

The Role of Persuasive Legal Instruments for the Recognition of LGBTQ Rights in India

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Abstract

Gender identity is one of the most fundamental aspects of life. The time has come that one must realize that gender identity cannot be categorised singularly to one's orientation which may be associated with his or her birth. Gender identity and sexual orientation is not only limited to the intimate lives of the individual but it impacts everything such as their family, professional, social and educational life. Therefore, gender identity and sexual orientation has to be connected with the human rights perspective to avail all the rights that is being guaranteed to a human. It is only then the basic rights of being a human can be realised by all irrespective of their identity or sexual orientation. All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. However, for the LGBTQ rights in India, the realisation of them being human and should be treated equal in dignity and rights was far from the truth until the year 2018. It was only in September 2018, the Supreme Court delivered a historic ruling legalising LGBTQ rights and partly holding Section 377 of the Indian Penal Code as unconstitutional. The colonial-era sodomy law violated the basic tenets of the constitution i.e., right to equality, right to privacy, and right to live with dignity. The right to life and personal liberty is a constitutionally guaranteed right that lays stress on the judicial recognition of such rights as an inextricable component of Article 21 of the Constitution and denial of it leads to discrimination which would offend Article 14 of our Constitution. Therefore, keeping in view the rights guaranteed by the Constitution of India, the rights of the LGBTQ community received the legal recognition in 2018. The LGBTQ rights in India would have not seen the light of the day if it was not looked into through the constitutional and human rights perspective. However, in recognition to the rights of the LGBTQ in India that stands today is

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also due to the role that has been played by the persuasive legal instruments such as international conventions, foreign judgments, etc.

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I. Introduction

Gender equality is a fundamental human right which provides a necessary foundation for a peaceful, prosperous and sustainable world. In terms of gender equality, there has been progress over the last decades with regard to the position of women however speaking of third gender their position remains stagnant. Laws are discriminatory and social norms remain pervasive, and therefore their sexual orientation and gender identity continues to be underrepresented.

Transgender is the umbrella term used for LGBTQ community members who are popularly known as homosexuals as well. The existence of homosexuals in our community is not a new phenomenon. They are in existence since early times but they were never recognized in the society as that of men and women. Therefore, the fight for the rights and recognition of the homosexuals has been a long one.

Speaking of gender justice, the conventional view is that it has always been the debates about equality between men and women but one must realize that it must not only refer to equal treatment of men and women but it should refer to all irrespective of the gender. If the society is to progress, then without gender justice it cannot take place. Everyone should be treated with equal dignity. Gender justice concerns all aspects of human life. It provides a framework for human rights where equality, empowerment to all gender and identities leads to societal transformation.²

Since, early times the gender inequality is well-known issue which is prevalent in society throughout the world where we have been more concerned about women. Today, the fight for gender equality is not restricted to men and women alone. Speaking of gender inequality in India, especially with regard to the homosexuals, it has mainly been due to the presence of draconian law Section 377 of the Indian Penal Code that they were not considered as equal and denied various rights which are essential to regulate the everyday affairs of life. In our country these group of

² (last visited Aug 27, 2022), <https://lawcorner.in/all-about-gender-justice/>.

people has always faced harassment, discrimination, the threat of violence. Due to the social stigma attached to their sexual orientation, it is often found that the majority of people belonging to this community hide their sexuality out of fear of losing their job, fear of discrimination and violence.

II. Gender Identity

“What’s in a name? That which we call a rose by any other name would smell as sweet.”

-Shakespeare³

The basic sense by the above phrase conveys that what really matters is the essential qualities of the substance and the fundamental characteristics of an entity but not the name by which it or a person is called. However, this saying does not go well with the attitude of the people towards LGBTQ community, what really matters in the today’s world is identification to exercise the basic human rights. Therefore, taking into consideration various forms of discrimination faced by the LGBTQ community, the Court in *National Legal Services Authority v. Union of India*,⁴ held that this community must be represented as a “Third Gender” to exercise various rights guaranteed by the Constitution of India.

