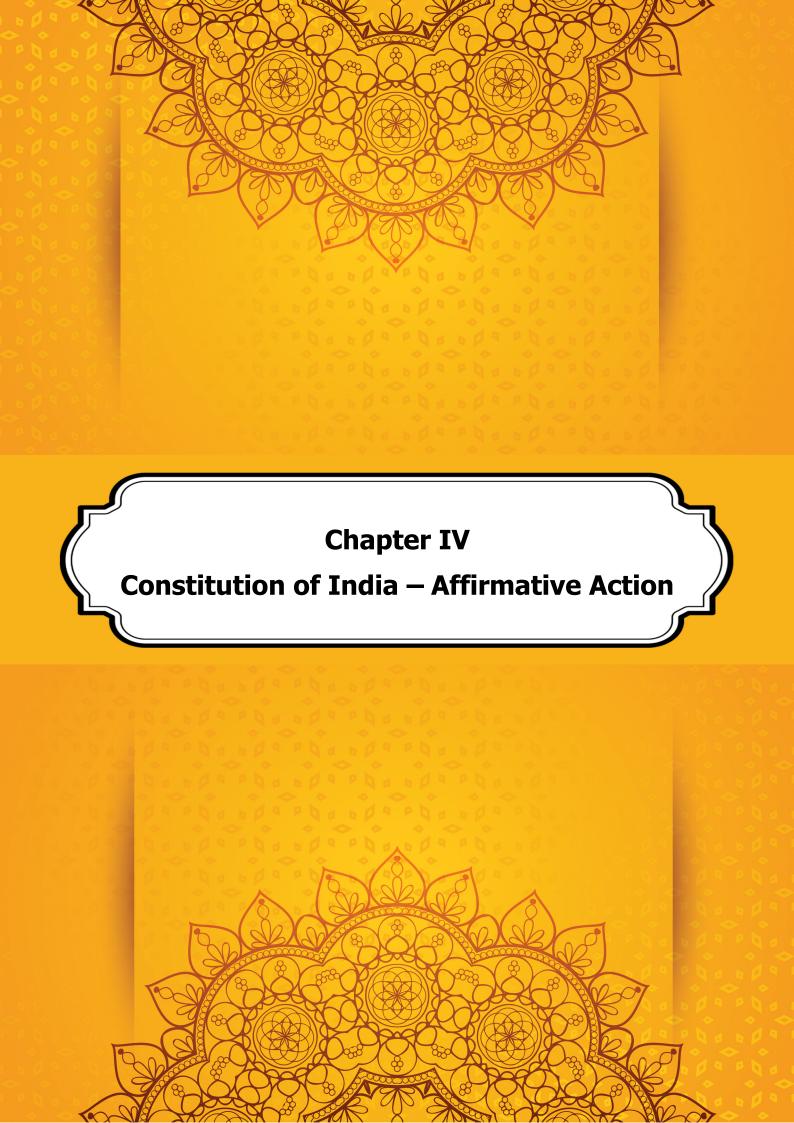
United States of America

Homosexuality was recognised as legal in the United States of America by the Supreme Court in the case of *Lawrence Vs. Texas* [539 U.S. 558 (2003)] in 2003. Same-sex marriages we not recognised by all the state of U.S.A., prior to 2015. On June 26, 2015 a ruling in *Obergefell Vs. Hodges* [576 U.S. 644 (2015)] by the U.S Supreme Court directed that all 50 states must issue marriage licenses for same sex couples and recognize same-sex marriages performed in any state. In 2013, gender change was recognized as legal without any procedure. It is permitted for the LGBTQIA people to serve in U.S Military.

<u>Australia</u>

In 1993, Homosexuality was decriminalized in Australia. Same-sex marriages were not recognised in Australia until 2017. The Marriage Amendment (Definition and Religious Freedoms) Act 2017 gave legal recognition to same-sex marriages. The age of consent is the same for all

individuals. The non-binary genders in Australia are recognized with the letter X. In 2017, gender change was recognized as legal without any procedure. The Human Rights and Equal Opportunity Commission Act, 1986 prevents discrimination based on gender identity and orientation. A special law called Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013 is enacted to safeguard the interests of the persons belonging to LGBTQIA+ community. Since 1992, homosexuals are serving in the Australian military openly.



Chapter IV - Constitution of India – Affirmative Action

The concept of affirmative action can be understood in a subtle sense as the practice or policy of favouring individuals belonging to groups known to have been discriminated against previously. It is in a sense a positive discrimination.

'Affirmative action' 37 in the United States and 'reservation policies' in India are arguably the two most important national instances of positive discrimination in favor of historically disadvantaged racial/ethnic minority groups. Talking about Transgender, the 21^{st} century has witnessed a clarion call for positive discrimination.

Affirmative action has been an ever evolving concept in India. Ever since Nehru emphasized the need to provide help to people defined as disadvantaged in socio-economic rather than in religious or ethnic terms there was a motion in favour of promoting the social and economically disadvantaged.³⁸ The 21st century witnessed the coming forward of the transgender community seeking their share of fair identity, thereby further evolving the theory of affirmative action in India.

The Kalelkar Commission issued a report in 1955 that recommended national-level reservations for OBCs in educational admissions but not in government service. When an effort to devise OBC socio-economic criteria other than caste failed, however, national-level reservations for OBCs were rejected by Kalelkar himself and by the Government of India - but they let

³⁷ President Kennedy first used the term "affirmative action" in Executive Order No. 10925, dated 6 March 1961 (See Mills, N. (1994): 5) "Introduction: to look like America," in N. Mills (ed.) Debating Affirmative

Action: Race, Gender, Ethnicity, and the Politics of Inclusion, New York: Dell.

³⁸ Quoted in Mendelsohn, O. and Vicziany, M. (1998) The Untouchables: Subordination, Poverty and the State in Modern India, Cambridge, UK: Cambridge University Press. 1998:132

states have discretion to choose their own criteria, encouraging the use of economic tests.³⁹ After the Transgender Persons (Protection of Rights) Act, 2019 coming into effect from 5th December, 2019 the States were bound to device ways to equate the representation guaranteed to transgender persons in India. Today, different states of India have different approach and concern to this community.

The Mandal Commission was severely handicapped in its efforts to identify "other backward classes" by a lack of systematic and up-to-date information on the caste/sub-caste affiliations of the Indian population, for the latest census of India to collect comprehensive and detailed information about caste status had been the census of 1931. In subsequent censuses such data have been collected only for caste and tribal groups on the official SC and ST lists. 40 On that light, the census data available about the transgender community is not up to the mark. The need for social security and social justice can only materialize when there is adequate representation from a community. The lack of representation contributes to marginalization with less invited participation and coordination from the community.

In Indira Sawhney Vs. Union of India⁴¹ the Supreme Court talked about the concept of 'social capital'. The term "social capital" has come increasingly into use to denote contacts, associations, and networks that help society to function well (economically and politically) and that enable individuals to improve their own position in society.⁴² The transgender community is an untapped social capital, marginalized in bias and stereotypes.

³⁹ See Radhakrishnan, P. (1990) "OBCs and central commissions," Seminar 375: 22-5.

⁴⁰ See Thomas E. Weisskopf, "Affirmative Action in the United States and India", Routledge frontiers of political economy, (2004)

⁴¹ AIR 1993 SC 477

⁴² See Sobel, J. (2002) "Can we trust social capital?", Journal of Economic Literature 40: 139-54.

Myron Weiner has developed this point in considerable depth. He argues that, 'preferential policies facilitate the mobilization of groups to demand their extension, creating political struggles over how the state should allocate benefits to ethnic groups, generating a backlash on the part of those ethnic groups excluded from benefits, intensifying the militancy of the beneficiaries and reinforcing the importance of ascription as the principle of choice in allocating social benefits and facilitating mobility.'⁴³ (Weiner 1983: 49)

There is also the problem of stigmatization, which the action of describing or regarding someone or something as worthy of disgrace or great disapproval. "Stigmatization is not merely the drawing of a negative surmise about someone's productive attributes. It entails doubting the person's worthiness and consigning him or her to a social netherworld"⁴⁴. (Loury 2002: 61)

The Supreme Court of India tends to understand the LGBTQIA+ rights as a matter of Dignity. The Supreme Court of India also inclines to comprehend freedom to include 'sexuality' and 'gender'. The Goal of affirmative action is to remedy past discrimination, enhance diversity, increasing political power of the minorities, providing role models, and enhancing wealth service provided to such community. The route map can take us to those contours of the Indian Constitution that needs emphasis.

Fundamental Rights & Transgender Persons

The Fundamental Rights enshrined in our Constitution of India is very much vital for our citizens and it is important basic structure of our

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⁴³ Weiner, M. (1983) "The political consequences of preferential policies: a comparative perspective," Comparative Politics 16: 35-52

⁴⁴ Loury, G.C. (1976) (2002) The Anatomy of Racial Inequality, Cambridge, MA: Harvard University Press.

Constitution. The Fundamental Rights enshrined in our Indian Constitution is very much illustrative and non-exhaustive. Protection of transgender persons was recognized as fundamental to Part III of the Indian Constitution by the Parliament in 2019 by legislating a new piece of law protecting the rights of transgender persons.

Article 14 of the Indian Constitution enshrines that, the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. This protection is wider than Article 21 of the Indian Constitution. Article 14 comprehensively incorporates to provide for equality and equal protection to all persons.

Article 15 of the Indian Constitution eshrines that, the State shall not discriminate against any citizen on grounds only of religion, race, caste, **sex, place of birth** or any of them. It is also pertinent to note that, Article 14 is person centric and Article 15 is citizen centric. Article 15 further narrates that, 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 access shops, public restaurants, hotels and places of public entertainment, or the use of wells, tanks, bathing ghats, roads, or places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

Article 16 of the Indian Constitution enshrines that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. 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 against in respect of, any employment or office under the State. Article 19 of the Indian Constitution

enshrines that, protection of rights regarding freedoms with reasonable restrictions.

Article 21 of the Indian Constitution enshrines that, No person shall be deprived of his life or personal liberty except according to procedure established by law.

Article 14, 15, 16, 19 and 21 are regarded as fundamental rights of the Indian Constitution that are upholding the principles of non-discrimination. Isn't it strange that the word 'Gender' is missing in these Articles? It is noteworthy to say that, the Constitution of India was not envisioned to be a 'Gender' centric document by the makers. Therefore, the word 'Gender' is absent in the Constitution of India. The 21st century has witnessed a great change. The time has come to evolve from limiting one's thinking to sexuality and to open one's mind to gender as a concept that has evolved as a separate degree of thinking. In view of the various constitutional mandates enshrined in our Constitution and each and every one of us being responsible citizens of the India, it requires from each one of us to be accountable for ourselves.

The idea of equality, and its ancillaries enshrined within Article 14 of the Indian Constitution has significance with respect to protection of the rights of Gender and sexual minorities. 'Gender' is a sense of expression often debated to have evolved from 'race' and 'sex'. In consonance with the Constitution of India, the Transgender Person (Protection of Rights) Act, 2019 was brought to effect.

Section 12 of the Transgender Persons (Protection of Rights) Act, 2019, provides for the '**right of residence'**, wherein, no child shall be separated from parents or immediate family on the ground of being a transgender, except on an order of a competent court, in the interest of

such a child brought up by persons who are not his parents. Every transgender person shall have a right to reside in the household where parent or immediate family members reside, a right not to be excluded from such household, a right to enjoy and use the facilities of such household in a non-discriminatory manner, where any parent or a member of his immediate family is unable to take care of a transgender, the competent court shall by an order direct such person to be placed in rehabilitation centre.

Directive Principles of State Policy & Transgender Persons

The Directive Principles of State Policy are non-justiciable guidelines given to the States. The State is responsible for preparing the platform for each and every citizen.

The Directive Principles of State Policy covers responsibility of the States, to secure social order, promotion and welfare of the people, equal justice and free legal aid, organization of village panchayat, right to work, right to education, right to public assistance, provisions for just and human conditions of work, maternity relief, living wages, participation in management of industries, promotions of co-operative societies, uniform civil code, childhood care and education, promotion of education and economic interest of weaker section, public heath etc. The Transgender Persons (Protection of Rights) Act, 2019 promotes the States to ensure that no transgender person is deprived of such rights.

According to Section 8 of the Transgender Persons (Protection of Rights) Act, 2019, the obligations of the Appropriate Government are given. Firstly, to secure full and effective participation of transgender persons and their inclusion in society, secondly, to take such welfare

measures to protect the rights and interests of transgender persons, and facilitate their access to welfare schemes framed by that Government, thirdly, to formulate welfare schemes and programmes which are transgender sensitive, non-stigmatising and non-discriminatory, fourthly, to take steps for the rescue, protection and rehabilitation of transgender persons to address the needs of such persons, and lastly, to take appropriate measures to promote and protect the right of transgender persons to participate in cultural and recreational activities.

In accordance with Section 14 of the Transgender Persons (Protection of Rights) Act, 2019, the appropriate Government shall formulate welfare schemes and programmes to facilitate and support livelihood for transgender persons including their vocational training and self-employment.

Rule 7 of the Transgender Persons (Protection of Rights) Rules, 2020, provides for welfare measures, education, social security and health of transgender persons.

The model directive enshrined within the Constitution of India is the guidebook for the State to prepare accommodation for its subjects.

Positive & Negative Rights in a case concerning Transgender Persons

It is important to have rights and duties specifically enshrined in each and every citizen's mind. The Centre and the State have to ensure that, there is a harmonious balance maintained between positive and negative rights.

What is meant by positive and negative rights? Positive rights are those rights, which require others to perform a duty or act in a certain way

and negative rights on the contrary are those rights that ensure the individual's natural freedom to act while not requiring anyone to act on behalf of another. Positive rights imply entitlements and negative rights imply liberties. For example, granting liberties to transgender persons means not blocking them in any way or acting to refrain the transgender community from coming forward. On the contrast positive rights exemplifies that, there is a duty cast upon others to respect the rights given to a transgender person.

When talking on the lines of human rights, positivity and negativity can be regarded as dimensions of civil, political, economic, social and cultural solidarity. The transgender persons ought to be accorded their rights and not giving their fair share of representation out of stereotypes, bias and narrow conscience goes against the procedure established by law.

Civil, Political, Social and Economic Rights & Transgender Persons

The Preamble of the Indian Constitution guarantees Social, Economic and Political Justice. This is an objective resolution passed by the people of India and given to them.

Section 11 of the Transgender Persons (Protection of Rights) Act, 2019, provides, for Grievance Redressal Mechanisms, that, every establishment shall designate a person to be a complaint officer to deal with the complaints relating to violations against Transgender persons.

Section 15 of the Transgender Persons (Protection of Rights) Act, 2019, mandates the appropriate Government to provide for healthcare facilities, wherein, measures in relation to transgender persons, to set up separate human immunodeficiency virus Sero-surveillance Centres to conduct serosurveillance for such persons in accordance with the guidelines

issued by the National AIDS Control Organisation in this behalf, to provide for medical care facility including sex reassignment surgery and hormonal therapy, before and after sex reassignment surgery and hormonal therapy counseling, bring out a Health Manual related to sex reassignment surgery in accordance with the World Profession Association for Transgender Health guidelines, review of medical curriculum and research for doctors to address their specific health issues, to facilitate access to transgender persons in hospitals and other healthcare institutions and centres and for coverage of medical expenses by a comprehensive insurance scheme for Sex Reassignment Surgery, hormonal therapy, laser therapy or any other health issues of transgender persons.

Therefore, it is important to have an understanding beyond stereotypes that, transgender persons have their civil, political social and economic rights as delivered by the Preamble of the Indian Constitution.

Access to Education and Employment & Transgender Persons

Access of Education and Employment is an indomitable part guaranteed by the Indian Constitution. The Constitution of India guarantees access to education and employment to all its citizens.

Section 9 of the Transgender Persons (Protection of Rights) Act, 2019, envisages non-discrimination in employment, wherein, no establishment shall discriminate against any transgender person in any matter relating to employment including, but not limited to, recruitment, promotion and other related issues. Section 10 outlays obligations of establishments that enshrine that, every establishment shall ensure compliance of this Act.

Section 13 of the Transgender Persons (Protection of Rights) Act, 2019, provides for obligation of educational institutions to provide inclusive education to transgender persons, wherein, every educational institution funded or recognized by the appropriate Government shall provide inclusive education and opportunities for sports, recreation and leisure activities to transgender persons without discrimination on an equal basis with others.

In National Legal Services Authority Vs. Union of India⁴⁵, the Supreme Court of India identifies the term 'transgender' as an umbrella term. In E. V. Chinnaiah Vs. State of Andhra Pradesh⁴⁶ and State of Andhra Pradesh Vs. P. Sagar⁴⁷ the Supreme Court, discussed about protection and reservation afforded to a 'class'. In M. Nagaraj Vs. Union Of India⁴⁸ wherein standards for setting a community as Socially and Economically Backward Classes was discussed and the Supreme Court noted that, declaring transgender persons as Socially and Economically Backward Classes without proper assessment and analysis of proper data goes against the spirit of the Constitution was observed. The Constitution of India is wide open to transgender persons also. There is no implicit or explicit restraint that can be administered from applying those constitutional mandates to them.

'Gender' as a 'Class' & Transgender Persons

The Gender as a Class debate supplies emphasis on the aspect of 'backwardness'. This was potentially discussed in the NALSA⁴⁹ Judgment by the Supreme Court of India. The Supreme Court of India in M. R. Balaji Vs.

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⁴⁵ (2014) 5 SCC 438 (462)

⁴⁶ AIR 2005 SC 162

⁴⁷ 1968 SCR (3) 565

⁴⁸ AIR 2007 SC 71

⁴⁹ 2014 5 SCC 438

Mysore⁵⁰, categorically stated that, determination of State backwardness is the function of state. The Supreme Court in Anil Kumar Gupta Vs. State of Uttar Pradesh⁵¹ talked about open competition. The Supreme Court in Rajesh Kumar Daria Vs. Rajasthan Public Service Commission⁵², discussed about special reservation and social reservation. The Supreme Court discussed about inter-locking of reservation in Indira Sawhney Vs. Union of India⁵³. In Triloki nath Vs. State of J&K⁵⁴ the Supreme Court categorically distinguished about 'class'. In State of Uttar Pradesh Vs. Pradip Tadon⁵⁵the tests for determining backwardness was discussed by the Supreme Court, the Supreme Court rejected the argument of poverty for determining backwardness citing its earlier decision in J. P. Parimoo Vs. State of Jammu & Kashmir⁵⁶ that, "if poverty is the exclusive test a large population in our country would be socially and educationally backward class of citizens. Poverty is evident everywhere and perhaps more so in educationally advanced and socially affluent classes. A division between the population of our country on the ground of poverty that the people in the urban areas are not poor and that the people in the rural areas are poor is neither supported by facts nor by a division between the urban people on the one hand and the rural people on the other that the rural people are socially and educationally backward class. Some people in the rural areas may be educationally backward, some may be socially backward. there may be few who are both socially and educationally backward. but it cannot be said that all citizens residing in rural areas are socially and educationally backward.". The Supreme Court categorically

⁵⁰ 1963 AIR SC 649 (Para 24)

⁵¹ (1995) 5 SCC 173

⁵² (2007) 8 SCC 785

⁵³ 1992 Supp 3 SCC 217 (Paras 815,779)

⁵⁴ (1969) 1 SCR 103 (Para 4)

⁵⁵ 1975 SCR (2) 761

⁵⁶ [1973] 3 S.C.R. 236

differentiated social and educational backwardness. The Supreme Court in Ram Singh Vs. Union of India⁵⁷ discussed about 'homogeneity' that, "a social class as an identifiable section of society which may be internally homogenous (based on caste or occupation) or heterogeneous (based on disability or gender e.g. transgender). Backwardness is a manifestation caused by the presence of several independent circumstances which may be social, cultural, economic, educational or even political".

