

# TRANSFORMATIVE CONSTITUTIONALISM AND RIGHTS OF TRANSGENDERS IN INDIA: A STUDY

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## ABSTRACT

The basic purpose of constitution has always been to transform society for better and to make it more progressive and embracing. Transformative Constitutionalism ensures that Constitution keeps on adapting as per change in the society but the spirit of constitution should never change. The key idea of transformative constitutionalism is that we should change to make a deeply-wounded society complete again. The word 'Gender' in primitive use included only men and women. But in today's time, society has acknowledged one more gender namely the transgender people. In Supreme court's landmark judgement of *Navtej Singh Johar v. Union of India*, homosexuality was decriminalized and homosexuals were given equal constitutional citizenship. This decision followed the path of court's 2014 decision in *NALSA v. Union of India*, which recognized transgender person's gender identity rights. Through this decision court has given equal status to transgender people as that of men and women. This case has indeed created a history, by giving the identity to transgender people as third gender. However, since then, petitions have been filed before several Indian Courts demanding marriage equality under India's marriage law. These developments have made it imperative to examine the relationship between LGBT+ rights and family law. Mostly it is contended that existing patriarchal social institutions blatantly ignores transformational possibilities. These all new progressions suggest that, despite growth, we are still diverted from the path of transformative constitutionalism judicial pronouncement on marriage equality is yet to be made in India.

**Keywords:** *Constitutional Rights, Judicial Decisions, Transgenders, Transgenders Act, Transformative Constitutionalism.*

## 1. INTRODUCTION

A constitution is a living document that realizes the people's will. The forming of a constitution is a big milestone in a country's history. Especially for those which have been This is especially true for countries that have been controlled in the past. The constitution includes not only the limitations on authority of government, but it also reflects on ambitions of the country to bring change in current order of things. The Indian Constitution, with similar history, has been seen as a transformational constitution.<sup>2</sup>

Court has given life to the letters of the law by interpreting constitutional provisions as per changing needs of the society. Due to this, judiciary has been criticized by many experts and being tagged as "overarching". Transformative constitutionalism encompasses inculcating principles such as equality, liberty, fraternity, and dignity into society. It aims to achieve the primary goal of the constitution which is to transform society for the finer. As per one interpretation. It has aimed to give predominant importance to Constitutional morality rather than what constitutes morality in society, according to one interpretation. As per another interpretation it will continue to adapt as per needs of the society without touching its core structure and substance. The constitution is transformational, and there has been an absolute attention throughout the constitution on devotion to changing relationships, both between individuals and between individuals and between individuals.<sup>3</sup> All operations of the

constitution have been taken care of through the lenses of transformation Transformative Constitutionalism has been a radical approach to attain specified goals by safeguarding people's fundamental rights and opportunities.<sup>4</sup> The judiciary plays a very important role as a tool for social and political change. The Indian courts has been acting as a tool for change as they have vowed to interpret and regulate the law. Transformative constitutionalism strives to raise society based on continually changing principles.<sup>5</sup>

LGBT+ have been denied their right to sexual orientation and thereby they were impoverished of their right to full citizenship under the Constitution. In its landmark 2018 decision, *Navtej Singh Johar v. Union of India*<sup>6</sup>, the Indian Supreme Court had decriminalized homosexuality and granted the equal constitutional citizenship to LGBT+ Indians. This decision has followed the court's 2014 decision in *NALSA v. Union of India*<sup>7</sup>, in which transgender person's identity rights were acknowledged. Equal status of men and women were given to transgenders through this decision. In fact, history has been made through this judgement by giving identity to transgender people as third gender. Nevertheless, it had taken more than 70 years and almost 2 decades of the long legal fight to scratch down this old age law which had been used as a weapon to pester and exploit LGBT+ who didn't follow with the traditional binary of sexuality and gender. But the sad situation is that even after scratching Section 377, present laws are inadequate in securing basic human rights to the LGBT+ community in India.<sup>8</sup> In this article discussion on constitutional rights of LGBT+, history of the LGBT+ rights movement in India, some landmark Judgements and their impact on the LGBT Rights have been made to have a comprehensive dialogue further.

