



MARCH 2023

Compendium on LGBTQIA+ Rights

A compilation of key laws applicable to the LGBTQIA+ community

Preface

By Keshav Suri

I grew up in a society with heteronormativity ruling the discourse around gender. To live through that was a herculean challenge for me. I knew I was “different” all along, and the world never failed to remind me of the same at every available opportunity. Studying in an all-boys catholic school, I was the student who gravitated towards playing female characters in school plays. I remember being ridiculed for my mannerisms, for me just being who I am. When it came to the queer community, I remember people either dodging the topic entirely or passing lewd comments. The very concept of the LGBTQIA+ community was an alien subject. Growing up as a member of the community was like an unsupervised experiment, the dangerous mix of confusion and lack of knowledge often led to loneliness.

The internal struggle when I decided to come out to my family is something only my fellow members from the queer community will empathize with. As I grew up, I needed a sounding board, and I decided it had to be my family first. I was afraid how they would take it, but I am so grateful that they understood me and accepted me as I am with open arms. But their acceptance, support and love were accompanied by a lingering concern on how society would treat me and a need to protect me from judgement and negativity. It was only because of their unconditional love that I was able to find the courage to use my privilege and do my bit to bring about a change in our society.

When I joined the hospitality world as Executive Director at The Lalit Suri Hospitality Group, I took it upon myself to champion inclusion in my own organisation. There was initial hesitation amongst my colleagues, but I won them over through various sensitisation sessions, making them aware of the struggles and challenges faced by the marginalised communities. With time, we began to see positive results with all members upholding the values of empathy and compassion in all their day-to-day interactions.

Riding on the strength and support of my teams I decided to launch the #PureLove Campaign in 2016. This campaign was started to provide a much-needed platform to marginalised communities at various intersections including women, people with disabilities, acid attack survivors and LGBTQIA+ community, to come forth, share their experiences, seek emotional support and find economic opportunities for themselves.

Today, I am proud to say that we at The Lalit Suri Hospitality Group welcome people from all walks of life, with a special focus on marginalized communities. We became the first hotel chain and the only Indian organization to sign the United Nations Standards of Conduct to tackle discrimination against LGBTQIA+ persons and our 3500 employees took a pledge to ensure zero discrimination based on preconceived notions. Diversity, Equity & Inclusion became the core pillars of our policy to ensure people feel recognised and represented. ‘Kitty Su’, the nightclub at The Lalit became a safe haven for people from the queer community as it not only hosted international drag artists but also has revolutionised the Indian drag scenario. It has given a platform to over 500 Indian queer and drag artists as well as artists with disabilities.

I was one of the petitioners in the Supreme Court to revoke Section 377 of the Indian Penal Code. It was important not just for the dignity of LGBTQIA+ community but also to boost the pink economy of the country. The archaic law was read down in September 2018 and it was a sweet, hard-fought victory for every Indian to live their lives authentically and embrace their true selves.

However, I believe, the road to equality is long one and there is growing need to bring about a change in the mindset at grassroot levels. In order to bring inclusion into the workforce and educate the masses, I also launched the Keshav Suri Foundation in October 2018 to work towards embracing, empowering and mainstreaming the marginalised communities at various intersections in India.

Since the last 4 years, the Keshav Suri Foundation has been working tirelessly to create projects and opportunities through various initiatives and programs, focusing on the marginal intersections of the society. The foundation is working towards livelihood building by providing skilling and job opportunities, access to education through Aditya Nanda Scholarship and various other fellowships and learning opportunities, making mental health services available for all with no cost, and creating workspaces diverse & inclusive. The foundation also runs Project ‘Prahari’ to support acid attack survivors with skilling and job opportunities.

Our continuous engagements with FICCI and effort to work with diverse communities also resulted in setting up of, FICCI Diversity & Inclusion Task Force. My foundation in collaboration with Stonewall UK and Pride

Circle, also introduced - India Workplace Equality Index (IWEI). It is India's First comprehensive benchmarking tool for employers to measure their progress on LGBTQIA+ inclusion at workplaces.

Through my work, I have met some of the most incredible talents who would have remained on the fringes due to unjust prejudices. Their dreams do not deserve to be stifled just because of the limitations a heteronormative society places on them. Creating opportunities for these people gives meaning to my work. I am in awe of their courage in the face of adversity and their story of struggles. However, all of this is just a teaser, and the real work lies ahead. My teammates and I are excited to work on new endeavours and empower the community in countless more ways.

Foreword

By Nandini Khaitan

“WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity; and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation.”

- Preamble to the Constitution of India

The Preamble of the Constitution of India indicates the source from which it derives its authority. One of the reasons that the Constitution of India stands tall, is the strong foundation of moral principles the Preamble lays down for its people. Although the Preamble is the only part of the Constitution that mentions the word “dignity”, it infuses the spirit throughout the text.

In recognising the individual’s dignity, the drafters of the Constitution were in consonance with the sentiment during World War II *“to reaffirm faith in fundamental human rights, in the dignity and worth of the human person”*, expressed in the UN Charter, 1945. The Universal Declaration of Human Rights, 1948 strongly championed a similar goal when it declared in Article 1, *“All human beings are born free and equal in dignity and rights.”*

The idea of dignity as fundamental to human existence is not recent and it finds a place in various religious and ancient texts. The American and French Constitutions - which influenced the drafting of the Indian Constitution - both hold that all men are created equal in their rights. Dignity is a *sine qua non* of human rights. Indeed, it cannot be bestowed as it is inherent. The preamble to the Universal Declaration of Human Rights also states that the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. However, it took the horrors of two World Wars and a long, hard-fought struggle for independence for the concept to find formal and constitutional roots in an independent India.

The last part of the Preamble - *“fraternity”* was added as the drafters of the Constitution felt that the need for fraternal concord and goodwill in India was greatly needed and this particular aim of the Constitution should be emphasized by special mention. The words *“dignity of the individual”* which follow the word *“fraternity”*, are placed ahead of the words *“unity and integrity of the nation”*. Following the debates, the Constituent Assembly adopted the Preamble without any further alteration. This reinforces the belief that that the unity of the nation is intrinsically tied to the concept of dignity of the individual.

In his famous speech of 25 November 1949, Ambedkar said *“without fraternity, equality and liberty will be no deeper than coats of paint”*. This is a clear call for the citizens of the country to support and uphold each other’s dignity for the purpose of building a united nation.

One of the most important ways the law defines and shapes our lives is how we identify ourselves¹. The law which effectively means a set of rules for what citizens can or cannot do reflects the times these rules were created and enforced in. The roles of say an employer, wife, daughter, lover, though social, are all governed by rules and laws. For these laws to remain relevant they must keep up with the changes in society and dynamically mirror the times in which they exist.

The process of legislating in a democracy the size of India means there is inbuilt diversity in the framers of the law in the Parliament. However, some of the major laws of the country were enacted over hundred and fifty years ago and have held their ground for decades even after independence. The result was that the elected representatives in charge of making laws were conditioned to follow the laws that were already laid down. So, while the law aims to mirror the times it lives in, society can also be held back by archaic laws

¹ Saurabh Kirpal, *Sex and the Supreme Court: How the Law is Upholding the Dignity of the Indian Citizen 2* (2020).

that reflect obsolete norms. In such a situation, it has fallen on the courts to perform a balancing act between existing social norms and civil liberties and strike down those laws that do not uphold fundamental rights of the citizens. And while it is true that courts have been watchguards of the rights of citizens since independence, it is only recently that courts have started looking at the individual's rights as a tool for social change.

The issues of gender equality, privacy, diversity and inclusion are now at the forefront of judicial pronouncements. The *Vishakha* judgement² concerning sexual harassment at the work place, the privacy judgement recognising the right to privacy as being an intrinsic part of the fundamental right to life, the recent judgments on transgenders and Section 377, upholding a married daughter's rights in her father's HUF, allowing women into Sabarimala and holding that a homemaker's contribution to home is equivalent to that of a husband have all been winds of change making the individual's freedom of expression, dignity and right to life the lens through which laws are now being viewed.

For a society and thus a nation to function cohesively, its laws need to be inclusive, robust and clear. As the Chief Justice of India, Hon'ble Mr Justice DY Chandrachud has also stated, "When I emphasise individual dignity, I equally emphasise social cohesion". We can only truly move forward if our citizens live in an inclusive and progressive society where their dignity and freedom of expression is upheld. The first step towards living in a free and inclusive environment is the freedom to be yourself and be able to make choices without being discriminated against. The ability to make these choices arises from the awareness of rights (or the lack of them). Awareness in turn depends on access to information and justice. Unfortunately, the LGBTQIA+ community has not only faced discrimination since centuries but there is also a severe lack of awareness about their rights which in turn affects how the laws are interpreted and implemented.

The watershed moments for the LGBTQIA+ community were the passing of judgements in the case of *NALSA v Union of India*³ which recognised the constitutional rights of the transgender community, and the case of *Navtej Singh Johar v Union of India*⁴ when the Supreme Court of India read down Section 377 of the Indian Penal Code, thereby decriminalising consensual same-sex relations. The euphoria following the judgements was underpinned by hope that the time for discrimination is in the past and acceptance is the future. Unfortunately, with ignorance and stigmas still rampant and even suicide cases being reported within the community, it is evident that both the knowledge and effect of the judgements is yet to permeate to the ground level.

This Compendium is a humble step to raise awareness and provide access to information.

"Every individual soul is potentially divine" - Swami Vivekananda

² AIR 1997 SC 3011.

³ (2014) 5 SCC 438.

⁴ (2018) AIR SC 4321.