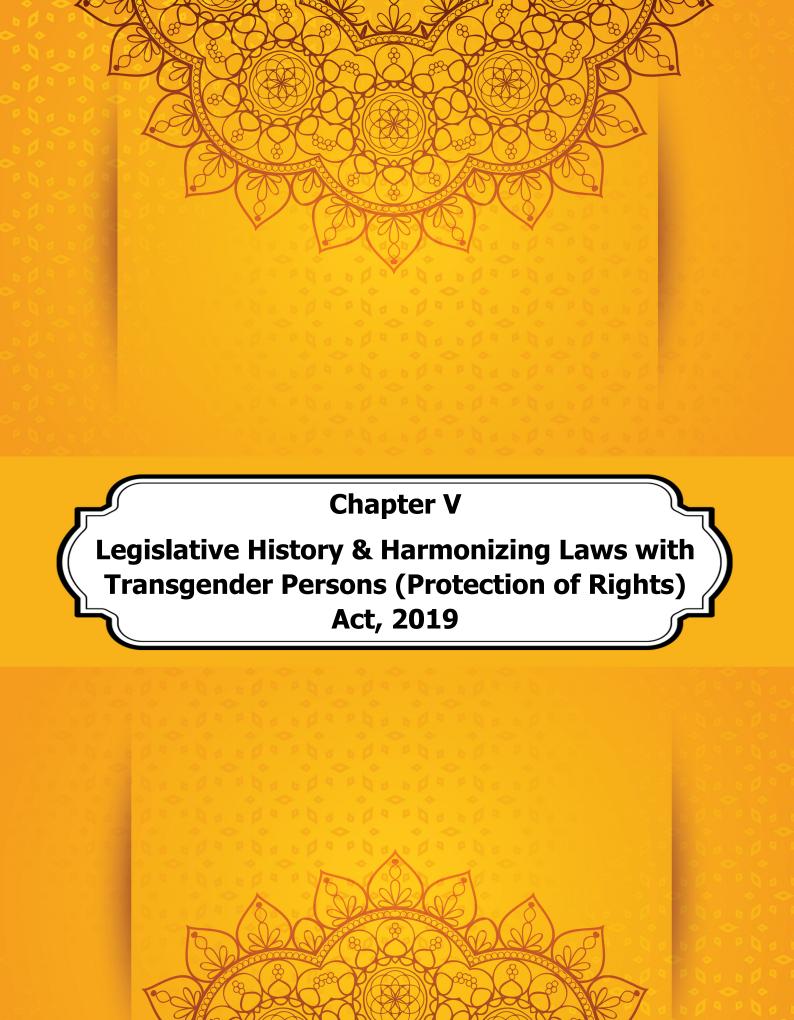
In Aslam Pasha Urf. Chandini Vs. State of Karnataka (KHC) W.P. No. 11610 of 2013 dated 18th July 2014, and Swapna Vs. The Chief Secretary (MHC) W.P. No. 31091/2013 dated 15th July 2015, the State Governments were given directions to provide reservations to transgender persons. The Courts rejected the preposition that, "an administrative action rather than judicial interpretation which could only be provided by the Legislature".

'Gender' as a 'Class' is also a Social-legal discipline. Therefore, it is important to understand and analyse 'Gender' as a 'Class' from that perspective. Our society is structured based on 'values' and 'behaviour'. When values are institutionalized and behaviour structured in terms of them, the result is stable system. A state of 'social equilibrium' is attained, the various parts of the system being in a state of balance. Two main ways of maintaining social equilibrium are 'socialization' and 'social control'. Social exclusion is usually defined as a dynamic process of progressive multidimensional rupturing of the 'social bond' at the individual and collective levels. Social exclusion precludes full participation in the normatively prescribed activities of a given society and denies access to information, resources, sociability, recognition, and identity, eroding self-respect and reducing capabilities to achieve personal goals. Gender is a type of social stratification.

⁵⁷ (2015) 4 SCC 697 (Para 54)

Etymological genealogy of the word "gender" can be experienced across the world. The root of the English, French, and Spanish words is the Latin verb generare, to beget, and the Latin stem gener-, race or kind. The substantives "Geschlecht", "genre", and "genero" refer to the notion of sort, kind and class. The modern English and German words, "Gender" and "Geschlecht" adhere closely to concepts of sex, sexuality, sexual difference, generation, engendering, and so on. French and Spanish seem not to carry those meanings readily. Words close to "gender" are implicated in concepts of kinship, race, biological taxonomy, language, and nationality. "Gender" is at the heart of constructions and classifications of systems of difference. The complexity of gender as a concept derives from an early distinction made between 'sex' and 'gender', where the latter term sought to forestall a naturalistic reduction of the gender question and to go beyond a reference to merely the sexual or biological difference between the male and female. The idea of sexual difference which suggested that biology lay behind the differential capacities of women and men in the social or public domain seems to have been an important point in relation to which the 'equality/'difference' debate, central to western feminism, was organized.

On that edifice, the Constitution of India provides and mandates for Transgender Persons (Protection of Rights) to the fullest of its spirit and contours. The Constitution of India neither leverage a transgender person to have arbitrary or excessive powers nor does it promote a constitutional bias or structured silence against transgender persons.



Chapter V - Legislative History & Harmonizing Laws with Transgender Persons (Protection of Rights) Act, 2019

Legislative History

Traces of law relating to transgender persons can be found in the history from the beginning of time moving through the Vedic period, Mughal period, pre-colonial era and the post-colonial eras. Beginning from the colonial era, it is important to understand and synthesize the various laws that were in place to superintend transgender person's protection of rights in India.

The Criminal Tribes Act, 1871, Part II exquisitely spoke about 'Eunuch' being ineffectual persons. It was a law that faced a lot of criticisms, in the later future. Today, multi-fold dimensions have evolved from the terminologies 'sex', 'gender' and 'race'.

Section 36A of the Karnataka Police Act, 1964 as amended in 2012 exclusively gave the power to regulate eunuchs in the state of Karnataka. In order to prevent or suppress or control undesirable activities of eunuchs, in the area, preparation and maintenance of a register of the names and places of residence of all, residing in the area under his who reasonably suspected of kidnapping or charge and are emasculating boys or of committing unnatural offences or any other offences or abetting the commission of such offences, filing objections by aggrieved to the inclusion of his name in the register and for removal of his name from the register for reasons to be recorded in writing, prohibiting a registered, from doing such activities as may be stated. Pursuant to the case of Karnataka Sexual Minorities Forum Vs. State of Karnataka⁵⁸, an

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⁵⁸ 2017 SCC OnLine Kar 558

amendment to S. 36A to replace the word 'eunuch' to 'undesirable activities' and 'person' was carried out in 2016. However, even today, on a plain reading of S. 36A, the implication of the Section targets transgender persons. Even today, S.36A still contains the word 'eunuchs' in one place within S. 36A. This in specific, is a clear contradiction recorded to prevent or suppress or control undesirable activities of transgender persons, in the letter of law which is conflicting to the Transgender Persons (Protection of Rights) Act 2019.

There weren't any special laws meant to protect the interests of transgender persons before the Transgender Persons (Protection of Rights) Act 2019 to represent and highlight the interests in the social, economic and political front of India. Bill No. XLIX of 2014 was introduced in Rajyasabha on 12th December 2014 with elaborate discussion on the various rights and liberties required by transgender persons. However, later in 2019 Bill No. 169-C was introduced in the Loksabha on 11th July 2019 which was passed as the Transgender Persons (Protection of Rights) Act 2019 (hereinafter "the 2019 Act").

Indian Penal Code & Transgender Persons Protection of Rights

The Indian Penal Code in Section 7 envisage that, every expression which is explained in any part of this Code, is used in every part of this Code in conformity with the explanation. Keeping this Section in premise, Section 8 envisages, 'Gender', as the pronoun 'he' and its derivatives are used of any person, whether male or female. Section 10 explains, 'Man' and 'Women' as, he word 'man' denotes a male human being of any age; the word 'woman' denotes a female human being of any age. Section 12 explains, the word 'public' as, the word "public" includes any class of the public or any community. Thus a transgender person does have a material

right to believe in that character (whether male or female) irrespective of gender according to Section 8. Section 8 narrates 'he' to include its derivatives used of any person. The meaning of the term '**Trans**', denotes a derivation. This derivation is symbolising a personal identity that doesn't correspond to sex assigned at birth.

Building on the evidence that, Indian Penal Code accommodates the interests of the transgender community, let us move to offences affecting human body in Chapter XVI, Section 375 of IPC narrates sexual intercourse with woman under circumstances under six descriptions. Whether the term 'women' in S. 375 includes trans women also? The definition of 'Person' in Section 11, Indian Penal Code gives an inclusive definition. On a plain literal reading of the Indian Penal Code, keeping in light S. 10 of the Indian Penal Code, the word 'woman' denotes a female human being of any age. This potentially exhausts us to the question whether a 'trans women' can denote to be a female human being? It is important to consider the discourse between mental age and self-perceived identity as the Supreme Court of India differed on the moot point that, biological age should be given primacy over the mental age.⁵⁹ The question whether self-perceived identity can be given primacy over peer-perceived identity is still an unsettled position of law considering the letter of laws laid down by the Transgender Persons (Protection of Rights) Act, 2019 in Sections 4, 5, 6, and 7.

The definition of a "transgender person" in S. 2(k) of the Transgender Persons (Protection of Rights) Act, 2019, 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

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⁵⁹ Eera Vs. State (NCT of Delhi), (2017) 15 SCC 133

therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta is illustrative and exhaustive.

In 2011 at England and Wales Court of Appeal (Civil Division) while deciding the case of R. Vs. Berkshire West Primary Care Trust⁶⁰, on gender reassignment found that, "A congruent female psychological, social and physical appearance is essential for the transsexual's ability to function as a female in society and is intrinsic to the personal identity of the transperson."

In S. Sushma Vs. Commissioner of Police⁶¹, the Madras High Court discusses about Article 14, reflecting how equality before law and its origin from the concept of rule of law.⁶² The Madras High Court expresses its concern how State has to ensure, equality before law and equal protection of laws to the transgender persons. The two auxiliaries of Article 14 cannot be made elastic to cast out sexual orientation and gender identity.

It is odd that, Indian Penal Code doesn't define the word 'natural' as today the word 'natural' could be interpreted subjectively. Section 377 of IPC explains unnatural offences as, whoever voluntarily has carnal intercourse against the order of nature with any man, woman or 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. Explaining that, penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section. According to Arushi Garg⁶³ in her Article argues on the issue of the definition of 'man' and 'woman' under Section 10 of the IPC that, "it could

^{60 2011} EWCA Civ 247

⁶¹ 2021 SCC OnLine Mad 2096 (Para 22 and 23)

⁶² V.G. Row Vs. State of Madras AIR 1951 Mad 147

⁶³ Navigating Through 'Age' and 'Agency' in Eera Vs. State, 14 Socio-Legal Rev. 79 (2018)

open the door to extending the law on sexual violence to male victims to an unprecedented degree. Most sexual offences under the IPC can only be committed by a man against a woman;⁶⁴ for others, the perpetrator can be of any gender, but the victim must be a woman.⁶⁵ Notably, this means that intersex victims are likely excluded from the law on sexual offences altogether,⁶⁶ while male victims are not recognized under most provisions.⁶⁷" This takes us back to the definition of a 'transgender person'. A transgender person is defined as one whose gender does not match the gender assigned at birth. It includes trans men and trans women, persons with intersex variations, gender queer persons, and persons with socio-cultural identities, such as kinnar and hijra. Intersex variations is defined to mean a person who at birth shows variation in his or her primary sexual characteristics, external genitalia, chromosomes, or hormones from the normative standard of male or female body.

The Transgender Persons (Protection of rights) Act 2019 states that the relevant government will take measures to ensure the full inclusion and participation of transgender persons in society. It must also take steps for their rescue and rehabilitation, vocational training and self-employment,

⁶⁴ See IPC, §354 (assault or criminal force to woman with intent to outrage her modesty), §354A (sexual harassment), §354B (assault or use of criminal force to woman with intent to disrobe), §354C (voyeurism), §354D (stalking), §375 (rape), §376B (sexual intercourse by husband upon his wife during separation) and §376D (gang rape).

⁶⁵ IPC, §376C (sexual intercourse by a person in authority).

⁶⁶ See the definition of 'man' and 'woman' under Section 10 of the IPC; It is not clear what the understanding of this provision would be following the NALSA decision, where the principle of self-identification in respect of gender was recognised, and the state's duty to protect the rights of trans persons, including those of the 'third gender' was recognised; National Legal Services Authority Vs. Union of India, (2014) 5 SCC 438.

⁶⁷ A notable exception is Section 377, though this provision is broad enough to criminalise even consensual sex between male adults; IPC, §377; Suresh Kumar Koushal Vs. Naz Foundation, (2014) 1 SCC 1; A curative petition against this provision is pending; Vishnupriya Bhandaram, Rainbow at End of the Tunnel? Curative Petition on Section 377, a Last Legal Remedy to Toss Draconian Law Out, FIRST POST (Feb. 1, 2016), www.firstpost.com/india/rainbow-at-the-end-of-the-tunnel-curative-petition-on-section-377-a-last-legal-remedy-to-toss-draconian-law-out-2605384.html.

create schemes that are transgender sensitive, and promote their participation in cultural activities.

Protection of Human Rights Act 1993 & Transgender Persons Protection of Rights

S. 2 (1) (d) 'human rights' provides for life, liberty, equality and dignity of the individual to be guaranteed. The guiding principles of non-discrimination, full and effective participation and inclusion in society, respect for difference and acceptance of transgender persons as part of human diversity and humanity, and equality of opportunity and accessibility are auxiliaries of human rights. This has to reflect on Transgender Protection giving the transgender community functional autonomy.

POCSO Act 2012 & Transgender Persons Protection of Rights

The Protection of Children from Sexual Offences Act, 2012 is a gender neutral law. Child sexual abuse can be committed by any person irrespective of their gender, age, literacy level, socio-economic status. This piece of law works more inquisitively into the problems of children. Many studies suggest that in cases of child sexual abuses, generally the perpetrators are known to the children or their parents such as friends of the parents, neighbours, relatives and child sexual abuse by a stranger is often a rare phenomenon.

The Transgender Person (Protection of Rights) Act, 2019 dictate that,

"The appropriate Government and local authorities shall take all necessary measures to ensure that transgender children enjoy human rights on an equal basis with other children.

The appropriate Government and local authorities shall ensure that all transgender children shall have on an equal basis with all other children a right to freely express their views on all matters affecting them; and provide them appropriate support for the exercise of the right."

The Protection of Children from Sexual Offences Act, 2012, being gender neutral legislation provides more protection to all children regardless of their gender identity. This may be extended to Indian Penal Code as well.

Immoral Traffic Prevention Act of 1956 & Transgender Persons Protection of Rights

The Immoral Traffic Prevention Act of 1956 is a vital aspect that goes without saying when talking about the protection of Transgender protection. Going on the lines of the Immoral Traffic Prevention Act of 1956 written focusing on the word 'person' inclusively including 'women or girl' doesn't explain anything about transgender or doesn't differentiate between 'man' and 'woman' explicitly. This law covers sexual exploitation and abuse as well. The Immoral Traffic Prevention Act of 1956 provides for protective homes, shelters, corrective institutions, public places and special police officers to deal with matters ancillary and incidental to sexual exploitation and abuse. The transgender community in India is frequented with sexual exploitation and abuse always. There is no social acceptance or functional autonomy granted to this community to live their life freely without fear of social stigmatization. Therefore, it is important to ensure that, the judicial conscience is safeguarded from being stigmatized to gender stereotypes.

The Immoral Traffic Prevention Act of 1956 (Amended in 1986) is the chief instrument of the Indian state's regulation of prostitution which mandates to prevent the traffic of women and children into prostitution. With the 1986 Amendment, the title was modified to "Immoral Traffic Prevention Act", and it became gender neutral. The ambit of the Act now applied to both male and female sex workers and

possibly also to those whose gender identity was indeterminate. It is with the 1986 Amendment that both male and hijra sex workers became criminal subjects of the Act. This provided the legal basis for arrest and intimidation of the transgender sex workers population.⁶⁸ But today, there is a cloud of reformation that is seen from the transgender community of due to the widespread social acceptance from creation of awareness amongst the masses.

Indecent Representation of Women (Prohibition) Act 1986 & Transgender Persons Protection of Rights

The Indecent Representation of Women (Prohibition) Act 1986 prohibits indecent representation of women through advertisements or in publications, writings, paintings, figures or in any other manner. This law specifically ensures that integrity of women is safeguarded to the fullest of the spirit of our Indian Constitution. On similar lines it is also important to ensure that, no person shall publish, or cause to be published, or arrange or take part in the publication or exhibition of, any advertisement which contains indecent representation of transgender community in any form. No person shall produce or cause to be produced, sell , let to hire, distribute, circulate or send by post any book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, representation or figure which contains indecent representation of transgender persons in any form.

Domestic Violence Act, 2005 & Transgender Persons Protection of Rights

The Domestic Violence Act, 2005 provide for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family. Domestic

Hon'ble Thiru. Justice P.Sathasivam, Judge, Supreme Court of India, Rights of Transgender People
 Sensitising Officers to Provide Access to Justice, Lecture delivered on Refresher Course for Civil Judges (Junior Division)-I Batch at Tamil Nadu State Judicial Academy on 12.02.2011

violence is a silent social stigma that has many dimensions. One such dimension is particularly seen in the case of transgender community as well. The family often tends to outcast a transgender person by devising to violence which often goes un-reported. S. 2(f) defines the term 'domestic relationship' in a pervasive manner. It says, a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family.

Labour Laws & Transgender Persons Protection of Rights

Under the Constitution of India, Labour is a subject in the Concurrent List and, therefore, both the Central and the State governments competent to enact legislations subject to certain matters being reserved for the Centre. It is imperative to note that, labour rights are extended to the Transgender Community as well. Under Union List, Entry No. 55 of the Seventh Schedule of the Constitution of India dealing with Regulation of labour and safety in mines and oilfields; Entry No. 61 dealing with industrial disputes concerning Union employees and Entry No. 65 dealing with Union agencies and institutions for - (a) professional, vocational or technical training, including the training of police officers; or (b) the promotion of special studies or research; or (c) scientific or technical assistance in the investigation or detection of crime. Under Concurrent List, Entry No. 22 of the Seventh Schedule of the Constitution of India dealing with Trade unions; industrial and labour disputes; Entry No. 23 dealing with Social security and social insurance; employment and unemployment and Entry No. 24 dealing with Welfare of labour including conditions of work, provident funds, employers' liability,

workmen's compensation, invalidity and old age pensions and maternity benefits. Appropriate conditions at work are ensured by measures taken to promote safety at the workplace and minimizing occupational hazards should be mandatorily ensured to the transgender community without bias or stereotypes. Under Seventh Schedule, Concurrent List, Entry No. 24 of the Constitution of India dealing with Welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits cannot be compromised against the transgender community. An economy organized for planned production and distribution, aiming at the realisation of social justice and the welfare of the masses can function effectively only in an atmosphere of industrial peace ensured by including the transgender community into our system.

Medical Laws & Transgender Persons Protection of Rights

Medical Laws in India are a crucial aspect that involves many laws. The transgender person's protection of rights is very much protracted towards medical laws. Medical jurisprudence and psychology are critical for transgender protection on the same line as how far law can open its limps to accommodate a transgender person identity to the fullest. Reassignment involves a surgical procedure that can help a vulnerable transgender person to reflect one's mirror image to the inner self coming out of gender dysphoria. Laws relating to Gender affirming procedures are very naïve in India and hence to be understood from a global perspective collating the best practices followed in different parts of the world.

