

# JOURNEY OF TRANSGENDER FROM MARGINALISM TO MAINSTREAM IN INDIA\*

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## Abstract

*Indian society strictly revolves around the idea of binary code of gender since ages. Society did not acknowledge the existence of any such individual who did not conform to this binary system. All those individuals who do not conform to either male or female gender are known as transgender. Transgender has always been ignored, harassed and humiliated by the society. They do not even enjoy certain basic human rights which are available to every individual being born as human. The researcher in this paper has discussed about the discriminatory constitutional and legislative provisions relating to rights of transgender. Transgenderism is not a modern phenomenon but has existed since times immemorial. The researcher has made an attempt to discuss present judicial attitude towards the rights of transgender. The researcher with the help of this paper has tried to bring into light the changing scenario of society regarding transgender community.*

## INTRODUCTION

The Transgender community has existed since the inception of human society. But the contemporary terminology was invented somewhere around 1990. Transgender has now emerged as an umbrella term which includes all those individuals who do not fit into strict binary gender code of society. Strictly, the term “Transgender” includes only those people whose gender identity or gender expression is different from the natural sex allocated at birth. These people are not satisfied with their natural sex and feel being in wrong place. Gender identity is one’s inner feeling of being a male or female or neither of these. It may or may not be in consonance with the sex assigned at birth. In such a situation person identifies himself as transgender. Identities like hijras, cross dressers, transsexual, intersex, lesbian, gays, bisexuals are all covered under this umbrella term. As per latest Census, transgender population in India exceeds 2 million. Further 95% of the population does not lead a worthy life though the situation was quite different in ancient India<sup>1</sup>. Transgender was earlier being treated as a mental illness but it is only in 2018 that world health organization (WHO) recognized it as sexual health condition.<sup>2</sup>

The term Transgender stems from Latin word ‘Trans’ meaning across. Literally, the term transgender means moving across the gender. To understand what actually transgender is one must know the difference between gender and sex. Sex is based on body parts especially reproductive organs. On the other hand, Gender is depicted by the behavioral aspect which mostly correlates with the natural assigned sex of the individual. For instance, female is sex and woman

<sup>1</sup> Retrieved from <https://womennow.in/transgender-people-third-gender-social-recognition> (last visited on December 3, 2018).

<sup>2</sup> Retrieved from <https://yourstory.com/socialstory/indian-transgender-community-crucial-steps> (last visited on December 3, 2018).

is gender. But whenever the correlation between the gender and sex is missing, it causes dissatisfaction and disharmony within the body of the individual. Person feels uneasiness with to his gender identity. Gender identity is the internal phenomenon where a person feels completely satisfied with his gender and sex. Usually person depicts his satisfaction openly through his behavior, clothing, dressing etc. which is known as gender expression.<sup>3</sup>

Since the beginning of British rule they had been given maltreatment which continues even today. Society is reluctant to acknowledge their identity in the mainstream. Now for the last one decade the judiciary in India has been very active in helping them to regain their identity in society. Year 2009 marks the beginning of equality era for transgender when for the first time election commission in India introduced the column “other” on the ballot paper. Since then nearly 1 million population has got itself registered as others.<sup>4</sup> Gradually the apex court also recognized them as third gender in **National Legal Services Authority v. Union of India**<sup>5</sup>. The recognition of equal worth and equal right of choice of an individual being essential to human rights is the basis of this landmark pronouncement.<sup>6</sup> On August 24, 2017 The Hon’ble Supreme court gave another favorable judgment to transgender community in the case of **Justice K.S. Puttaswamy (Retd.) and another vs. Union of India and others**.<sup>7</sup> The apex court held that it is undoubted that only miniscule portion of total population comprises of lesbians, gays, bisexuals and transgender. But this cannot be the basis to deny them the basic fundamental right to privacy as enshrined under Article 21 of the Indian Constitution.<sup>8</sup> With the same supportive attitude, the Union judiciary on September 06, 2018 has decriminalized the consensual same sex relationship between adults in private. It declared this part of Section 377 Indian Penal code 1860 to be unconstitutional.<sup>9</sup> With this historic judgment the Supreme Court has overruled its own judgment delivered in *Suresh Kumar Kaushal v. Naz foundation*<sup>10</sup> wherein it upheld the law.<sup>11</sup>

