



# A CONFLICT OF COMPREHENSIVE LEGAL FRAMEWORK FOR TRANSGENDER PERSONS- A JURISPREDUENTIAL PERSPECTIVE

**Parveen Islam**

**Assistant Professor, NEF Law College**

**Dr. Hiren Ch. Nath**

**Associate Professor, The Assam Royal Global University, Assam**

## INTRODUCTION

The transgender person represents a challenge to the notion of sex and sexuality as the problems to gendered and heterosexual subjectivities continue to persist. A number of judicial pronouncements particularly in U.S, Australia and New Zealand abandoned chromosomes and birth as the governing factor in determining sex. Instead, preferred to articulate the test of psychological and anatomical harmony which gave prominence to sex reassignment surgery. Judicial anxiety over the homosexual body proves to be a consistent and central feature of transgender jurisprudence. Although, there has been a gradual shift in the outlook of gender identity, Foucault has rightly argued that the function of law as a judicial entity has greatly diminished and focused more on regulations governing norms. This has been exemplified by the U.S. Supreme Court in *Bowers v. Hardwick*<sup>1</sup> and by the House of Lords in the infamous case of *R v. Brown*<sup>2</sup> how, the structural mindset of normative gender construct lead the way for stigmatization, discrimination, marginalization and violation of their rights exposes the transgender people to extreme vulnerabilities.<sup>2</sup>

Prior to 19<sup>th</sup> C the idea of recognizing deviant sexual actions were not prominent and social mindset was confined to cultural assumptions. In 1849, Claude Francois Michea, a French physician, for the first time formulated a theory that sexual desire between men is an inborn phenomenon.<sup>4</sup>

<sup>1</sup> *Bower v Hardwick* 478 U.S.186 (more) 106 S.Ct.2841 <sup>2</sup> *R v Brown* [1993] UKHL 19.

<sup>2</sup> Andrew N Sharpe, *TRANSGENDER JURISPRUDENCE*, Cavandish Publishing Ltd, London.

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Despite having existed throughout the history of human civilization, a large number of literature related to biological aetiology, failure to consolidate consensus as well as psychological accounts have tended to receive prominence in accessing and categorizing transgender persons.

In 1980, “Trans-sexualism” was recognised as a mental disorder by the American Diagnostic Association in the Diagnostic and Statistic Manual of Mental Disorder which was later substituted as “Gender Identity Disorder”. There have been several attempts made by various scholars and medical experts to identify such gender deviant behaviours and the need to align their perceived gender through surgical procedures.<sup>5</sup>

By 1990’s the term “Transgender” which was initially denoting “Transsexual” and “ Transvestite” has come to operate as an umbrella term to identify multiplicity of trans-subjectivities like gays, lesbians, bisexuals, intersex, queer, cisgender etc. In other words, it encompasses numerous gender identities including surgical, non-surgical as well as ‘male’ or ‘female’ with problematic understanding of their sex.

Raising awareness about their rights has challenged the previous notion of medical and psychological disharmony owing to wrong body. The case of *Corbett v. Corbett*<sup>6</sup> receives considerable importance in this regard because it impacts the perception about sex and also provides an understanding as to how judicial thinking influences the reform in transgender jurisprudence. In this case Ormrod J. held that determination of sex at the time of birth is the governing criteria as it is a congruence of chromosomal, gonadal and genital factors. This decision was criticised on the ground that Ormrod J. failed to take into consideration psychological and hormonal factors thus, evidencing the judicial legal restraint of thinking beyond the sex of male or female.

In *Re X*<sup>7</sup>, *Anonymous v. Weiner*<sup>8</sup> and *Anonymous v. Hartin*<sup>9</sup> the Court rejected the applications of the trans women to change their birth certificates on the ground that they are only ostensibly female but chromosomally male. However, in a similar case of *Re Anonymous*<sup>3</sup> Pecora J held that the applicant is female because her anatomy has been brought into conformity with her psychological sex. His Lordship further added that the objective of surgical intervention is to bring into alignment one’s anatomical sex with psychological sex.

The attempts to bring psychological and anatomical harmony through sex reassignment surgeries to contain the transgender into an established gender order has in many instances proved detrimental to the jurisprudential reform and the same is evident under the provisions of Section 5, 6, and 7 of the Transgender Persons (Protection of Rights) Act 2019 in India.

<sup>3</sup> *Re Anonymous* [293 NYS 2d 834 (19680)].

Transgender jurisprudence in India owes credibility to judicial interventions. The growing visibility of concerns pertaining to health, prostitution, marriage, adoption, identification, discrimination amongst the transgender persons globally made a forced shift to reimagining gender at national and international level. This in turn led to mapping a framework for protection, welfare and assimilation of the transgender persons.

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<sup>5</sup> ibid

<sup>6</sup> Corbett v. Corbett [1970] 2 All ER 33

<sup>7</sup> Re X [1957] Scot LT 61; 73 Scot L.Rev 203.

<sup>8</sup> Anonymous v. Weiner [270 NYS 2d 319 (1996)]. <sup>9</sup> Anonymous v. Hartin [347 NYS 2d 515 (1973)].

