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**TRANSCENDING BOUNDARIES - EVALUATING HUMAN RIGHTS  
FOR TRANSGENDER INDIVIDUALS IN INDIAN LAW**

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**Abstract**

In India's history, 2014 was a significant year for the advancement of transgender rights, which became a reality in 2019. The Transgender People (Protection of Rights) Act of 2019 was made possible by the judiciary's recognition of transgender people as the third gender in the NALSA Judgment of 2014. The United Nations Charter and treaty-based organizations demonstrate the commitment of nations to protect transgender rights. The 2019's Act's passage into law in India was celebrated as a historic achievement as it marked the end of the transgender community's long history of marginalization and persecution. Although the legislation gave rise to optimism, transgender activists opposed it, highlighting a continuous fight. The Act's definition of "transgender" which departs from important NALSA recommendations, is what makes it so controversial. Interestingly, transgender people themselves do not directly contribute, and the discussion of civil and political rights is mostly mute. The act is acknowledged as a good attempt to forbid discrimination and provide social welfare measures for the community, notwithstanding these complaints. The purpose of this essay is to examine the shortcomings and restrictions of the law by examining the idea of transgender people, India's historical context, the different types of discrimination that this community faces, international human rights legislation that address these issues, and the judiciary's role in promoting these rights.

**Keywords:** *Transgender, Third Gender, United Nations, Civil Rights, Political Rights, Human Rights*

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## Introduction

A pivotal point in the history of gender justice on the international legal scene was highlighted in 2013 by a statement released by the UN Secretary General at the time. Among other things, this proclamation recognized that transgender people's rights are in fact human rights. The United Nations' commitment to upholding, defending, and advancing the rights of transgender people was represented in a number of reports and statements by charter and treaty-based organizations, even in the lack of a special instrument that addressed the rights of the LGBT community. Even with the large number of transgender people in the world today and the cultural, religious, and social historical evidence of their existence, it is clear that transgender people continue to be among the most marginalized groups in society and that they have significant obstacles when trying to fit into the more mainstream gender category. Due to the global prevalence of transphobia and homophobia, this population is subject to legislation and discriminatory practices. When it comes to state-sponsored violence against transgender people, the UN has repeatedly recommended that state parties remove or modify discriminatory criminal legislation. However, 69 states have not complied.<sup>2</sup>

India made tremendous progress in 2014 by formally recognizing the transgender population as the third gender, a move sparked by the landmark NALSA Judgment.<sup>3</sup> The country recognized the pervasive prejudice suffered by the transgender community in different facets. Before 2019, the Indian community's rights were derived from the Indian Constitution as well as from important human rights documents like the ICCPR, the UDHR, and the ICESCR, among others. But because of the particular difficulties and problems the group faced, it became clear that specific law was required to safeguard their rights.

A significant result of the NALSA ruling was the swift introduction of a law pertaining to transgender rights, which became enacted in 2019 as the Transgender Persons (Protection of Rights) Act. Despite being intended to be empowering and enabling, this law has not been without criticism. The transgender community has expressed objections and concerns since its founding. In order to evaluate the law, this study will look at the community's vulnerability and investigate legal safeguards that go beyond the letter of the law.

## Historical Perspective of Transgender

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<sup>2</sup>Mehta, Ritwik. (2021). Analysing transgender rights in india. *Indian Journal of Law and Legal Research*, 2(1), 1-9.

<sup>3</sup> National Legal Services Authority v. Union of India and Others, AIR 2014 SC 1863.

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Known by different titles according to their social ties, transgender people in India have a rich historical heritage. Jain literature and ancient epics like the Mahabharata and the Ramayana reference Hijra narratives. Although there is evidence of discrimination against the group now, an analysis of ancient India shows a more accepting and courteous attitude toward its citizens.

The community's historical significance and its exalted position in ancient times were also emphasized by the NALSA ruling.<sup>4</sup> According to historical accounts, transgender people played significant roles in the Ottoman empires of the Islamic world throughout the Mughal era. They held positions of authority in judicial and religious organizations and functioned as political counsellors and administrators.