## HISTORICAL BACKGROUND

Undoubtedly, the ready and clear references are available in every ancient religion of the world that proves the existence of transgender. Even from a passing glance of history it is very much clear that homosexual pattern of behavior and related aberrant sexual practice were in existence since the time of exodus and were widely followed during monarchy. Homosexuality was widely practiced in ancient Greek society. Plato affirms that a man’s dedication to his male friend / partner surpassed his dedication towards his professional, social, monetary and family interests. In short, homosexual attraction exceeded everything and everyone else in man’s life to the extent, that it even surpassed death. Feeling of love and passion between two males is cardinal theme of Gilgamesh epic (2000

<sup>3</sup> Nicholas Telch, *Transgender 101: A Simple Guide To A Complex Issue* 3-6 (Columbia University Press, New York, USA, 2012).

<sup>4</sup> Retrieved from <https://matadornetwork.com/read/heres-world-learn-indias-third-gender-acceptance> (last visited on December 3, 2018).

<sup>5</sup> (2014) 5 SCC 438.

<sup>6</sup> Sakshi Parashar, “Inclusion of transgender community within socially and educationally backward classes: Examining the deeper concerns”, retrieved from <http://ili.ac.in/pdf/sakshi.pdf> (last visited on December 3, 2018).

<sup>7</sup> (2017) 10 SCC 1

<sup>8</sup> Retrieved from <https://indiankanoon.org> (last visited on December 4, 2018).

<sup>9</sup> *Navtej Singh Johar v. Union of India* (2018) 1 SCC 791.

<sup>10</sup> (2014) 1 SCC 1

<sup>11</sup> [https://en.wikipedia.org/wiki/Navtej\\_Singh\\_Johar\\_v.\\_Union\\_of\\_India](https://en.wikipedia.org/wiki/Navtej_Singh_Johar_v._Union_of_India) (last visited on December 4, 2018).

B.C).<sup>12</sup> Aristophanes claims that there were three sexes conforming to the sun, earth and the moon. Man is offspring of sun, women of earth and both man and woman of the moon; as it is composed of sun and earth.<sup>13</sup>

India is no exception when it comes to age old history of transgender. References of homosexuality can be found in ancient scriptures like Manusmriti, Kamasutra, Upanishads and Puranas.<sup>14</sup> Persons born without proper sexual organs were known as nisarga in Sanskrit during Vedic civilization. Today, those born with illogical combination of male and female sex organs are called intersex. In Vedic period people were aware of third sex and could easily recognize such features/characteristics of their children. But at all they were so lenient that they gave them comfortable and liberal atmosphere to bear what nature have given them and as a consequence develop into a healthy adult. On the other hand, western society has always been reluctant to speak openly about intersex or third sex as they strictly believe that there are two sex created by God - male and female. God is also male but in contrast in Indian religious texts, we find mention of Lord Shiva as Ardhnarishwar- meaning thereby possessing half male half female. Lord Shiva is worshipped in this form at large in Indian society till date but it is usually considered a taboo to even talk about someone who possesses both male and female qualities.<sup>15</sup>

The existence of eunuchs is well evident in Ramayana. When Lord Rama went to exile, several countrymen followed them to forest. But Lord Rama told that all men and women must return back to home now. At that time the transgender were also present there. It is said that all the eunuchs kept waiting for Lord Rama for a long period of 14 years outside the forest as Lord Rama did not told them to return. Happy with their devotion Lord Rama bestowed them with the power to confer blessings on people on all auspicious occasions. This tradition continues till date.<sup>16</sup>

With the start of colonial rule in 18th century, the situation for hijras underwent drastic change. During the British era to control the activities of hijras “The Criminal Tribes Act 1871” was enacted which implied that whole of hijra community is criminal and is addicted to commission of non-bailable offences. Though, it was repealed in August 1949. Another provision under Section 377 IPC was enacted even prior to criminal tribal act which punishes those sexual practices which are typically connected with transgender people.<sup>17</sup> In the words of Laxmi Narayan Tripathi, a social transgender activist,

“Before the Britishers came; we were at least treated with dignity and respect in society. We were discriminated against under the Tribal Act [Criminal Tribal Act, 1871,] which lumped the khwaja Sara community with “habitually criminal” groups like thugs. Section 377 [of the Indian Penal Code, which criminalizes sexual activities against the “order of nature”] also discriminated against us. Before

<sup>12</sup> James B De Young, *Homosexuality : Contemporary claims examined in the light of Bible and ancient literature and law* 122 (Kregel Publication, Grand rapid MI 49501, USA, 2000).