## 2. DEFINITION OF GENDER

Term 'Sex' and 'gender' have been usually swapped, even though both the terms have contrasting meanings where sex indicates to a set of biological attributes in humans and animals. Fundamentally, it consists of physical and physiological features inclusive of chromosomes, gene expression, hormone levels and function, and reproductive/sexual anatomy. Generally sex has been classified as female or male but there is disparity in the biological attributes that contains sex and how those attributes are communicated. The term Gender attributes to the socially constructed roles, behaviours, expressions and identities of girls, women, boys, men, and gender diverse people.<sup>9</sup> It has impact on how people perceive themselves and each other, how they act and interconnect, and the distribution of power and resources in society. Gender identity has not been restricted to a binary i.e girl/woman,

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<sup>1</sup> Gautam Bhatia, THE TRANSFORMATIVE CONSTITUTION, 75 (2019).

<sup>2</sup> Aastha Khanna and Divesh Sawhney, "NALSA Judgment: Critique of The Indian Perspective Beyond the Adams-and-Eves Worldview", Global Freedom of Expression Columbia University <https://globalfreedomofexpression.columbia.edu/publications/nalsa-judgment-critique-of-the-indian-perspective>

*-beyond-the-adams-and-eves-worldview/* (last visited on May 10, 2023)

<sup>3</sup> Transformative Constitutionalism and the Role of Judiciary *available at*: <https://blog.ipleaders.in/transformative-constitutionalism-role-judiciary/> (last visited on 2<sup>nd</sup> June 2023).

<sup>4</sup> Upendra Baxi, The Impossibility of Constitutional Justice: Seismographic Notes on Indian Constitutionalism in INDIA'S LIVING CONSTITUTION: IDEAS, PRACTICES, AND CONTROVERSIES (Zoya Hasan, et.al., eds. 2002).

boy/man nor is it stable: it keeps on changing over time. There has been substantial diversity in how individuals and groups understand, experience and express their genders through the roles they take on, the expectations placed on them, relations with others and the complicated ways that gender has institutionalized in society.

### **2.1 Transgenders- The Third Gender**

The transgender community has been given different names which consists of eunuchs, Aravanis, Jogappas, Shiv-Shakti, Hijras, etc. They were part of Indian society for centuries. The third gender commonly known as transgender have been subsisting in every culture, race, class and religion since the very beginning of human life. The transgenders are those persons who regardless of their age, sex, personality, appearance, attitude, behavior or personal characteristics are unlike stereotypical genders. It implies that they vary in identity of about how men and women are assumed to be. They also play fundamental role in the society and have equal right in everything and in every resource that has been available to all over the world. The third gender i.e., “Transgender” denotes those individuals who have been different in their biological constructions. They have been taken as different for the stereotype gender roles.<sup>10</sup> Due to different gender they were forced to face discrimination in society.

### **3. RIGHTS OF TRANSGENDERS UNDER THE CONSTITUTION OF INDIA**

The Indian constitution has always stressed on protecting and safeguarding rights of people under the principles laid down in Article 14, 15,16 and 21. But, since the enactment of the Constitution of India, these sexual minorities had waited long enough for identification of their rights. They were subjected to discrimination, and harassment and treated as second-class citizens.<sup>11</sup>

However, in the year of 2014, the Supreme Court of India has legally recognized transgenders as the “third gender” in the case of NALSA .v. Union of India. Thereby constitutional rights of transgenders were also recognised.

Article 14 deals with Equality before the law or equal protection before the law within the territory of India. After this judgement, the expression “person” includes male, female and third gender within its ambit so the transgenders were also qualified to legal protection under Indian constitution in all the domains of state activity.<sup>12</sup>

Article 15 which deals with the prohibition of discrimination on the ground of religion, race, caste and sex now covers the third gender under its scope as being the citizens they also owns the right to not to be discriminated on the ground of their religion, caste race and sex. They also owns the right to preserve their gender expression which has been majorly reflected through their clothes, action and behaviour.

The definition of sex given under Article 16 has been broadened which now includes “Psychological Sex” and gender identity within its scope. Thereby, the transgenders being the citizens of India have been given the right to employment and equal opportunity in the matters of employment and any kind of discrimination on the basis of their sexual orientation is banned.<sup>13</sup>

<sup>5</sup> *Navtej Singh Johar v. Union of India* A.I.R. 2018 S.C. 4321 (India).