From a global perspective, Japan in 2003 has come up with Act on Special Cases in Handling Gender for People with Gender Identity Disorder. 69 Article 2 of this law defines a 'Person with Gender Identity Disorder', as a person whose biological gender is evident, but who holds a persistent conviction under which they psychologically identify themselves as being of the opposite gender and who has the intention of physically and socially conforming with the Opposite Gender, and has received concurrent diagnoses on such identification with the Opposite Gender from two or more physicians equipped with the necessary knowledge and experience to give accurate diagnoses on this matter, based on generally accepted medical knowledge. It is strange that, Japanese law witnessed the aspect of gender identity as a disorder at the beginning. However the Japanese law gives a developmental leap on the line in which medical laws have to develop by talking about concurrent diagnoses.

The Gender Diagnosis Act, 2004⁷⁰ passed by the United Kingdom, gives a detailed account about the role of medical practitioners and psychologists in dealing with a transgender person. This piece of law also accommodates a equalling retirement pension benefits and insurance related aspects as provided by the National Insurance Act of the United Kingdom.

The United States of America has travelled a long way setting the example for the world giving LGBTQIA+ community their fair share of rights and liberties. The landmark decision given by Supreme Court of the United States in Bostock Vs. Clayton County, Georgia⁷¹, against discrimination gives a detailed account about civil liberties.

⁶⁹ Act on Special Cases in Handling Gender for People with Gender Identity Disorder (2003) Available at, http://www.japaneselawtranslation.go.jp/law/detail/?id=2542&vm=04&re=02

Gender Recognition Act 2004, Available at https://www.legislation.gov.uk/ukpga/2004/7/enacted
 2020 U.S. LEXIS 3252 Available at https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf

Keeping the eruptions from these three Countries on the table, it is envisioned for a fair, equitable and just edifice of medical laws for the LGBTQIA+ community in India.

Anti-Superstition Laws & Transgender Persons Protection of Rights

Anti-Superstition Laws can be regarded as a gray shade in Indian legal system despite the fact that, Indians are superstitious in their ideologies and beliefs. The need to develop these laws has good significance in mitigating the stereotypes attributed against transgender persons to achieve gender justice.

Property Laws & Transgender Persons Protection of Rights

The Constitution of India guarantees the right to property as a Constitutional right. There is a clear emphasize that, this rights is all-pervasive. This right is most often negated to transgender community. There are visible examples of such rights being shaved away from the transgender community by their own kith and kin for being born or raised on different attitudinal platform.

Property laws in India embody principles of equity, justice and good conscience. Property laws regulate the transmission of property between two living persons into harmony with the rules affecting its devolution on death. Therefore it is important that, unconscious bias should not creep into justice delivery mechanism.

Personal Laws & Transgender Persons Protection of Rights

Family law in India on marriage, divorce, custody of children, maintenance and adoption, inheritance and succession has its source routed on statues and religion. Each religious group following largely its own personal laws in matrimonial and family relations is a grave concern in the case of the Transgender Persons Protection of Rights in India.⁷²

The constituent assembly has adopted a safe and pragmatic approach by conceding to the right to religion as a fundamental right. The constituent assembly also ensured to enshrine the principles of justice, equality and liberty to all, irrespective of caste, religion and gender and set the attainment of a uniform civil code as their goal. The Constitution being the grundnorm of our country, all those laws made in the country has to pass through the touch-stone of constitutional vires. Constitution of India is sensitive to the right of women and should be sensitive to the rights of transgender persons thereby ensuring fair and equitable personal laws.

Statutory Interpretation & Transgender Persons Protection of Rights

The Transgender Persons (Protection of Rights) Act, 2019 is a law that has a pervasive significance in various laws that presently exist in India today. The cause of a transgender person for his civil liberties shall draw the more than one law before the bar and the bench. Therefore, it is important for the judges to be well aware about the various principles of statutory interpretation.

The basic principles that has to be born in mind are reiterated here as follows,

- 1. The duty of the judicature is to act upon the true intention of the legislature the *mens* or *sententia legis*
- 2. When the question arises as to the meaning of a certain provision in a statute, it is not only legitimate but proper to read that provision in

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⁷² Training Programme on Gender & Law, participated by, Hon'ble Justice R. Banumathi, Judge retired, Supreme Court of India (1997)

its contet. The context here means, the statue as a whole, the previous state of the law, other statutes in *Pari materia*, the general scope of the statute and the mischief that it was intended to remedy.⁷³

- 3. The courts strongly lean against a construction which reduces the statute to a futility. A statute or any enacting provision therein must be so construed as to make it effective and operative 'on the principle expressed in the maxim, *ut res magis valeat quam pereat.*⁷⁴
- 4. When the words of a statute are clear, plain or unambiguous, i.e., they are reasonably susceptible to only one meaning, the courts are bound to give effect to that meaning irrespective of consequences.⁷⁵
- 5. The rule of plain meaning implies to decide whether certain words are plain or ambiguous by studying their context and construct the real meaning by concluding that, they can bear only one meaning and a judicial officer is duty bound to give effect to that meaning.

⁷³ Union of India Vs. Elphinstone Spinning and Weaving Co. Ltd. (2001) 4 SCC 139; Central Bank of India Vs. State of Kerala (2009) 4 SCC 94 Para 98

⁷⁴ Nand Kishore Ganesh Joshi Vs. Commr. Municipal Corporation Kalyan AIR 2005 SC 34 (p. 37 Para 19)

⁷⁵ Nathi Devi Vs. Radha Devi Gupta AIR 2005 SC 648 P. 659

Transgender Persons (Protection of Rights) Act, 2019 – An Appraisal

Transgender Persons (Protection of Rights) Act, 2019 (hereinafter the Act) extends to the whole of India. The Act defines a 'Transgender person' under Section 2(k) of the Act. "transgender person" means 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.

Section 3 of the Act provides for prohibition of discrimination against a transgender person on the grounds of,

- The denial, or discontinuation of, or unfair treatment in, educational establishments and services thereof;
- The unfair treatment in, or in relation to, employment or occupation;
- The denial of, or termination from, employment or occupation;
- The denial or discontinuation of, or unfair treatment in, healthcare services;
- The denial or discontinuation of, or unfair treatment with regard to, 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;
- The denial or discontinuation of, or unfair treatment with regard to the right of movement;
- The denial or discontinuation of, or unfair treatment with regard to the right to reside, purchase, rent, or otherwise occupy any property;

- The denial or discontinuation of, or unfair treatment in, the opportunity to stand for or hold public or private office; and
- The denial of access to, removal from, or unfair treatment in, Government or private establishment in whose care or custody a transgender person may be.

Section 4 of the Act recognizes the identity of Transgender Persons. The Transgender Persons shall have 'a right to self-perceived gender identity'.

Section 5 of the Act provides for application for certificate of identity wherein a transgender person may make an application to the District Magistrate for issuing a certificate of identity as a transgender person and a parent or guardian of such minor child may make an application to the District Magistrate.

Section 6 of the Act provides for issue of certificate of identity for such applicant wherein, the District Magistrate shall issue to the applicant, a certificate of identity as transgender person indicating the gender of such person as transgender. The gender of transgender person shall be recorded in all official documents. The certificate issued to a transgender person shall confer rights and be a proof of recognition of identity as a transgender person.

The NALSA⁷⁶ Judgement has recorded that, Article 19 and Article 21 gives a transgender person to have self-perceived identity. However, Sections 4, 5, 6, and 7 of the Transgender Persons (Protection of Rights) Act, 2019, necessitates the procedure for a peer-perceived identity by the appropriate government for affirming the self-perceived identity of a transgender person. The idea of getting a certificate for establishing gender identity is

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⁷⁶ (2014) 5 SCC 438

often criticised that records an inconsistency in the law that has to be settled.

Section 7 of the Act provides for change in gender wherein after the issue of a certificate if a transgender person undergoes surgery to change gender either as a male or female, such person may make an application, along with a certificate issued to that effect by the Medical Superintendent or Chief Medical Officer of the medical institution in which that person has undergone surgery, to the District Magistrate for revised certificate. The District Magistrate shall, on receipt of an application along with the certificate issued by the Medical Superintendent or Chief Medical Officer, and on being satisfied with the correctness of such certificate, issue a certificate indicating change in gender. The person who has been issued a certificate of identity shall be entitled to change the first name in the birth certificate and all other official documents relating to the identity of such person. However, such change in gender and the issue of revised certificate shall not affect the rights and entitlements of such person under this Act.

Section 16 of the Act provides for the National Council for Transgender Persons. The Council shall function to advise the Central Government on the formulation of policies, programmes, legislation and projects with respect to transgender persons, to monitor and evaluate the impact of policies and programmes designed for achieving equality and full participation of transgender persons, to review and coordinate the activities of all the departments of Government and other Governmental and non-Governmental Organizations which are dealing with matters relating to transgender persons, and to redress the grievances of transgender persons. The NCT will consist of: (i) Union Minister for Social Justice (Chairperson); (ii) Minister of State for Social Justice (Vice- Chairperson);

(iii) Secretary of the Ministry of Social Justice; (iv) one representative from ministries including Health, Home Affairs, and Human Resources Development. Other members include representatives of the NITI Aayog, and the National Human Rights Commission. State governments will also be represented. The Council will also consist of five members from the transgender community and five experts from non-governmental organizations.

Section 17 of the Act provides for Offences and penalties, wherein, Whoever compels or entices a transgender person to indulge in the act of forced or bonded labour other than any compulsory service for public purposes imposed by Government, denies a transgender person the right of passage to a public place or obstructs such person from using or having access to a public place to which other members have access to or a right to use, forces or causes a transgender person to leave household, village or other place of residence, and harms or injures or endangers the life, safety, health or well-being, whether mental or physical, of a transgender person or tends to do acts including causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years and with fine.

Transgender Persons (Protection of Rights) Rules 2020

The Ministry of Social Justice and Empowerment, in exercise of its powers conferred under section 22(1) and (2) of the Transgender Persons (Protection of Rights) Act, 2019, have made rules that underlay the Act.

The Transgender Persons (Protection of Rights) Act, 2019 & Corresponding Rules with Forms and Annexures					
Section	Rule	Form/Annexure/			
-	2(b)	Form 2			
3	2(c)	Form 1			
-	2(d)	Form 3 or Form 4			
-	2(e)	Form 6			
-	2(f)	Annexure 1			
6	4	-			
6	5	Form 3, Annexure 1			
7	6	Form 1, Form 4, Annexure 1			

According to Rule 4 of the Transgender Protection Rules 2020, the Identity Certificate is to be issued within 30 days of the receipt of duly filled application along with the Affidavit and Report of the Psychologist.

According to Rule 6 of the Transgender Protection Rules 2020, the applicant shall have a right to appeal, within 30 days from the date of intimation of rejection of the application, to the District Magistrate who shall refer the matter to a medical board for a final decision.

The Transgender Protection Act 2019 condemns the discrimination against a transgender person, including denial of service or unfair treatment in relation to: (i) education; (ii) employment; (iii) healthcare; (iv) access to, or enjoyment of goods, facilities, opportunities available to the public; (v)

right to movement; (vi) right to reside, rent, or otherwise occupy property; (vii) opportunity to hold public or private office; and (viii) access to a government or private establishment in whose care or custody a transgender person is.

Every transgender person shall have a right to reside and be included in his household. If the immediate family is unable to care for the transgender person, the person may be placed in a rehabilitation centre, on the orders of a competent court.

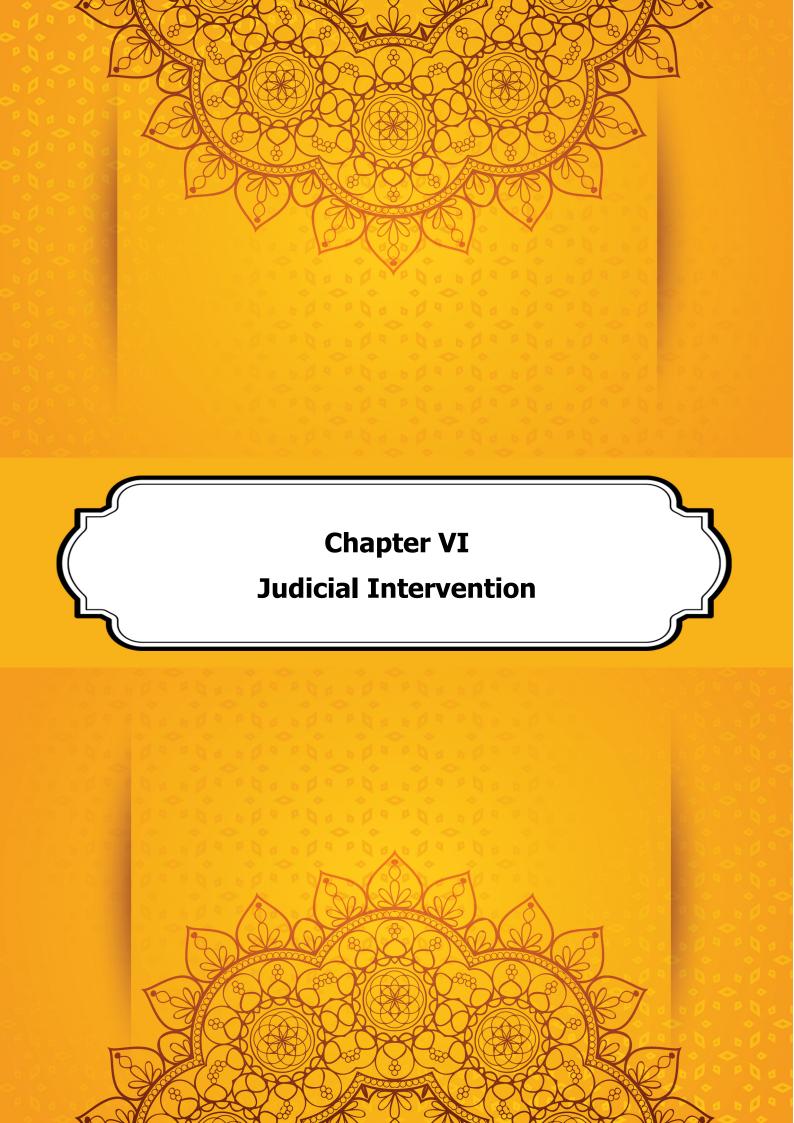
No government or private entity can discriminate against a transgender person in employment matters, including recruitment, and promotion. Every establishment is required to designate a person to be a complaint officer to deal with complaints in relation to the Act.

Educational institutions funded or recognized by the relevant government shall provide inclusive education, sports and recreational facilities for transgender persons, without discrimination.

The government must take steps to provide health facilities to transgender persons including separate HIV surveillance centres, and sex reassignment surgeries. The government shall review medical curriculum to address health issues of transgender persons, and provide comprehensive medical insurance schemes for them.

The Transgender Protection Act 2019 recognizes the following offences against transgender persons: (i) forced or bonded labour (excluding compulsory government service for public purposes), (ii) denial of use of public places, (iii) removal from household, and village, (iv) physical, sexual, verbal, emotional or economic abuse.

In essence, the Transgender Persons (Protection of Rights) Act, 2019 is set in course for providing, the formulation and implementation of a comprehensive national policy for ensuring overall development of the transgender persons and for their welfare to be undertaken by the State uniformly by incorporating aspects like 'abuse' to include physical and verbal abuse, 'barrier' to mean any factor including attitudinal, cultural, economic, institutional, political, religious, social or structural factors which hampers the full and effective participation, of transgender person in society., 'discrimination' to mean any distinction, exclusion or restriction on the basis of gender identity and expression which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other includes all forms of discrimination, including denial of reasonable accommodation., and 'exploitation' to mean using a transgender person to one's own advantage to which one is not otherwise entitled, or to the latter's disadvantage, to which such latter person is not otherwise liable.



Chapter VI - Judicial Intervention

We shall now trace the intervention of judiciary for the betterment of LGBTQIA+ community and their rights in India by discussing some landmark Judgements.

For the very first time in 2001, Naz Foundation, an NGO along with Lawyers Collective filed a petition before the Delhi High Court challenging the Constitutional validity of Section 377 of IPC. It was argued by the petitioners that; Section 377 of IPC violated the Fundamental Rights of right to life and liberty, right to privacy and dignity, right to health, right to equality and freedom of expression.

In 2009, the Delhi High Court in the case Naz Foundation Vs. NCT of Delhi⁷⁷, held that Section 377 of IPC levied an arbitrary restriction over two adults engaging in consensual intercourse in private. Thus, violating the Fundamental Rights enshrined under Articles 14, 15, 19 and 21 of the Indian Constitution.

The case of Suresh Kumar Koushal Vs. Naz Foundation⁷⁸

After the decision of Delhi High Court on decriminalizing Section 377 IPC, many religious groups vehemently rejected the judgement. Further, an appeal was presented before the Supreme Court of India to reconsider the Constitutional validity of Section 377 of IPC.

The Supreme Court on 11th of December 2013, overturned the Delhi High Court judgment in Naz Foundation case and re-criminalised homosexuality. The bench held that, LGBT+ persons constituted a 'minuscule minority' and

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⁷⁷ 2009 SCC OnLine Del 1762

⁷⁸ (2014) 1 SCC 1

hence, they do not need Constitutional protection and further observed that Section 377 of IPC did not suffer from the vice of unconstitutionality.

Soon after the decision was rendered by the Supreme Court, huge protests began in each and every corner of the Country. Even those who did not know about the issue started to voice out their concern because the decision has curbed the basic human rights of the homosexual persons.

This led to yet another case, the National Legal Services Authority (NALSA) Vs. Union of India⁷⁹, where the Supreme Court recognised the transgender persons the 'third gender'. Earlier, the transgender persons were forced to either choose male or female as their gender. This decision of the Supreme Court gave them a special status recognising their gender identity. The other special feature of this judgement is that it laid down the framework to guarantee the transgender community a whole gamut of basic human rights mentioned below;

- 1. It was held by the Court that non-recognition of their identities violates
 Article 14,15,16 and 21 of the Constitution of India.
- 2. Further, the Supreme Court directed the Government of India to treat the members of "Third Gender" as an economically and socially backward class.
- 3. Through this judgement directed to the Government that, necessary policies should be made in favour of the transgender community in the light of Articles 15(2) and 16(4) to ensure equality of opportunity in education and employment.
- 4. As per the judgement, the third gender are to be categorised as other backward classes [OBC] to avail reservations in government jobs and in educational institutions.

⁷⁹ AIR 2014 SC 1863

5. The court also opined that, the conflict between one's birth gender and sexual identity is not a pathological condition. It was held that, rather than adopting a "treatment of the abnormality", the focus should be on "resolving distress over a mismatch".

This judgement also paved way for many young transgender persons to identify themselves as a transgender without having to undergo sexual reassignment surgeries.

Further, in 2018, a five-judge bench of the Supreme Court of India, in the case of Navtej Singh Johar Vs. Union of India⁸⁰, held the Section 377 of IPC to be Ultra Vires to the Constitution of India to an extent that, it criminalises voluntary carnal intercourse against the order of nature. It vindicated that, Section 377 of IPC was vague which did not create comprehensible distinction between what is "natural" and what is "unnatural". It also curbed the freedom an individual in expressing their sexual identity; the right to freedom of expression enshrined in Article 19 of the Constitution.

This judgement overruled the Suresh Koushal case and relied on the case of Justice K.S. Puttaswamy Vs. Union of India⁸¹, that had declared Right to Privacy a part of the Right to Life and Personal Liberty guaranteed under Article 21 of the Constitution.

