

## **3. Comparative Analysis of Trans-Gender Laws of India and USA**

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**Abstract:**

*In recent times, there has been a lot of discussion and media hype with respect to Lesbian, Gay, and Bisexual & Transgender (LGBT) persons. But the most important question that has surfaced before the world community today is whether the rights of the gay or lesbians are included under our basic human rights. These inquiries have taken center stage even at the United Nations. Besides, the United Nations has been working with Member States in order to disacknowledge bigotry and interdiction primarily based on homophobia and transphobia. There has been a remarkable shift in the thought process and legal aspect over the past 20 years in various countries across the globe. In fact, approximately over 30 countries have legalized homosexuality. Number of mass movements, resistance, continuous efforts from the U.N., various NGOs internationally, and representatives of Member States to guarantee the human rights of LGBT persons has gained momentum like never before. Also, there has been efforts being made towards the global inclusion of LGBT rights in our basic human rights. Still the trajectory of progress is lopsided and dented. There is no headway with respect to the protection of the people of this community at places of work. The discrimination towards LGBTQ is primarily based on sexual orientation or gender identity. If at all any kind of protections exists they are either inadequate or unenforced. Thus, there is a need for stronger methods and laws to provide the LGBTQ a level playing field.*

**Keywords:**

*LGBTQ, Human Rights, Homosexuality, United Nations.*

The word 'Transgender' is a blanket term which refers to people who have different gender identity from the sex assigned to us since birth. The term 'Transgender' started coming into use in the late 20<sup>th</sup> century though the people who come under this category have always existed in every culture throughout the history. It is only now that we have started discussing about the Trans people and their position in our society. The Trans community is a diverse community. Some of them are identified as Tran's men or Trans women whereas few describe them as non-binary, genderqueer, gender non-conforming, agender, bigender or other identities.

### **3.1 India and the Trans Community:**

India is changing and we may call it as 'New India'. This is because the society and the thought process in the given society have changed by leaps and bounds. As a result of the

changes that have occurred in the social fabric the entire pattern of belief has changed and so has the judiciary. The Supreme Court of India in September 2018 gave a landmark judgement with respect to the LGBTQIA+ community in India. It was a historic moment in September 2018. The judgement struck down the Section 377 of Indian Penal Code and thereby approving sexual relations between adult people of the same sex which was unlawful until then. The government laid emphasis on the significance of including people from various groups and identities.

In fact, the present government has pressed on the importance of including many groups and identities of India which remained on the edge under the previous regimes. The government has acknowledged the changes that the society is going through and that nobody should be isolated.

Due to the changes and growing acceptance in society the Transgenders acquired more tolerance and recognition in past few years and also became a part of the government. In 2014, the Transgenders began to identify themselves as 'Third Gender' and on 6<sup>th</sup> September 2018, with the allusion to Section 377 of the Indian Penal Code, the group came to be legally accepted. The Indian Law does not proscribe to make symbolic same sex marriage. Since 2019, the transgender women have also got the right to record their marriages according to the Hindu Marriage Act by way of the decision of the Madras High Court.

The Ruling party upheld the ruling of the Apex Court on the decriminalization of homosexuality. It is thus believed that the transgender community may get to see greater inclusion, tolerance and normality. It is further believed that since it is the rule of law the people must honour the variegated community and group that exist in the society and those who do not concede they still are required to do so.

The Transgender have been stigmatized in the society since time immemorial. Our government and judiciary have tried to diminish this stigma. The movies have a greater and deeper role in changing the perspectives of society be it any aspect including the lives of Transgenders that are part of our system. Cinema acts as a right medium in changing the outlook of the masses. Initially, the Transgenders were seen in comic or villainous role but now the movies have become more realistic and are trying to portray the true agonies of Transgenders. All this could happen due to the landmark judgement passed by the Supreme Court for Section 377. Now the society has become way more aware.

The young people of India have played an indispensable role in removing this slur. The Supreme Court has established the foundation for respect for this community so now the New India which comprises mostly of young population is trying to accept and embrace the changes.

### **3.2 The Human Rights Violations:**

The Hon'ble Supreme Court of India in its various judgements has reiterated that human rights are supreme. Few landmark judgements with respect to the violation of Human Rights are as follows:

### **3.2.1 M.C. Mehta vs. Union of India<sup>1</sup>:**

This case was related to Bhopal Gas Tragedy. Mr. M. C. Mehta filed a Public Interest Litigation for the tragedy that occurred due to the poisonous gas leakage by a plant in Bhopal. In this case the scope of Article 21 and 32 of the Constitution of India was extended by the Court.