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The legal landscape

Indian legal legislative and policy framework

We have listed some of the key legal provisions in Indian laws from both Central and State which deal with or may have a bearing on the LGBTQIA+ community.⁵

Name of the legislation / legal instrument	Key provisions relating to LGBTQIA+ persons
The Indian Penal Code, 1860	<ul style="list-style-type: none"> • Section 377: Criminalized all sexual activities between people of the same-sex. • Section 377 was read down and sex between consenting adults of the same sex was decriminalised in <i>Navtej Singh Johar v Union of India</i>⁶.
The Criminal Tribes Act, 1871	<ul style="list-style-type: none"> • Sections 24 to 27: Designated eunuchs as criminals, required their registration, and gave broad powers to arrest anybody suspected of ‘promiscuous activities’. • Section 30: Prohibited eunuchs from having a right to testamentary succession. • The Criminal Tribes Act 1871 was repealed through the Criminal Tribes Act, 1911, which was repealed by the Criminal Tribes Act, 1924, which was eventually repealed effective 31 August 1952.
The Constitution of India, 1950 (Constitution)	<ul style="list-style-type: none"> • Article 15(1): Prohibits discrimination on the basis of sex, read to include gender as well. • Article 21: Grants the right to life and personal liberty, read to include the right to dignity and privacy.
The Karnataka Police Act, 1963	<ul style="list-style-type: none"> • Section 36A: Required the obligatory registration of eunuchs to regulate “undesirable” activities. • The reference to “eunuchs” was removed by way of Karnataka Police (Amendment) Act, 2016, which became effective on 26 July 2016.⁷
The notifications and guidelines of the University Grants Commission	<ul style="list-style-type: none"> • Notification dated 23 July 2014: Identifies transgender as the third gender for the purpose of admission and for availing various scholarship programmes and schemes provided by University Grants Commission. • UGC Regulations on Curbing the Menace of Ragging in Higher Educational Institutions, 2009: Recognises (through an amendment in 2016) that ragging shall, among other things, mean any act of physical or mental abuse (including bullying and exclusion) targeted at another student (fresher or otherwise) on the ground of gender (including transgender), and sexual orientation.
The Transgender Persons (Protection of Rights) Act, 2019 (Transgender)	<ul style="list-style-type: none"> • Section 2(k): Gives a multi-identity definition of a transgender person as ‘[a] person whose gender does not match with the gender assigned to

⁵ We have set out a tabular representation of the key laws dealing with the LGBTQIA+ community or part thereof on a good faith basis, and we will endeavour to revisit and update the same from time to time.

⁶ (2018) AIR SC 4321.

⁷ It may be noted that the Karnataka Police Act, 1963 has been widely critiqued for its erstwhile provisions relating to “eunuchs”. Accordingly, we have made a specific reference to the said police law.

<p>Persons Act) and the rules framed thereunder</p>	<p>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, LGBTQ+ and person having such socio-cultural identities as <i>kinner, hijra, aravani and jogta.</i>'</p> <ul style="list-style-type: none"> • Section 3: Forbids discrimination against transgender people in areas like education, employment, etc., and recognises their right to live, buy, rent, or otherwise occupy any property. • Sections 4 and 5: Grants the right to self-perceived gender identity and provides for a certificate mechanism from the District Magistrate as a proof of recognition. • Section 8: Mandates the appropriate governments to take welfare measures to secure the full participation of transgender people within society. • Section 9: Decrees non-discrimination against transgender persons in matters of employment. • Section 12: Grants transgender children the right of residence with their family. • Sections 13, 14, and 15: Upholds the rights of transgender people in the areas of education, social security, and health respectively by directing the creation of special facilities. • Section 15: Makes it a responsibility of the appropriate government to take measures to provide for medical care facility including sex reassignment surgery and hormonal therapy, and to 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. • Section 18: Lists offences against transgender persons and prescribes punishments for them.
<p>The Tamil Nadu Special Reservation of Seats in Educational Institutions including Private Educational Institutions and of Appointments or Posts in the Services under the State within the Reservation for the Most Backward Classes and De-notified Communities Act, 2021</p>	<ul style="list-style-type: none"> • Section 3: Provides 2½% reservation in seats of educational institutions in the state for transgender persons which are included within the meaning of Part-Most Backward Classes. • Section 4: Provides 2½% reservation in appointment or posts in the services under the state for transgender persons which are included within the meaning of Part-Most Backward Classes.
<p>The Karnataka Civil Services (General Recruitment) Rules, 1977</p>	<ul style="list-style-type: none"> • Rule 9(1D): Provides (by way of an amendment in 2021) 1% reservation in vacancies in direct recruitments in favour of transgender persons, in each of the categories of General Merit, Scheduled Castes, Scheduled Tribes, and in each of the categories among Other Backward Classes.
<p>The National Medical Commission (Prevention and Prohibition of</p>	<ul style="list-style-type: none"> • Paragraph 4(i): Recognises (through an amendment in 2016) that ragging shall, among other things, mean any act of physical or mental abuse (including bullying and exclusion) targeted at another student

<p>Ragging in Medical Colleges and Institutions) Regulations, 2021</p>	<p>(fresher or otherwise) on the ground of gender (including transgender), and sexual orientation.</p>
<p>Advisory dated 10 January 2022 issued by the Ministry of Home Affairs, Government of India</p>	<ul style="list-style-type: none"> • The advisory was issued by the Ministry of Home Affairs, Government of India, to the Chief Secretaries / Administrators and the Director General / IG (Prisons) of all states / union territories, in relation to treatment and care of transgender persons in prisons. • Paragraph 3(b): Advises in favour of a separate ward for transgender inmates, keeping in view their right to privacy and dignity. • Paragraph 3(c): Records respect for self-identity of transgender persons in relation to admission procedures, medical examination, search, treatment and care inside prisons, etc. • Paragraph 3(f): Recognises transgender persons’ right to have access to the same standards of healthcare as are available to other inmates.
<p>Tamil Nadu Police Subordinate Police Officer’s Conduct Rules, 1964</p>	<ul style="list-style-type: none"> • Section 24 C: Provides that no police officer shall indulge in any act of harassment of any person belonging to the LGBTQIA+ community and the persons working for the welfare of the said community.
<p>Ayushman Bharat - Pradhan Mantri Jan Arogya Yojana (AB-PMJAY Scheme)⁸</p>	<ul style="list-style-type: none"> • The Government of India has extended AB-PMJAY Scheme’s health insurance coverage to LGBTQIA+ persons inclusive of gender re-affirmation surgery and transition related healthcare in the health benefit package. Pursuant to this inclusion, each LGBTQIA+ person shall receive an annual insurance cover of INR 5,00,000. However, to avail the benefit, it is mandatory for an LGTBQIA+ person to be possessing a transgender identity certificate from National Portal for Transgender Persons.

⁸ About Pradhan Mantri Jan Arogya Yojana (PM-JAY) | Official Website Ayushman Bharat Pradhan Mantri Jan Arogya Yojana | National Health Authority (pmjay.gov.in).

International legal regime

Having so examined the Indian legal framework on LGBTQIA+ community, we list below some of the key international human rights conventions bearing relevance to the LGBTQIA+ community.

1. The Universal Declaration of Human Rights (1948)
2. The International Covenant on Civil and Political Rights (1966)
3. The International Covenant on Economic, Social and Cultural Rights (1966)

Notably, the communications and opinions issued under some of these conventions have expressly dealt with matters relating to gender identity and sexual orientation. We have listed some of the key ones below.

International conventions	
<p>The International Covenant on Civil and Political Rights, 1966 (India is a state party to the convention)</p>	<ul style="list-style-type: none"> • In Communication Number 488/1992, the United Nations Human Rights Committee issued an opinion holding that anti-homosexuality laws violated Articles 17 and 26 of the International Covenant on Civil and Political Rights, 1966, concerning the right to privacy and non-discrimination.
<p>The resolutions of the United Nations Human Rights Council</p>	<ul style="list-style-type: none"> • Mandate of the independent expert on protection against violence and discrimination based on sexual orientation and gender identity (A/HRC/RES/41/18, adopted 19 July 2019): The United Nations Independent Expert tracks abuses against LGBTQIA+ persons, recommends solutions and amendments in local and international laws, etc. • Resolution dated 30 June 2016 on protection against violence and discrimination based on sexual orientation and gender identity (A/HRC/RES/32/2): The resolution re-iterated and emphasized the United Nations Human Rights Council's role in protecting LGBTQIA+ rights as a fundamental part of its mandate. • Resolution on human rights, sexual orientation and gender identity (A/HRC/RES/17/19, adopted 17 June 2011): This wide-ranging resolution expressed concern about violence towards LGBTQIA+ people, commissioning a United Nations study focused on LGBTQIA+ issues.

Glossary of terms⁹

S. No	Term	Description
A	TERMS RELATED TO SEX	
A1	Sex	'Sex' refers to the biological make-up of a person, based on external or internal body parts, hormones, sex chromosomes, etc.
A2	Sex characteristics	'Sex characteristics' refer to an individual's physical sexual / reproductive features that are formed on the basis of their sex. This includes genitalia (vagina / uterus or penis / testicles etc.), sex chromosomes (XX, XY, XXY, XYY, XO, etc.), dominant sex hormones present in their body (estrogen, progesterone, testosterone etc.), secondary sexual features (breasts, facial hair, deep voice etc), among others. Sex characteristics may influence a person's gender identity, expressions, sexual orientation or sexuality, but are not the cause of it.
A3	Intersex	<p>Intersex people have innate sex characteristics that do not fit medical and social norms for female or male bodies. These can include external or internal reproductive parts, chromosome patterns, and/ or hormonal patterns. Being Intersex can create risks or experiences of stigma, discrimination and harm.</p> <p>Note: It's wrong to assume that all intersex persons are transgender. Intersex persons also have diverse intersections of gender identity, gender expression and sexuality. Like any individual, intersex persons are the only ones who can determine their gender identity, sexuality, and sexual orientation.</p> <p>Note: Several intersex children are forced into surgical procedures by doctors and parents / guardians, to make their bodies 'conform' to a binary sex. This is unethical and should be called out in stories. These enforced surgeries can also result in trauma, health conditions and more later.</p>
B	TERMS RELATED TO GENDER	
B1	Gender	'Gender' is how society perceives persons, based on the norms, behaviours and roles associated with the sex assigned at birth. For instance, a person assigned male is expected to grow up to be a 'man' and be powerful and assertive; a person assigned female is expected to grow up to be a 'woman' and to be sweet and nurturing. It is a social construct, and what each gender is 'expected' to do changes from society to society, and over time.
B2	Gender Identity	'Gender Identity' refers to how an individual defines their own gender. It depends on a person's deeply felt internal experience of gender. It need not correspond to the sex assigned to the person at birth, and the expectations that society has from this assigned sex or associated gender. 'Gender Identity' is self-determined - that is, only an individual can declare what their gender identity is. There is no 'medical test' for gender identity. For instance, a transgender man, or transgender woman,

⁹ Based on the judgement dated 18 February 2022 passed by High Court of Madras in the case of *S. Sushma v Director General of Police* (2021) 5 MLJ 9 and subsequent notification dated 20 August 2022 published in the Tamil Nadu Government Gazette titled 'Notification regarding the glossary for addressing the LGBTQIA + community'.