The Supreme Court of India in the landmark third gender case held that right to choose gender is a human right from which many other rights flow. The court also held that the word person used under the Article 14 and 21 of the constitution of India is gender neutral. They are entitled legal protection of laws in all spheres of activity which includes employment, healthcare, education, etc.

The Court in the third gender case upheld the rule of law by advancing justice to the class who are deprived of their legitimate natural and constitutional rights. It was also observed that by social justice and equality one must understand that it to be present in the true spirit of the constitution enshrined in the preamble.

In *National Human Rights Commission v. State of Arunachal Pradesh*,⁵ the court observed that India is a country governed by the rule of law and our constitution

³ (Last visited Aug 27, 2022), https://main.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf.

⁴ (2014) SCC SC 328.

⁵ (1996) 1 SCC 742.

confers certain rights on every human being. Also, every person is entitled to equality before the law and equal protection of the laws. Thus, it becomes clear that the rights conferred by the Constitution of India are applicable to all irrespective of the gender.

III. Rights of Third Gender through the Lens of Human Rights

The central idea of human rights rests on the premise that all humans are equal. Thus, all humans have equal dignity and should be treated equally. If by any means the dignity of the individual is undermined, then it is considered as a violation of the principle of equality and paves the way for discrimination. Speaking of homosexuality, it was also regarded as a mental disorder until 1990.⁶

The preamble to the Universal Declaration of Human Rights, 1948 mandates that the foundation of freedom, justice and peace in the world can take place only when recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is done. Article 1 of the UDHR states that “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” Although the first article of the UDHR itself speaks of equality in dignity and rights and to act towards one another in a spirit of brotherhood, the attitude of the society was never in consonance with the UDHR mandates.

According to the provisions of the UDHR, everyone is entitled to all the rights and freedoms without any distinction,⁷ right to life, liberty and security of person,⁸ right not be subjected to torture or to cruel, inhuman or degrading treatment or punishment,⁹ right to recognition everywhere as a person before the law,¹⁰ equality before the law and equal protection of the law without any discrimination,¹¹ right to the protection of the law against such interference or attacks.¹² Therefore, all

⁶ (Last visited Aug 27, 2022), <https://www.unfpa.org/events/international-day-against-homophobia-transphobia-and-biphobia>.

⁷ Universal Declaration of Human Rights, 1948, Art. 2.

⁸ Universal Declaration of Human Rights, 1948, Art. 3.

⁹ Universal Declaration of Human Rights, 1948, Art. 5.

¹⁰ Universal Declaration of Human Rights, 1948, Art. 6.

¹¹ Universal Declaration of Human Rights, 1948, Art. 7.

¹² Universal Declaration of Human Rights, 1948, Art. 12.

the rights enumerated above specifically under the UDHR becomes applicable to every human beings without any discrimination.

IV. Constitutional Provisions

The preamble to the Constitution of India mandates justice socially, economically, and politically and equality of status for all irrespective of gender. The Constitution of India under the Articles 14 and 21 guarantees right to equality and equal protection before the law. The basic premise of equality under the Constitution of India is that the sex of an individual is irrelevant to exercise their fundamental rights. Under the directive principles of state policy, it is also the duty of the state to ensure welfare of the people irrespective of the gender. It is evident from the various constitutional amendments that with the advancement in the society the Constitution of India provides for the special provisions if needed.¹³

In *National Legal Services Authority v. Union of India*,¹⁴ the Supreme Court of India ruled that the rights and freedoms of transgender people in India are protected under the Constitution. The court held that the word “person” used under the Article 14 and 21 of the Constitution of India is gender neutral and covers transgender who are neither male nor female. In September 2018, the Supreme Court also decriminalised adult consensual same-sex relationships. These two landmark judgments are comprehensive both in terms of recognition of constitutional rights and in empowering LGBTQ community as well. Both judgments mark an important moment for LGBTQ rights that not only reversed the colonial-era law but also ordered that LGBTQ Indians be accorded all the protections of their constitution. This was a welcome victory after a long battle fought for the recognition of third gender in the society but it does not necessarily mean that LGBTQ people in India are fully free or perceived as equal among their fellow citizens as they are still underrepresented.