Ram Singh & Ors. Vs. Union of India⁸²

While considering the parameters for determining 'backwardness' in the context of affirmative action, the Supreme Court held that, "We may, therefore, understand a social class as an identifiable section of society

⁸⁰(2018) 10 SCC 1 ⁸¹ (2018) 3 SCC 797 ⁸² (2015) 4 SCC 697

which may be internally homogeneous (based on caste or occupation) or heterogeneous (based on disability or gender e.g. transgender). Backwardness is a manifestation caused by the presence of several independent circumstances which may be social, cultural, economic, educational or even political. ... The recognition of the third gender as a socially and educationally backward class of citizens entitled to affirmative action of the State under the Constitution in National Legal Services Authority Vs. Union of India [(2014) 5 SCC 438] is too significant a development to be ignored. In fact, it is a pathfinder, if not a path-breaker. It is an important reminder to the State of the high degree of vigilance it must exercise to discover emerging forms of backwardness. The State, therefore, cannot blind itself to the existence of other forms and instances of backwardness. An affirmative action policy that keeps in mind only historical injustice would certainly result in under protection of the most deserving backward class of citizens, which is constitutionally mandated.

Lt. Col. Nitisha & Ors. Vs. Union of India & Ors. 83

Regarding the concept of formal versus substantive equality, the Supreme Court observed that, "Recognizing that certain groups have been subjected to patterns of discrimination and marginalization, this [substantive] conception provides that the attainment of factual equality is possible only if we account for these ground realities. This conception eschews the uncritical adoption of laws and practices that appear neutral but in fact help to validate and perpetuate an unjust status quo. ... The doctrine of substantive equality and anti-stereotyping has been a critical evolution of the Indian constitutional jurisprudence on Article 14 and 15(1). The spirit of these tenets have been endorsed in a consistent line of authority by this Court. In National Legal Services Authority v. Union of India, this Court

^{83 2021} SCC OnLine SC 261

recognized how the patterns of discrimination and disadvantage faced by the transgender community and enumerated a series of remedial measures that can be taken for their empowerment. ... The term 'indirect discrimination' is not to refer to discrimination which is remote, but is, instead, as real as any other form of discrimination. Indirect discrimination is caused by facially neutral criteria by not taking into consideration the underlying effects of a provision, practice or a criterion.

The recent judicial trends in the High Courts

In the case of Jayalakshmi Vs. State of Tamil Nadu [(2007) 4 MLJ 849], this is a case where a trans-women immolated herself as a result of torture and sexual harassment by the Police. A writ of Mandamus was filed in the Madras High Court by the sister of the deceased to direct the respondents to pay compensation and initiate disciplinary actions against the respondents. It was held that, the State Government shall pay compensation of a sum of Rs.5 lakhs to the petitioner for the harassment and initiate disciplinary action against other respondents (police officials) for the treatment meted out to the deceased resulting in her self-immolation.

In the case of Nangai Vs. Superintendent of Police [2014 (2) LLN 511 (Mad)], the Madras High Court had to decide whether, the Petitioner who identifies as a woman but the medical tests marked her as "trans gender" was eligible for appointment as a "Woman Police Constable" and whether the termination of the petitioner from service due to medical examination showing her to be transgender is sustainable? The Court observed that no law provided a definitive set of tests to determine whether a person may qualify as male or as female. Further, the Court held that, the Services Board had violated the Right to Privacy of the petitioner by disqualifying

her from applying as a woman, as she had recognized herself and by society as female.

In the case of G. Nagalakshmi v. Director General of Police, W.P.No.15223 of 2014 (Mad), the Madras High Court had to decide Whether a person who lived her entire life as a woman can be prohibited from identifying as a woman legally because she has an X-Y chromosome? The Court in this case held that the petitioner had the right to self-determine her "sexual identity" under Article 19(1)(a). Relying on the NALSA judgment, the Court also observed that, the petitioner has a right to identify as either female or third gender, regardless of the finding of the medical examination and directed the Tamil Nadu Uniformed Services Board to re-instate the petitioner in her services as female constable.

In the case of S. Swapna Vs. State of Tamilnadu W.P. (MD) 10882/2014, a writ of Certiorarified Mandamus to direct the Joint Director of Government Examination to issue fresh S.S.L.C certificate and H.S.C Certificate. The petitioner in this case had under gone gender affirmation procedure and wanted her name and gender to be changed in the certificates. The petitioner prior to filing of the petition had made application to the Joint Director of Government Examination to issue the certificates in her new identity. The High Court in this case held that, the Joint Director of Government Examination had to accept the application along with the certificates issued by the Tahsildar and Medical Officer, besides the certificate issued by the Madurai Kamaraj University and make appropriate changes in all the relevant records.

K. Prithika Yashini Vs. Chairman, Tamil Nadu Uniformed Services Recruitment Board, (2015) 8 MLJ 734, the Madras High Court had previously directed the TNUSRB to consider the application of the

Petitioner and allow her write examination for the post of Sub-Inspector of Police. The TNUSRB in its application had not included the sexcategory for the "third gender" as against the judgement in the case of NALSA Vs. Union of India, thus did not give opportunity to the Petitioner. The Petitioner participated in all the test for the recruitment to the post as directed by the Court. Subsequently, the Petitioner, was unable to qualify due to the delay of 1.11 second in the 100-meter sprint. Now, the Court had to decide whether the 1.11 second delay in the 100-meter sprint was sufficient grounds to disqualify the Petitioner's application. The Court in this case observed that, no one really understood the discrimination faced by the transgender community and recounted the harassment inflicted on Petitioner throughout the selection process, which required her to go to Court at each stage to assert her rights. The Madras High Court held that, a 1.11 seconds difference in a physical test should not be an obstacle for her recruitment and further stated that, the Petitioner should be considered for the post of Sub-Inspector since there was no other applicant in the third gender category.

In the case of K. Gowtham Subramaniyam Vs. Controller of Examination Anna University, W.P. No. 7536 of 2017 [Mad HC], the Madras High Court had to decide whether the Respondents are obligated to carry out necessary changes of name and sex of the petitioner in the certificates issued by them. It was held that, when a transgender person undergoes a gender affirmation surgery and thereafter makes an application for change of name and sex in the relevant records, the concerned authorities have to verify the records and make consequential changes in the records concerned.

In the case of Arunkumar and Sreeja Vs. Inspector General of Registration W.P. (MD) NO. 4125 OF 2019 AND W.M.P. (MD) NO. 3220 OF 2019, the Madras High Court had to decide whether the term 'bride', as mentioned in Section 5 of the Hindu Marriage Act (HMA) meant only women, or included transgender persons as well, given that Sreeja was a trans woman. The Court observed that a marriage solemnized between a male and a trans woman, both professing Hindu religion, was a valid marriage. The Court further stated that, the transgender persons have the right to decide their gender, as per the decisions of Supreme Court in NALSA Vs. Union of India, which has been reiterated in Justice K. S. Puttaswamy Vs. Union of India and again in Navtej Singh Johar Vs. Union of India.

In the case of Sushma and Seema Vs. Commissioner of Police W.P.No.7284 of 2021, the Madras High Court had to decide whether police protection for threat and danger to the safety and security be granted or not to the persons belonging to LGBTQIA+ community? The Madras High Court while rendering its decision issued several guidelines to the police officials for the protection of the persons belonging to the LGBTQIA+ communities. The highlights of this decision are:

- It was held that, whenever a missing person case is filed at any police station and upon investigation it is found that the person belongs to LGBTQIA+ community, then the police shall record the statement of the persons and close such cases without harassing them.
- This decision also prohibited the Conversion therapy which is a
 pseudoscientific practice of attempting to change an individual's sexual
 orientation from homosexual or bisexual to heterosexual using
 psychological, physical, or spiritual interventions.

- The Court has suggested comprehensive measures to sensitize the society and various branches of the government including the Police and judiciary to remove prejudices against the queer community.
- The Court directed the State and the Union Government to conduct mental health camps and awareness programs to sensitise on the understanding of gender, sexuality, sexual orientation and promote acceptance of diversity.
- Further, the prison authorities were directed to ensure that transgender and gender-nonconforming prisoners are housed separately from other binary prisoners to eliminate chances of sexual assault.

Sushma and Seema Vs. Commissioner of Police W.P.No.7284 of 2021, Order dated 31.08.2021

- The Order concerned the follow-up actions taken pursuant to the Orders issued in the case of Sushma Vs. Commissioner of Police [W.P. 7284 of 2021] on 07.06.2021.
- The Court observed that absence of internal communication and hierarchical orders within the Police Department is no excuse to deny protection to the LGBTQIA+ community. Three directions were issued to the police, which are as follows:
 - [a] Police department is to refrain from harassing activists and people from NGOs and people belonging to the LGBTQIA+ community.
 - [b] A specific clause is to be added in the Police Conduct Rules specifically providing that any harassment by the police, to the persons belonging to the LGBTQIA+ community and/or to the activists and NGO workers, will be treated as misconduct and will entail a punishment for such misconduct. and;

- [c] While conducting sensitization programs for the Police, it must be conducted through the persons belonging to the community and/or the activists and NGO workers who are involved in this cause.
- The Court expressed it concerns over the insensitive manner of media reportage of the case, and observed that stigmatising, inaccurate and inherently unscientific phrases are rooted in queerphobia and cannot be tolerated or entertained any further, and that journalists must stick to sensitive and inclusive terms on the gender spectrum.
- The Court observed that "prescribing anti-depressants and erectile dysfunction drugs to a person and referring them into cognitive behavioural therapy as "remedy" to their gender identity and sexuality is nothing but conversion "therapy", camouflaged as medical and mental health support", and expressed the need for revamping the curriculum for MBBS course. The National Medical Commission and Indian Psychiatric Society were directed to file a report on steps taken to address this issue.
- The Court reiterated the need to create a congenial atmosphere for the LGBTQIA+ community by accepting them as they are, and stated that the State and the Central Government are expected to give more priority to this issue and come up with some positive actions on their part.

Sushma and Seema Vs. Commissioner of Police [W.P.No.7284 of 2021, Order dated 04.10.2021]

- This Order concerns the follow-up on the Orders issued on 31.08.2021 in the case of Sushma Vs. Commissioner of Police [W.P. 7284 of 2021].
- The Compliance Report in furtherance of the three directions issued to the police department, in the previous Order dated 31.08.2021, was

filed and it stated that the necessary departmental circulars were issued. Further it was submitted that the process of adding a specific clause in the Police Conduct Rules as directed in the previous Order dated 31.08.2021, is underway, and that it would be reported to the Court during the next hearing.

- It was submitted that insofar as media/press is concerned, one of the renowned newspapers already arranged for a seminar where it was decided that the media must build a queer friendly future and they are in the process of developing a material containing the words and expressions that are to be used while reporting or writing about the LGBTQIA + community. The idea of using a Style Guide for uniform reporting stories involving queer persons was recorded by the Court.
- Based on the Status Report filed by the Ministry of Social Justice and Empowerment, it was submitted that initiatives to support the transgender community were taken under the Garima Greh scheme. It was submitted that the list of NGOs dealing with the transgender community would be published by the Ministry of Social Justice and Empowerment, and that the details of NGOs dealing with other members of the LGBTQIA+ community, would be handled by the Ministry of Home Affairs, who are yet to be impleaded in this case. The Court was also notified of the Support for Marginalised Individuals for Livelihood and Enterprise (SMILE) Scheme, and the initiatives taken by the Ministry of Social Justice and Empowerment to sensitise the stakeholders and the transgender community, including on the Transgender Persons (Protection of Rights) Act, 2019. It was submitted that the process of issuing identity cards to transgender persons are underway.

 The Court emphasised that training programmes for all stakeholders need to be conducted regularly, and that one-time measures would not suffice to eradicate embedded prejudice.

In the case of Kavin Thamizh Vs. Inspector of Police, H.C.P.(MD) No.1082 of 2021, a Habeas Corpus Petition was filed by a trans-man, whose partner was unlawfully confined by her father. The Court heard the detenue and ordered her to be set free, considering the fact that the detenue was a major and is willing to go with the petitioner on her own volition, thus, the detenue was at liberty and permitted to live with her partner.

Sivakumar TD Vs. State of Tamil Nadu⁸⁴

In this case, the Madras High Court observed that, "transgender persons above the age of 18 years do not require parental approval for the gender-affirmation process."

M. Srinivasan Vs. State⁸⁵

In a case where a trans woman sought remedy under the Tamil Nadu Prohibition of Harassment of Women Act, 2002, the Madras High Court referred to the decision in Arunkumar Srija v. Inspector General of Registration and upheld the right to self-perceived identify and rejected the contention that a transgender person cannot invoke the provisions of the Tamil Nadu Prohibition of Harassment of Women Act, 2002.

Mansur Rahman Vs. The Superintendent of Police & Anr. 86

In this case the Madras High Court observed that, "In Lata Singh v. State of Uttar Pradesh [(2006) 5 SCC 475], the Hon'ble Supreme Court has stated that the instrumentalities of the State should encourage inter-caste

^{84 2021} SCC OnLine Mad 5089

^{85 2020} SCC OnLine Mad 6311

^{86 2018} SCC OnLine Mad 3250

and inter-religious marriage and give the couples sufficient police protection. This Court is of the view that, to the said list, the marriage with transgender persons also deserves to be included for police protection."

I. Jackuline Mary Vs. The Superintendent of Police & Ors. 87

In a case where the petitioner identified herself as a female, but was terminated from service by the police department by labelling her as a transgender person, the Madras High Court upheld the right to self-perceived identity and held that, "the allegation that the petitioner did not disclose that she is a transgender person at the time when she got appointment is untenable because she has never admitted that she is a transgender person. Thus, looking at from any angle, the impugned order of termination from service is unsustainable and, therefore, it is liable to be set aside."

Similarly in T. Thanusu Vs. The Secretary to Government of Tamil Nadu & Ors.⁸⁸, the Madras High Court relying on the decisions in NALSA and Nangai case upheld the right to self-perceived identity.

In the case of Mulla Faizal @ Fazilabanu Suleman Vs. State of Gujarat and Ors⁸⁹, the Gujarat Hight Court had to decide whether the Respondent was obligated to change the entry regarding appellant's sex in the Register of Births on the basis of incorrect identification of the sex of appellant at birth on account of him being intersex. It was held that, this case is not one of change of sex of the appellant by operation. His claim is based on the medical opinion that he was born a 'natural male' with some deformity of the sexual organs. The provisions of the Act clearly permit the correction of

⁸⁷ 2014 SCC OnLine Mad 987

^{88 2014} SCC OnLine Mad 3475

⁸⁹ MANU/GJ/1098/2000

an entry in the Register of births if it is found to be "erroneous in form or substance or has been improperly made."

In the case of Shri. Vinod v. State of Karnataka, W.P. No. 32978 of 2013 the Karnataka High Court has to decide whether the Respondents are obligated to carry out necessary changes of name and sex of the petitioner, who was born with intersex variation and had now undergone necessary medical procedures for the same in their official records. The Court held that, the petitioner is entitled to seek for such relief in the of medical in consideration his records present petition and representations.

In the case of Shivani Bhat v. Union of India and Ors., 223 (2015) DLT 391, the Delhi High Court had to decide whether the confinement of an adult gender-variant person through withholding of his travel and identity documents constituted a violation of their fundamental rights. It was held that, that no person can be illegally confined in their home, as it is a violation of their basic rights. The court reiterated the holding of the NALSA judgment and ruled that "there is, thus, no gainsaying the fact that transgender persons enjoy basic human rights including protection from violence and discrimination. They have the right to dignity and self-determination."

In the case of Sweety Vs. General Public MANU/HP/1242/2016, the Himachal Pradesh High Court had to decide on 'what would be the mode of succession of eunuchs i.e. transgender, in absence of any religion being professed or have been claimed by the plaintiff.' The Himachal Pradesh High Court came to a conclusion that, since the plaintiff in her evidence had clearly established and proved the deceased to be her chela and the property inheritance customs within the Guru-Chela system was recognized

regardless of a person's religious identity as both of them belong to one Kinnar Community.

In the case of Sreeja S. Vs. Commissioner of Police (W.P. (Crl.) 372 of 2018, the Kerala High Court had to decide a Habeas Corpus Petition on whether persons of same gender are entitled to lead a 'live-in relationship'. In this case the Petitioner's partner was detained by her parents illegally on learning about her relationship with the Petitioner. Kerala High Court relying on the decisions of Navtej Singh Johar Vs. Union of India ((2018) 1 SCC 791), Gerry Vs. Gerry Douglas (AIR 2018 SC 346), Nandakumar and another Vs. State of Kerala and others (AIR 2018 SC 2254), and others judgements held that, the 'live-in relationship' between the petitioner and the alleged detenue will not in any manner offend any provisions of law or it will become a crime in any manner and set the alleged detenue at liberty to go along with the petitioner, as desired by her.

In yet another similar case, Shampa Singha Vs. The State of West Bengal & Ors, W.P. 23120(W) of 2018 the Calcutta High Court observed that, consensual cohabitation between two adults of the same sex cannot, be illegal far less a crime. Fundamental right to life under Article 21 of the Constitution of India inheres within its wide amplitude an inherent right of self-determination with regard to one's identity and freedom of choice with regard to sexual orientation or choice of partner.

Vyjayanti Vasanta Mogli Vs. State of Telangana 90

In a writ petition highlighting the plight of transgender persons during the Covid-19 lockdown, the Telengana High Court sought for a report with regard to (i) number of transgender persons living in the major cities of the

⁹⁰ 2020 SCC OnLine TS 440

State, (ii) the concrete steps being taken by the State Government for ensuring that the members of the transgender community have ready availability of foodgrains, consumable items, and medicines as per their need and requirements, and (iii) the number of NGOs with which the Government is coordinating in order to ensure that all the essential commodities do reach the transgender community through these NGOs. The Court further directed the State Government to ensure that these commodities are given to the members of the transgender community free of cost and without insisting on the production of ration card/white card etc.

Veera Yadav Vs. Chief Secretary, Government of Bihar & Ors. 91

The Patna High Court held that, "all policies framed and instructions issued by the Government, be it Central or State, shall be implemented in letter and spirit and no member of the transgender community shall be deprived of his Ration only on account of such status or not possessing the Ration Card."

Chinmayee Jena Vs. State of Odisha & Ors. 92

The Orissa High Court in this case upheld the right of a same-sex couple to be in a live-in relationship, by referring to the Yogyakarta Principles and the NALSA judgment on the right of a person to self-determine their sex and gender, and according protection of personal autonomy of an individual.

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⁹¹ 2020 SCC OnLine Pat 591

^{92 2020} SCC OnLine Ori 602

Noori Vs. State of Madhya Pradesh 93

The Madhya Pradesh High Court in this found that "most of the transgender persons face difficulty not only because they do not have transgender identity card, but even the 'Ration' Cards are also not issued in their names. It has also been demonstrated that owing to non-availability of 'Ration' Card, the transgender community are not in a position to get their 'Aadhar' Card issued.". The Court directed the Member Secretary, M.P. State Legal Service Authority to provide assistance to all such transgender persons across the State by getting a survey conducted through Paralegal Volunteers and help them in getting their Identity Cards/Transgender Cards, 'Ration' Cards and 'Aadhar' Cards prepared. The Secretary of the District Legal Service Authority, in each districts, shall monitor this exercise. The Collectors of the respective districts shall provide them all necessary support for facilitating the work of survey as well as issuance of Identity Card/Transgender Card, 'Ration' Card and 'Aadhar' Card. The respondents-State is directed to place on record the relevant material showing other benefits which are being provided to the transgender community in the State of Madhya Pradesh under any other scheme of the Central Government/State Government."

Tessy James Vs. Director General of Police⁹⁴

The Kerala High Court in a habeas corpus petition filed by the mother of a trans woman, who was allegedly detained by transgender persons, observed that "The self-identification of the detenu as a transgender person is clearly expressed by speech, mannerism, clothing etc. which we noticed during our interaction and fortified by the medical report. ... The freedom of speech and expression guaranteed under Article 19(1)(a) of the

^{93 2021} SCC OnLine MP 1791

^{94 2018} SCC OnLine Ker 2140

Constitution of India takes within its sweep the right of a person to live as a transgender person. ... The detenu has undoubtedly the right to wander about or associate with likeminded people and cannot be compelled to be at his parental home as wished by the petitioner..."