But throughout the era of British colonization, transgender people's standing decreased. This decline was caused by a number of things throughout this period, such as their loss of civil rights and status as a criminal caste. Their discriminatory position was further worsened by the enactment of the IPC, 1860, especially sec. 377, which dealt with unnatural offenses. This discrimination persisted even after India gained independence.<sup>5</sup>

The transgender population in modern-day India experiences marginalization, discrimination, and harassment. A landmark decision by the Supreme Court in 2014 recognized the civil and political rights of the transgender population and labelled them as the Third Gender. The judiciary's recognition of the rights of the community was revolutionized by this ruling, as demonstrated by other seminal cases such as *Puttuswamy*<sup>6</sup> and *Navej Singh Johar*.<sup>7</sup> The Transgender Act, which was passed in 2019, is a major turning point in the national conversation on transgender rights since it established the community's legal entitlement to certain rights.

### **International Human Rights Laws vis-à-vis Trans-genders**

Until recently, it was uncommon to use terminology like sexual orientation and gender identity in official talks as well as casual interactions. Notably, discussions on these topics have come up in treaty-based organizations including the UN Charter. The Human Rights Council is now debating national laws that discriminate against people and the duties

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<sup>4</sup>*Id.*

<sup>5</sup> M. Michelraj, *Historical Evolution of Transgender Community in India*, 4(1) ARSS. 17- 19.

<sup>6</sup> K.S. Puttuswamy v. Union of India, (2017) 10 SCC 1.

<sup>7</sup> Navej Singh Johar v. Union of India, AIR 2018 SC 4321.

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governments have under international human rights treaties to prohibit such discrimination through legislation. A significant turning point was reached in June 2011 when the HRC passed a resolution with strong support, initiating the first-ever official UN report on gender identity and sexual orientation, written by the OHCHR. The conclusions of this paper served as the foundation for a panel discussion on March 7, 2012.<sup>8</sup>

Asserting that such crimes are in violation of current international human rights legislation, the then-UN Secretary highlighted the grave consequences of violence and discrimination against the LGBTQ+ community, calling it a "monumental tragedy" and a stain on public conscience. In the absence of a formal treaty, existing international legal principles provide a strong foundation for the need to protect, prevent, repeal, safeguard, and forbid discrimination.<sup>9</sup>

The non-discrimination principle, which guarantees that the LGBTQ+ group cannot experience discrimination in exercising rights stipulated in treaties because of their gender identification, is a key tenet of international human rights accords. The OHCHR and HRC's recommendations outline five crucial duties that nations must fulfill in order to defend the rights of the LGBTQ+ population.

First and foremost, states need to protect transgender people from homophobic and transphobic violence by including sexual orientation and gender identity in hate crime laws, putting in place efficient procedures for reporting and documenting such incidents, making sure that offenders are thoroughly investigated and prosecuted, and acknowledging that persecution on the basis of sexual orientation or gender identity is a legitimate reason for asylum claims.

Second, states should look into state-sponsored violations, ensure redress in case of violation, prohibit and penalize torture and cruel treatment of community members during detention, provide proper training for criminal justice officials, and keep an eye on detention facilities in order to prevent these practices.

Thirdly, states need to do rid of laws that make homosexuality illegal in order to stop arrests for reasons related to gender identity or sexual orientation and to stop humiliating tests used

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<sup>8</sup>*Historic UN Panel on Sexual Orientation and Gender Identity (March 2012)*. (n.d.). OHCHR. Retrieved January 23, 2024, from <https://www.ohchr.org/en/sexual-orientation-and-gender-identity/historic-un-panel-sexual-orientation-and-gender-identity-march-2012>.

<sup>9</sup>Kukreti, Shivani. (2021). Recognizing transgender in india: glaze over the reality. *Indian Journal of Law and Legal Research*, 2(1), 1-7.

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to ascertain these factors. The Human Rights Committee has continuously called for decriminalization, highlighting the ICCPR's guarantee to privacy.

Fourth, based on provisions in several human rights treaties, nations should enact anti-discrimination legislation that expressly forbid discrimination on the grounds of sexual orientation and gender identity.

Fifth, states must protect the LGBTQ+ community's freedoms, including the right to peaceful assembly, association, and speech, and they must apply restrictions sparingly rather than arbitrarily targeting the community.

Furthermore, as the UDHR and ICCPR emphasize, the right to be acknowledged as a person before the law is recognized by current basic human rights treaties. The Yogyakarta principles informed the court's views in the NALSA Judgment.

As a result, as demonstrated by a number of treaties, the UN has continuously taken an active role in defending the rights of minorities, including the third gender.<sup>10</sup> India is required to uphold and implement these values in order to support the advancement and well-being of the LGBTQ+ community as a signatory to important human rights treaties.