The step towards gender equality in the society has been made with the decriminalisation of the colonial era law but there is still much that remains to be done if the civil rights of LGBTQ persons in India are to be protected. In the Third Gender Case the Supreme Court accorded that the LGBTQ community has the

¹³ INDIA CONST. Art. amended by The Constitution (Ninety Third Amendment) Act, 2005.

¹⁴ A.I.R. 2014 SC 1836.

absolute and inalienable right to define themselves in their own terms and have the right to express their identities without fear of violence or retribution. We must realize that all human beings hold the basic human rights and needs to be recognized as such within the societies to live in.¹⁵

The impact of non-recognition of the LGBTQ community properly and treating them as minuscule population are many as they have been facing discrimination and disaffection from their family and friends, invisibleness and harassment at school which may take toll on their mental health, dropping on their school, and homelessness etc. This discrimination affects the main social good such as education, employment, health care of the LGBTQ people.

Although the LGBTQ community has still not reached its full potential, the Indian judiciary with the help of various constitutional provisions, international instruments and foreign judgments, etc. has to some extent played pivotal role for the representation and recognition of LGBTQ community in the society. The steps taken by the Supreme Court of India in 2014 and 2018 towards third gender in the case of *National Legal Services Authority v. Union of India*,¹⁶ is that the rights and freedom of transgender people in India were protected under the constitution and in the case of *Navtej Singh Johar v. Union of India*,¹⁷ the court decriminalised the colonial ban on gay sex.

V. Role of Persuasive Instruments in Recognition of LGBTQ Rights in India

The Constitution of India provides for fundamental rights and directive principles of state policy for the betterment and welfare of the people. Time and again it has been amended to ensure such rights of the people and duties of the state in safeguarding those rights. The Indian Constitution guarantees fundamental rights to safeguard each and every individual who is the citizen of India under various provisions. Article 14 provides right to equality and equal protection to all citizens. Article 15 and 16 prohibits discrimination on the grounds of religion, race, caste, sex or birth place. Thus, the Constitutional provisions clearly mandates that gender-based discrimination are unreasonable and nobody can be discriminated on the basis of sex. As article 19(1)(a) provides that all citizens of

¹⁵ Zainab Patel, The long road to LGBT equality in India (2019), <https://www.undp.org/india/blog/long-road-lgbt-equality-india>.

¹⁶ (2014) 5 SCC 438.

¹⁷ (2018) 1 SCC 791.

India have the right to freedom of speech and expression, thus the LGBTQ community has every right to defend their rights to express their gender identity by virtue of this article. The Article 21 of the Indian Constitution which provides for protection of life and personal liberty is of widest amplitude where within the ambit of right to life and personal liberty, it protects gender privacy, identity and integrity.¹⁸

Despite such Constitutional provisions it took so long to realise and recognise the rights of the LGBTQ in India. It was only after the landmark judgment of 2014 that they received the identity as a third gender in the country. To receive this identity, the Court relied on various foreign judgments and international instruments. As our Constitution provides that it is only in the absence of a contrary legislation, the rules of international law are given importance and taken into consideration. The reliance on persuasive instruments can be made by the court by virtue of Article 51¹⁹ and 253²⁰ of the Constitution of India.

In *Kesavananda Bharati v. State of Kerala*,²¹ the court in view of Article 51 of the constitution of India, the court held that due regard be given to the international conventions and norms when there is no inconsistency between the international and domestic laws. In *Apparel Export Promotion Council v. A. K. Chopra*,²² the Court held that in cases involving violation of human rights, the High Courts and Supreme Court of India is obliged to apply international instruments and conventions when there is no inconsistency between the international law and the domestic laws. Therefore, the discrimination and non-recognition of the LGBTQ in the society was in violation of the human rights principles. In *S Jagganath v. Union of India*,²³ the Court held that international agreement would prevail and override any inconsistent State laws.