Christina Lobo Vs. State of Karnataka⁹⁵

The Karnataka High Court held that, "Since the identity of the petitioner is officially recorded in the Aadhaar card issued by Unique Identification Authority of India (UIDAI) and the passport issued by the Central Government, in view of Rule 3 of Transgender Persons (Protection of Rights) Rules, 2020, the petitioner is not required to make an application for certificate of her identity. In the result, the petition deserves to be allowed."

All Assam Transgender Association Vs. State of Assam⁹⁶

In a case concerning the lack of funds for running the shelter homes meant for transgender persons, the Gauhati High Court directed the "Social Welfare Department to make arrangement for finances for these three shelter homes, at least an interim arrangement be made so that at least for the next two months these shelter homes can run properly."

Atri Kar Vs. The Union of India & Ors. 97

In this case the Calcutta High Court held that, "A transgender person cannot be discriminated on the basis of sex. The selection process undertaken by the State Bank of India does not allow a transgender person to apply as such as the gender column of the on-line application form provides for two options which does not include a transgender person.

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^{95 2020} SCC OnLine Kar 1634

^{96 2021} SCC OnLine Gau 929

^{97 2017} SCC OnLine Cal 3196

Such an on-line application form is an active discrimination against a transgender person and is violative of Article 15 of the Constitution of India."

Chanchal Bhattacharyya Vs. State of West Bengal & Ors. 98

In this case, where a trans man sought for name change in the educational certificates, the Calcutta High Court observed that, "The Court in 'National Legal Services Authority' (supra) had observed that absence of any statutory regime would not stand as an impediment, legal or otherwise in giving due recognition to the gender identity, yet, absence of law has been assigned to be a disability to grant relief to the petitioner. None has argued that 'Tamal' and 'Tamali' is not one and the same individual. Once there is no dispute on this score, the President of the Board ought to have given recognition to the choice exercised by the child of the petitioner in tune with his constitutional right by directing his subordinates to make necessary endorsements on the relevant certificates to such effect i.e. Tamal and Tamali is the same person based on reassigned sex after undergoing SRS, so as to enable the child of the petitioner obtain all facilities/benefits flowing from such certificates."

Anjali Guru Sanjana Jaan Vs. State of Maharashtra & Ors. 99

In this case the Bombay High Court set aside the order if rejection of nomination form of a transgender electoral candidate by upholding the right to self-perceived identity under Section 4 of the Transgender Persons (Protection of Rights) Act, 2019.

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⁹⁸ 2016 SCC OnLine Cal 2124

⁹⁹ 2021 SCC OnLine Bom 11

Madhu Bala Vs. State of Uttarakhand & Ors. 100

The Uttarkhand High Court in this case held that, "the consensual cohabitation between two adults of the same sex cannot in our understanding be illegal far or less a crime because it's a fundamental right which is being guaranteed to the person under article 21 of the Constitution of India, which inheres within its ambit and it is wide enough in its amplitude to protect an inherent right of self-determination with regards to one's identity and freedom of choice with regards to the sexual orientation of choice of the partner."

Paramjit Kaur & Anr. Vs. State of Punjab & Ors. 101

In a case concerning a same sex couple facing serious threats from their family, the Punjab & Haryana High Court held that, "the petitioners are entitled to protection of their lives and liberty as envisaged under Article 21 of the Constitution of India, regardless of the nature of relationship between them. Assuming, they were living simply as friends together, even then they are constitutionally entitled to live in peace. Legitimacy of their relationship with each other, therefore, is of no consequence viz-a-viz their right to life and liberty."

Salamat Ansari & Ors. Vs. State of U.P. & Ors. 102

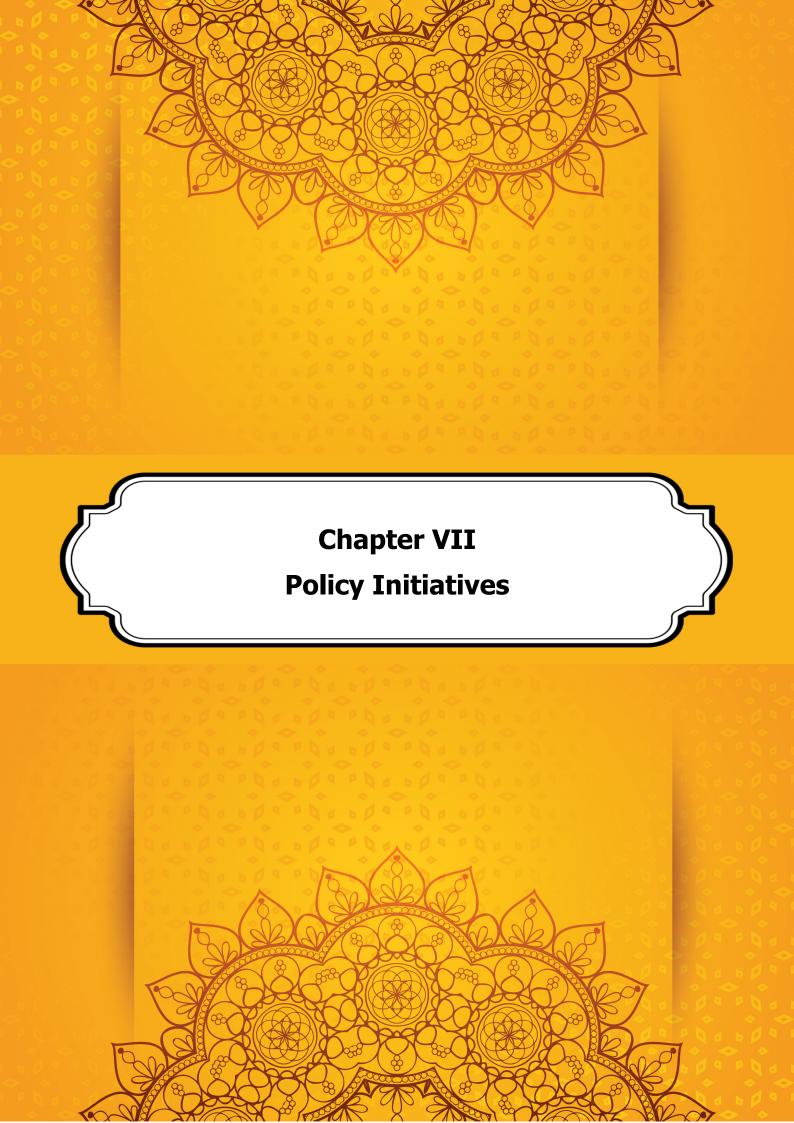
The Allahabad High Court in this case held that, "We fail to understand that if the law permits two persons even of the same sex to live together peacefully then neither any individual nor a family nor even State can have objection to relationship of two major individuals who out of their own free will are living together. Decision of an individual who is of the age of majority, to live with an individual of his/her choice is strictly a right of an

¹⁰⁰ 2020 SCC OnLine Utt 276

¹⁰¹ 2020 SCC OnLine P&H 994

¹⁰² 2020 SCC OnLine All 1382

individual and when this right is infringed it would constitute breach of his/her fundamental right to life and personal liberty as it includes right to freedom of choice, to choose a partner and right to live with dignity as enshrined in Article 21 of the Constitution of India."



Chapter VII - Policy Initiatives

This Chapter throws light on the various policy interventions and schemes available for the benefit of transgender persons. So far there are no specific measures available particularly for persons belonging to other sexual minorities.

National and State Councils for protection and welfare of Transgender Persons¹⁰³

Department of Social Justice and Empowerment is the nodal Ministry for Welfare for Transgender Persons. The Ministry enacted the Transgender Persons (Protection of Rights) Act, 2019 and provisions of the same came into force on 10.01.2020. The Ministry has also prepared "The Transgender Persons (Protection of Rights) Rules, 2020" for effective implementation of the provisions of the Act and the same has been notified in the Gazette of India on 29.09.2020. Further, in accordance with the provisions of the said Act, the Ministry, vide notification dated 21.08.2020, has constituted the National Council for Transgender Persons. It aims at setting up Transgender Welfare Boards in all States across the country. The main objective of the council is to focus on the livelihood related concerns of transgender people and to spread awareness for the acceptance of trans persons within society. Following are the functions of the National Council for Transgender Persons:

 It will act as an advisory to the Central Government on the formulation of policies, programs, legislation, and projects with respect to transgender persons

National Portal for Transgender Persons, Department of Social Justice and Empowerment, Government of India (Available at: https://transgender.dosje.gov.in/Applicant/Registration/AboutUS)

- To ensure and monitor the impact of policies and programs designed for achieving equality and full participation of transgender persons
- It will also analyse and coordinate the activities of all the departments of Government and other Governmental and non-Governmental Organisations, working for matters regarding the same
- Resolving and Redressing the grievances of transgender persons

SMILE Scheme

The Government has approved a comprehensive scheme named "Support for Marginalised Individuals for Livelihood and Enterprise (SMILE)" which includes a sub-scheme for Comprehensive Rehabilitation for Welfare of Transgender Persons. This scheme is a sub-scheme under the 'Central Sector Scheme for Comprehensive Rehabilitation of persons engaged in the act of Begging'. It covers several comprehensive measures including welfare measures for persons who are engaged in the act of begging. It also focuses on rehabilitation, provision of medical facilities and intervention, counselling, education, skill development, economic linkages to transgender persons. The scheme would be implemented with the support of State/UT Governments/Local Urban Bodies, Voluntary Organizations, Community Based Organizations (CBOs), institutions and others. The scheme provides for the use of the existing shelter homes available with the State/UT Governments and Urban local bodies for rehabilitation of the persons engaged in the act of Begging. In case of the non-availability of existing shelter homes, new dedicated shelter homes are to be set up by the implementing agencies.

Garima Greh Scheme¹⁰⁴

The establishment of Garima Greh is in accordance with Section 12(3) of the TG Act 2019 which says that whether any parent or a member of his immediate family is unable to take care of a transgender, the competent court shall by an order direct such person to be placed in the rehabilitation centre. Garima Grehs will not only ensure that the community has access to a safe and secure environment, it will also go a long way in the empowerment of transgenders. The main aim of Garima Greh is to provide shelter to transgender persons with basic amenities like food, medical care and recreational facilities. Besides, it will provide support for the capacity-building/skill development of transgender persons.

Tamil Nadu

Tamil Nadu Aravanigal (Transgender) Welfare Board 105

Tamil Nadu is the first state in the country to establish the Transgender Welfare Board, on 15th April 2008, under the aegis of the then Chief Minister of Tamil Nadu, Dr. M. Karunanidhi. To commemorate the establishment of the Transgender Welfare Board, 15th April is celebrated as Transgender Day in the state. The State Transgender Welfare Board provides the following support- Identity Card, Ration Card, Voter ID Card, House Patta, Medical Facilities, Free Housing, Educational loan, Skill Training, Short Stay Home. It has also set up District Level Committees functioning under it.

Tamil Nadu is also the first state to introduce transgender welfare measures for the benefit of transgender persons. The state provides for

¹⁰⁴ About Garima Greh (Available at: https://transgender.dosje.gov.in/GarimaGreh/About)

¹⁰⁵ Tamil Nadu Third Genders Welfare Board, Social Welfare Department, Government of Tamil Nadu (Available at: https://www.tnsocialwelfare.org/pages/view/third-genders-welfare-board)

free gender affirming surgeries at government general hospitals, and free education at Manonmaniam Sundaranar University.

The Department of Social Welfare vide G.O.Ms.No.71, Dated 06th November 2015, in furtherance to the decision in NALSA Vs. Union of India, ordered the classification of transgender persons as 'third gender' in all places where gender identity is required to be mentioned. The Order also provided that the transgender persons shall also have the right to decide their self-identified gender as male, as female, or as the third gender. ¹⁰⁶

Upon the recommendation of the Tamil Nadu Backward Classes Commission, transgender persons were included in the list of Most Backward Classes vide G.O.Ms.No.28, Dated 06th April 2015, for reservation of seats in educational institutions and appointments or posts in the services under the state.¹⁰⁷

The Finance (Pension) Department vide G.O.Ms.No.180, Dated 20th June 2017 directed payment of family pension to the transgender child of Government servant/Pensioners, treating them as woman child.¹⁰⁸

The Health and Family Welfare Department vide G.O.Ms.No.307, Dated 09th July 2019, established Speciality Clinics for Transgender Persons at The Rajiv Gandhi Government General Hospital, Chennai and Government Rajaji Hospital Madurai. 109

https://cms.tn.gov.in/sites/default/files/go/swnmp_e_71_2015.pdf)

¹⁰⁶ G.O.Ms.No.71, Dated 06th November 2015, Social Welfare and Nutritious Meal Programme Department, Government of Tamil Nadu (Available at:

¹⁰⁷ G.O.Ms.No.28, Dated 06th April 2015, Backward Classes, Most Backward Classes and Minorities Welfare Department, Government of Tamil Nadu (Available at: https://cms.tn.gov.in/sites/default/files/go/bcmbc_e_28_2015.pdf)

G.O.Ms.No.180, Dated 20th June 2017, Finance [Pension] Department, Government of Tamil Nadu (Available at: https://cms.tn.gov.in/sites/default/files/go/fin_e_180_2017_0.pdf)

¹⁰⁹ G.O.Ms.No.307, Dated 09th July 2019, Health and Family Welfare Department, Government of Tamil Nadu (Available at: https://cms.tn.gov.in/sites/default/files/go/hfw_e_307_2019.pdf)

The Social Welfare Department has enhanced the incentive for small business entrepreneurs to Rs. 50,000/-. Earlier it was Rs.20,000/- which was then enhanced to Rs.25,000/- 110

To empower transgender persons economically, bank loans upto 15.00 lakh with 25% subsidy are provided to the Self Help Groups run by transgender persons to take up income generating activities. Various economic activities like provision stores, rearing of milch animals, canteens, production units of soap, napkin, milk products, plying passenger autos, load autos and business activities related to cloth, coir, rice etc., have been taken up by these Self Help Groups. Over 51 Self Help Groups, with 442 transgender members have been provided assistance for various projects with 25% subsidy and 75% as bank loan. ¹¹¹

As a first of its kind in India, Tamil Nadu has introduced a Pension scheme for destitute transgender persons who are aged above 40 years, wherein Rs.1,000 is paid as monthly pension.¹¹²

The Government of Tamil Nadu launched a 'Scheme for free distribution of Goats/Sheep' for the poorest of the poor in the rural areas in order to enhance their standard of living, and a 'scheme for distribution of 60,000 lactating cows free of cost in rural village panchayats'. The free goats/sheep and milch cows will be distributed at the rate of 4 goats/sheep per household. In order to empower the women, it has been decided that the actual beneficiary will be the woman of the household. In case there are any transgender residing in the village panchayat, who are otherwise

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¹¹⁰ T.N. to hike subsidy for transgenders, THE HINDU, 7th June 2018 (Available at: https://www.thehindu.com/news/national/tamil-nadu/tn-to-hike-subsidy-for-transgenders/article24098828.ece)

¹¹¹ Tamil Nadu Third Genders Welfare Board, Social Welfare Department, Government of Tamil Nadu (Available at: https://www.tnsocialwelfare.org/pages/view/third-genders-welfare-board)

Pension Scheme for Third Genders, Social Welfare Department, Government of Tamil Nadu (Available at: https://www.tnsocialwelfare.org/pages/view/pension-scheme-for-third-genders)

eligible as per the criteria given below, they will also be considered to be eligible for the Scheme. 113

Tamil Nadu Transgender Policy

A comprehensive 'Tamilnadu Transgender Policy' by the Tamil Nadu State Planning Commission is underway. The Policy aims to remove all barriers that prevent transgender persons from accessing their rights and ensuring that their rights are not infringed upon in relation to i. living with family, ii. Education, iii. Employment, iv. Health care, v. access to public goods and facilities, vi. Right to movement, vii. Right to property including right to rent, and viii. opportunity to hold public or private office.

The Policy incorporates a rights-based approach for protection and empowerment of transgender persons, with particular reference to right to identity, right against discrimination, right of residence and right to inheritance. The Policy envisages improving access for enhancing capabilities, social, economic and political opportunities and services, in the areas of education, health, skill development and employment, poverty reduction and shelter.

Bihar

Web Portal for Transgender Persons

The Social Welfare Department of the Government of Bihar, has set up a separate web portal¹¹⁴ for transgender persons to disseminate relevant information such as legal provisions. It also provides the following services¹¹⁵:

¹¹³ Department of Animal Husbandry, Dairying and Fisheries, Government of Tamil Nadu (Available at: https://cowgoatscheme.tn.gov.in/milchcowsheep/)

Third Gender Portal, Social Welfare Dept. (Directorate of Social Welfare), Government of Bihar (Available at: http://www.swdbihar.in/TransGender/Default.aspx)

¹¹⁵ Services Details, Third Gender Portal, Social Welfare Dept. (Directorate of Social Welfare), Government of Bihar (Available at: http://www.swdbihar.in/TransGender/Services.aspx)

- Forming Self Help Group (SHG) through which they will get benefit of loans through bank for starting their Livelihood activities, and continue them. Accordingly, one transgender SHG has formed in Mithapur, Patna.
- 2. Information Centre for Transgender Persons in all District of Bihar
- Following the decision in W.P.(C) 400/2012, provision has been for medical care and treatment to transgender persons in hospitals, separate public toilets and for preparation of various social welfare schemes for their betterment.
- 4. Availing Transgender card through online registration

Bihar State Transgender Welfare Board

The Bihar State Transgender Welfare Board has been constituted in 2015. The measures for the social development of the transgender community are being implemented and monitored by the Board from time to time. Its composition included the members of the transgender community to ensure their recognition and empowerment. Establishment of 'Facilitation Centre' at the district level in which at least two members of the transgender community are included as members, has also been carried out. Following the decision of the Patna High Court, the Bihar government has also released a notification which provided for employment of transgender persons in Bihar police. 116

National Capital Territory of Delhi

The Delhi government recognised the rights of transgender children by means of a Directorate of Education circular in 2015 in the shadow of the Right to Education (RTE) Bill. A transgender child was included within the

¹¹⁶ List of Acts and Rules, Home Department, Government of Bihar (Available at: http://home.bihar.gov.in/CMS/ActsRules.aspx)

purview of a "child belonging to disadvantaged group", as defined in the said section of the Right to Education Act, and was therefore entitled to 25% of the seats reserved for the Economically Weaker Sections (EWS) in all schools situated within the National Capital Territory of Delhi. 117

Rajasthan

Owing to the difficulties faced by transgender persons in pursuing education, the Directorate of Secondary Education, Government of Rajasthan has directed schools across the state to admit transgender students under the transgender category. Furthermore, it has promised action against any school that shows reluctance, or objects to admit transgender students. This move is progressive because it recognises transgender children as a separate category that requires specific affirmative action. ¹¹⁸

Madhya Pradesh

Madhya Pradesh Transgender Policy, 2020¹¹⁹, has also been proposed for effective implementation of the Transgender Act, 2019.

Maharashtra

Maharashtra has recently set up its State Transgender Welfare Board, which will provide avenues for formal education, expand employment and self-employment opportunities, run health programmes and provide free legal help to the community.

¹¹⁷ Mousumi Padhi and Purnima Anjali Mohanty, Securing Transgender Rights through Capability Development, Vol. 54, Issue No. 1, EPW, 5th Jan 2019 (Available at: https://epw.in/node/153263/pdf) ¹¹⁸ Mousumi Padhi and Purnima Anjali Mohanty, Securing Transgender Rights through Capability Development, Vol. 54, Issue No. 1, EPW, 5th Jan 2019 (Available at: https://epw.in/node/153263/pdf)

Development, Vol. 54, Issue No. 1, EPW, 5th Jan 2019 (Available at: https://epw.in/node/153263/pdf) ¹¹⁹ State Transgender Policy, Madhya Pradesh, 2020 (Available at:

http://aiggpa.mp.gov.in/uploads/project/State Transgender Policy1.pdf)

Odisha

Sweekruti (A Scheme for Promotion of Transgender Equality & Justice), 2017¹²⁰

'Sweekruti' has been launched for promotion of transgender equality and justice in the state, particularly for protecting rights of gender non-conforming children. the scheme emphasises on inter-departmental coordination in providing services to transgender persons. The scheme provides for issuance of SMART cards to all transgender persons, and endeavours to ensure that transgender persons enroll themselves in the schemes and programmes, by conducting regular surveys. The scheme provides for counselling and mental health services for the child and their parents, and further provides for educational scholarships for transgender students.