### **Judicial Framework**

The Navtej Singh Johar case has established the legality of homosexuality and consenting adult relationships, which has resulted in notable modifications to the legal standing and entitlements of those associated. With the exception of India, many nations have legalized homosexuality; nonetheless, some 69 nations still forbid such behaviour. Since sec. 377 of the IPC obstructed the LGBT community's ability to fully realize their fundamental human rights, the aforementioned ruling was a turning point in the history of gender justice.<sup>11</sup> Long before 2018, India started on a progressive path that recognized not just sexual orientation but also the gender identification of the third gender, resulting in the implementation of laws in 2019.

The journey began in 1994 when AIDS activist Bhedbhav Virodhi Andolan filed a petition against sec. 377 of the IPC due to police prohibitions against the distribution of condoms in jails.<sup>12</sup> The momentum persisted even after the petition was dismissed, and in 2001 the Delhi

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<sup>10</sup> Toonen v. Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

<sup>11</sup> Ananya Das, *Analysis of LGBT rights in India*, 1 IJERND 10-13 (2018).

<sup>12</sup> Dr. Janak Raj Jai, *Landmark Judgment on Homosexuality*, AIR Online (Jan. 23, 2022), <https://www.aironline.in/legalarticles/Landmark%20Judgment%20n%20Homosexuality>.

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High Court received a PIL from the Naz Foundation contesting sec. 377. The group said that Articles 14, 15, 19, and 21 of the Indian Constitution, fundamental rights, were infringed by this clause. In 2009, the Delhi High Court ruled that sec. 377 violated constitutional principles because it made consenting private adult actions illegal.<sup>13</sup>

But in *Suresh Kumar Koushal v. Naz Foundation*, the Supreme Court reversed the Delhi High Court's ruling in 2013, holding that Section 377 did not infringe upon the right to privacy and dignity guaranteed by Article 21.<sup>14</sup> The Supreme Court deferred to the legislature to determine whether to keep or amend the provision pertaining to private, consenting actions between people of the same sex.

The *National Legal Services Authority v. Union of India* in 2014 led to the transgender community's recognition as a third gender. Since the constitutionality of Section 377 had already been determined in the Suresh Koushal case, this historic ruling did not review that issue.<sup>15</sup> Rather, the court stressed respect to the basic rights provided in the Constitution by citing international treaties and standards. The ruling emphasized that discrimination on the basis of sexual orientation or gender identity would be against these rights.

The right to privacy was upheld as a basic right by the nine-judge panel in *K.S. Puttuswamy v. Union of India* in 2017. This included the ability to have intimate relationships based on personal choices. This ruling reversed earlier rulings and recognized the inherent, unalienable right to privacy, which includes gender identity and sensual desire.

The case of *Navtej Singh Johar v. Union of India* was another challenge to the constitutional validity of sec. 377.<sup>16</sup> Citing breaches of Articles 14, 15(1), 19(1)(a), and 21 of the Indian Constitution, the five-judge constitutional panel ruled that Section 377 was unconstitutional. The ruling in the Suresh Koushal case was overturned, with a focus on upholding everyone's fundamental human rights, including those of the LGBT community. Although consenting to sexual activity was made lawful, there are still questions about the LGBT community's legal standing and rights under current legislation. Beyond transgender rights, the lack of particular laws for this group begs the question of whether the legal safeguards that are in place are sufficient or if more steps are required to ensure the rights of these people.

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<sup>13</sup> 160 Delhi Law Times, 277.

<sup>14</sup> Civil Appeal No. 10972 of 2013.

<sup>15</sup> *Suresh Kumar Kaushal vs. Naz Foundation: A Critical Analysis*. (2014, July 21). Academike. <https://www.lawctopus.com/academike/suresh-kumar-koushal-vs-naz-foundation-critical-analysis/>.

<sup>16</sup> *Supra* note 6.

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### **Enactment of Legislative Instance for Transgender Rights**

Lesbian, homosexual, and bisexual concerns are not the same as those of transgender people, which is why the Bill's drafting purposefully separated the topics. Lesbians, gay men, and bisexuals experience difficulties mostly related to the legal and cultural acceptability of their sexual orientation; transgender people struggle with identity issues. The Transgender Peoples (Protection of Rights) Act, 2019 was introduced in response to the social exclusion, discrimination, and marginalization that transgender people face.<sup>17</sup>

This act underwent a number of obstacles and changes during its legislative process before arriving at its current, if incomplete, form. Initially known as The Rights of Transgender Persons Bill, 2014, the measure was first introduced on December 17, 2014, in response to the NALSA ruling. But before receiving final clearance, it was criticized and changed several times over the course of over five years. The initial edition had some shortcomings, such as not having a dedicated healthcare chapter and not providing a thorough analysis of the body of research on transgender rights that was available. It also did not include intersex individuals.