In *National Textile Workers' Union v. P R Ramkrishnan*,²⁴ the Supreme Court observed that "if the law fails to respond to the needs of changing society, then

¹⁸ <https://www.legalserviceindia.com/legal/article-7932-lgbt-rights-in-india.html> (last visited Aug 27, 2022).

¹⁹ INDIA CONST. Art. 51.

²⁰ INDIA CONST. Art. 253.

²¹ (1973) 4 SCC 225.

²² (1999) 1 SCC 759.

²³ (1997) 2 SCC 87.

²⁴ A.I.R. 1983 750.

either it will stifle the growth of the society and choke its progress, or if the society is vigorous enough, it will cast away the law, which stands in the way of its growth.”²⁵ Therefore, in the absence of municipal laws, the Article 253 of the constitution enables the Parliament to legislate the laws implementing the international instruments.

The court took cognizance of various persuasive legal instruments in the light of the above judgments and referred to international instruments as well as foreign judgments for the recognition and representation of LGBTQ rights in India. Such as the Universal Declaration of Human Rights, 1948, the International Covenant on Civil and Political Rights, 1966, the Yogyakarta Principles on the Application of International Human Rights law in relation to Sexual Orientation and Gender Identity, the United Nations Convention on Torture and Other Cruel Inhuman and Degrading Treatment or Punishment.

The court took note of the US Supreme Court decisions for the recognition of the rights of the LGBTQ community. For instance- the case of *City of Chicago v. Wilson*,²⁶ where the Court struck down the municipal law prohibiting cross dressing. Similarly, in *Doe v. Yunits*,²⁷ the court held the right of a person to wear school dress that matches their gender identities as part of protected speech and expression. The Supreme Court of India also took reference of the decision of the Supreme Court of Nepal where in the case of *Sunil Babu Pant v. Nepal Govt.*,²⁸ the recognition to the third gender as equal to men and women of the country was highlighted to exercise the fundamental rights guaranteed to the citizens of the country.

Likewise, the judgment of the Supreme Court of Pakistan²⁹ has also been referred where the protection of life, liberty and dignity of the individual not limited to men and women but to third gender as well was considered.

²⁵(last visited Aug 27, 2022), <https://www.news9live.com/kerala/law-while-changing-with-social-needs-should-acknowledge-technological-advancements-kerala-hc-73892.html>.

²⁶ (1978) 389 N.E. 2d 522.

²⁷ (2000) WL 33162199.

²⁸ 2008 2 N.J.A.L.J. 262: WP No. 917 of (2007).

²⁹ Mohd Aslam Khaki v. Senior Supt. of Police (Operation) Constitution Petition No. 43 of (2009).

In *Dudgeon v. United Kingdom*,³⁰ the European Court of Human Rights made the following observations with respect to homosexuality that the members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts. But when the consenting adults alone are involved then that cannot on its own warrant the application of penal sanctions against them.

In *Ang Ladlad LGBT Party v. Commission of Elections*,³¹ the Supreme Court of the Republic of the Philippines observed that the expressions concerning one's homosexuality and the activity of forming a political association that supports LGBT individuals are protected as well.

The case of *Mosley v. News Group Newspapers Ltd.*,³² has been relied on to highlight that the emphasis for individual's freedom to conduct his sex life and personal relationships as he wishes, subject to the permitted exceptions, countervails public interest.

In *Navtej Singh Johar v Union of India*³³ the Supreme Court consisting of five judges bench delivered a historical verdict on sexual orientation in which the homosexuality is partially de-criminalised as under section 377 of IPC, 1860. However, the court observed that the acts which involves force relating to sex with minors, non-consensual sexual acts, and bestiality remains a criminalized offense. In delivering this historic judgment the court took into consideration the various provisions of the Indian Constitution. For instance- the support of article 19 of the Constitution of India was taken as it gives right to express sexual orientation freely. Likewise, the article 21 of the Constitution of India as right to life and liberty include privacy, dignity and autonomy.