In order to increase employment opportunities for transgender persons, the scheme provides for assistance with skill upgradation, securing employment and engaging in income-generating activities. The scheme provides that the State must make provisions to provide training to government employees, NGO heads, corporate managers etc, on the concerns and issues of the transgender community.

The scheme highlights the need for research for devising appropriate rehabilitation of transgender individuals. It places the obligation on coordinating and converging existing schemes on the District Administration, in order to enable the inclusion of transgender persons therein. In particular, the scheme specifies that the Block Administration must (a) ensure coverage of transgender persons under various poverty

¹²⁰ Sweekruti: A Scheme for Promotion of Transgender Equality & Justice, Social Security and Empowerment of Persons with Disabilities (SSEPD) Department, Government of Odisha (2017) (Available at: https://ssepd.gov.in/system/download/Scheme%20for%20TG%20-%20Final.pdf)

alleviation schemes; (b) sensitize local leaders on transgender rights and issues; and (c) increase participation of community-based organisations at the grass root level.¹²¹

Karnataka

Karnataka State Policy on Transgenders, 2017¹²²

The Karnataka State Policy for Transgender Persons suggests the term 'transgender' be used instead of 'third gender'. This enables the inclusion of socio-cultural identities such as Jogappas and Hijras. The Policy assures social protection to transgender persons to include access to basic amenities such as sanitation, housing, health facilities, and provisions for education and employment. The Policy provides for establishment of Cell for Transgender Persons under the Directorate of Women and Child Development, which will operate at the State and District levels. The Policy has sought to create counselling centres for gender non-conforming children and their parents, for the purpose of sensitisation as well as for coping with gender dysphoria and harassment. The Policy provides that workplaces in the public and private sector must put forth antidiscrimination policies, and shall make their sexual harassment policies inclusive of transgender persons. A Monitoring Committee consisting of Government employees, at least four non-official members from the transgender community, and experts in the field, is to be formed to establish an accountability mechanism. 123

¹²¹ Sweekruti Odisha (A Scheme For Promotion Of Transgender Equality & Justice), 2017, Reports & Policies, CLPR, (Available at: https://translaw.clpr.org.in/reports-and-policies/sweekruti-odisha-a-scheme-for-promotion-of-transgender-equality-justice-2017/)

¹²² Karnataka State Policy on Transgenders, Government of Karnataka (2017) (Available at: https://drive.google.com/file/d/1fMq8S8DYJez9Ibi5zXVp_uwX13AQfz17/view)

¹²³ Kartikeya Garg and Naira Dar, Karnataka introduces a State Policy for Transgender Persons, CLPR, 16th November, 2017 (Available at: https://clpr.org.in/blog/karnataka-introduces-a-state-policy-for-transgender-persons/)

1% Reservation for Transgender Persons

Subsequent to the decision of the Karnataka High Court in *Sangama Vs. State of Karnataka [W.P.No. 8511 of 2020, dated 18th August 2021]*, the Karnataka Civil Services (General Recruitment) (Amendment) Rules, 2021, vide the newly inserted Rule 9(1D), provides for 1% horizontal reservations for transgender persons in employment for civil services posts across caste categories. ¹²⁴

West Bengal

Swawalamban Scheme

The Swawalamban¹²⁵ scheme provides vocational training to socially marginalized women and transgender persons, at the Chief Minister's instance, the Department has designed and implements Swawalmban Special and MuktirAlo, which specifically supports those forced into commercial sex work and their children into alternative livelihoods.

A major step forward has been the establishment of The West Bengal Transgender Development Board which was constituted in July 2015, with the objective of improving the status of the highly marginalized and vulnerable transgender who are lagging behind on human development indices, especially education and employment. A State Coordination Committee has been constituted with members of several departments so that the challenges faced by the community – education, security, medical access, rehabilitation and welfare can be expedited. Mass awareness messages have already been broadcast over the radio, and the

¹²⁵ Swawalamban, Department of Women & Child Development and Social Welfare, Government of West Bengal (Available at: http://wbcdwdsw.gov.in/User/scheme_swawalamban)

¹²⁴ Mihir Rajamane, Horizontal Reservations for Transgender Persons: Taking Intersectionality Forward, CLPR, 21st August 21, 2021 (Available at: https://clpr.org.in/blog/horizontal-reservations-for-transgender-persons-taking-intersectionality-forward/)

Commissioner of Kolkata Police has been requested to recruit transgender persons into the Civic Police Force. 126

Andhra Pradesh

Pension scheme for transgender persons in Andhra Pradesh

The Andhra Pradesh cabinet approved various development scheme for transgender persons in the scheme. Under the pension scheme the state government will provide a monthly pension of Rs. 1,500 for transgender persons above 18 years in the state. Over 26 thousand transgender persons in Andhra Pradesh are to get benefited by the transgender development schemes.

State Policy for Transgender Persons

The government is coming up with a policy for transgender persons and planning to put it online for reviews and comments from the various sections of the society. Under the policy, the government will provide following benefits for transgender persons in Andhra Pradesh: Skill development programs, financial assistance, Ration cards, Plots, Scholarships.

Other measures

Apart from these major benefits government will also provide loans from banks so that transgender persons can start their own business. Government is also planning to build special toilets in the public places such as malls, cinema halls, etc. for transgender persons. Arogyasri scheme will be extended to transgenders to provide subsidized bus passes and health care.

¹²⁶ Department of Women & Child Development and Social Welfare (Available at: http://wbcdwdsw.gov.in/User/wd_sw)

Kerala

State Policy for Transgenders in Kerala, 2015¹²⁷

The Policy provides for the establishment of the Transgender Justice Board, State Transgender Welfare Board and District Transgender Justice Committees. These bodies are to enable inter-departmental coordination in addressing the issues faced by transgender persons, and ensure participation of transgender persons in decision making, and their access to education, health, public transport and social security, and development opportunities. The Policy requires the inclusion of the 'third gender' category in all application forms.

It states that the Department of Labour and Department of Industries should facilitate self-employment of transgender persons, sensitize employers and employees on transgender issues at the workplace. The Department of General Education and Higher Education should ensure that educational institutions frame a transgender policy. The Department of Health and Department of Social Justice should include transgender persons under healthcare and insurance schemes, and provide for proper counselling, funds for gender affirming surgeries and separate HIV sero-surveillance centres to address sexual health issues. The Department of Social Justice should establish shelter homes, provide housing schemes, monthly pension schemes and day care centres for elders. The Department of Food and Civil Supplies should issue Below Poverty Line ration cards under Public Distribution System to provide food at free or subsidised cost. The Law Department, police and other government departments should

¹²⁷ State Policy for Transgenders in Kerala, Department of Social Justice, Government of Kerala (2015) (Available at:

http://swd.kerala.gov.in/DOCUMENTS/Policy/State%20Policy/tg_policies_1458712412.pdf)

enable the realisation of the right to live with dignity and free from violence.

The Policy provides for establishing a helpline and crisis management centre, recording and compiling statistics of crime against transgender persons, and providing free legal aid to redress discrimination and violence, and recommends recognising the right to marriage, partnership and parenting.¹²⁸

Welfare schemes by Social Justice Department, Government of Kerala¹²⁹

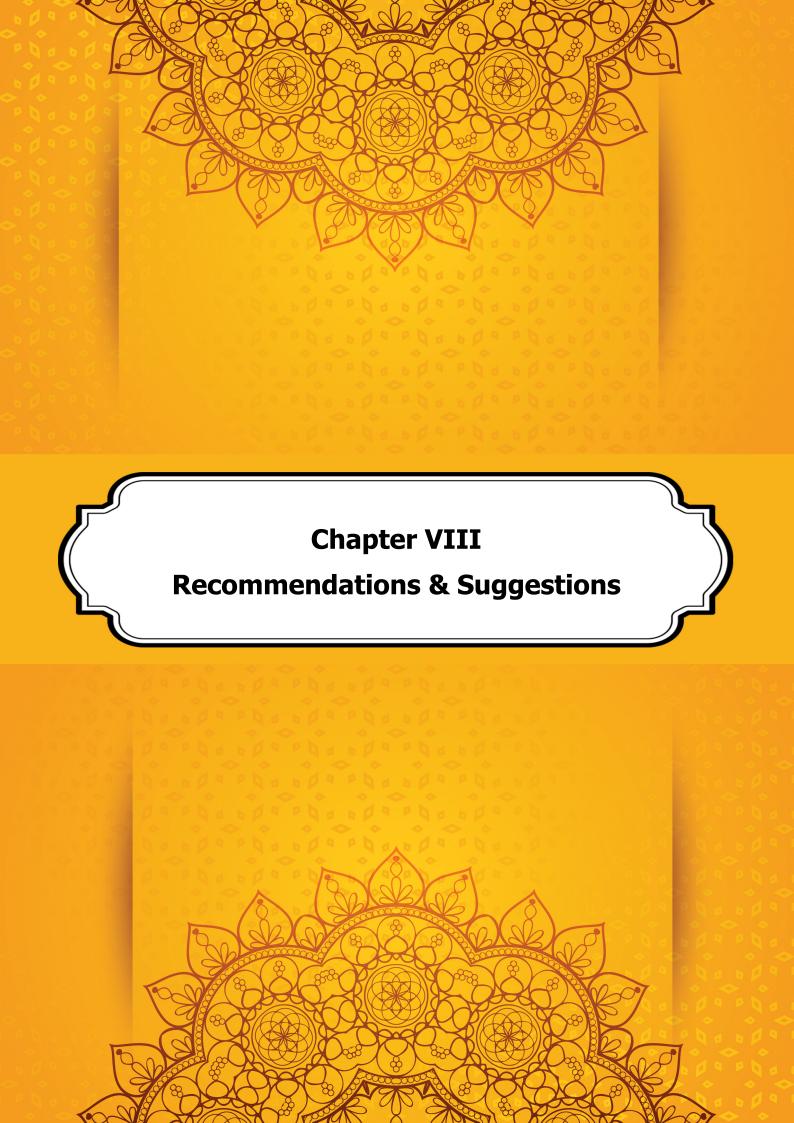
In furtherance of the policy, the Social Justice Department, Government of Kerala, has brought out the following schemes for the welfare and empowerment of transgender persons:

- 1. Varnam scheme for TG students pursuing distance education courses
- 2. Saphalam scheme for Transgender students pursuing Professional courses
- 3. Self-employment assistance for Transgender persons
- 4. 'Samanwaya' continuing education programme for Transgender persons
- 5. Marriage assistance for legally married Transgender couples
- 6. Financial assistance to Transgender persons for self-employment
- 7. Financial aid to Transgender persons for Sex Reassignment Surgery
- 8. Financial aid to Transgender persons for further treatment after SRS
- 9. Financial Aid for providing hostel facility to Transgender students
- 10. Self-employment scheme for Transgender persons (sewing machine)

(http://swd.kerala.gov.in/beneficiary-info.php?benef_sl=N3NWOHVxUiN2eQ==)

¹²⁸ State Policy for Transgenders in Kerala, 2015, CLPR (Available at: https://translaw.clpr.org.in/legislation/state-policy-for-transgenders-in-kerala-2015-policy-india/) ¹²⁹ Schemes benefitting transgender persons, Social Justice Department, Government of Kerala

- 11. 24x7 Helpline for Transgender community
- 12. Scheme for imparting skill development training to Transgender persons
- 13. Scholarship for Transgender Students
- 14. Scheme for imparting driving classes to Transgender persons
- 15. Identity card for Transgender persons
- 16. Transgender cell



Chapter VIII – Recommendations & Suggestions

"Equality not only implies preventing discrimination but goes beyond in remedying discrimination against groups suffering systematic discrimination in society. In concrete terms, it means embracing the notion of positive rights, affirmative action and reasonable accommodation."

Justice A.K. Sikri

The following pointers are with reference to all spheres of human life, be it personal, professional or social. These suggestions intend to enable the realisation of the civil & political rights and social & economic rights, and are not meant to be an exhaustive list. The sum and substance of the suggestions are that the LGBTQIA+ individuals must gain confidence in the legal system that the State would protect, respect and defend their rights. While in some aspects the measures require inclusion of LGBTQIA+ persons within the existing laws, other measures require special treatment owing to the marginalisation suffered by LGBTQIA+ persons. This is in tandem with the principle of equality among equals under Article 14 of the Constitution of India, which espouses the twin ideals of 'equality before the law' and 'equal protection of laws'.

Right to Family

The precursor to social acceptance is acceptance by family. Family is fundamental unit of social life. It is the first place where one is entitled to feel most safe and secure. The Universal Declaration of Human Rights, 1948 [UDHR] under Article 16 declares Right to Family as a fundamental right¹³⁰. Systemic reform for transgender persons in marital relationships,

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 $^{^{130}}$ Article 16, Universal Declaration of Human Rights, 1948

require revisiting and revamping marriage, divorce and succession laws, which so far conform to the gender and sex binary.

- Criminalising parents and other family members who shun their queer children or queer family members is one measure to protect LGBTQIA+ individuals against exploitation, followed by sensitisation of parents and other family members.
- It is not uncommon for transgender persons to marry and have children prior to transitioning. Likewise, people with homosexual orientation are often forced into heterosexual marriages with, and such people may choose to come out later on. In such cases, the partner and children also need to be sensitised on the changed family dynamic.
- The existing policies/laws with relation to marriage, adoption, surrogacy and inheritance of property must be made equally applicable to the LGBTQIA+ community.

The Indian legal system accords preference to the institution of marriage. By denying sexual minorities the right to marry, they are made to forego the legal benefits of marriage, viz., opening a bank account, availing bank loan, accessing affordable housing, availing family health insurance, life insurance, tax benefits and property rights.

The Supreme Court in its decision in Shakti Vahini Vs. Union of India¹³¹ held that the right to choose one's life partner is a fundamental right. Although this decision was with reference to condemning the honour killing as a crime, the rationale can be applied to the case of same-sex marriages as well.

The concept of a family under Indian law is being constantly redefined. Unmarried persons are allowed to adopt children. The Surrogacy Bill is also

¹³¹ Shakti Vahini Vs. Union of India, (2018) 7 SCC 192

criticised on the ground that it does not permit unmarried individuals to avail the services of a surrogate. In such diverse situations where 'family' has no ideal singular meaning, restricting the laws to heteronormativity and the gender binary is not legally sensible.

Reproductive Rights

 Systemic reform for transgender persons in marital relationships, require revisiting marriage, divorce and succession laws, which so far confirm to the gender binary.

Right to family and right to healthcare go hand in hand. One facet of this is in reproductive rights. Access to Sexual Health and Reproductive Health (SHRH) is considered to be an integral part of right to healthcare, which is a basic human right. *B.K. Parthasarathi vs. Government of Andhra Pradesh*¹³² is one of the earliest judgements to uphold the reproductive rights as part of the Right to Privacy under Article 21 of the Constitution.

According to the World Health Organisation, reproductive rights include the right to decide whether or not to have children, the number and spacing of children; as the well as the access to information and facilities to make these decisions. Reproductive rights gained more traction in the latter half of the 20th century. The UN as part of the International Conference on Population and Development in 1994, setup the UN Fund for Population Activities, which provides assistance on eradicating gender-discriminatory practices in healthcare. The discourse on the right to have a family is at a nascent stage, and presents an opportune time for developing the law and policy in this regard.

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 $^{^{132}}$ B.K. Parthasarathi vs. Government of Andhra Pradesh, 1999 (5) ALT 715

- For ensuring welfare of the prospective child, the Transgender Rules
 have to specify affirmative action in education and employment,
 equipping the transgender with the required capabilities.
- The National Health Policy shall also provide the option of preserving the sex gametes of the transgender person before they opt for gender affirming procedure.
- Expanding the scope of the Surrogacy Bill on par with the adoption laws, would enable trans women to have children through surrogacy.

Section 3(e) of the Transgender Persons (Protection of Rights) Act, 2019 prohibits discrimination on access to facilities and opportunities available to the public. However, the Surrogacy (Regulation) Bill, 2020, currently pending with the Rajya Sabha, limits the opportunity to heterosexual marital relationships. Moreover, though Regulation 5 of the Adoption Regulations, 2017 allow single cisgender women and men to adopt, the same is not extended to transgender persons.¹³³

Access to Healthcare

- The National Health Policy needs to acknowledge, affirm and provide for affordable access to healthcare for LGBTQIA+ individuals.
- Antiretroviral therapy centres (ART) should be inclusive in their approach and must not discriminate against gender and sexual minorities.
- The State must also provide affordable access to healthcare

This includes the access to affordable physical and mental healthcare, gender-affirming healthcare including hormone replacement therapy [HRT], post-transition healthcare, healthcare insurance, rehabilitation from addiction.

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¹³³ Central Adoption Resource Authority (Available at: http://cara.nic.in/#)

- Poor quality of gender affirming surgery leads to severe physical distress and psychological side-effects. Doctors must be sensitized towards the issues and challenges related to transgender persons. Medical facilities should be provided keeping in view of the needs of the transgender community.
- Forced surgeries on intersex children and adults must be prohibited.

The rights of the intersex must be given serious consideration. When intersex children are young, a surgical procedure is usually performed by the doctors after taking consent of the parents, in order to align the biological sex of the child within the binary. Such surgeries are known to cause severe dysphoria in intersex individuals as they grow older. Therefore, it is essential to ensure that such procedures without the informed consent of the intersex person.

Access to Education

 Introducing gender studies in school is crucial to bring about awareness on diversities in gender and sexual identities, in an age-appropriate manner.

Sexuality and gender education will help spread awareness and sensitivity towards the children and curb bullying and teasing in schools towards the LGBTQIA+ community. Such education must provide judgement-free information.

It is noteworthy to mention that in November 2021, the NCERT brought out an educational material "designed for sensitization of teachers and educators regarding aspects of gender diversity keeping gendernonconforming and transgender children at centre stage". Unfortunately, the material was taken down in response to complaints.¹³⁴ This only reaffirms the need for state support and accountability in ensuring sensitisation at the school level.

 Intervention by the functionaries under the juvenile justice system, particularly the Child Welfare Committee and Juvenile Justice Boards should address the issues of transgender and gender non-conforming children as Children in Need of Care and Protection.

Justice P. Sathasivam has rightly stated that "Adolescence is a confusing time during which the children learn the skills required to become healthy adults. They experience significant intellectual, emotional, and. physical developments during this bridge to adulthood. This is equally true of the transgender adolescent, but they have the added disadvantage of coming of age in a society in which their identities are stigmatized and their families and schools often harass and victimize them. These children are often rejected, neglected, or abused by their guardians and choose a life on the streets rather than remain in hostile environments. ... If the purpose of the juvenile justice system is to intervene in a troubled youth's life and guide them towards becoming contributing members of society, then the juvenile justice system must support transgender persons in their youth in the exploration and expression of their sexual orientation and gender identity.

• The University Grants Commission in its student centric policies should incorporate specific provisions for protecting LGBTQIA+ students against discrimination and harassment.

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¹³⁴ Aparna, NCERT Withdraws Transgender Inclusion Training Material After NCPCR Notice, PATHASHALA, 9th November 2021 (Available at: https://www.pathashala.co.in/ncert-withdraws-transgender-inclusion-training-material-after-ncpcr-notice/law-and-policy/)

- The POCSO Rules 2020 require every educational institution to have in place a Child Protection Policy. Such policy shall incorporate the concerns with reference to bullying and harassment of transgender and gender non-conforming children.
- Higher educational institutions such as colleges and Universities shall incorporate measures to be taken against bullying and harassment of LGBTQIA+ students.