S. No	Term	Description
		or a non-binary person, are the only ones who can say what their gender is.
B3	Gender expression	<p>Gender expression is how a person publicly expresses or presents their gender. This can include behaviour and outward appearance such as dress, hair, make-up, body language and voice.</p> <p>A person's chosen name and pronouns are also common ways of expressing gender.</p> <p>Gender expression does not automatically correspond to one's gender identity. For instance, a woman may dress in pants and shirts and have short hair – generally related by society to a 'man's' gender expression.</p> <p>Another example a person assigned male at birth who wears a saree isn't automatically a transgender woman. They may still identify as a man or as non-binary, or any other gender identity.</p>
B4	Gender non-conforming person	<p>People (adults or children) who do not conform to either of the binary gender definitions of male or female, as well as those whose gender expression may differ from standard gender norms. In some instances, individuals are perceived as gender non-conforming by other people because of their gender expression.</p> <p>However, these individuals may not perceive themselves as gender non-conforming. Gender expression and gender non-conformity are clearly related to individual and social perceptions of masculinity and femininity.</p>
B5	Transgender person	<p>A transgender person is someone whose gender identity does not match with the sex they were assigned at birth. People assigned male or female at birth, and Intersex persons, can be transgender.</p> <p>A person is transgender whether or not such a person has undergone gender affirmation procedures like hormone therapy or surgery, as per judgement passed by the Supreme Court in the case of <i>NALSA v Union of India</i>¹⁰ and Transgender Persons (Protection of Rights) Act.</p> <p>Note: Do not use the term 'transgenders' or 'a transgender, i.e. as a noun. The word has to be used as an adjective. The correct usage is transgender person, trans person, transgender woman, trans woman, transgender man, trans man, etc. depending on the context.</p>
B6	Trans woman or Transgender woman	'Transgender woman' refers to a person who was assigned male at birth, but whose gender identity is that of a woman. 'Transgender woman' can be shortened to 'trans woman' (two words).
B7	Trans man or Transgender man	'Transgender man' refers to a person who was assigned female at birth, but whose gender identity is that of a man. 'Transgender man' can be shortened to 'trans man' (two words).
B8	Gender nonbinary person	Non-binary refers to a gender identity that doesn't ascribe to the woman-man binary. A 'non-binary' person is someone who does not identify as a man or a woman.
B9	Gender dysphoria	The psychological distress that results from an incompatibility between a person's self-perceived gender identity, and the gender they are associated with by society based on the sex they were assigned at birth.

¹⁰ (2014) 5 SCC 438.

S. No	Term	Description
		Not all trans persons may experience gender dysphoria. Many may experience gender dysphoria from childhood, while others may experience it later - such as after puberty.
B10	Gender incongruence	A marked and persistent incongruence between the gender felt or experienced by a person, and the gender associated by society with the sex they were assigned at birth.
B11	Gender affirmation procedures	Procedures that help an individual affirm their gender identity, including social (wearing clothes perceived to be closer to gender of choice, attempting to “live as the gender”, medical (surgery, hormone, laser), and legal (changing their name and gender on paper) procedures.
B12	Gender Affirmation Surgery	Surgery of external sex characteristics that help an individual affirm their gender identity, or ‘look how they feel on the inside’. It is recommended to use this term instead of Sex Reassignment Surgery (SRS) which was used in the past.
B13	Dead name	The name that was given to a transgender person by their family, and one by which they were identified. However, the transgender individual may no longer use that name. The name a transgender person has ‘left behind’ or ‘killed’. Usually, this refers to the name they were given by their parents/guardians. Note: While reporting, do not ask for a person’s old name’ or original name’ or deadname. It is not an important detail the society needs to know, and mentioning a person’s deadname in a story is disrespectful. Similarly, descriptions like “the man became a woman” or “the woman became a man” should be avoided. You must stick to the name they give you in all published reports.
B14	Gender fluidity / Gender fluid person	‘Genderfluidity’ refers to a person’s experience of not having a ‘fixed’ gender. A ‘gender fluid’ person may identify with all genders, multiple genders, or with two genders (bigender) (Also see: non binary).
B15	Cisgender	A person whose gender identity conforms with the gender corresponding to the sex assigned at birth. A person who is not transgender or non-binary is cisgender.
C.	TERMS RELATING TO SEXUALITY	
C1	Sexuality	Sexuality refers to a person’s behaviours, desires, identity and attitudes related to sex and physical intimacy with others.
C2	Sexual Orientation	‘Sexual orientation’ refers to which person(s) / gender(s) an individual is attracted to - physically, emotionally, and/or romantically. For instance, ‘heterosexual’ orientation refers typically to attraction between a man and a woman. ‘Homosexual’ refers to attraction between two men or two women. Note: ‘Sexual orientation’ is different from ‘gender identity’. Example: Just like a cisgender woman can be heterosexual, bisexual or homosexual (straight, bi or lesbian), a transgender woman, too, can be heterosexual, homosexual or can have any of a wide variety of sexual orientations.

S. No	Term	Description
C3	Heterosexuality / Heterosexual	<p>'Heterosexuality' typically refers to the sexual attraction between men and women. A 'heterosexual man' or 'straight man' is a man who is attracted to women. A 'heterosexual woman' or 'straight woman' refers to a woman who is attracted to men.</p> <p>'Heteroromantic' refers to romantic/emotional attraction, beyond just sexual attraction. This applies for cisgender and transgender persons.</p>
C4	Homosexuality/ Homosexual	<p>'Homosexuality' refers to a sexual attraction to a person of their same gender. A 'homosexual man' or a 'gay man' is a man who is attracted to men; a 'homosexual woman' or 'lesbian' refers to a woman who is attracted to women.</p> <p>'Homoromantic' refers to a person who feels romantic/emotional attraction to persons of the same gender. This applies for cisgender and transgender persons.</p>
C5	Bisexuality / Bisexual	<p>'Bisexuality' refers to attraction towards persons of one's own gender, and persons of another gender. In the past, bisexuality has been defined as attraction to both men and women but as our understanding of gender and gender identity evolves beyond the man / woman binary, the definition of bisexuality is also evolving.</p> <p>'Bisexuality' need not imply equal degree of attraction to both genders - just significant attraction to both.</p>
C6	Pansexuality/ Pansexual	<p>'Pansexuality' refers to attraction towards persons of multiple genders / all genders, or attraction irrespective of gender. A 'pansexual person' feels attraction towards persons of all genders or multiple genders. 'Pansexuality' need not imply equal attraction to all genders.</p>
C7	Asexual / Aromantic (Aro-Ace)	<p>'Asexual' refers to a person who does not feel sexual attraction towards anyone.</p> <p>'Aromantic' refers to a person who does not feel romantic / emotional attraction towards anyone.</p> <p>Note: A person can be both asexual and aromantic at the same time; or they can feel only sexual attraction, or only romantic attraction, and not the other.</p> <p>For example, a person can be asexual, but at the same time feel romantic attraction towards persons of the same gender, or vice versa.</p>
C8	Romantic orientation	<p>Romantic orientation refers to an individual's romantic / emotional attraction, independent of their sexual attraction. People can be 'homoromantic', 'heteroromantic', 'panromantic', 'aromantic' etc. Romantic orientation need not correspond to a person's sexual orientation.</p> <p>For instance, a person who is pansexual - that is, they are sexually attracted to people of all genders - can be homoromantic, which means they want to have romantic / emotional relationships only with persons of their own gender.</p>
D	UMBRELLA/ COLLECTIVE TERMS	
D1	Queer	<p>'Queer' is an umbrella term used to refer to diverse sex characteristics, genders and sexualities that are not cisgender and/or heterosexual. It is a 'reclaimed' word - the word was used as a slur for people who did not</p>

S. No	Term	Description
		<p>align to the societal assumptions of gender and sexuality in the past. However, the LGBTQIA+ community has now claimed ownership of the term and use it to describe themselves.</p> <p>It is a departure from the dominant, outdated cisgender, heterosexual centric understanding of sex, gender and sexuality. The term includes persons of diverse sex characteristics, gender expressions and identities, and sexualities who identify themselves as queer and includes emerging politics around these topics.</p>
D2	LGBTQ+	LGBTQ+ is a term used to collectively refer to gay, lesbian, bisexual, transgender, queer, intersex, asexual, pansexual people and people of other non- cisgenders and non-hetero sexual orientations. The term is sometimes shortened to LGBT, or LGBTQ, or LGBTQIA+ as well.
E.	OTHER COMMUNITY TERMS	
E1	Coming Out	<p>Coming out is the process of disclosing one’s LGBTQ+ identity to others. Usually, LGBTQ+ / queer persons ‘come out’ multiple times throughout their lives in different interactions with different people. That is, it’s not a one-time’ event.</p> <p>Note: There is criticism and discourse around the fact that LGBTQ+ persons have to ‘come out’ at all - because the assumption in society is that everyone is, or ought to be, cisgender and straight. While doing stories about a person ‘coming out’ or mentioning ‘coming out’ in a story, please do so with an understanding that this should not have to be the norm for queer persons.</p>
E2	Ally	<p>A person or organisation supportive of the rights of LGBTQIA+ persons and communities and uses their privilege/position in society to promote LGBTQIA+ rights, communities, and causes.</p> <p>Note: An ‘ally’ should ideally be identified by the community / communities based on their actions. Self declaration of allyship does not mean much if the person’s actions and words end up hurting the communities they claim to support. Take the self declaration of allyship by cisgender and heterosexual persons with a pinch of salt, and while reporting, try to confirm with LGBTQ+ communities whether this person is actually seen as an ally by the communities in question.</p>
E3	Queer Pride Parade / Rainbow Pride Parade	‘Queer pride parades’ or ‘Rainbow pride parades’ or ‘LGBTQ pride parades’ are events celebrating LGBTQIA+ / queer culture and asserting self-respect in these identities. These events are often used as a method for visibility for queer groups, as well as platforms to demand for the rights of queer communities.
E4	Conversion Therapy, SOGIE-change efforts	Practices that aim to ‘change’ or ‘convert’ people from queer to heterosexual, from trans to cisgender, or gender nonconforming to gender conforming. Some of these attempts stem from superstitions and religion-based beliefs.