<sup>13</sup> Bolich Ph.D, G.G Bolich, *Transgender History And Geography: cross dressing in context* 18 (Psyche's Press, North Carolina, Vol 3, 2007)

<sup>14</sup> Amit Kashyap, “Anti Gay Law: will it go?” Civil and Military Law Journal, 118 (2009).

<sup>15</sup> Mandeep Verma, “Problems of God's own Creation” Cr.L J 214-215 (2012).

<sup>16</sup> Amit Tyagi, “Bases of Human rights and rights of transgender” Indian Bar Review, Vol. xxxii, 479 (2005).

<sup>17</sup> National Legal Service Authority v. Union of India (2014) 5 SCC 438.

the British, we were important [in society]; we were working as everything, from cooks to advisors to people managing the harems. Our ancestors were trusted.”<sup>18</sup>

## CONSTITUTIONAL AND LEGISLATIVE PROVISIONS RELATING TO RIGHTS OF TRANSGENDERS:

The Constitutional and Legislative provisions relating to Rights of transgender are discussed as under:

### A. Constitutional Provisions

It is evident that the thinking regarding human rights being inalienable for the development of human personality is prevalent since the time of natural law. They are guaranteed in our Constitution in form of Fundamental Rights under Part III of Indian Constitution. The idea behind ensuring these rights is that every individual has certain minimal freedoms. Moreover by implanting them in our Constitution, they have been taken out of hands of political majorities. No law can take away any Fundamental Rights as it would be declared unconstitutional. The concept of Fundamental Rights depicts modern democratic mindset.<sup>19</sup>

#### a. Right to Equality

Equality is the basic element of Indian democracy. Article 14-18 broadly provides for the Right of equality. Article 14 is the genus and article 15 and 16 are its species. Article 14 lays down the strict principles to combat discrimination. Article 14 specifically deals with equality before law and equal protection of law.<sup>20</sup> In **Nagaraj v. Union of India**<sup>21</sup>, the hon'ble Supreme Court clearly declared that equality is important aspect of democracy and is part of basic structure of Constitution. Equality is blended in our Constitution even our preamble emphasizes on equality as basic feature of constitution. Any amendment which abridges the equality is invalid. Neither Central nor State legislative can infringe equality.<sup>22</sup>

Article 14 nowhere limits the applicability of the word person to be used only for male or female. Transgender who fall neither within male nor female classification also comes within the expression person. Hence they are entitled to enjoy legal protection of laws in all State activities just like any other male/female. Rather they are sexually exploited and harassed. They do not enjoy the privileges available to other citizens of the country. They are discriminated on the basis on their gender identity or sexual preferences. Due to lack of recognition about their gender identity they are subjected to harsh and violent behavior by the society. In **National Legal Services Authority v. Union of India**<sup>23</sup>, the hon'ble apex court held that discrimination on the basis of sexual preferences or gender identity is violative of Article 14. In **R.D. Shetty v. International Airport Authority**<sup>24</sup>, the Supreme Court opined that Article 14 strikes at arbitrariness in State action and ensure fairness and equality of treatment. In **National Human Rights Commission**

<sup>18</sup> Retrieved from <http://www.dawn.com> (last visited on October 10, 2018)

<sup>19</sup> M.P. Jain, *Indian Constitutional Law* 846 (Lexis Nexis, Gurgaon, 7<sup>th</sup> ed., 2016).

<sup>20</sup> *NAZ Foundation v. NCT Delhi*, 160 DLT 277.

<sup>21</sup> AIR 2007 SC 1.