Alienation and discrimination at the school level sets the course for exploitation and perpetuates the precarious condition of gender and sexual minorities. A sound education is non-negotiable for personal development and a stable and secure livelihood. Therefore, educational institutions need to ensure that safe educational environment is not denied to any student.

Employment Rights and Labour Laws

- Reservation and age-relaxation for transgender community must be provided with respect to public employment.
- The State as an intermediate measure, can also consider providing economic incentives to employers, to encourage the employment of queer individuals. Employers must encourage the transgender & identified categories to apply for the jobs in their job advertisements. An equal opportunity should be provided during job interviews regardless of gender identity and sexual orientation.
- The Occupational Safety, Health and Working Conditions Code, 2020, should incorporate special provisions for the well-being and safety of LGBTQIA+ persons.
- The Code on Social Security, 2020 should be amended to provide paid leave to individuals recovering from gender affirming surgeries and procedures.

- The Industrial Relations Code, 2020 needs to accommodate representation of transgender persons, and enable their collective bargaining power.
- The Sexual Harassment at Workplace (Prevention) Act, 2013, must be made applicable to transgender and non-binary individuals.

Rule 12 of the Transgender Persons (Rights of Persons) Rules 2020 prescribe that a safe working environment should be provided for the transgender employees in all organisations. It also requires that a non-discriminatory policy be formulated and displayed to propagate inclusive working environment, promote respect for people across all gender, sex and sexuality spectrums, and not tolerate disrespect towards any group.

However, unless parallel legislative changes are brought in, a policy remains a toothless tiger. Therefore, the labour legislations need to be inclusive in application to gender and sexual minorities.

Criminal Laws

 LGBTQIA+ individuals need to be given protection against natal family violence.

The Protection of Women from Domestic Violence Act, 2005 needs to be made applicable to trans women, as well as trans men who in transition. It is crucial to plan and implement how to best integrate the existing preventive measures of family violence, viz. to ensure that they are inclusive and demonstrate an intersectional approach.

 Laws pertaining to rape/sexual assault and sexual harassment need to be made gender neutral, and inclusive of all gender and sexual identities. The Protection of Children from Sexual Offences Act, 2012 is gender-neutral and protects all children from sexual assault and harassment, regardless of their gender identity. Similar construction of gender neutrality in sexual assault and harassment laws in the Indian Penal Code was recommended by the 172nd Law Commission Report in 2000, as well as by the Justice Verma Committee Report of 2013. In 2019, a private member Bill¹³⁵ was introduced in the Rajya Sabha seeking to amend the IPC, CrPC and the Indian Evidence Act, in line with the recommendations of the Reports mentioned above. However, these recommendations and proposals were not implemented.

Recently a police officer in Coimbatore, Tamil Nadu, has been suspended has been booked under for sexually abusing a trans woman who had approached the police station to file a complaint. Section 18(d) of the 2019 Act provides for penalties against sexual abuse. However, the period of imprisonment prescribed under Section 18 is a maximum of two years, whereas for a similar offence under the IPC, the period of imprisonment ranges from three years to ten years. This disparity in punishment for the same of nature of offence, tends to imply that the law views violence against transgender persons as trivial when compared to violence against cisgender women.

In light of the Supreme Court's decision in Navtej Singh Johar Vs. Union of India decriminalising consensual homosexual intercourse, and the enactment of the Transgender Persons (Protection of Rights) Act, 2019, it has become imperative that the provisions of the IPC, particularly the

¹³⁵ The Criminal Law (Amendment) Bill, 2019, Bill No. XVI of 2019 (Available at: http://164.100.47.4/BillsTexts/RSBillTexts/asintroduced/crimnal-E-12719.pdf)

¹³⁶ Policeman suspended for sexually abusing transwoman complainant, THE HINDU, 11th November 2021 (Available at: https://www.thehindu.com/news/cities/Coimbatore/policeman-suspended-for-sexually-abusing-transwoman-complainant/article37429605.ece)

provisions on rape and sexual harassment, be amended in gender-neutral terms in order to protect the rights of the LGBTQIA+ persons.

 The Prison Rules, 1983 and Criminal Rules of Practice, 2019 (Madras High Court) need to be amended to protect the dignity of the LGBTQIA+ individuals.

The Constitution of India and the Criminal Procedure Code, 1973 protect the rights of arrested persons. Such rights upon arrest must be extended to queer individuals. For instance, the physical examination and arrest of a trans woman must be done by a woman police officer. Rule 6(11) of the Criminal Rules of Practice, 2019 provides the procedure in case of arrest of a transgender person. The provision prescribes that the transgender person must undergo a medical test to determine their 'predominant sex orientation', for the purpose assigning them to the appropriate prison holding. Here, it is not clear what is meant by 'predominant sex orientation' and further, the requirement of the medical test becomes redundant in the light of the Transgender Persons (Protection of Rights) Act, 2019, which already prescribes the procedure for self-perceived identity. Thus, this provision needs to be revisited in order to avoid unnecessary intrusions into the privacy and dignity of transgender persons.

In the United States, the Prison Rape Elimination Act, 2003 was brought to force with an intention to ban torture on transgender persons and provide cells based on their requirements by ignoring their genitals. The revised guidelines now say that the Transgender Executive Council "will use biological sex as the initial determination" and that, an inmate may also be assigned to a facility based on their self-identified gender if "there has been significant progress towards transition as demonstrated by medical

and mental health history." Prison wardens are permitted to recommend transferring an inmate based on their identified gender as well. 137

- Cases pertaining to trans women can be dealt with in the Mahila Courts.
- Recourse to file criminal complaints in case of harassment and assault needs to be made to be effective, in user-friendly terms. In connection with the same, sensitising lower cadre of officials is required (ex.: training in police academy). The law also needs to crackdown on custodial violence against queer individuals.
- Begging and prostitution is not to be criminalised, but the vulnerable persons engaged in it need to be provided security and rehabilitation.

The Immoral Trafficking Prevention Act, 1956, is used less for preventing trafficking than for intimidating those who are the most vulnerable i.e., the individual sex worker. This law needs to be reformed with a clear understanding of how the state is to deal with those engaged in sex work.

• Conversion therapies and treatments for 'curing' gender identity and sexual orientation must be criminalised.

It is reiterated that gender and sexual identities beyond the binary, are not disorders or abnormalities, but are diversities prevailing in nature. Any attempt made at 'curing' a person's gender or sexual identity, or sexual orientation, is nothing but a travesty, and must therefore be criminalised. This requirement was emphasised in the decision of the Madras High Court in Sushma Vs. Commissioner of Police.

 The Press Council of India and other bodies regulating mass media should issue guidelines to ensure sensitive and respectful treatment of LGBTQIA+ individuals, their lived experiences and stories.

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¹³⁷ Jenny Gathright, The Guidelines For Protection Of Transgender Prisoners Just Got Rewritten, NPR, 12th May 2018 (Available at: https://www.npr.org/sections/thetwo-way/2018/05/12/610692321/the-quidelines-for-protection-of-transgender-prisoners-just-got-rewritten)

Access to Welfare Measures

- The efficacy of the Transgender Welfare Board in various states must be reviewed periodically. Unless the Transgender Welfare Development Board is strengthened by being given enough funding, made truly representative and given powers to take up welfare activities, it would not be of much effect and would only provide lip-service for the rights of transgender persons.
- All welfare schemes and relief measures should take into account gender diversity, especially in terms of eligibility requirements and should take an intersectional approach. Welfare schemes and measures should consider the particular vulnerabilities of the trans and intersex community and ensure that transgender persons are fully covered under these schemes.
- Many of the welfare schemes remain inaccessible to the intended beneficiaries, as they do not have access to bank accounts and the requisite ID cards. So the availability of the necessary requirements for the welfare schemes must be strengthened, lest the welfare measures remain dormant.
- Certain welfare schemes for transgender persons insist on gender affirming surgeries for receipt of benefits, which is in contradiction with the right to self-perceived identity and right to privacy as guaranteed under the Constitution of India. This must be avoided.

The Yogyakarta Principles explicitly prescribe that governments take all necessary measures to ensure that identity papers such as birth certificates, passports, and electoral records include a person's perceived gender without any medical intervention. For example, after Argentina eased the process of changing one's gender on identity cards, more than 3000 people applied for a change within the first year, and there were no

reported cases of fraud. This number had increased to 10,000 in 2017 with no reported cases of fraud. ¹³⁸

- The terminology in the title and content of the schemes and policies is inappropriate. The term 'transgender persons' should be used in place of 'transgenders' or 'third gender'. This is because the word 'transgender' is an adjective and not a noun, and a person cannot be referred to as an adjective, and usage of 'third gender' tends to imply a sense of hierarchy among the genders. The term 'gender affirming surgery' is to be used in place of 'sex change surgery' or 'sex reassignment surgery'. This is because transition is not merely about changing or reassigning one's sex, it is about shifting presentation to match the already existing gender identity.
- LGBTQIA+ youth need to be provided a secure environment during puberty. While one's natal family is supposed to be ideal secure place, in reality such safe spaces are not available. Access to affordable housing.
- The District Legal Services Authority and the State Legal Services
 Authority shall take active measures to provide legal assistance to
 LGBTQIA+ persons.
- The Transgender Persons (Protection of Persons) Rules, 2020 provides for setting up a helpline to provide assistance to transgender persons. It needs to be ensured that helpline functions 24/7, and that the operators handling the helpline are trained and are well-versed on the issues and concerns of the LGBTQIA+ people. The helpline operators shall also assist in reaching out the concerned governmental authorities.
- Special measures to be taken to prevent suicides by LGBTQIA+ persons.

¹³⁸ Karan Gulati and Tushar Anand, Inheritance rights of transgender persons in India, NIPFP Working Paper Series, No. 350, 26th August 2021 (Available at: https://nipfp.org.in/media/medialibrary/2021/08/WP 350 2021.pdf)

 Policy interventions should incorporate the tools of gender mainstreaming and gender budgeting.

Concluding Note

Even though the laws and schemes are present on paper, implementation is hampered and the benefits do not actually reach the community due to lack of sensitivity of the lower-cadre officers, i.e., the people who actually come in contact with the LGBTQIA+ community.

The focal point of state interventions must be removal of hurdles and opening up of avenues for self-realisation of the gender and sexual minorities. While awareness and understanding are key for social change, they need not be a precursor for enforcement of rights. There are several instances where change in social attitudes were nudged by legislative and judicial interventions, rather than the other way around. All persons are inherently entitled to human rights, simply by virtue of being a human. No person should have to suffer the agony of having to hide their true identity in fear of persecution.

Therefore, it is parallelly crucial that the focus is more on rights than on benefits. The LGBTQIA+ community demands respect and protection, not sympathy and pity. The State's measures should not be intended as mere charity, but as a tool that the marginalised sections can use to prop themselves up to empower themselves and act with agency and autonomy. For this to be possible, strong political will along with sensitisation of lawmakers, judicial fraternity and executive officers is important. Systemic change in the mind set of people, coupled with the above-mentioned measures, would go a long way in putting an end to discrimination based on gender and sexual orientation.

BARE ACT Transgender Persons (Protection of Rights) Act, 2019

THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT 2019

Section

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THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019 NO. 40 OF 2019

[5th December, 2019.]

An Act to provide for protection of rights of transgender persons and their welfare and for matters connected therewith and incidental thereto.

BE it enacted by Parliament in the Seventieth Year of the Republic of India as follows:—

CHAPTER I PRELIMINARY

1. Short title, extent and commencement.—

- (1) This Act may be called the Transgender Persons (Protection of Rights) Act, 2019.
- (2) It extends to the whole of India.
- (3) It shall come into force on such date¹ as the Central Government may, by notification in the Official Gazette, appoint.

2. Definitions.—

In this Act, unless the context otherwise requires,—

- (a) "appropriate Government" means, —
- (i) in relation to the Central Government or any establishment, wholly or substantially financed by that Government, the Central Government;
- (ii) in relation to а State Government any or or establishment, wholly substantially that financed Government, or any local authority, the State Government;
- (b) "establishment" means—
- (i) anybody or authority established by or under a Central Act or a State Act or an authority or a body owned or controlled or aided by the Government or a local authority, or a Government company as defined in section 2 of the Companies Act, 2013 (18 of 2013), and includes a Department of the Government; or

- (ii) any company or body corporate or association or body of individuals, firm, cooperative or other society, association, trust, agency, institution;
- (c) "family" means a group of people related by blood or marriage or by adoption made in accordance with law;
- (d) "inclusive education" means a system of education wherein transgender students learn together with other students without fear of discrimination, neglect, harassment or intimidation and the system of teaching and learning is suitably adapted to meet the learning needs of such students;
- (e)"institution" means an institution, whether public or private, for the reception, care, protection, education, training or any other service of transgender persons;
- (f) "local authority" means the municipal corporation or Municipality or Panchayat or any other local body constituted under any law for the time being in force for providing municipal services or basic services, as the case may be, in respect of areas under its jurisdiction;
- (g) "National Council" means the National Council for Transgender Persons established under section 16;
- (h) "Notification" Means a notification published in the Official Gazette;
- (i) "Person with intersex Variations" means a person who at birth shows Variation in his or her primary sexual characteristics, external genitalia, chromosomes or hormones from normative standard of male or female body;
- (j) "Prescribed" means prescribed by rules made by the appropriate Government under this Act; and
- (k) "Transgender person" means a person whose gender does not match with the gender assigned to that person at birth and

includes trans-man or tans-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, gender queer and person having such socio-cultural identities as kinner, hijra, aravani and jogta.

¹10th January, 2020, *vide* notification No. S.O. 135(E), dated 10th January, 2020, *see* Gazette of India, Extraordinary, Part II, sec. 2(*ii*).

CHAPTER II

PROHIBITION AGAINST DISCRIMINATION

- **3. Prohibition against discrimination.**—No person or establishment shall discriminate against a transgender person on any of the following grounds, namely:—
 - (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 with regard to, 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 establishment in whose care or custody a transgender person may be.

CHAPTER III

RECOGNITION OF IDENTITY OF TRANSGENDER PERSONS

- **4.** Recognition of identity of transgender person.—(1) A transgender person shall have a right to be recognised as such, in accordance with the provisions of this Act.
- (2) A person recognised as transgender under sub-section (1) shall have a right to self-perceived gender identity.
- **5. Application for certificate of identity.**—A transgender person may make an application to the District Magistrate for issuing a certificate of identity as a transgender person, in such form and manner, and accompanied with such documents, as may be prescribed:

Provided that in the case of a minor child, such application shall be made by a parent or guardian of such child.

- **6. Issue of certificate of identity.**—(1) The District Magistrate shall issue to the applicant under section 5, a certificate of identity as transgender person after following such procedure and in such form and manner, within such time, as may be prescribed indicating the gender of such person as transgender.
- (2) The gender of transgender person shall be recorded in all official documents in accordance with certificate issued under sub-section (1).
- (3) A certificate issued to a person under sub-section (1) shall confer rights and be a proof of recognition of his identity as a transgender person.
- **7. Change in gender.**—(1) After the issue of a certificate under sub-section (1) of section 6, if a transgender person undergoes surgery to change gender either as a male or female, such person may make an application, along with a certificate issued to that effect by the Medical Superintendent or Chief Medical Officer of the medical institution in which that person has undergone surgery, to the District Magistrate for revised certificate, in such form and manner as may be prescribed.
- (2) The District Magistrate shall, on receipt of an application along with the certificate issued by the Medical Superintendent or Chief Medical Officer, and on being satisfied with the correctness of such certificate,

issue a certificate indicating change in gender in such form and manner and within such time, as may be prescribed.

(3) The person who has been issued a certificate of identity under section 6 or a revised certificate under sub-section (2) shall be entitled to change the first name in the birth certificate and all other official documents relating to the identity of such person:

Provided that such change in gender and the issue of revised certificate under sub-section (2) shall not affect the rights and entitlements of such person under this Act.

CHAPTER IV

WELFARE MEASURES BY GOVERNMENT

- **8. Obligation of appropriate Government.**—(1) The appropriate Government shall take steps to secure full and effective participation of transgender persons and their inclusion in society.
- (2) The appropriate Government shall take such welfare measures as may be prescribed to protect the rights and interests of transgender persons, and facilitate their access to welfare schemes framed by that Government.
- (3) The appropriate Government shall formulate welfare schemes and programmes which are transgender sensitive, non-stigmatising and non-discriminatory.
- (4) The appropriate Government shall take steps for the rescue, protection and rehabilitation of transgender persons to address the needs of such persons.
 - (5) The appropriate Government shall take appropriate measures to promote and protect the right of transgender persons to participate in cultural and recreational activities.

CHAPTER V

OBLIGATION OF ESTABLISHMENTS AND OTHER PERSONS

9. Non-discrimination in employment.—No establishment shall discriminate against any transgender person in any matter relating to employment including, but not limited to, recruitment, promotion and other related issues.

- **10. Obligations of establishments.** Every establishment shall ensure compliance with the provisions of this Act and provide such facilities to transgender persons as may be prescribed.
- **11. Grievance redressal mechanism.** Every establishment shall designate a person to be a complaint officer to deal with the complaints relating to violation of the provisions of this Act.
- **12. Right of residence.**—(1) No child shall be separated from parents or immediate family on the ground of being a transgender, except on an order of a competent court, in the interest of such child.
 - (2) Every transgender person shall have—
 - (a) a right to reside in the household where parent or immediate family members reside;
 - (b) a right not to be excluded from such household or any part thereof; and
 - (c) a right to enjoy and use the facilities of such household in a non-discriminatory manner.
- (3) Where any parent or a member of his immediate family is unable to take care of a transgender, the competent court shall by an order direct such person to be placed in rehabilitation centre.

CHAPTER VI

EDUCATION, SOCIAL SECURITY AND HEALTH OF TRANSGENDER PERSONS

- **13. Obligation of educational institutions to provide inclusive education to transgender persons.** Every educational institution funded or recognised by the appropriate Government shall provide inclusive education and opportunities for sports, recreation and leisure activities to transgender persons without discrimination on an equal basis with others.
- **14. Vocational training and self-employment.** The appropriate Government shall formulate welfare schemes and programmes to facilitate and support livelihood for transgender persons including their vocational training and self-employment.
- **15. Healthcare facilities.** The appropriate Government shall take the following measures in relation to transgender persons, namely:—

- (a) to set up separate human immunodeficiency virus Serosurveillance Centres to conduct sero- surveillance for such persons in accordance with the guidelines issued by the National AIDS Control Organisation in this behalf;
 - (b) to provide for medical care facility including sex reassignment surgery and hormonal therapy;
 - (c) before and after sex reassignment surgery and hormonal therapy counselling;
- (d) bring out a Health Manual related to sex reassignment surgery in accordance with the World Profession Association for Transgender Health guidelines;
 - (e) review of medical curriculum and research for doctors to address their specific health issues;
- (f) to facilitate access to transgender persons in hospitals and other healthcare institutions and centres;
- (g) provision for coverage of medical expenses by a comprehensive insurance scheme for Sex Reassignment Surgery, hormonal therapy, laser therapy or any other health issues of transgender persons.