FAQs

Identification as LGBTQIA+ and Fundamental Rights

The Universal Declaration of Human Rights, 1948 proclaims that “All human beings are born free and equal in dignity and rights.”¹¹ Accordingly, each human being has certain basic human rights which are inalienable. The right of an individual to make a choice and decision regarding their gender identity and/or sexual orientation has over a period of time come to be recognized as an inherent and inalienable right.

<p>What are the rights of LGBTQIA+ persons?</p>	<p>Currently, there is no single consolidated law asserting rights for LGBTQIA+ community. The rights have to be read together from different laws, right from the Constitution to specific law like Transgender Persons Act, along with judicial precedents.</p>																							
<p>What are the constitutional rights of LGBTQIA+ persons?</p>	<p>The basic rights of LGBTQIA+ community, as a person or citizen of India are set out in Part III of the Constitution and are known as the Fundamental Rights. While there are no specific rights in the Constitution vis-à-vis LGBTQIA+, there are certain fundamental constitutional rights which are relevant for all persons or citizens of India, as the case maybe, irrespective of their identification as LGBTQIA+. Some of such fundamental rights under the Constitution are as follows:</p> <table border="1" data-bbox="544 965 1426 1960"> <tr> <td data-bbox="544 965 815 1061">Article 14</td> <td data-bbox="815 965 1426 1061">Right to equality (this entails both equality before law as well as equal protection of law)</td> </tr> <tr> <td data-bbox="544 1061 815 1144">Article 15</td> <td data-bbox="815 1061 1426 1144">Right against discrimination on the basis of religion, race, caste, sex or place of birth</td> </tr> <tr> <td data-bbox="544 1144 815 1240">Article 16</td> <td data-bbox="815 1144 1426 1240">Right to equal opportunity without discrimination in matters of public employment</td> </tr> <tr> <td data-bbox="544 1240 815 1308">Article 17</td> <td data-bbox="815 1240 1426 1308">Abolition of untouchability</td> </tr> <tr> <td data-bbox="544 1308 815 1404">Article 19</td> <td data-bbox="815 1308 1426 1404">Freedom of speech, assembly, association, movement, trade, and occupation</td> </tr> <tr> <td data-bbox="544 1404 815 1583">Article 21</td> <td data-bbox="815 1404 1426 1583">Right to life and personal liberty This has been interpreted diversely by the Courts to expand the constitutional right to rights for livelihood, health, privacy, etc.</td> </tr> <tr> <td data-bbox="544 1583 815 1650">Article 22</td> <td data-bbox="815 1583 1426 1650">Protection against arrest and detention</td> </tr> <tr> <td data-bbox="544 1650 815 1740">Article 23</td> <td data-bbox="815 1650 1426 1740">Prohibition of traffic in human beings and forced labour</td> </tr> <tr> <td data-bbox="544 1740 815 1836">Article 24</td> <td data-bbox="815 1740 1426 1836">Prohibition of employment of children in factories</td> </tr> <tr> <td data-bbox="544 1836 815 1904">Articles 25 and 26</td> <td data-bbox="815 1836 1426 1904">Right to freedom of religion</td> </tr> <tr> <td data-bbox="544 1904 815 1960">Articles 29 and 30</td> <td data-bbox="815 1904 1426 1960">Cultural and educational rights</td> </tr> </table>		Article 14	Right to equality (this entails both equality before law as well as equal protection of law)	Article 15	Right against discrimination on the basis of religion, race, caste, sex or place of birth	Article 16	Right to equal opportunity without discrimination in matters of public employment	Article 17	Abolition of untouchability	Article 19	Freedom of speech, assembly, association, movement, trade, and occupation	Article 21	Right to life and personal liberty This has been interpreted diversely by the Courts to expand the constitutional right to rights for livelihood, health, privacy, etc.	Article 22	Protection against arrest and detention	Article 23	Prohibition of traffic in human beings and forced labour	Article 24	Prohibition of employment of children in factories	Articles 25 and 26	Right to freedom of religion	Articles 29 and 30	Cultural and educational rights
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¹¹ <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.

	As the times progresses, the rights of LGBTQIA+ community are overwhelmingly evolving at the hands at judicial interpretation by the Courts across India.
What are the key rights recognised by the courts of India for LGBTQIA+ persons?	<p>A large part of the LGBTQIA+ legal jurisprudence has developed at the hands of Courts. The following is list of key basic rights recognized by the courts.</p> <p>(a) Self-determination of gender and Identification as a third gender;¹²</p> <p>(b) Right to seek food security and to avail status of head of a household and laid down that under National Food Security Act, 2013;¹³</p> <p>(c) Protection against marginalization;¹⁴ and</p> <p>(d) Personal liberty to engage in voluntary sexual acts.¹⁵</p>
Is discrimination on the basis of identification as LGBTQIA+ person legal?	<p>No.</p> <p>Discrimination on the basis of an individual identifying themselves as LGBTQIA+ person is not legal. In fact, the Constitution clearly prohibits discrimination on the ground of sex. The term sex is read to include gender as well.</p>

¹² *NALSA v Union of India*, (2014) 5 SCC 438.

¹³ *Ashish Kumar Mishra v Bharath Sarkar*, 2015 KHC 2765.

¹⁴ *Shivani 'Shivy' Bhat v State of NCT of Delhi*, 2015 (4) JCC 2476.

¹⁵ *Navtej Singh Johar v Union of India*, (2018) AIR SC 4321.

Criminalisation of LGBTQIA+ community

Criminalisation of identity

Gender identity is an integral part of the personality and one of the most basic aspects of self-determination, dignity and freedom.¹⁶ The right to choose one’s gender identity is integral to the right to lead a life with dignity and therefore falls within the scope of the right to life.

Is identifying as LGBTQIA+ considered a crime in India?	No. The case of <i>NALSA v Union of India</i> ¹⁷ legally recognised the right of a transgender person to identify as a ‘third gender’.
Is identifying as LGBTQIA+ considered a crime in other countries?	Yes, in some countries. Reportedly, identifying as LGBTQIA+ is criminalized in 15 countries in the name of public order offences and/or under the guise of ‘cross-dressing’, ‘impersonation’, ‘disguise’ or ‘hooliganism’. ¹⁸
Is there any specific law in India for the protection of the rights of transgender persons?	Yes. The Transgender Persons Act was enacted for protection of rights of transgender people, establishing safeguards for their welfare, and other related matters.

Criminalisation of same-sex activity

Same-sex intimacy and relationships have been in different forms been criminalized across the world.

Is same-sex activity considered a crime in India?	No. Indian Penal Code, 1860 had criminalized consensual same-sex activity and sexual acts performed on animals by way of Section 377. Section 377 of the Indian Penal Code, 1860 was struck down as unconstitutional as far as consensual same-sex activity is concerned, by 5 judge bench of the Supreme Court in <i>Navtej Singh Johar v Union of India</i> ¹⁹ in 2018.
Is same-sex activity considered a crime in other countries?	Yes, in some countries. Reportedly, at least 69 jurisdictions criminalise private, consensual, same-sex sexual activity. ²⁰²¹
What is the penalty/consequence of same-sex activity in countries where it is considered a crime?	The penalty/consequence for same-sex activity in the countries where it is considered a crime ranges from imprisonment to death penalty. ²²

¹⁶ (2014) 5 SCC 438.

¹⁷ (2014) 5 SCC 438.

¹⁸ https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/?type_filter=crim_lgbt.

¹⁹ (2018) AIR SC 4321.

²⁰ https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/?type_filter=crim_lgbt.

²¹ http://internap.hrw.org/features/features/lgbt_laws/.

²² https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/?type_filter=crim_lgbt.

Community rights

| Marriage/ civil or domestic partnership/ civil union

Apart from social legitimacy, marriage accords a bundle of rights and benefits to a given couple. These include, for instance, right of succession and inheritance upon the death of the spouse,²³ and right of maintenance.²⁴ Further, certain entitlements, such as, privileged communication between the two spouses in a marriage are available to married persons under the Indian Evidence Act, 1872.²⁵ Moreover, live in heterosexual couples have been recognised by court as eligible for protection for domestic violence through court decisions²⁶. However, it remains to be seen whether the Indian judiciary would extend the same protection it affords to heterosexual couples to same-sex couples.

In terms of existing legislations, it is worthwhile to note that the laws governing marriage, divorce, succession, inheritance (personal laws) are diverse and religion-centric in India. The religion of the person who wishes to get married/divorced in India governs which personal law would apply. Following is an enumeration of the personal laws in force in India:

- Hindu Marriage Act 1955 (HMA)
- Indian Christian Marriage Act 1872 (CMA)
- Parsi Marriage and Divorce Act 1936 (PMDA)
- Muslim Personal Law (Shariat) Application Act, 1937 / Dissolution of Muslim Marriages Act, 1939. It may be noted however, that in case of Muslims, while some aspects of Muslim marriage are codified under these statutes, however, some aspects still remain uncoded and still are considered applicable to as 'rule of decisions' as per Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937
- Apart from the above-stated specific legislations pertaining to personal laws, a civil marriage can also be solemnized and registered between a male and female of any religion, under the Special Marriage Act, 1954 (SMA).

<p>Is same-sex marriage recognised in India?</p>	<p>No.</p> <p>While there is no express bar on same-sex marriage under the above-mentioned statutes, but at the same time, these statutes do not legitimize the same, i.e., recognize and allow the registration of marriage for a same-sex couple. The wording of these statutes is not in gender neutral terms, thereby creating issues in legitimizing marriage amongst the LGBTQIA+ community. For instance, while prescribing the conditions for marriage, the HMA, the CMA, the PMDA and the SMA, use terms like 'bride', 'bridegroom', 'male', 'female', which traditionally refer to a heterosexual couple.</p> <p>In this regard, it is pertinent to mention the case of <i>Arun Kumar v The Inspector General of Registration</i>,²⁷ where the Madras High Court held that a marriage solemnized between a male and a transwoman, both professing Hindu religion, is a valid marriage under Section 5 of HMA. The court held that the term bride mentioned in Section 5 will also include intersex and transgender person who identify themselves as woman.</p>
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²³ For intestate succession (succession in absence of a will), see, the Hindu Succession Act 1956, for Hindus, Sikhs, Buddhists and Jains; Muslim personal law for Muslims; Indian Succession Act 1925 for Christians and Parsis.