The Transgender Persons (Protection of Rights) Bill, 2016 was reintroduced in 2016 as a reaction to these deficiencies. This version, however, came with its own set of problems, including the removal of reservation clauses that the Supreme Court had suggested in the NALSA ruling and the lack of a defined grievance resolution procedure. As a result, the bill underwent additional changes and was reintroduced by the 17<sup>th</sup> Lok Sabha on August 5, 2019. On November 26, 2019, the Rajya Sabha then heard the measure.<sup>18</sup>

The purpose of the law is to protect the transgender community's fundamental rights. As previously explained, the goals and rationale for the law's enactment highlight the marginalization and difficulties the minority faces in society. Even though the community is protected by Articles 14, 15, 16, and 19 of the Indian Constitution, problems still arise, hence the legislation was created to address and settle these difficulties completely.

Important words like transgender people, those with intersex variants, and inclusive education are defined in the Act. It includes the outlawing of discrimination on the part of

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<sup>17</sup>Kishore, Suvam. (2023). Transgender in india: socio-legal study. *Indian Journal of Integrated Research in Law*, 3(1), 1-24.

<sup>18</sup>Gupta, Shubhangi, & Khushi. (2021). Position of Transgender in India: Primitivism to Post Modernization. *International Journal of Law Management & Humanities*, 4, 1480-1486.

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people or organizations for the reasons indicated in the clause. The law recognizes a transgender person's right to self-perceived gender identity; nevertheless, in order to get a certificate of identification, they must apply to the District Magistrate. The Act outlines the process for changing a certificate's gender. While Sections 9–12 concentrate on the responsibilities of businesses, Section 8 imposes requirements for the relevant government. Education, social security, and health care for transsexual people are covered in Sections 13–15. Section 16 of the Act creates the National Council of Transgender Persons as a monitoring and enforcement tool. This is a great step, as it requires five representatives of the transgender community to serve on the council. In addition, specialists in transgender matters are included to carry out the authorities and duties delineated in Section 17.<sup>19</sup>

Examining the Ministry of Social Justice and Welfare's official website reveals initiatives to streamline the application process and increase accessibility to programs like educational scholarships. Section 18 of the law lists crimes against transgender people and lays out the associated penalties.

Examining the Act closely reveals that the rights that are acknowledged are the same as those that are granted by the Indian Constitution to every person or citizen. The aforementioned rights encompass the following: the freedom from discrimination; the right to live, own, or rent any property; the freedom to move about freely; the opportunity to work in public or private offices; the right to an education; the right against unfair treatment; the right against denial of service; the right against discrimination in employment or occupation; the right to medical and healthcare facilities; and the right to access government and private establishments.<sup>20</sup>

### **Conclusion and The Way Forward**

Like many other human rights issues, the Indian judiciary has always pushed for the increasing fulfilment of basic human rights for the most marginalized groups in society. Most people have responded favourably to the Supreme Court's NALSA Judgment's orders, particularly when compared to the 2019 Act's provisions. While the enforcement and execution of this recently established law are still being evaluated, it is certainly worthy of

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<sup>19</sup>*Id.*

<sup>20</sup>Bhardwaj, Shristi. (2022). Transgender community in india and its related laws in india. *Jus Corpus Law Journal*, 3(1), 1147-1153.

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praise. But we also cannot ignore the fact that there are some loopholes and flaws in the law that need to be fixed right away.

It is obviously necessary to harmonize this law with other social welfare and personal statutes, such as those pertaining to surrogacy, maternity benefits, and criminal laws. Achieving this connection is essential to achieving the main goal of guaranteeing the transgender community's full enjoyment of their fundamental rights. By addressing these discrepancies, the loopholes in the legislation that protect civil and political rights will be filled. To do this effectively, the community must be made more aware of the rights outlined in the legislation as well as the social welfare programs that the relevant government is required to provide in accordance with the Act.

Moreover, there is an urgent need to educate and teach District Magistrates, who have a great deal of power to determine the gender of transgender people through the issuance of certificates. One of the arguments made against the bill is that the LGBT Movement ought to have been more involved in the creation of this legislative framework. As such, it is imperative to give careful thought to how to guarantee that the community is adequately represented in decision-making processes that have an immediate impact on their future life.

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