<sup>6</sup> *National Legal Services Authority (NALSA) v. Union of India and Others* A.I.R. 2014 S.C. 438 (India)..

<sup>7</sup> The Indian Penal Code, 1860, S. 377.

For an era transgenders have been deprived of their fundamental right under Article 21<sup>14</sup> of the Indian constitution which deals with the protection of life and personal liberty. But now after the *NALSA* judgement the transgenders have been recognized as the citizens of India and they also have full right to protect their rights and personal liberty. The Supreme Court had also observed the right to dignity by recognizing gender identity within the ambit of Article 21. friends or relatives. Sometimes even their parents act as their pimps. In addition to this some are forced to go away from their parental home as they are not allowed to be a part and parcel of normal community and class. Many of them have been victims of rape and physical and verbal abuse. They are not even qualified to take education in educational institutions as ordinary person. Hence, regardless of gender diversity in our ancient temple sculptures, mythology and religious treatises, it could be concluded that transgender people in India, till date, face intolerance, shame, biasness and violence.<sup>16</sup>

#### 4. JUDICIAL FIGHT FOR RIGHTS OF TRANSGENDERS

Since, the British era Section 377 criminalization of homosexual activity had been enacted which stood for more than 70 years after Indian independence. Evolution of LGBT rights has taken place after independence. After 2010, situations had started changing, people have become more conscious about the LGBTQ community. LGBTQ started contesting for their identity and rights.<sup>17</sup> *NALSA* judgement was the pathbreaking judgement where for the first time identity rights of transgenders were recognised. Many judgements later on followed the same path. The Supreme Court in 2013 passed the *Koushal* judgment, overturning the Delhi High Court judgement reading down Section 377 in *Naz v. Union of India*. It was a major setback for LGBTQ community in India. Nevertheless, the brighter side to it was that the LGBTQ movement on the ground had been growing quickly, with increase in their social acceptance. Transgenders had to face pressure of criminal threats and were coerced into begging and sex work.

In 2017, a nine-judge Bench of the Supreme Court, in *Puttaswamy*, clearly recognized the right to privacy as a fundamental right and had remarked that LGBTI persons have right to privacy. Any kind of aggressive treatment towards LGBTI was prohibited.

Later on in 2019 in famous case of *Navtej Singh Johar v. Union of India* the court had taken down Article 377 of Indian Constitution and legitimized homosexuality in India. In the same year court had delivered a pathbreaking judgement in *Arun Kumar v. Inspector General of Registration and others*<sup>18</sup>, where ambit of word 'Bride' under Hindu Marriage Act was broadened and transwomen were also made part of it. Marriage between transwomen and man both being hindu was legalised in this judgement. Thereby, this judgement had broken all the taboos persisting since ages. In this was Supreme court of India has adopted an egalitarian approach to transform society into better and thereby delivered all these pathbreaking judgements to provide justice to transgenders.

<sup>8</sup> Chakrapani, V., *Hijras/Transgender in India: HIV, Human Rights, and Social Exclusion*, available at: [http://indiagovernance.gov.in/files/hijras\\_transgender\\_in\\_india\\_hiv\\_human\\_rights\\_and\\_social\\_exclusion.pdf](http://indiagovernance.gov.in/files/hijras_transgender_in_india_hiv_human_rights_and_social_exclusion.pdf) (last visited on May 10, 2023).

<sup>9</sup> Poonam Verma, *Position of Transgenders after the enactment of 'Transgender Persons (Protection Of Rights) Act, 2019, An Analysis*, RJPSS (2022).

## 5. RUDIMENTS OF TRANSGENDERS BILL, 2019

The Transgender Persons (Protection of Rights) Bill<sup>19</sup>, 2019 had been presented in Lok Sabha on July 19, 2019. As per this act transgenders are those who do not match the gender assigned to them at birth. All persons with an intersex variation, genderqueers, trans-men, trans-women comes within the ambit of this definition. Under this act, the district magistrate has been given power to accord certificate of identification to these persons as transgender. It restricts discrimination and unjust treatment in any institution like healthcare, employment, education and access to public. The right to residence of transgenders was also recognised in it. For their social welfare various schemes were given by the government like vocational training programs and self-employment.<sup>20</sup> It also includes provisions to allow health care facilities to transgenders which comprises of HIV surveillance centres and sex reassignment surgeries. Offences like bonded labour, physical and sexual abuse have been also recognised under this act and punishments for the same have also been given.