²⁴ See, for instance, Section 24, Hindu Marriage Act 1955; Section 18 Hindu Adoption and Maintenance Act 1956.

²⁵ See, Section 122, Indian Evidence Act 1872.

²⁶ *Indra Sarma v VKV Sarma*, (2013) 15 SCC 755.

²⁷ 2019 SCC OnLine Mad 8779.

	It remains to be seen whether this interpretation given by Madras High Court is espoused further and accepted by other courts of India.
Have courts in India recognized a same-sex couple's right to marry?	No. The courts in India have not recognised same-sex marriage as such. Pertinent to note that public interest litigations seeking recognition of same-sex marriage under the Special Marriage Act, Foreign Marriage Act and Hindu Marriage Act were pending before various High Courts in India. As of 6 January 2023, all such cases have been transferred to the Supreme Court and bunched together in the matter of <i>Supriyo @ Supriya Chakraborty v Union of India</i> . ²⁸
Are same-sex couples allowed to marry in other parts of the world?	Yes, in some countries. More than 30 countries in the world have legalized marriages between same-sex couples through legislations/ court precedents. These include: Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Denmark, Ecuador, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, Mexico, Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, Switzerland, Taiwan, United Kingdom, United States, Uruguay. ²⁹ However, identifying as LGBTQIA+ is still illegal in several countries, with some countries even prescribing the death penalty for homosexuality.

| *Live-in / Co-habitation*

Can same-sex couples be in a live-in relationship?	After the decision of the Supreme Court in <i>Navtej Singh Johar</i> and the striking down of Section 377 of the Indian Penal Code, 1860 to the extent it criminalized consensual same-sex activity, it appears that High Courts have recognised that a person has a right to have a live-in relationship with a person of his / her choice even though such a person may belong to the same gender. The High Courts have recognized this right of live-in / cohabitation as a part and parcel of right to liberty under Article 21 of the Constitution. ³⁰
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²⁸ Writ Petition (Civil) no. 1011 of 2022 in Supreme Court.

²⁹ This is basis information available in the public domain, for instance: <https://www.hrc.org/resources/marriage-equality-around-the-world> <https://worldpopulationreview.com/country-rankings/countries-where-gay-marriage-is-legal>.

³⁰ *Chinmayee Jena v State of Orissa*, 2020 SCC OnLine Ori 602; *Paramjit Kaur and Another v State of Punjab*, 2020 SCC OnLine P&H 994; *Madhubala v State of Uttarakhand*, 2020 SCC OnLineUtt 276; and *Salamat Ansari v State of UP*, 2020 SCC OnLine All 1382.

| Adoption and related rights

– Adoption rights and other reproduction rights like assisted reproductive technology (ART)

- Adoption is the process through which the adopted child is permanently separated from his biological parents and becomes the lawful child of the adoptive parents acquiring all the rights, privileges and responsibilities that are available to a biological child. With respect to adoption, the governing principle remains, the notional standard of ‘best interest of the child’.
- Adoption in India is monitored and regulated by Central Adoption Resource Authority (CARA) a statutory body of the Ministry of Women and Child Development, Government of India.³¹
- Two primary legislations govern adoption in India. The Hindu Adoption and Maintenance Act, 1956 governs adoptions by Hindu. The Juvenile Justice Care and Protection of Children Act, 2015 and the Adoption Regulations, 2017³² provide for a secular framework and permits adoption by all Indian citizens, OCIs, NRIs and foreigners irrespective of religion.
- With respect to adoption from other countries, India is also a signatory to the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption governing inter-country adoptions.³³

Can an Indian same-sex couple adopt a child together in India?	<p>No.</p> <p>As per the Adoption Regulations, 2017, a couple can adopt a child together provided they have been married for a period of two years. Since a marriage between the same-sex couple is not legally recognised, same-sex couples cannot adopt a child together in India.</p>
Can an Indian LGBTQIA+ person adopt a child in an individual capacity in India?	<p>A single person identifying as female / male can adopt a child in an individual capacity in India.</p> <p>As per the Adoption Regulations, 2017, a single female is eligible to adopt a child of any gender and a single male can only adopt a male child. The eligibility criteria for prospective adoptive parents does not expressly prohibit homosexual or bisexual individuals from adopting in an individual capacity. However, the adopted child will be deemed as the biological child of only the adoptive parent and no rights will flow from the partner of the adoptive parent.</p> <p>Further, basis a plain reading of the law, whereas a single female and a single male are eligible to adopt individually, it is presently unclear whether a transgender person is eligible to adopt under the Adoption Regulations, 2017. When it comes to adoption, CARA is the certifying authority that will ultimately scrutinize the adoption applications.</p>
Can an Indian same-sex couple adopt a child together from countries other than India?	<p>As per Hague Convention on Adoption, an intercountry adoption shall take place only after the competent authority in the receiving state (India) has determined that the prospective adoptive parents are eligible and suitable to adopt. Since, same-sex couples cannot adopt a child together in India, CARA will not deem the prospective adoptive parents eligible to adopt a child from another country.</p>
Can an Indian LGBTQIA+ individual adopt a child in individual capacity from	<p>Maybe, yes.</p> <p>Since certain LGBTQIA+ individuals like homosexual and bisexuals are eligible to adopt a child from India in an individual capacity, it is possible for those LGBTQIA+ individuals to adopt a child from another</p>

³¹ <http://cara.nic.in/>.

³² http://cara.nic.in/PDF/Regulation_english.pdf.

³³ <https://www.hcch.net/en/instruments/conventions/full-text/?cid=69>.

countries other than India?	country provided the adoption laws of other countries permit the same.
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– **Reproduction rights like surrogacy**

ART means techniques and attempts to achieve a pregnancy by handling the sperms and eggs outside the body and transferring an embryo into a reproductive system of a woman. This includes freezing eggs, Intra Uterine Inception (IUI), In-vitro fertilization (IVF), sperm donation, surrogacy etc. (ART services).

India has recently introduced new legislations to govern surrogacy and assisted reproductive technologies. The Assisted Reproductive Technology (Regulation) Act, 2021³⁴ (ART Act) aims to regulate and supervise assisted reproductive technology services, prevent misuse and promote ethical practice, while the Surrogacy (Regulation) Act, 2021³⁵ (Surrogacy Act) governs surrogacy in India.

Can same-sex couples use ART services in India?	No. The ART services can be availed by a commissioning couple. The term commissioning couple has been defined as an infertile married couple. Since same-sex couples are not legally allowed to marry, they cannot avail ART services.
Can same-sex couples have child via surrogacy in India?	No. The Surrogacy Act only permits an Indian couple and an Indian widow or divorcee woman between the age of 35 to 45 years to avail surrogacy. Importantly, the term couple has been defined as a legally married Indian man above the age of 21 years and woman above the age of 18 years who do not have any surviving child either biologically or via surrogacy or adoption. As such same-sex couples are not eligible to have a child in India via surrogacy.
Who can donate semen and eggs?	As per Section 27 of ART Act, the ART banks can obtain semen from males between 21 years of age and 55 years of age, both inclusive. ART banks can obtain oocytes from females between twenty-three years of age and thirty-five years of age. An oocyte donor shall donate oocytes only once in her life and not more than seven oocytes shall be retrieved from the oocyte donor.
Who can be a surrogate?	Only a married woman having a child of her own and between the age of 25 to 35 years on the day of implantation, is eligible to be a surrogate mother or help in surrogacy by donating her egg or oocyte.

³⁴ <https://dhr.gov.in/document/acts-circulars/assisted-reproductive-technology-regulation-act-2021>.

³⁵ <https://dhr.gov.in/document/acts-circulars/surrogacy-regulation-act-2021>.

Overview of the Transgender Persons (Protection of Rights) Act 2019

In the NALSA judgement, the Supreme Court obligated the government to take steps to address the problems being faced by the transgender community and to frame social welfare policies for their benefit. In furtherance of this, the Transgender Persons Act was enacted. The Transgender Persons Act establishes a framework for a transgender person to be recognized as such in accordance with the statute and provides the right to self-perceived identity of a person.

<p>Who is a 'transgender' under the Transgender Persons Act?</p>	<p>"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 <i>kinner</i>, <i>hijra</i>, <i>aravani</i> and <i>jogta</i>.</p>
<p>What are the rights granted under the Transgender Persons Act?</p>	<p><u>Identity</u>: The Transgender Persons Act provides for the recognition of the identity of a transgender person. It provides primarily two rights, i.e., right to be recognised as transgender and the right to self-perceived gender identity.</p> <p><u>Prohibition against discrimination</u>: The Transgender Persons Act provides for the prohibition of discrimination against transgender persons. It provides nine grounds on which persons cannot be discriminated against. These include unfair treatment or denial of education, employment opportunities, healthcare services, right to use goods and facilities customarily available for public use, right to movement, right to reside or occupy any property, opportunity to stand for or hold public or private office, and access to government or private establishment in whose care a transgender person may be. Importantly, the Transgender Persons Act provides for some of the following rights:</p> <p><u>Right of residence</u>: Every transgender person shall have a right to reside and be included in their 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.</p> <p><u>Employment</u>: No establishment can discriminate against a transgender person in employment matters, including recruitment, and promotion.</p> <p><u>Education</u>: Educational institutions funded or recognised by the government shall provide inclusive education, sports and recreational facilities for transgender persons, without discrimination.</p> <p><u>Health care</u>: The government must take steps to provide health facilities to transgender persons including separate HIV surveillance centres, and sex reassignment surgeries.</p>
<p>What are the different certificates prescribed under the Transgender Persons Act?</p>	<p><u>Certificate of identity for transgender persons</u>: Section 5 of the Act enables a transgender person to make an application to the District Magistrate for issuing a certificate of identity as a transgender person under the Transgender Persons Act. In the case of a minor child, their parent or guardian shall make the application. Once the certificate has been issued, the gender shall be recorded accordingly in all official documents of such transgender person. This certificate is especially important since it is upon its issuance that a person shall be conferred the rights under the Transgender Persons Act.</p> <p><u>Certificate of identity for change of gender</u>: After obtaining a certificate under Section 5 of the Transgender Persons Act, if a transgender person undergoes surgery to change gender either as male or female, such person can make an application to the District Magistrate for a revised certificate with the gender of the person. The person issued this certificate is entitled</p>