In *Suresh Kumar Koushal Vs. Naz Foundation*,³⁴ the Court held that homosexual act is an criminal offense where only the Parliament have power to decriminalised it and the right to privacy cannot cover the homosexual act and re-criminalised homosexuality. The court held that LGBT community constituted a minuscule population and therefore did not deserve constitutional protection and stated that

³⁰ App No 7525/76, [1981] ECHR 5.

³¹ G. R. No.190582, Supreme Court of Philippines (2010).

³² (2008) EWHC 1777 (QB).

³³ (2018) 1 SCC 791.

³⁴ (2014) 1 SCC 1.

Section 377 of IPC did not suffer from the vice of unconstitutionality. To this disregard this remorseful judgment, the statement made by the Justice Indu Malhotra of the Supreme Court of India³⁵ can be noted that history owes an apology to the members of LGBT community and their families, for the delay in providing redress for the dishonor and avoidance that they have suffered through the centuries is very much true.

However, in *K.S. Puttaswamy v. Union of India*,³⁶ the nine judges' bench of the Supreme Court of India held that the minuscule population of LGBT cannot be the ground to deprive them of the basic fundamental rights. The Sexual orientation is an essential attribute of privacy which is protected by various articles of the Constitution of India. The limitations on the fundamental right cannot be held acceptable even if it is a few as opposed to a large number of people. Therefore, no one shall be subjected to a hostile treatment and the judgment given in the case of *Suresh Kumar Koushal v. Naz Foundation*, was rectified henceforth.

In *National Legal Services Authority v. Union of India*,³⁷ the court held that the non-recognition of the identity of the third gender was in violation of Article 14, 15, 16 and 21 of the Constitution of India. The Supreme Court of India held that the members of LGBTQ community must be treated as a "Third Gender". The Court also directed that the government should make proper policies for the LGBT community in the light of Articles 15(2) and 16(4) to promote equal opportunity in education and employment. They shall be placed as an economically and socially backward class to receive the benefit of reservation in government jobs and educational institutions both. The Court also took cognizance that a difference between one's birth gender and identity is not essentially a pathological condition.

In *Naz Foundation Government v. NCT of Delhi*,³⁸ the High Court of Delhi held that Section 377 of IPC, 1860 arguments supported decriminalisation, not legalisation, and imposed an unreasonable restriction over two adults engaging by mutual consent intercourse in private. The court also stated that a part of

³⁵ (Last visited Aug 27, 2022), <https://economictimes.indiatimes.com/news/politics-and-nation/history-owes-apology-to-lgbt-community-and-kin-justice-indu-malhotra/articleshow/65708442.cms?from=mdr>.

³⁶ (2017) 10 SCC 1.

³⁷ (2014) 5 SCC 438.

³⁸ (2009) SCC Del 1726.

section 377 of IPC which criminalised the homosexual act needed to be declared unconstitutional. The first case where the court de-criminalised the homosexuality in India. The court in this case considered that the basic fundamental rights enshrined under Articles 14,15,19 and 21 of the Indian Constitution is violated due to the criminalization of homosexual act under section 377 of IPC. As according to Article 21 of the Indian Constitution nobody can enjoy their life without dignity and privacy.

V. Conclusion

Our society has never realised the trauma or pain undergone by the members of the transgender community until the landmark judgments of 2014 and 2018. But with the growing awareness amongst people and easy accessibility to information and technology LGBTQ citizens in our country are no more a “minuscule minority” and recognition has been achieved to some extent due to both national binding laws as well as persuasive legal instruments. Due to such recognition today, they have a voice that is strong and refuses to be silent any longer in their efforts to reclaim equality. As India being a diverse country with such high illiteracy and being the second largest populous nation the attitudes towards the LGBTQ vary vastly. This further adds complexities to make people understand the gender identity and sexual orientation. Thus, until and unless the government gives the LGBTQ people in India an equal status, a just and fair struggle for social recognition by LGBTQ will go on.