### **3.2.2 Naz Foundation vs. NCT<sup>2</sup>:**

In this case the Naz Foundation (India) Trust challenged the constitutionality of Article 377 under Article 14, 15, 19 and 21 before the Delhi High Court. The Foundation argued that Section 377 reflects a superannuated understanding of the purpose of sex as a means of procreation and has no place in a modern society. Further, the police detonated the provision which held back the efforts aimed at preventing the spread of HIV/AIDS. The Foundation also cited an instance as an example from an incident that happened in 2001 in Lucknow where HIV prevention workers were distributing condoms to homosexual men who were arrested on the allegation that they were conniving to commit an offence. The Naz Foundation also argued that this provision was being misused to punish the consensual sexual activities that do not happen to be peno-vaginal. Thus, the Delhi High Court gave a ruling in the year 2009 with respect to Section 377 that this section cannot be used to punish the sex between two consenting adults. The court said that it is the violation of right to privacy and personal liberty under Article 21 of the Constitution. The Court held that the classifying and targeting of homosexuals violates the fundamental rights viz. right to privacy and personal liberty guaranteed under Article 21 of the Constitution. Besides it violates human dignity which is the nucleus of the Indian Constitution. The court decriminalized the sexual activities which were considered against the order of nature which included homosexual acts according to the Section 377 of the Indian Penal code. Several organizations and individuals challenged the decision of Delhi High Court in the Supreme Court arguing that the right to privacy does not include the right to commit any offence. Also decriminalizing homosexuality could be detrimental to the institution of marriage and might entice the young people towards homosexual activities. The Apex court overruled this verdict of Delhi High Court in 2013 in Suresh Koushal case and held that the decision of decriminalizing homosexuality can only be done by the Parliament and not the Court.

### **3.2.3 NALSA vs. Union of India<sup>3</sup>:**

This is the landmark judgement where Court for the first time acknowledged the rights of the Transgenders as 'Third Gender' and the non-binary identities ordered the government to treat them as minorities. The court also upheld the fundamental rights of the Tran genders and ordered to provide them with reservations in jobs, education and other amenities.

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<sup>1</sup> 1987 AIR 965, 1986 SCR (1) 312.

<sup>2</sup> Naz Foundation v. Govt. of NCT of Delhi, 160 Delhi Law Times 277 (Delhi High Court 2009) Archived 26 August 2009 at the Way back Machine

<sup>3</sup> (2014 ) 5 SCC 438)3

### **3.2.4 Navtej Singh Johar v UOI; Akkai Padmashali v UOI<sup>4</sup>:**

In September, 2018 the five judges Bench with one accord struck down Section 377 of the Indian Penal Code to the extent that it criminalized the same-sex relations between consenting adults.

The Section 377 of the Indian Penal Code classified the sexual intercourse between same sex people as ‘unnatural offence’ which is ‘against the order of nature’ for which 10 years imprisonment was prescribed. This provision was a Victorian-era law which pulled through the 21<sup>st</sup> century. As per the reports from across the globe there are 123 countries in the World who have never penalized or decriminalized homosexuality whereas there are 57 countries that have actively criminalize same-sex relations. According to Indian Law, the LGBT individuals are now lawfully allowed to engage in consensual intercourse. In addition to this, the Court has upheld provisions in Section 377 which criminalizes non-consensual acts or sexual acts performed on animals.

The judgment collectively cited fundamental rights violations in reading down Section 377. They found Section 377 as discriminating against individuals on the basis of their sexual orientation and gender identity which violates Articles 14 and 15 of the Constitution. Hence, they ruled that Section 377 violates the rights to life, dignity and autonomy of personal choice under Article 21. Lastly, they found that it impedes an LGBT individual’s ability to fully realize their identity by violating the right to freedom of expression under Article 19 (1) (a).

### **3.3 Globalization and Trans Community in India:**

The developing nations like India have number of issues to deal with along with the mobilization of ‘third sex’ and the ‘sexual character’ as legislative issues further arousing the predominant issues such as citizenship, human rights, social personality and convention.

Globalization is primarily the transfer of ideologies past the economic borders and supranational interchange along with international exchanges. In the case of issues with respect to sexuality, the globalization results in a sort of repressive attitude towards the same. The effect of globalization on ‘third gender’ with respect to acceptance of what contradicts the ideologies bound by the traditional rules of nature comes from the deep-rooted cultural framework of a country. Nevertheless, what efforts the country takes having an extremely positive outlook towards the social acceptance of what was once contemplated as an interdiction seems formidable. But the society needs to untie itself from the existing boundaries and think from the perspective of the ideals that our Constitution beholds. The Transgender community like any other community must be treated fairly and on equal footing in every sphere be it political or economic aspects as the source of the rights comes directly for the Constitution and not from the wounded ideologies of the society which is in contradiction with the legal and political framework of the country.

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<sup>4</sup> (2018) 10 SCC 1 (Navtej Singh Johar vs. Union of India)

### **3.4 United States and the Transgender Community:**

The Federal statutes in the United States of America does not explicitly protect people from gender identity-based discrimination in any field be it employment, education, housing, public accommodations or any other streams. The Transgender people exercise the right to marry individuals in the United States, irrespective of their current gender identity or birth sex. But the courts are yet to ponder over the constitutionality of recent policies which tend to restrain the transgender people to serve in the military. The United States' federal system of governance has decentralized its policy-making and approbates a blending of policies and laws among federal, state, and municipal governments.