	to change the first name in their birth certificate and other official documents relating to their identity.
What is the process of obtaining a certificate under the Transgender Persons Act?	<p><u>Certificate of identity for transgender persons:</u> The procedure for the issue of a certificate of identity is given under Rules 3 and 4 of the Transgender Persons (Protection of Rights) Rules, 2020 (Transgender Persons Rules). Any transgender person can make an application in Form-1 given in the Transgender Persons Rules, which must be submitted to the District Magistrate in person or by post. Once the application has been made, the District Magistrate shall issue the certificate of identity within 30 days, based on the application, the affidavit attached, and the report of the psychologist, without any medical examination. The District Magistrate shall issue the certificate of identity in Form-3 of the Transgender Persons Rules, indicating the gender of such person as transgender. The gender shall be recorded accordingly in all official documents illustrated in Annexure-1 of the Transgender Persons Rules. Any official document reflecting the changed gender will have the same serial or reference number as in the original one.</p> <p><u>Certificate of identity for change of gender:</u> The procedure is given under Rule 6 of the Transgender Persons Rules. If a transgender person undergoes a gender affirming medical intervention, they may apply to the District Magistrate for a revised certificate in the Form-1 of the Transgender Persons Rules, along with a certificate issued by the Medical Superintendent or Chief Medical Officer of the medical institution where that person has undergone surgery. Based on these documents along with the surrender of the transgender identity card, the District Magistrate after review, shall issue the revised certificate within 30 days indicating gender change in Form-4 of the Transgender Persons Rules. Any official document reflecting the changed gender will have the same serial or reference number as in the original one.</p>
Is there any statutory welfare association or body for transgenders?	As per Section 10 (1) of the Transgender Persons Rules, 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. However, presently not all states have established welfare boards.
What is the punishment for non-compliance/violation of the Transgender Persons Act?	Whoever violates the provisions or goes against their obligations as prescribed under the Act or forces, denies or in any way harms transgender persons which would ultimately result in taking away their recognition, such person shall be punishable with imprisonment for a term not less than six months which may extend to two years with fine.
What are the actions required to be undertaken by private companies under the Transgender Persons Act?	<p>The Transgender Persons Act is applicable to establishments including any company or body corporate or association or body of individuals, firm, cooperative or other society, association, trust, agency, or institution. This means that even private companies must comply with the provisions of the Act. In lieu of this, companies must adopt the following policies:</p> <ul style="list-style-type: none"> • Non-discrimination in employment and other related issues; • Compliance with the statute and provision of such facilities to transgender persons as may be prescribed; and • Setting up a grievance redressal mechanism by designating a complaint officer to deal with the complaints relating to violations of the provisions of the statute.

While the Transgender Persons Act and the rules thereunder have been brought into force, some of the provisions like setting up of welfare boards, transgender protection cell and grievance officer positions are subject to implementation by appropriate government/establishments. Presently, the Transgender Persons Act has been challenged before the Supreme Court as being unconstitutional in the case of *Swati Bidhan*

Baruah v Union of India.³⁶ Writ petitions have been filed with the Supreme Court to strike down Sections 4, 5, 6, 7, 12(3), 18(a) and 18(d) of the Transgender Persons Act. The matter is sub judice at the moment.



³⁶ WP(C) 51 of 2020.

Summary of key judicial precedents³⁷

Fundamental rights

[NALSA v Union of India \(Supreme Court\)](#)³⁸

Facts: The National Legal Services Authority filed a writ petition in the Supreme Court to advocate the cause of transgender community contending that the lack of legal recognition of self-identified gender violates the fundamental rights. The issue before the court was twofold: (i) whether recognition should be given to the self-identified gender of a person that is different from the gender assigned at birth; and (ii) whether the gender identity of people who do not identify as either male or female should be legally recognized as the third gender.

Judgement: In April 2014, a two-judge bench (Justices Radhakrishnan and Sikri) rendered their decision. On the first issue, the Court held that recognition should be given to the self-identified gender of a person that is different from the gender assigned at birth. On the second issue, the Court held that, "Hijras/Eunuchs, have the right to be legally identified as third gender, over and above binary genders under our Constitution and the laws." The Court declared that "no one shall be forced to undergo medical procedures, including SRS, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity." Finally, the Court held that the Constitution's provisions are gender-neutral and include transgender people in their protection. Additionally, discrimination based on gender identity is now included in the prohibition on discrimination based on 'sex' under Articles 15 and 16 of the Constitution. The Court ultimately adjudged that the state has an obligation to protect and recognize the "fundamental rights of transgenders to privacy, self-identity, autonomy and personal integrity". The petitioners were awarded a bevy of remedies in light of these findings. The Court ordered the central and the state governments to follow directions that were at once detailed (offer healthcare centres), wide (raise public awareness to promote social inclusion), and—unfortunately—vague (handle transgender people's difficulties and secure a respectable position in social and cultural life).

Comment: NALSA judgement explicitly recognises the constitutional rights of the transgender community and has opened the doorway for a series of progressive judgements.

[Justice KS Puttaswamy v Union of India \(Supreme Court\)](#)³⁹

Facts: Justice KS Puttaswamy (retd.) contested the constitutionality of the AADHAAR scheme for infringing on the right to privacy. A nine-judge bench decided on the presence of right to privacy under the Constitution.

Judgement: The Supreme Court held that privacy was intricately linked with dignity and read it within the scope of fundamental rights under Article 21 of the Constitution. Further, the Court held that the sexual orientation of a person falls within the ambit of right to privacy which in turn is derived from Article 21. The Court held that the identity of all individuals must be protected without discrimination because sexual orientation is an essential component of one's identity. The Court referred to the NALSA judgement, which had upheld the right to self-determination of gender. It also struck down the *Suresh Kumar Koushal v Naz Foundation*⁴⁰ judgement and ruled that a fundamental right cannot be curtailed merely because of a majoritarian view.

Comment: The Supreme Court held right to privacy to be a fundamental right as an intrinsic part of right to life and liberty under Article 21. Further, by recognizing sexual orientation protected under the right to privacy, the Court paved the way for the landmark judgement in *Navtej Singh Johar v Union of India*.⁴¹

³⁷ It may be noted that as per Article 141 of the Constitution, the law declared by the Supreme Court is binding on all courts within the territory of India, whereas as per Article 227 of the Constitution, the High Court is vested with the power of superintendence over the courts and the tribunals in the concerned state. The case law discussion in this compendium may be reviewed accordingly.

³⁸ (2014) 5 SCC 438.

³⁹ (2017) 10 SCC 1.

⁴⁰ (2014) 1 SCC 1.

⁴¹ (2018) AIR SC 4321.

Navtej Singh Johar v Union of India (Supreme Court)⁴²

Facts: Section 377 of the Indian Penal Code, 1860 criminalized consensual sexual relations between adults of the same-sex. A collective of LGBTQIA+ individuals filed a writ petition, challenging the constitutionality of the section.

Judgement: The Court unanimously held Section 377 as unconstitutional in so far as it criminalised sexual activity between two consenting adults. The Court held that rights must be read expansively and progressively. The Court further held that Section 377 to the extent it criminalised consensual same-sex activity violated the right to equality, as it discriminated against the LGBTQIA+ community. Further, it held that Section 377 was arbitrary, as it did not distinguish between consenting and non-consenting sexual activity.

The Court held that the members of the LGBTQIA+ community have the right to express their sexual orientation freely without any fear. It recognised same-sex sexuality as natural. It held that sexual activities between people belonging to the same-sex do not violate public order, decency, and morality. Since the act of sexual intercourse is private in nature, there arises no question of it violating public order, decency, or morality. Sexual acts cannot be seen purely from the lens of procreation and must be viewed as a form of expression. The Court held that Section 377 to the extent it criminalised consensual sexual conduct between adults of the same sex, violated human dignity, decisional autonomy, and privacy; as it prohibited persons from undertaking consensual sexual activity. Section 377 prevented members of the LGBTQIA+ community to fully realise their personhood. The Court further held that the right to privacy includes sexual privacy, and that one has the right to determine their sexual orientation.

The Court argued that when deciding questions of morality, the Court should be directed by constitutional principles and not social morality. The Constitution seeks to create an egalitarian and inclusive society, and thus morality must be interpreted to be progressive, inclusive, and egalitarian.

Comment: This landmark judgment finally decriminalized same-sex relations between consenting adults and is a triumph for LGBTQIA+ advocacy in India.

Soumya Majumder v Kallol Basu (Calcutta High Court)⁴³

Facts: The petitioner contended that the respondent organisation's internal committee as constituted under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, acted without jurisdiction when it took cognizance of a complaint of sexual harassment against the petitioner, despite the fact that both of them are of the same gender.

Judgement: The Court took cognizance of the ground realities and observed that people of the same gender can and do complain of sexual harassment against each other. An aggrieved woman can accordingly file a complaint of sexual harassment against another person of the same gender.

Comment: To the extent that the judgment clarifies that an aggrieved woman can file a complaint of sexual harassment against another woman, the judgment is aligned with the letter of the law. However, it appears that the judgment goes beyond the above-mentioned principle (of a woman being the aggrieved person under the law) to even hold that as per the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, "a person of any gender may feel threatened and sexually harassed". The law specifically deals with complaints of sexual harassment filed by women. In other words, while the respondent can belong to any gender, the complainant must be a woman.

⁴² (2018) AIR SC 4321.

⁴³ W.P.A. 9141 of 2020,

| Marriage and live-in relationships

[Supriyo @ Supriya Chakraborty v Union of India \(Supreme Court\)](#)⁴⁴

Facts: In this case, the petitioners have moved the Supreme Court for recognition of same-sex marriage.

Judgement: This matter is currently sub-judice. Notably, by way of its order dated 6 January 2023, the Supreme Court directed that since several writ petitions are pending on the same issue before various High Courts, the same shall stand transferred to and decided by the apex court. As such, with the present public interest litigation, 9 other writ petitions shall be heard by the Supreme Court.

Comment: While the matter continues to be sub judice, the outcome of the case would have noteworthy impact on the jurisprudence of same-sex marriages in India.