<sup>22</sup> M.P. Jain, *Indian Constitutional Law* 877 (Lexis Nexis, Gurgaon, 7<sup>th</sup> ed., 2016).

<sup>23</sup> (2014) 5 SCC 438.

<sup>24</sup> AIR 1979 SC 1628.

v. **State of Arunachal Pradesh**,<sup>25</sup> the Hon'ble Supreme Court opined, "We are a country governed by the rule of law. Our Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before law and equal protection of the laws".

### b. Prohibition of Discrimination

Article 15 is complementary to Article 14. Article 14 guarantees equality to all persons but Article 15 is limited to citizens but is wider in scope.<sup>26</sup> It lays down the specific grounds on which no discrimination can be made. It permits reservations in favour of some specific sects of society. But if any discrimination is done on the basis of religion, race, caste, sex, place of birth or any of them; it is violative of Article 15.<sup>27</sup> Article 15(4) is an exception to the general rule laid in Article 15. It empowers the state to make special provisions for upliftment of socially and educationally backward classes of citizens. The dictum behind protective discrimination under article 15(4) is that favorable treatment can be legally provided when any socially and educationally backward class of citizen requires it.<sup>28</sup>

Though the constitution does not define the word "Backward class" but number of commissions were appointed in 1953 and 1979 (Mandal Commission) under Article 340 of Indian Constitution. Finally, in 1992, Supreme Court laid down the principles for determination of Backward class in **Indira Sawhney & Ors v. Union of India**<sup>29</sup>. It is very much clear that the phrase backward class as used in Article 15(4) is distinct to Scheduled Caste and Tribes. In other words, it includes members other than Scheduled Castes and Tribes. The test for determining any class for benefit of Article 15(4) includes backwardness not only social but educational also.<sup>30</sup> Even transgender are included within backward class of citizen.<sup>31</sup>

### c. Equality of Opportunity in Matters of Public Employment

Article 14 to 16 is a code of guarantee for casteless and classless equality. Article 16 is another specific application of Article 14. Article 16 especially talks about equality in the fields of employment or appointment to any office under State.<sup>32</sup> Article 16 is wider than Article 15 as it contains seven prohibited grounds of discrimination. Residence and descent are the two additional prohibited grounds of discrimination mentioned under Article 16.<sup>33</sup> Right to equality includes both Right not to be discriminated against and protection against arbitrariness of the State. Article 16(4) allows reservation to be made in services under State in favour of background class of citizens which are not adequately represented.<sup>34</sup> Discussing the scope of Article 16(4), the Hon'ble Supreme Court in **Indra Sawhney v.**

<sup>25</sup> AIR 1996 SC 1234.

<sup>26</sup> Durga Das Basu, *Commentary on Constitution of India* 1752 (Wadhwa Law Agency, Nagpur, Vol. I, 8<sup>th</sup> ed., 2007).

<sup>27</sup> Narendra Kumar, *Constitutional Law of India* 155 (Allahabad Law Agency, Faridabad, 7<sup>th</sup> ed., 2008).

<sup>28</sup> Durga Das Basu, *Commentary on Constitution of India* 1817 (Wadhwa Law Agency, Nagpur, Vol. I, 8<sup>th</sup> ed., 2007).

<sup>29</sup> AIR 1993 SC 477.

<sup>30</sup> Durga Das Basu, *Commentary on Constitution of India* 1805-1807 (Wadhwa Law Agency, Nagpur, Vol. I, 8<sup>th</sup> ed., 2007).

<sup>31</sup> *National Legal Services Authority v. Union of India* (2014) 5 SCC 438.

<sup>32</sup> L.M Singhvi (ed.) *Constitution of India* 554-555 (Modern Law Publication, New Delhi, 2<sup>nd</sup> ed., 2008).

<sup>33</sup> Narendra Kumar, *Constitutional Law of India* 168 (Allahabad Law Agency, Faridabad, 7<sup>th</sup> ed., 2008).

<sup>34</sup> Durga Das Basu, *Commentary on Constitution of India* 1873-1875 (Wadhwa Law Agency, Nagpur, Vol. I, 8<sup>th</sup> ed., 2007).