The transgender rights in United States vary markedly by jurisdiction. In the year 2021 by mid-April there were approximately 117 bills introduced in 33 states to regulate the rights of transgender people.<sup>5</sup>

The Supreme Court ruling on transgender rights in 2020 in the case of *R.G. &G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission* held that the Title VII protections against sex discrimination in employment would extend to transgender employees. Besides, the Equality Act, if passed, might as well prohibit the discrimination on the basis of gender identity in employment, housing, public accommodations, education, federally funded programs, credit and jury service.<sup>6</sup>

Few lawsuits have argued on the Equal Protection Clause of the federal constitution or federal laws that prohibit discrimination based on gender identity. In fact, U.S. President Barack Obama issued an executive order which prohibited discrimination against transgender people in employment by the federal government and its contractors. In the year 2016, a letter was issued by the Departments of Education and Justice to the schools who received federal funding which interpreted Title IX protection to apply to gender identity and transgender students and advised schools to use a student's preferred name and allow the use of bathrooms and locker rooms to the student's past the gender identity. In US, the recognition and protection against the discrimination is provided by some states and local jurisdictions but only to an alternating point.

If we closely analyse, we find, a majority of people in United States have become more tolerant towards the transgender people. They want their country to extend more support and protection to Transgender people. They have disagreed that the transgender people are violating their culture in anyway and that they are not perturbed from exposing their children to them. They further argue that the society in U.S. has gone too far in and allows its people to dress and live as one even though they were born another. According to an LGBTQ advocacy group in March 2021, the State legislators in United States have come forth and filed 82 bills which might impact the rights of transgender people.

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<sup>5</sup> Krishnakumar, Priya (April 15, 2021)

<sup>6</sup> House Passes The Equality Act: Here's What It Would Do" .NPR.org. February 24, 2021.Retrieved April 23, 2021(<https://www.npr.org/2021/02/24/969591569/house-to-vote-on-equality-act-heres-what-the-law-would-do>)

The human Rights Campaign President Alphonso David in a statement "Progress in the fight for equality has always come in fits and starts but nevertheless marches forward. We know we are on the right side of history."

### **3.5 Challenges the Trans People Face:**

The Trans people have become visible to a great extent in both popular culture and in daily life. But they still face the challenges like discrimination, stigma, and systemic inequality. Despite the decision passed by U.S. Supreme Court the transpeople lack legal protection and face discrimination in the work place. There is still no comprehensive federal non-discrimination law which would include the gender identity. This clearly shows the Trans people still lack legal recourse.

The other problems of Trans people includes that they live in elevated rates of poverty and it gets higher if they are of colour. The data reveals that around 29% of Tran's adults live in dire poverty; followed by 39% Black Trans adults, which gets hiked at 48% if they are Latinx Tran adults and up to 35% of Alaska Native, Asian, Native Americans and Native Hawaiian or Pacific Islander Trans adults. Besides this, the Trans people still face a significant level of stigma for over a century as they have been characterized as mentally ill, socially digressive and sexually acquisitive. They are often ridiculed by a section of people in society who do not understand them and rather bully them, harass them and commit serious violence against them. Due to all these issues and stigma they are unable to access necessary services for their survival like housing. There are only 30% women's shelters that are willing to house trans-women. . With the recent progress in legal system approximately 27% of Tran's people have been fired, not hired and denied promotion due to their identity. The Trans people, many times have refrained from exercising their rights such as basic right to vote as they fear the discrimination at polls. Not only this, the trans people also experience intimate partner violence which is up to 54% as per the data while 47% are sexually assaulted and one in ten are physically assaulted.

According to the reports of the HRC Foundation analysis it is found that 22% of Tran's people and 32% of Trans people of color have do not have health insurance coverage. To add to this, 29% of Trans adults i.e. more than a quarter have been refused health care by the doctors because of their gender identity. This data itself reveals the situation of health care system that fails to meet the needs of the Trans community. The Trans community also lacks the accurate identity documents due to which they are unable to access the emergency housing or any other public services. Without proper identification, everything becomes difficult like travelling, registering for schools or accessing many services that are considered essential to function in society. At many places there is a requirement for the evidence of medical transition which could be exorbitant and is not something all people would go for; also it might be unaffordable for some.

### **3.6 Conclusion:**

The social organizations, NGO's, media and the judiciary are all working to remove the differences, discriminations, disparities, stigma and harassment that the Trans people as the marginalized community go through in their lives. They have tried to set a progressive

pattern where people could think, understand, acknowledge the co-existence of the Trans community and it is this approach that has made a critical difference. Also the Human Rights Campaign is committed to support and advocate the causes and issues of Trans Community. Still a large proportion of discrimination and inequity persists in society which is yet to be addressed. In these cases, the Parliament is under the burden of ratifying a potent anti-discrimination law to protect minorities like the transgender community. The jurisprudence has progressed over the years, but it alone cannot bear the load of protecting the citizens. Hence, despite the legislations people need to develop acceptance for the Trans community because there is not only the need for laws but also sensitivity to the conditions of minorities in an egalitarian democracy and much still needs.