[Madhu Bala v State of Uttarakhand \(High Court of Uttarakhand\)](#)⁴⁵

Facts: Madhu Bala and Meenakshi were in a lesbian live-in relationship. Meenakshi's parents disapproved of the relationship and detained her. Madhu Bala filed a *habeas corpus* petition against Meenakshi's family, the detainers.

Judgement: The Court held that same-sex live-in relationships are legal, even if marriage is not statutorily recognized between the parties. The fundamental right to liberty under Article 21 of the Constitution includes the right to choose one's partners and cohabit with them. The Court also ordered the police to ward off any untoward pressure the detenu might be facing from their family to marry a man. Lastly, the Court decided that these cases would be decided solely based on the statement of the detenu on whether they were being illegally detained or not. However, the Court held that the statement was to be made in the presence of the detainers.

Comment: The final holding of the Court, regarding the statement to be made in the presence of the detainers, dilutes the progressive significance of the judgement. Claiming that one is being detained in the presence of one's detainers, who are also family members, poses hurdles for LGBTQIA+ litigants. As was visible even in this case, the initial statement by Meenakshi was that she was being illegally detained; however, when asked to make the same statement in the presence of her family, she claimed the contrary and stated that she was not being detained.

[Chinmayee Jena @ Sonu Krishna Jena v State of Odisha \(Odisha High Court\)](#)⁴⁶

Facts: Sonu Jena, the petitioner, was a transgender man (assigned female at birth), who had been living consensually with his partner Rashmi (a woman). Rashmi's mother and uncle, the respondents in this case, took Rashmi away without her consent and coerced her into an arranged marriage with another person. Sonu Jena reported the incident to two different local police officials but received no response and subsequently submitted an application for a *habeas corpus* writ before the Court.

Judgement: The Court was faced with the question of whether or not Sonu Jena had the right to self-determination of sex and gender and to have a live-in relationship with a person of his choosing, regardless of whether or not that person belongs to the same gender. The Court relied on the *NALSA* judgement and affirmed the freedom of individuals to self-determine their gender is an essential component of personal autonomy and self-expression. The Court also cited the decision in *Navtej Singh Johar* and held that the criminalization of consensual same-sex relations is a violation of Articles 14, 15, 19, and 21 of the Constitution of India, and that LGBTQIA+ persons are entitled to a full range of constitutional rights, the most important of which is the freedom to choose one's partner. Therefore, the Court explicitly affirmed that the couple has the right to remain as live-in partners as consenting adults.

Comment: In a novel move, Indian judiciary for the first time explicitly recognized the rights of transgender people to enter a live-in relationship and cohabit with the partner of their choice regardless of the 'gender' of the partner.

⁴⁴ Writ Petition (Civil) 1011 of 2022.

⁴⁵ 2020 SCC OnLine Utt 276.

⁴⁶ 2020 SCC OnLine Ori 602.

Indra Sarma v VKV Sarma (Supreme Court)⁴⁷

Facts: The petitioner a heterosexual woman filed an application under the Protection of Women from Domestic Violence Act, 2005 seeking a protection order against the respondent a heterosexual man, with whom she was in a live-in relationship.

Judgement: While the live-in relationship in the instant case was between a man and a woman, the Court noted that the Domestic Violence Act, 2005 does not recognise the relationship between same-sex partners and that the same-sex relationship cannot be termed as a relationship in the nature of marriage under the law (note that the expression 'relationship in the nature of marriage' has been included in the statute to deal with cases of domestic violence between live-in partners).

Comment: Even though the subject-matter before the apex Court was not a live-in relationship between a same-sex couple, the observations of the Supreme Court in this regard as discussed above are cited by various Courts till this day to highlight how the legislative framework falls short of acknowledging the on-ground realities faced by LGBTQIA+ persons.

Paramjit Kaur v State of Punjab (High Court of Punjab and Haryana)⁴⁸

Facts: The petitioners were in a live-in lesbian relationship and were receiving threats from their family members. Subsequently, they approached the Court seeking protection for their lives and liberty.

Judgement: The Court adjudged that irrespective of the nature and details of the relationship that the petitioners had, they had the right to be protected with respect to life and liberty under Article 21 of the Constitution. The legitimacy or criminality of their relationship was of no consequence to their right to being protected.

Comment: This judgement asserted that the nature of the relationship does not need to be delved into for protection to be afforded under Article 21 of the Constitution.

⁴⁷ (2013) 15 SCC 755.

⁴⁸ 2020 SCC OnLine P&H 994.

Recognition of identity

[Mulla Faizal v State of Gujarat \(High Court of Gujarat\)⁴⁹](#)

Facts: The petitioner, Mulla Faizal, was born with underdeveloped external genitals and was registered as a female. He was later certified to be a male upon diagnosis and underwent operations to align with the male gender. The petitioner's parents made an application for issuance of a fresh birth certificate to him with corrections in entry regarding his sex. The District Registrar stated corrections in the birth certificates can only be made in case of an error and not in the case of petitioner where the petitioner's correction was because of a change in sex through operation. The petitioner argued that the operations were not for change in sex, and he was naturally born as a male but with deformity.

Judgement: The Court concurred with the petitioner, noting that Section 15 of the Registration of Births and Deaths Act, 1969, read with the rules thereunder, required the Registrar to undertake any required revisions to amend an incorrect entry.

Comment: This case predates NALSA wherein the Court recognized an individual's right to self-identified gender.

[Jayalakshmi v State of Tamil Nadu \(Madras High Court\)⁵⁰](#)

Facts: Pandian, a transgender woman, was subject to police questioning for being a suspect in a theft case. A month later, Pandian revealed to her sister, Jayalakshmi, that the police had routinely sexually and physically assaulted her. Upon intervention by her family, the family members were all criminally intimidated, harassed, and tortured. Pandian threatened to immolate herself if this were to continue, and when nothing changed, she set herself on fire. Even in the hospital, she was being coerced to sign a statement of attempted suicide and shortly thereafter she died. Jayalakshmi filed a writ petition, arguing that Pandian committed self-immolation upon the instigation of the respondents and was repeatedly sexually and physically abused. The respondents contended absence of any police atrocity.

Judgement: The Court decided that this was a case of custodial violence and held that Pandian's suicide was caused by sexual and physical harassment by the police.

Comment: While transgender issues were not directly raised in the judgement, the significance of the judgement is that the gender identity of the victim was respected by the Court and that the linkage between custodial harassment and the victim's gender identity was taken cognizance of.

[Ganga Kumari v State of Rajasthan \(Rajasthan High Court\)⁵¹](#)

Facts: Ganga Kumari had applied for the post of a woman constable. She cleared all her tests, but during the medical examination, she was labelled a hermaphrodite. Subsequently, her appointment was not confirmed. She filed a writ petition to have her appointment confirmed.

Judgement: The Rajasthan High Court differentiated between sex and gender and held that unless the job required information of the sex of the person, the field should be labelled "gender". It upheld a person's right to self-identify their gender and held that medical examinations, by asking candidates to disclose their gender identity, amounted to a violation of the person's right to privacy. It also upheld expression of gender identity as a part of freedom of speech.

Comment: The judgement gave Rajasthan its first transgender police officer. The Court held gender identity as a part of an individual's right to privacy. The Court also differentiated between sex and gender.

[Ms X v State of Uttarakhand \(High Court of Uttarakhand\)⁵²](#)

Facts: The petitioner was a transgender woman who had previously gone through the process of gender confirmation surgery. She was sexually assaulted and threatened with blackmail by the accused, and as a

⁴⁹ MANU/GJ/1098/2000.

⁵⁰ MANU/TN/8598/2007.

⁵¹ 2017 (4) WLN 554 (Raj.).

⁵² AIR 2019 Utt 138.

result, she filed an FIR against the accused under Section 376 of the Indian Penal Code, 1860 (criminalising the rape of a woman). Despite this, the investigating officer turned in the charge sheet under Section 377. On the basis of her biological sex, the state contended that the petitioner should not be considered female, but rather a male.

Judgement: The issue before the Court was whether the petitioner could self-identify her gender for the purposes of criminal statutes dealing with sexual violence, and whether the test to establish gender should be 'biological' or 'psychological.' The Court based its decision on the *NALSA* judgement, in which the Supreme Court had supported the 'psychological test' rather than the 'biological test.' The Court decided that the determination of a person's gender and sexuality, including for the purposes of laws such as the Indian Penal Code, 1860, had to be based on the 'psyche' of the individual and how they felt, rather than any biological factor. As the police officials had disregarded the ruling of the Supreme Court and relied on a 'biological test', the state, the Senior Public Servant, and the Investigating Officer were severely reprimanded by the Court. The Court upheld the "psychological" test and held that the petitioner should be considered as a female in every context.

Comment: The judgement is notable since it is one of the first decisions that supported the right to self-determination based on the "psyche" of the person, even in the context of criminal law and disregarded 'medical' or 'biological' procedures for identifying a person's gender.

[Arun Kumar v The Inspector General of Registration \(Madras High Court\)](#)⁵³

Facts: The petitioner, Arun Kumar, married Sreeja (a transgender woman) having followed all the necessary rites per Hindu customs. However, the District Registrar refused to confirm the registration of their marriage. The petitioner challenged this before the Madras High Court.

Judgement: Citing the *NALSA* case, the Court upheld the right of transgender women to self-identification and held that the term 'bride' under Hindu family law includes trans-women as well. The Court relied extensively on the *NALSA* judgement, linked the right to be recognised as a 'bride' to the right to privacy, equality, and autonomy, finally holding that refusal to register the marriage would amount to a violation of Ms. Sreeja's fundamental rights under Articles 14, 19(1)(a), 21 and 25 of the Constitution. Thus, the decision of the District Registrar was overturned.

The Court also addressed issues relating to sex reassignment surgeries (SRS) and Intersex Genital Mutilation (IGM). The Court ruled that the consent of a parent (to subject a transgender child to "corrective" surgeries) cannot be considered as the consent of the child, further holding that no one may be forced to undergo medical procedures for legal recognition of their gender identity. The Court further directed the Government of Tamil Nadu to ban these procedures against intersex infants.

Comment: Transgender persons' right to marriage was affirmed for the first time through the trans-inclusive interpretation of 'bride' as including transgender persons who self-identify as women.