## 6. RIGHTS OF TRANSGENDERS- THE NEVER ENDING FIGHT

The definition of “transgender person” which has been given in the act is unclear and confusing. Where gender identity of transgenders is distinct from their gender identity at birth. Even though, two separate definitions are unlike, the definition of “transgender” has too vast ambit as it includes “people with intersex variation” also. The penalties given under the act for offences seems to be inadequate for monstrous crimes like rape, sexual abuse or violence, sexual harassment or criminal assault. In addition to this, act has ignored the Right of self-determination of identity. The civil and criminal laws in India has identified two types of genders man and woman. The Act has not specified whether they would also be recognized as transgenders under the same category. Moreover, the Act does not provide for reservation for transgender persons as provided in transgenders bill. The act remains disappointing as it has failed to provide a diversity of other related rights as marriage rights, adoption rights, pregnancy rights, and even so. Realisation of rights of Transgenders have been left at behest of the government as it depends upon how much importance government pays to it.<sup>21</sup>. At last, the act has been silent about legal recognition of same sex marriages as heterosexual marriages which is the need of the hour.

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<sup>10</sup> How Article 14 of Indian Constitution is helpful in maintaining equality in gender justice, *available at*: <https://lawcorner.in/how-article-14-of-indian-constitution-is-helpful-in-maintaining-equality-in-gender-justice/> (last visited on June 7, 2023).

<sup>11</sup> Tarunabh Khaitan, *NALSA v. Union of India: What Courts Say, What Courts Do*, *available at*: <https://ukconstitutionallaw.org/2014/04/24/tarunabh-khaitan-nalsa-v-union-of-india-what-courts-say-what-courts-do/> (last visited on June 25, 2020)

<sup>12</sup> The Constitution of India, 1950, Art. 14-21.

<sup>13</sup> Parul Yadav, Komal Vig, *Restrictions Imposed by Human Biology in Achievement of Gender Justice as Human Rights* 20 MLU 26-30 (2020).

## 7. CONCLUSION

Undoubtedly, Transformative constitutionalism has put forward some remarkable changes in India with respect to recognizing the rights of underprivileged communities and broadening jurisprudence of human rights particularly of homosexuals. Transformative constitutionalism has considered the changing social norms and conduct of society and constitution itself adjusts to changing norms.<sup>22</sup> With change in the society the constitutional interpretation has become more spirited and varied and taking into consideration all the aspects of human sufferings. By decriminalizing homosexuality and broadening the scope of word “sex” the apex court has made transgenders free to enjoy their human rights which were somewhere under the contour of criminal law. Based on the discussion, the effort of the Supreme Court of India has made positive step towards enhancement of the livelihood conditions of the transgender communities. However, it must be mentioned that this recognition is not going to solve the problem. The battle is still half won because there is a long road ahead till complete protection, acceptance, and equal status is granted to transgender people.

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<sup>14</sup> Dr Vasant More, *Problems of Transgender Community in India: A Sociological Study*, Vivek Research Journal Special Issue (2021).

<sup>15</sup> Rachel Sweeney, *Homosexuals and the Right to Privacy*, 34 CUMB L REV 171.

<sup>16</sup> *Arun Kumar v. Inspector General of Registration*, A.I.R. 2019 M.H.C. 4125 (India).

<sup>17</sup> The Transgender Act (Protection & Rights ) 2019.

<sup>18</sup> Siddharth Narrain, *Being a Eunuch in India*, available at: (<http://www.countercurrents.org/gen-narrain141003.htm>); (last visited on May 10, 2023).

<sup>19</sup> “LGBT rights in India” available at: <https://en.wikipedia.org/wiki>. (last visited on May 10, 2023).

<sup>20</sup> Dr. Ansari Zartab Jabeen, *Indian Judiciary and Transformative Constitutionalism*, 2 ISSN 107-115 (2019).