**Union of India**<sup>35</sup>, it is an enabling provision empowering the State with discretion to make reservation in favour of any backward classes of citizens which in its opinion are not duly represented in services under State. Neither it imposes Constitutional duty nor confers a fundamental right on citizens to claim reservation.<sup>36</sup>

In **National Legal Services Authority, v. Union of India**<sup>37</sup>, the apex court opined that both Article 15 and 16 includes sex as prohibited ground of discrimination. Sex comprises of gender and biological attributes. Gender attribute is one's own gender identity and biological attributes includes primary and secondary sexual characteristics. Nowhere has it restricted itself to rigid binary gender code of male and female. As a result, even if anyone is discriminated on the basis of gender attributes then, such discrimination violates Article 15 and 16.

#### **d. Freedom of Speech and Expression**

Article 19(1) lays down basic freedoms which are essential for complete development of personality. But these are not absolute. They are bridled by restrictions provided under Article 19(2) to (6). They are natural right and are deemed to be inherent in every citizen. These freedoms are not available to non-citizens. It is pre-condition for any civilized society because unbridled power lead to oppression and unbridled freedom result in lawlessness and chaos.<sup>38</sup>

Highlighting the importance of freedom, the Hon'ble Supreme Court in **Dinesh Trivedi MP& others v. Union of India**<sup>39</sup> observed, "Democracy requires openness and openness is parallel to free society and sunlight is best disinfectant."

The most cherished freedom of speech and expression is available of all citizens without any reservation. All citizens are free to express their views and opinion provided they do not violate any restriction laid under Article 19(2) to (6). Transgender are nowhere expressly excluded from enjoying this right. That means they can also express their views regarding their identity. It can be visualized through dressings, behaviour, action, words or in other manner. Keeping in view the provisions of Article 19(2), no limitation can be placed on person's appearance or his choice/mode of dressing. So, transgender can express his personality through behaviour and appearance. State cannot interfere or prohibit such expression which forms core of their identity.<sup>40</sup>

#### **e. Right to Life and Personal Liberty**

Article 21 is the most important human right. The purpose Article 21 is to prevent encroachment by state into the sphere of personal liberty. Article 21, though framed in negative language, but it talks of two important rights (i.e.) life and personal liberty. These twin attributes enjoy superintendence over all other political and social order.<sup>41</sup> From time to time, the expression "life" as used in Article 21 has been broadly interpreted by the judiciary. This right

<sup>35</sup> AIR 1993 SC 477.

<sup>36</sup> Durga Das Basu, *Commentary on Constitution of India* 2031 (Wadhwa Law Agency, Nagpur, Vol. 1, 8<sup>th</sup> ed., 2007).

<sup>37</sup> (2014) 5 SCC 438.

<sup>38</sup> Narendra Kumar, *Constitutional Law of India* 215-216 (Allahabad Law Agency, Faridabad, 7<sup>th</sup> ed., 2008).

<sup>39</sup> (1997) 4 SCC 306.

<sup>40</sup> *National Legal Services Authority v. Union of India* (2014) 5 SCC 438.

<sup>41</sup> Durga Das Basu, *Commentary on Constitution of India* 3102-3103 (Wadhwa Law Agency, Nagpur, Vol. 1, 8<sup>th</sup> ed., 2007).

presupposes that every individual enjoys all faculties of his body in the best conditions. The scope of this right is explained by the supreme court in **Sunil Batra v. Delhi Administration**,<sup>42</sup> this right includes right to live a healthy life as to enjoy all faculties of human body in their prime conditions. It would even include right to protect person's tradition culture, heritage and all that affords meaning to life of a person. It includes within its ambit right to time and sleep peacefully and right to repose and health.<sup>43</sup>

Article 21 affords equal opportunity to all persons irrespective of any reservation. This right specifically provides for healthy and peaceful life. It is evident that Right to life includes Right of protection to everything that affords meaning to life. LGBT/Transgender must then be afforded protection to acknowledge their self-identity so that they can also live and sleep in peace. They can also live with dignity. They are also entitled to enjoy their faculties in their prime stage. Rather by disapproving their gender identity they cannot live healthily and peacefully.