[Anjali Guru Sanjana Jaan v State of Maharashtra \(High Court of Bombay\)](#)⁵⁴

Facts: The petitioner, a transgender woman, had her nomination form for village panchayat elections rejected on grounds that there was no reservation for transgender category in the village election. The petitioner decided to contest the election from the ward reserved for women-general category basis her self-identification as a woman. The state submitted that it would not make arguments against the *NALSA* judgement.

Judgement: The Court noted that the *NALSA* judgement recognized the rights of transgender persons to have a right to their self-identified gender under Articles 14, 15, 16, 19 and 21 of the Constitution. The legal recognition of gender identity is a part of the right to dignity and freedom guaranteed under the Constitution. The Court remarked that the petitioner had given in writing that she would not change over to male gender and set aside the impugned order, accepting the nomination form of the petitioner.

⁵³ AIR 2019 Mad 265.

⁵⁴ 2021 SCC Online Bom 11.

Comment: While the Court re-affirmed the principles of dignity and self-identity, its special focus on the statement of the petitioner to “not switch over to the male gender” is reflective of the difficulties transgender persons have to face in securing the benefits of affirmative action policies.

Kantaro Kondagari v State of Odisha (Odisha High Court)⁵⁵

Facts: The petitioner’s mother, who was receiving her late husband’s government pension, passed away in 2020. The petitioner, a transgender woman, thereafter, submitted an application for a family pension in accordance with Rule 56 of the Odisha Civil Services (Pension) Rules, 1992, according to which a family pension can be paid to an unmarried daughter even after she reaches the age of 25, as long as she does not marry or pass away before receiving the payment. The petitioner and her sister argued that they are qualified for the aforementioned pension since they both fall into the ‘unmarried daughter’ category. The authorities first approved their application, even though they were fully aware of the petitioner’s gender identification at the time. Despite this, the pension was never approved nor paid out on time. The petitioner claimed that they had been discriminated against simply for being a transgender person, and that such conduct of the authorities was in gross violation of the pension rules and the Transgender Persons (Protection of Rights) Act, 2019.

Judgement: The Court held that the petitioner as a transgender had every right to choose their gender and accordingly, they had submitted their application for grant of family pension. The Court again cited the *NALSA* case to support its ruling that the petitioner must be recognised as a daughter if that is her preferred gender identity. Thus, the petitioner’s claim was upheld.

Comment: The Court held in strong terms that a transgender person has every right to choose their gender. This was an unequivocal and clear expression of the right to self-determination.

Hina Haneefa v State of Kerala (High Court of Kerala)⁵⁶

Facts: Hina Haneefa, a transwoman, was denied enrolment in National Cadet Corps (NCC) Girls Division on the ground of being a transgender. Hina had previously undergone SRS and was issued a transgender identity card stipulating her gender as female in accordance with the Transgender Persons (Protection of Rights) Act, 2019.

Judgement: The Court ruled that Transgender Persons (Protection of Rights) Act, 2019 trumps the National Cadet Corps Act, 1948 and held Hina to be eligible for enrolment in the NCC Girls Division. The Court in this case rejected the State of Kerala’s objections contending that Armed Forces and NCC are “gender specific” organisations and including transgender within the gender specific roles would have “serious undesirable consequences.” In its objections, the state contended that trans-women in a girl’s unit would have an unfair advantage over other girls.

Comment: While the Court upheld Hina’s right to be enrolled in the NCC Girls Division, one of the rationales supporting the reasoning was that Hina had undergone SRS aiding her self-perceived gender identity. This rationale goes contrary to the Supreme Court’s holding in *NALSA* where the Supreme Court pronounced that “psychological test” should be followed instead of the biological test for recognition of gender identity.

Anamika v State of Kerala (High Court of Kerala)⁵⁷

Facts: Anamika, a sports enthusiast and a transwoman, had undergone sex reassignment surgery. Anamika always participated in various sports activities under the transgender category but was denied participation in district level judo competition because there was no transgender category.

Order. The case is pending at the Kerala High Court, but the court has passed an interim order wherein it has held that in the absence of a specific transgender category, the petitioner should be permitted to participate in the women’s category as the petitioner identifies as a woman.

Comment: This is a welcome move for enabling participation in sports by the transgender community in the gender category of their choice when there is no specific transgender category.

⁵⁵ Writ Petition (Civil) Number 4779 of 2022.

⁵⁶ Writ Petition (Civil) 23404 of 2020.

⁵⁷ Writ Petition (Civil) 24571 of 2022.

Social protection

[Shivani 'Shivy' Bhat v State of NCT of Delhi \(Delhi High Court\)](#)⁵⁸

Facts: Shivy, an NRI transgender man from the United States, was visiting his family who seized his travel documents and harassed and assaulted him in an attempt to “cure” him. Shivy managed to get the help of a local NGO, which was then harassed by the police.

Judgement: The Delhi High Court identified this as an instance of marginalisation of the transgender community. The Court reiterated the law laid down in the *NALSA* judgement and held that gender identity and sexual orientation are protected under the right to self-determination, dignity, and freedom. Shivy was guaranteed safe passage back to the United States, and the Court ordered the state to ensure that the harassment of the NGO’s workers stops.

Comment: The judgement is significant as it provided protection to a transgender individual against all forms of marginalisation including from both his family and the police. However, this judgement though progressive, misgenders Shivy as “she”.

[S Sushma v Commissioner of Police \(Madras High Court\)](#)⁵⁹

Facts: The petitioners were a lesbian couple who, having faced opposition from their family, fled from their respective houses. Thereafter, FIRs were registered by their families on account of them being missing. Apprehending harassment from the police, the petitioners approached the Madras High Court seeking a direction for protection from harassment.

Judgement: The Court directed that “the police, on receipt of any complaint regarding girl/woman/man missing cases which upon enquiry/investigation is found to involve consenting adults belonging to the LGBTQIA+ community, shall upon receipt of their statements, close the complaint without subjecting them to any harassment”. While passing these orders (and connected directions), the Court noted that it is no longer *res integra* that Article 21 of the Constitution inherently recognises and ensures to all individuals, “complete autonomy over the most intimate decisions to their personal life, including their choice of partners” and that LGBTQIA+ individuals are entitled to privacy and a dignified existence. With this, the High Court directed numerous sensitization measures to be taken by various ministries and departments and directed the Central and the state governments to file their respective reports indicating compliance with the directions. The directions include orientation programmes for the police personnel to help them navigate through the Transgender Persons (Protection of Rights) Act, 2019 and similar awareness sessions to be conducted by NGOs which can apprise the officials about the on-ground challenges faced by LGBTQIA+ community vis-à-vis law enforcement agencies.

Comment: The Court recognised one of the most fundamental needs of the enforcement regime in India - sensitization. It also, very importantly, acknowledged how the law and the society influence each other to bring transformation in the way certain vulnerable sections of society are perceived. The directions laid down by the High Court are commendable, although there is little clarity on the progress made by the relevant governments towards compliance with the same.

⁵⁸ 2015 (4) JCC 2476.

⁵⁹ (2021) 5 MLJ 9.

| Employment

[Shanavi Ponnusamy v Ministry of Civil Aviation \(Supreme Court\)](#)⁶⁰

Facts: The candidature of the petitioner, a transgender, for the position in the cabin crew was rejected by Air India allegedly by reason of her gender identity. Notably, the petitioner had already been serving Air India as part of its customer support team. During this time, she underwent a sex reassignment surgery and became a woman. Thereafter, when Air India launched its recruitment drive for a post in the cabin crew, the petitioner applied for the same in the female category. However, she could not make it to the selected candidates' list allegedly on account of being a transgender.

Judgement: The Supreme Court passed an interim order on 8 September 2022 directing the Central Government to come out with a suitable policy on employment of the third gender and to respond to the Supreme Court in this regard in 3 months.

Comment: The Supreme Court's observations assume immense relevance as these have been rendered against the backdrop of the Transgender Persons (Protection of Rights) Act, 2019, which requires the appropriate government to take steps to secure full and effective participation of transgender persons and their inclusion in society.

⁶⁰ Writ Petition (Civil) Number 1033 of 2017.

Conclusion

Several academics and judges have written on ancient India's acceptance of transgender persons.⁶¹ During India's colonial rule, however, this attitude changed and there was a drastic shift in India's outlook to LGBTQIA+ community.⁶² One of the glaring illustrations of this could be found in the colonial era laws of India like Section 377 of the Indian Penal Code 1860 and chapter 2 of the Criminal Tribes Act 1871, which blatantly took away the basic rights of LGBTQIA+ persons. To sum up, pre-independence and for the longest time post-independence India has grappled with letting go of prejudices formed against the LGBTQIA+ community.

The stance of the Indian judiciary in recognizing that the 'LGBTQIA+ community has been denied of what has been rightfully theirs' has moved the wheels in the right direction. Recently, the Supreme Court, in its judgement in *Deepika Singh v Central Administrative Tribunal*⁶³, took cognizance of the fact that traditional family structures which involved a mother and father have evolved into family structures that include unmarried partnerships to queer relations. Thus, one may say with hope, that we are finally on the journey to realising the dream of their dignity and identity for all.

While the judiciary has been pro-actively playing its part in recognising rights of the LGBTQIA+ community, similar expectations arise from other the pillars of our democracy, i.e., the legislature for enacting progressive laws and the executive in enforcing them at the ground level. For instance, while *Navtej Singh Johar v Union of India*,⁶⁴ decriminalized private consensual homosexual acts in 2018, private consensual acts still face social stigma and threats at the ground level. The need of the hour is for the legislature to enact positive laws that accord the LGBTQIA+ community with basic rights in respect of marriage, succession, adoption and employment. The legislature should also take an initiative to re-calibrate the existing laws, for instance, make them more gender neutral, to ensure their fair applicability to the LGBTQIA+ community. Enacting these progressive laws would also be in line with India's international human rights obligations and will be an abiding move to building a truly united nation which upholds the dignity of its citizens and social cohesion.

⁶¹ Aniruddha Dutta, "An epistemology of collusion: Hijras, kothis and the historical (dis) continuity of gender/sexual identities in eastern India", (2012) 24(3) Gender & History 825.

⁶² <https://theconversation.com/indias-sodomy-ban-now-ruled-illegal-was-a-british-colonial-legacy-103052>.

⁶³ Civil Appeal Number 5308 of 2022.

⁶⁴ (2018) AIR SC 4321.

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