CHAPTER VII

NATIONAL COUNCIL FOR TRANSGENDER PERSONS

- **16.** National Council for Transgender Persons. (1) The Central Government shall by notification constitute a National Council for Transgender Persons to exercise the powers conferred on, and to perform the functions assigned to it, under this Act.
 - (2) The National Council shall consist of—
 - (a) the Union Minister in-charge of the Ministry of Social Justice and Empowerment, Chairperson, *ex officio*;
 - (b) the Minister of State, in-charge of the Ministry of Social Justice and Empowerment in the Government, Vice-Chairperson, *ex officio*;
 - (c) Secretary to the Government of India in-charge of the Ministry of Social Justice and Empowerment, Member, *ex officio*;
 - (d) one representative each from the Ministries of Health and

Family Welfare, Home Affairs, Housing and Urban Affairs, Minority Affairs, Human Resources Development, Rural Development, Labour and Employment and Departments of Legal Affairs, Pensions and Pensioners Welfare and National Institute for Transforming India Aayog, not below the rank of Joint Secretaries to the Government of India, Members, *ex officio*;

- (e) one representative each from the National Human Rights Commission and National Commission for Women, not below the rank of Joint Secretaries to the Government of India, Members, *ex officio*;
- (f) representatives of the State Governments and Union territories by rotation, one each from the North, South, East, West and North-East regions, to be nominated by the Central Government, Members, *ex officio*;
- (g) five representatives of transgender community, by rotation, from the State Governments and Union territories, one each from the North, South, East, West and North-East regions, to be nominated by the Central Government, Members;
- (h) five experts, to represent non-governmental organisations or associations, working for the welfare of transgender persons, to be nominated by the Central Government, Members; and
- (i) Joint Secretary to the Government of India in the Ministry of Social Justice and Empowerment dealing with the welfare of the transgender persons, Member Secretary, ex officio.
- (3) A Member of National Council, other than ex officio member, shall hold office for a term of three years from the date of his nomination.
 - **17. Functions of Council.** The National Council shall perform the following functions, namely:—
 - (a) to advise the Central Government on the formulation of policies, programmes, legislation and projects with respect to transgender persons;
 - (b) to monitor and evaluate the impact of policies and programmes designed for achieving equality and full participation of transgender persons;
 - (c)to review and coordinate the activities of all the departments of Government and other Governmental and non-Governmental Organisations which are dealing with matters relating to transgender persons;

- (d) to redress the grievances of transgender persons; and
- (e) to perform such other functions as may be prescribed by the Central Government.

CHAPTER VIII OFFENCES AND PENALTIES

18. Offences and penalties. — Whoever, —

- (a) compels or entices a transgender person to indulge in the act of forced or bonded labour other than any compulsory service for public purposes imposed by Government;
- (b) denies a transgender person the right of passage to a public place or obstructs such person from using or having access to a public place to which other members have access to or a right to use;
 - (c) forces or causes a transgender person to leave household, village or other place of residence; and
- (d)harms or injures or endangers the life, safety, health or well-being, whether mental or physical, of a transgender person or tends to do acts including causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years and with fine.

CHAPTER IX MISCELLANEOUS

- **19. Grants by Central Government.** The Central Government shall, from time to time, after due appropriation made by Parliament by law in this behalf, credit such sums to the National Council as may be necessary for carrying out the purposes of this Act.
- **20.** Act not in derogation of any other law. The provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being in force.
- **21.** Protection of action taken in good faith. No suit, prosecution or other legal proceeding shall lie against the appropriate Government or any local authority or any officer of the Government in respect of anything which is in good faith done or intended to be done in

pursuance of the provisions of this Act and any rules made there under.

- **22.** Power of appropriate Government to make rules. (1) The appropriate Government may, subject to the condition of previous publication, by notification, make rules for carrying out the provisions of this Act.
- (2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—
 - (a) the form and manner in which an application shall be made under section 5;
 - (b) the procedure, form and manner and the period within which a certificate of identity is issued under sub-section (1) of section 6;
 - (c) the form and manner in which an application shall be made under sub-section (1) of section 7;
 - (d) the form, period and manner for issuing revised certificate under sub-section (2) of section 7;
 - (e) welfare measures to be provided under sub-section (2) of section 8;
 - (f) facilities to be provided under section 10;
 - (g) other functions of the National Council under clause (e) of section 17; and
 - (h) any other matter which is required to be or may be prescribed.
- (3) Every rule made by the Central Government under subsection (1), shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.
- (4) Every rule made by the State Government under sub-section (1), shall be laid, as soon as may be after it is made, before each House of the State Legislature where it consists of two Houses, or where such legislature consists of one House, before that House.

23. Power to remove difficulties. — (1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act as appear to it to be necessary or expedient for removing the difficulty:

Provided that no such order shall be made after the expiry of the period of two years from the date of commencement of this Act.

(2) Every order made under this section shall, as soon as may be after it is made, be laid before each House of Parliament.

Transgender Persons (Protection of Rights) Rules, 2020

TRANSGENDER PERSONS (PROTECTION OF RIGHTS) RULES, 2020

MINISTRY OF SOCIAL JUSTICE AND EMPOWERMENT

NOTIFICATION

New Delhi, the 25th September, 2020

G.S.R.592(E).— Whereas the draft rules in exercise of the powers conferred by section 22 of the Transgender Persons (Protection of Rights) Act, 2019 (40 of 2019) were published, as required by sub-section (1) of the said section vide notification of the Government of India in the Ministry of Social Justice and Empowerment, number G. S. R. 441(E), dated the 13thJuly, 2020 in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) inviting objections and suggestions from the persons likely to be affected thereby, before the expiry of the period of thirty days from the date on which copies of the Gazette containing the said notification were made available to the public;

And whereas, the copies of the said Gazetted notification were made available to the public on the 13th July, 2020;

And whereas, the objections and suggestion received from the public in respect of the said draft rules have been considered by the Central Government;

Now, therefore, in exercise of the powers conferred by section 22 of the Transgender Persons (Protection of Rights) Act, 2019 (40 of 2019), the Central Government hereby makes the following rules namely:-

- **1. Short title and commencement.** (1) These rules may be called the Transgender Persons (Protection of Rights) Rules, 2020.
- (2) They shall come into force on the date of their publication in the Official Gazette.
- 2. Definition.- In these rules, unless the context otherwise requires,-
 - (a) "Act" means the Transgender Persons (Protection of Rights) Act, 2019 (40 of 2019);
 - (b) "applicant" means a transgender person who submits an application under rule 3;
 - (c) "application" means the application form as provided in Form -1;

- (d) "any official documents" include all documents listed in Annexure 1, which the appropriate Government may revise, by notification in the Official Gazette;
- (e) "certificate of identity" means a certificate issued by the District Magistrate under section 6 or section 7 of the Act as in Form 3 or Form 4 respectively;
- (f) "form" means a form prescribed to these rules;
- (g) "identity card" means a photo identity card issued in Form 5 to a transgender person under section 6 or issued in Form 6 to a transgender person on change of gender under section 7 on the basis of "certificate of identity" issued by the District Magistrate or an identity card to a transgender person issued by a State authority prior to the coming into force of these rules;
- (h) "medical institution" means any medical institution whether hospital or clinic, private or public, in rural areas or urban or overseas;
- (i) "medical intervention" includes any gender affirming medical intervention undertaken by an individual to facilitate the transition to their self-identified gender, including but not limited to counseling, hormonal therapy, and surgical intervention, if any.
- (j) "section" means a section of the Act;
- (k) all other words and expressions used herein but not defined and defined in the Act shall have the same meaning assigned to them in the Act.

3. Application for issue of certificate of identity under section 6 or section 7:

- (1) A transgender person desirous of obtaining a certificate of identity shall make an application as prescribed in Form -1.
- (2) The application shall be submitted to the District Magistrate in person or by post till online facilities are developed by the State Government concerned and thereafter the application shall be made by online only:

Provided that the appropriate Government may undertake measures, as it deems appropriate, to facilitate the submission of applications for certificate of identity by transgender persons living in remote areas or disadvantaged conditions:

Provided further that in case of a minor child, such application shall be made by a parent or guardian of such minor child and in the case of a child in need of care and protection, by the competent authority under the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016).

(3) Transgender persons who have officially recorded their change in gender, whether as male, female or transgender, prior to the coming into force of the Act shall not be required to submit an application for certificate of identity under these rules:

Provided that such persons shall enjoy all rights and entitlements conferred on transgender persons under the Act.

- **4. Procedure for issue of certificate of identity:-** (1) The District Magistrate shall, subject to the correctness of the applicant's particulars, get the application processed based on the affidavit submitted declaring the gender identity of any person in Form- 2, without any medical or physical examination, and thereafter issue an identification number to the applicant, which may be quoted as proof of application.
- (2) For the purpose of determination of the place of residence, the applicant shall have to reside in the area under the jurisdiction of District Magistrate as on the date of application and an affidavit to this effect shall be submitted in Form-2.
- **5. Issue of certificate of identity for a transgender person under section 6.-** (1) The District Magistrate shall issue to the applicant, a certificate of identity in Form-3 following the procedure provided in rules 4 indicating the gender of such person.
- (2) The said certificate of identity shall be issued within thirty days of receipt of duly filled in application along with the affidavit.
- (3) The certificate of identity issued under sub-rule(1) shall be the basis to change the gender as well as the name and the photograph, if so necessitated, of the transgender person in all such official documents as provided in Annexure-1, in accordance with the gender specified in the said certificate of identity.
- (4) The District Magistrate shall, at the time of issuance of the certificate of identity under sub-rule (1), issue a transgender identity card in Form 5 to the applicant.
- (5) The appropriate Governments shall maintain a register for the issuance of certificate of identity card and the transgender identity card.

- (6) The authority that issued the official document, on an application made by an applicant under rule 3, shall change the name or gender or photograph or any of this information of the applicant in the official documents within fifteen days of making of such application.
- (7) Any official document wherein gender, name and the photograph of transgender are revised based on the said certificate of identity, shall bear the same serial or reference number as in the original official document of such transgender person who seeks change in the name or gender or both in the official documents:

Provided that all benefits that a transgender person was entitled to based on an identity card, if any, issued by a State authority shall continue to be enjoyed by that transgender person based on the certificate of identity issued under these rules.

6. Procedure for issue of a certificate of identity for change of gender.-

- (1) If a transgender person undergoes medical intervention towards a gender affirming procedure, either as a male or female, such person may apply in the Form -1, along with a certificate issued to that effect by the Medical Superintendent or Chief Medical Officer of the medical institution in which that person has undergone the said medical intervention, to the District Magistrate for the issue of a revised certificate of identity.
- (2) The District Magistrate shall, on receipt of an application referred to in sub-rule (1) shall verify the genuineness of the said medical certificate, which shall not include any physical examination.
- (3) The applicant shall be a currently residing in the area under the jurisdiction of the District Magistrate as on the date of application and an affidavit to this effect shall be submitted along with the application in Form-1 and no additional evidence shall be called for.
- **7. Issue of certificate of identity under section 7-** (1) The District Magistrate shall issue a revised certificate of identity in Form 4 to the applicant seeking change in gender indicating the gender of such a person as male or female, as the case may be.
- (2) The District Magistrate shall issue the revised certificate under sub-rule (1) within fifteen days of its receipt of the application.
- (3) The certificate of identity issued under sub-rule (1) shall entitle the applicant to record or change the gender, as well as photograph and name, if so necessitated of transgender person in all such official documents

provided in Annexure -1, in accordance with the gender specified in the said certificate of identity as male or female, as the case may be.

- (4) The District Magistrate while issuing the certificate of identity for change of gender shall simultaneously issue an identity card in Form 6 to the applicant.
- (5) The authority that issued the official document, on an application made by an applicant under sub-rule (3), shall change the name or gender or photograph or any of this information of the applicant in the official documents within fifteen days of making of such application.
- (6) Any official document wherein gender, name or photograph of transgender person is revised based on the said certificate of identity shall bear the same serial or reference number as in the original official document of such transgender person who seeks change in the name or gender or both in the official documents.
- **8. Communication of rejection of application-** (1) In case of rejection of application made under rule 3, the District Magistrate shall inform the applicant the reason or reasons for such rejection within thirty days from the date of receipt of such application.
- (2) The District Magistrate may review the decision of rejection of the application based on the reply submitted by the applicant regarding the reason for rejection communicated in sub-rule (1) of rule 8 within sixty days from the date of such rejection.
- **9. Right to appeal-** The applicant shall have a right to appeal, within ninety days from the date of intimation of the rejection of the application, to the appellate authority as designated by the appropriate Government by notification for a final order.

10. Welfare measures, education, social security and health of transgender persons by appropriate Government-

- (1) The appropriate Government shall constitute a welfare board for the transgender persons for the purpose of protecting their rights and interests of, and facilitating access to schemes and welfare measures framed by the Government.
- (2) The appropriate Government shall review all existing educational, social security, health schemes, welfare measures, vocational training and self-employment schemes to include transgender persons to protect their rights and interests and facilitate their access to such schemes and welfare measures framed by that Government.

- (3) The appropriate Government shall formulate educational, social security, health schemes and welfare schemes and programmes as specified in Annexure-II in a manner to be transgender sensitive, non-stigmatising and non-discriminatory to transgender persons.
- (4) The appropriate Government shall take adequate steps to prohibit discrimination in any Government or private organisation, or private and public educational institution under their purview, and ensure equitable access to social and public spaces, including burial grounds.
- (5) The appropriate Government shall create institutional and infrastructure facilities, including but not limited to, rehabilitation centre referred to in sub-section (3) of section 12 of the Act, separate human immunodeficiency virus sero-surveillance centres, separate wards in hospitals and washrooms in the establishment, within two years from the date of coming into force of these rules to protect the rights of transgender persons.
- (6) The appropriate Government shall carry out an awareness campaign to educate, communicate and train transgender persons to avail themselves of the benefits of welfare schemes, educate and train transgender persons on their rights; eradicate stigma and discrimination against transgender persons and mitigate its effects.
- (7) The appropriate Government shall also provide for sensitisation of institutions and establishments under their purview, including:-
 - (a) sensitization of teachers and faculty in schools and colleges, changes in the educational curriculum to foster respect for equality and gender diversity;
 - (b) sensitization of healthcare professionals;
 - (c) sensitization programmes in workplaces;
 - (d) sensitization programmes for complaints officers.
- (8) All educational institutions shall have a committee which shall be accessible for transgender persons in case of any harassment or discrimination, with powers to ensure that transgender students do not have to be affected by the presence of the persons bullying them, including teachers.
- (9) The appropriate Government shall create institutional and infrastructure facilities, including but not limited to, temporary shelters, short-stay homes and accommodation, choice of male, female or separate wards in hospitals and washrooms in the establishment within two years from the date of

coming into force of these rules to protect the rights of transgender persons.

- **11. Provisions for non-discrimination.-** (1)The appropriate Government shall take adequate steps to prohibit discrimination in any Government or private organisation or establishment including in the areas of education, employment, healthcare, public transportation, participation in public life, sports, leisure and recreation and opportunity to hold public or private office.
- (2) The appropriate Government shall within two years from the date of coming into force of these rules, formulate a comprehensive policy on the measures and procedures necessary to protect transgender persons in accordance with the provisions of the Act.
- (3) The policy formulated under sub-section (2) shall include preventative administrative and police measures to protect vulnerable transgender communities.
- (4) The appropriate Government shall be responsible for the supervision of timely prosecution of individuals charged under section 18 of the Act, or under any other Law for similar offences committed against the transgender persons.
- (5) Every State Government shall set up a Transgender Protection Cell under the charge of the District Magistrate in each District and under Director General of Police in the State to monitor cases of offences against transgender persons and to ensure timely registration, investigation and prosecution of such offences.
- **12. Equal opportunities in employment.-** (1) Every establishment shall implement all measures for providing a safe working environment and to ensure that no transgender person is discriminated in any matter relating to employment including, but not limited to, infrastructure adjustments, recruitment, employment benefits, promotion and other related issues
- (2) Every establishment shall publish an equal opportunity policy for transgender persons.
- (3) The establishment shall display the equal opportunity policy, including the details of the complaints officer, preferably on their website, failing which, at conspicuous places in their premises.
- (4) The equal opportunity policy of an establishment shall, inter alias, contain details of-

- (a) infrastructural facilities (such as unisex toilets), measures put in for safety and security (transportation and guards) and amenities (such as hygiene products) to be provided to the transgender persons so as to enable them to effectively discharge their duties in the establishment.
- (b) applicability of all rules and regulations of the company regarding service conditions of employees;
- (c) confidentiality of the gender identity of the employees;
- (d) complaint of the officers.
- **13. Grievance redressal.-** The appropriate Government shall ensure that every establishment designates a complaint officer in accordance with section 11 within thirty days from the date of coming into force notification of these rules.
- (2) The complaint officer shall enquire into the complaints received within fifteen days from the date of receipt of such complaints.
- (3) The head of the establishment shall take action on the enquiry report submitted by the complaints officer within fifteen days from the date of submission of the report.
- (4) The head of the establishment shall take action forthwith in all cases where action has not been taken in accordance with the above time limits.
- (5) The appropriate Government shall also set up within one year a grievance redressal mechanism, operating through a helpline and outreach centres, for ensuring proper implementation of the provisions of Chapter V of the Act with special reference to sub- sections (1) and (2) of section12.
- (6) The grievance redressal system shall ensure resolution of grievances within thirty days from the date of bringing of such grievance to the helpline, and imposing of penalties as laid down in section 18.
- (7) The appropriate Government shall put in place a monitoring system for tracking the number of complaints filed, enquired and action taken of all the establishments in their jurisdiction.

- **14.** National Council (1) The National Council shall perform the functions as per Section 17 of the Act.
- (2) National Institute of Social Defence shall give secretarial assistance to the National Council in conduct of its meetings and facilitate in the discharge of the functions of the National Council.

[F.No. 17-2/2019-DP-II]

RADHIKA CHAKRAVARTHY, Jt. Secy.

Programme Schedule

TAMIL NADU STATE JUDICIAL ACADEMY In association with UNICEF

Sensitization programmeon Rights and Protection of LGBTQIA+ Community for Civil Judges and Assistant Public Prosecutors

On 14.11.2021 at TNSJA Headquarters, Chennai and TNSJA Regional Centre, Madurai * (*Regional Centre, Madurai linked through Video Conferencing)

10.00 a.m. – 10.15 a.m.	Scope and Object of the Programme						
10.15 a.m. – 11.00 a.m.	Inaugural Session						
10.15 a.m. – 11.30 a.m.	Legal rights of people belonging to LGBTQIA+ and Challenges in securing them						
11.30 a.m. – 11.45 a.m.	Tea Break						
11.45 a.m. – 12.15 p.m.	LGBTQIA+: Access to Justice and empowerment						
12.15 p.m. – 01.00 p.m.	Open House Discussion						
01.00 p.m. – 02.00 p.m.	Lunch Break						
02.00 p.m. – 04.00 p.m.	Transcending Hurdles and Emerging Victorious - A panel discussion						
	Moderator:						
	Speakers:						
Rainbows shall not fade away! Wherever you are							

The Law Protects You

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ஒளி தருவேன்!

நீயல்ல! – என்னை நானேதான் எழுதினேன்! உயிர் வளர்த்தாய்! ஊண் அளித்தாய், உண்மை – ஆயின் உணர்வழிக்க நீயேதான் முயற்சித்தாய்! நீ என்னை அவனென்றாய்! நான் மறுதலித்தேன்! வீடு எனக்கு கூடல்ல, கூண்டானது!

அவளும், நானும் உனக்காக உருகினோம்! அருகில்தான் வந்தாய் அரவணைப்பாய் என்றே(ங்)கினேன் நீயோ ["] நீ அவளல்ல ["] என்றாய்! நான் மறுதலித்தேன்! என்னுடல் இப்போது சிலையல்ல எனக்கு சிறையானது!

முட்டி மோதி எட்டிப் பிடித்தாலும் வேலையில் எனைநீ வேறாய்ப்பார்க்கிறாய், சாலையில் நின்றாலும் சந்தேகப்படுகிறாய். தலைக்கு மேலொரு கூரை தேடினால் பொன்னோடுவேய்ந்தாற் போல குடக்கூலி கேட்கிறாய்! அட! செத்துத் தொலைந்தாலும் என் சாதி என்னவென்று ஏன் நீ கேட்கிறாய்? – அங்கே புதைக்க மறுக்கிறாய்!

> பாலூட்டா தாயான நான் இப்படியேப் போனாலினி எரியூட்டா தீயுமாவேன்!

> > Lee