Right to privacy is inherent in the basic right of life and liberty. No person has a right to interfere within private affairs of others. Private relationships can arise out of contract marriage, commerce or politics. But even this right is not unbridled. It can be bridled for the prevention of crime, disorder or medical safety. The society which allows its members to choose the way they want to lead life will only acknowledge the privacy of its members. It not only warrants isolation and evasion from public sphere but also undue intervention from the state.<sup>44</sup> Recently in **Justice K. S. Puttaswamy (Retd.) and Anr. v Union Of India And Ors**,<sup>45</sup> the hon'ble Supreme court declared right to privacy a fundamental Constitutional right which is protected under Article 14, 19 and 21.

Despite of all these foregoing provisions in our Constitution transgender have not been able to exercise their rights in true sense. Non recognition of their identity often subjects them to discrimination and becomes a hurdle in enjoying these rights.

## B. Legislative Provision

Unnatural Offences: Section 377 of the Indian Penal Code, 1860 is a British era barbaric provision which discriminated against transgender community. It basically reflects the colonial concern about national, social, sexual and racial purity both at home and colonies. The arena of Section 377 is basically designed to punish and prevent same-sex associations/relationship, particularly sodomy and is extended to include every sexual relationship involving penile penetration.<sup>46</sup>

Section 377 applies to both homosexual and heterosexual behaviors. Though the expression "carnal intercourse against the order of nature" has not been clearly defined but it undoubtedly includes anal intercourse and oral sex

<sup>42</sup> AIR 1978 SC 1675.

<sup>43</sup> Narendra Kumar, *Constitutional Law of India* 319-20 (Allahabad Law Agency, Faridabad, 7<sup>th</sup> ed., 2008).

<sup>44</sup> Durga Das Basu, *Commentary on Constitution of India* 3137-3139 (Wadhwa Law Agency, Nagpur, Vol. 1, 8<sup>th</sup> ed., 2007).

<sup>45</sup> (2017) 10 SCC 1.

<sup>46</sup> "Historical Evolution of Section 377 and its location within LGBT Movement in India", retrieved from <http://www.academia.edu> (last visited on January 18, 2019).

which are more prevalent among homosexuals though even heterosexuals involve in such activities. But in India, usually male homosexuals are targeted by sodomy laws.

But after the verdict of Hon'ble Supreme court in **Navtej Singh Johar v. Union of India**<sup>47</sup>, the consensual same sex relationship between adults in private have been taken out of the purview of Section 377 Indian Penal Code, 1860. It no longer remains an offence.

## JUDICIARY AND RIGHTS OF TRANSGENDERS

Judiciary is the third organ of the State. It is primarily responsible for ensuring just society. It interprets Constitution keeping in mind the changing needs of society. Legislature cannot foresee each and every situation as society is dynamic. Hence, judiciary comes for the rescue in such situations.<sup>48</sup> Presently Supreme Court with its activist approach has introduced the concept of rationalism into cold letters of law for remedying the lacunae of traditional approach.<sup>49</sup>

The Supreme Court being the apex judicial body has been very active in interpreting our Constitution to safeguard fundamental rights and protecting democratic mores. This is very evident from the role of judiciary in **Maneka Gandhi v. Union of India**<sup>50</sup> wherein the Court has override its decision in **AK Gopalan v. State of Madras**<sup>51</sup>, stating that Article 14, 19 and 21 of Indian Constitution make a comprehensive code on the ground of human rights, natural justice and rule of law. Innumerable Rights have been impliedly been included within the Ambit of Article 21 of Indian Constitution such as Right to speedy Trial, Right to Medical Aid, Right to privacy etc.<sup>52</sup> Despite of such verdicts the transgender community is still battling every day to combat their oppression and discrimination at the hands of society. They are denied all their rights due to lack of recognition. But the last decade has witnessed a tremendous progression in the rights of transgender. The judicial attitude starting with Naz Foundation to Navtej Singh Johar is evidence of the fact that society has started acknowledging their existence.

### **Naz Foundation v. Government of NCT**<sup>53</sup>

The Hon'ble Delhi High Court declared in so far Section 377 penalises consensual sexual acts of adults in private is violative of Article 21, 14, and 15 of the Constitution. The provision will continue to govern nonconsensual penile non vaginal sex and penile non-vaginal sex involving minors. Person above the age of 18 is regarded as adult. Section 377 grossly violates their Right to privacy and liberty embodied under Article 21 of Indian Constitution. The court opined that the sphere of privacy ensures the development of human relations without interference from the State. It

<sup>47</sup> (2018) 1 SCC 791.

<sup>48</sup> K.K. Ghai "Judiciary: Functions, Importance and an Essential Quality of Judiciary" retrieved from <http://www.yourarticlelibrary.com> (last visited on December 5, 2018).

<sup>49</sup> Sourav Agarwal "Civil And Political Rights Of Transgender In Indian Constitutional Perspective" retrieved from [http://ijlls.in/wp-content/uploads/2017/12/article\\_on\\_tg\\_1-1.pdf](http://ijlls.in/wp-content/uploads/2017/12/article_on_tg_1-1.pdf) (last visited on December 06, 2018)

<sup>50</sup> AIR 1978 SC 597.

<sup>51</sup> AIR 1950 SC 49.

<sup>52</sup> CBP Srivastava "Balancing activism and restraint in judiciary", retrieved from <http://discoveryias.in> (last visited on December 5, 2018).

<sup>53</sup> 160 DLT 277.



ensures complete development of one's personality. Our Constitution recognizes right to live with dignity and right to privacy under Article 21. Section 377 denies person's dignity and criminalities core identity on the basis of sexual orientation. Section 377 denies gay person a right to full personhood which is implicit with right to life under Article 21 of Indian Constitution. Court further opined that it is inevitably true that discrimination caused to gay community and MSM is unfair and unreasonable. Court further held that sexual orientation is analogous to sex and discrimination on the basis of social orientation is violative of Article 15 of Indian Constitution. In the present case, two Constitutional rights which are relied upon (i.e) right to personal liberty and right to equality; are fundamental human rights which accrue to individual due to being born as human rather on any other considerations. Moreover, it is not to be forgotten that discrimination is anti-thesis to equality and that it is only the recognition of equality which will enhance the dignity of every individual.

The Delhi high court in 2009 gave a very balanced verdict in favour of transgender. It strikes the chord between Right to privacy vis a vis right to consensual same sex relationships. But this judgment was overruled by Hon'ble Supreme court in the case of **Suresh Kumar Kaushal and Anr v. Naz Foundation & Ors**<sup>54</sup> in 2013. The court gave more weightage to social strictures and institution rather than to individual's rights. It failed to strike a balance between social morality and personality development.

### **National Legal Service Authority v. Union of India & Ors**<sup>55</sup>

In this petition the major issue was whether the transgender people, who do not fall either in male or female category, have the right to be identified and classified as a third gender. Another related issue which was considered/demanded attention was whether the biological male who was born with female characteristics/female orientation (vice versa) has the right to get himself identified and classified as a female as per his choice, when such person has already undergone sex reassignment surgery and has changed his/her sex as well?

After going through the detailed submission, this Hon'ble Supreme Court held that hijras/Eunuchs for the purpose of Part III of Constitution and all State and Central laws be recognized as Third Gender: The Right of transgender to identify their gender is upheld and government is directed to legally recognize their right of self-identification. It further directed to treat them as socially and educationally backward class of citizen and extend all the reservation to them in cases of admissions to educational installation and public appointments. State and Centre government are directed to establish separate HIV- Sero Surveillance centre for transgender as they suffer many health issues. Government should seriously try to combat the issues faced by transgender. Government should give proper medical facilities and provide public toilets. The Hon'ble court issued directions to government to make welfare schemes and create public awareness and must take-steps to help them to regain their respect in society.

<sup>54</sup> (2014) 1 SCC 1.

<sup>55</sup> (2014) 5 SCC 438.

This judgment was a major breakthrough for the transgender community. They got their long awaited right to self-determination of identity. They were all recognized under the category of third gender. Further strict guidelines were issued to the government to work upon welfare policies and schemes specially designed for transgender. The court directed to treat them at par with socially and educationally backward class of citizens.

### **Justice K.S. Puttuswamy (retd) v. Union of India<sup>56</sup>**

Popularly known as aadhar judgment. This writ petition was filed to challenge the aadhar project wherein it was mandatory to have aadhar number to access all government facilities and rights. Justice K.S Puttuswamy was the first person to challenge it in the year 2012. He contended that it is an infringement of fundamental rights. This dispute was finally resolved by the nine judge bench of Supreme Court on August 24, 2017. The apex court declared that right to privacy is basic fundamental right and is inherited in right to life under article 21 of Indian Constitution. This very judgment paved the way for another remarkable verdict from the bench of apex court in 2018.<sup>57</sup>

### **Navtej Singh Johar v. Union of India<sup>58</sup>**

This is the landmark verdict of the apex court where in it opined that Suresh Kumar judgment needs reconsideration. The three judge bench expressed that it needs to be settled by large bench. Hence the writ petition is placed before this Hon'ble court. The main questions of adjudication being involved:

1. Whether Supreme Court in its decision in the case of Suresh Kaushal has rationally understood the concept of morality and social morality?
2. Whether Section 377 of Indian Penal Code is violative of Article 14 and 15 of Indian Constitution as regard discrimination on basis of sexual orientation and gender identity?
3. Whether Article 19 of Indian Constitution is infringed by Section 377 of Indian Penal Code in so far it prohibits expression of sexual orientation and gender identity as belonging to LGBT community?
4. Whether Section 377 of Indian Penal Code is constitutionally valid in so far it penalises consensual acts done in privacy between adults?

The apex court held as far as Section 377 Indian Penal Code, 1860 penalizes consensual sexual activities between the adults be it homosexuals or heterosexual is unconstitutional. But if a woman or man engages in any activities with animals then this aspect is Constitutional and will remain penalized under Section 377. Even any act done by individual without the consent of any of them will also remain punishable. The apex court opined that the verdict in Suresh Kaushal was based on the opinion that section 377 Indian Penal Code, 1860 affects smaller fraction of society and the fact that it is misused by society at large does not reflect the need of change in law. Such a view is not permissible constitutionally. Constitutional morality includes many social values within its ambit. The most important

<sup>56</sup> (2017) 10 SCC 1.

<sup>57</sup> <https://www.indiatoday.in/india/story/ks-puttaswamy-aadhaar-verdict-1349652-2018-09-26> (last visited on December 9, 2018).

<sup>58</sup> (2018) 1 SCC 791.

being an assumption of pluralistic and liberal society. It endorses all the organs of state to preserve all-embracing nature of society and to restrict any kind of discrimination or attempt to capture the rights of any section, however, small they may be. It is only Constitutional morality that can be allowed to penetrate or interfere with rule of law. Social morality cannot be allowed to violate fundamental rights of even a single individual. Section 377 Indian Penal Code is violative of Article 19 (1) (a) of Indian Constitution so for it unreasonably curbs the rights of LGBT relating to fundamental freedom of expression and choice. Irrational restriction cannot be imposed on the exercise of fundamental rights in the name of public decency and morality.

It is evident from above that the journey of transgender community in the past one decade from 2009 to 2019 has many ups and down but in the end the community has gained a lot. The court is deciding the best it can decide about them. Now the efforts need to be done by the society at large.

## CONCLUSION

India is the largest democracy and has the voluminous written Constitution. Undoubtedly, the preamble emphasizes on equality and social justice. Constitution mandates that every individual should be treated equally and must not be discriminated against. But this mandate is not strictly implemented even today. The transgender community which has now been declared at par with socially and educationally backward class of citizens is still battling with the harassment, violence and discrimination. They even after 70 years of our Constitution have not been able to enjoy the rights imbibed in the Constitution. Rather they are victimized and still are taken to be stigma in society. Even after number of verdict from the Hon'ble apex court, they have not got their due. The Supreme Court very clearly directed that they should be treated at par with socially and economically backward citizens and hence be entitled all the same benefits they receive under the Constitution. It is just words for the implementing agencies as nothing has been done so far. But for this community it is only a ray of hope which will brighten their lives someday. It is the urgent need of the hour that the society must change its approach and help the transgender to become the part of mainstream rather than being marginalized since times immemorial.