#### EVOLUTION OF TRANSGENDER THEORY

Transgender theory owes its origin to the feminist jurisprudence. Feminist movement from the very beginning sought to acquire all kinds of rights for women in society at par with man. The purpose was to bring a social equilibrium in terms of rights of women. But, in the recent past seeking equality rights of other genders has also been brought under the canopy of feminist jurisprudence.

Present day feminist theories are experiencing new perspectives and encompassing new dimensions with the evolution of other genders donning new roles and gaining prominence. Furthermore, gender is being mainstreamed into every aspect of society by becoming more and more inclusive and intersectional. This has resulted in the expansion of gender studies in the 21<sup>st</sup> century. During 1970's the feminists substituted the term

'sex' with 'gender' in order to provide universal meaning to the term 'man' and 'women'.<sup>4</sup>

The history of feminism is better described as waves of feminism. The *first* wave started between 19<sup>th</sup> and early 20<sup>th</sup> C where women sought equal contracts and property rights but became suffrage centric. This wave ended by women in U.S. achieving voting rights in 1919. The *second* wave during 1960's and 1970's witnessed women's fighting for equal legal, social and economic rights. During the *third* wave feminism focused on demonstrating how race, ethnicity, class, religion, gender, sexuality and nationality are all significant factors for one's identity. The *fourth* wave addresses the issues of campus rape, discrimination at work place and sexual harassment.<sup>5</sup>

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<sup>4</sup> Dr. Nabila Sadiq, "Waves of Feminism/ Gender Theory", Teaching Learning Material.

<sup>5</sup> Ibid.

TABULAR REPRESENTATION OF DIFFERENT THEORIES OF FEMINIST JURISPRUDENCE<sup>13</sup>

TYPES	CENTRAL IDEA	SOME THEORISTS	GOAL
Liberal Feminism	Women are rational individuals entitled to same social privilege as men	Friedman, Nussbaum, Wolf	Reform within system
Marxist Feminism	Women can be seen as a special class, exploited through the capitalism sexual division division of labour	Delphy, Rowbotham	Gender inequalities will disappear after revolution or social redistribution
Radical Feminism	Women are oppressed within patriarchy,	Millet, Jackson, Firestone	Revalue 'feminine' value such as an ethic of

	especially through male control of sexuality		care, feminine revolution
Liberal Modernist	Rational individual have certain rights that should be common to all	Beauvoir , Oakley	Redistribute wealth and social rewards
Lesbian Political Theory/ Lacan and French Feminism	Women's have different ( even if not natural) means they have special Needs (feminine)	Irigaray, Young	Difference should be recognised and valued.

## JOURNEY FROM ISOLATION TO ASSIMILATION: NEO-LIBERALISM

The term 'transgender' has been used since early 1990's through a movement influenced by Leslie Feinberg's against pathologizing terminologies and bringing the non-conforming gender identities under one umbrella community. Denial of basic human rights and massive discrimination and marginalization faced by the transgender persons in all social institutions including family, labour market, housing, health, education and sexual instances of hate crimes including sexual abuse ignited the minds of the transgender activists. They initiated transgender movements to address the numerous issues faced by the gender non-conforming population across the globe.<sup>6</sup>

The transgender social activism gained resonance with the rise of feminism in 1960's. The first trans riots in U.S in 1966 followed by the infamous New York City Stonewall Riots of 1969 marked the foundation for contemporary LGBT movement in history.

This results into neo-liberal factionalism encompassing judicious rights and recognition, including State-issued ID's, citizenship rights, marital rights, inheritance rights, health, employment, sexual and reproductive freedom etc. A survey conducted by GATE (Global Action for Trans Equality) reported that although trans and intersex movements are rapidly growing worldwide but such movements are generally underfunded.<sup>7</sup> In 2009, the U.S gender identity has been covered by federal hate crime law under Matthew Shepard Act. More than 30 European countries have also formulated legal provisions to recognise transgender person's gender identity.<sup>16</sup> In 2011, the UN Human Rights Council passes the UN Resolution on Human Rights of

LGBT. Countries like Brazil, Ecuador, Germany, Malta, Netherlands, Uruguay have used the Yogyakarta Principles to respond violence and discrimination.<sup>8</sup>

Other major focal points of trans activities also include teacher- training programs, establishment of 'safe-spaces' for LGBT youth in schools, install gender-neutral bathrooms and awareness raising campaigns. These transgender movements have inspired knowledge production through art, literature and scope for cultural assimilation.

Further, academic integration of Tran's existence and violence in Conference, Journals and academic programs have a pressing effect of addressing transgender issues as an agenda for social justice.

The development of transgender jurisprudence is a cumulative effort of accepting the transgender person as equal members of society and to ensure equal rights and guarantee equal protection. During 1850's-

<sup>6</sup> Id.note 3.

<sup>7</sup> Daniela Jauk, "Transgender Movement in International Perspective", (2016). [www.researchgate.net/publication/316364157\\_Transgender\\_MOVEMENTS\\_IN\\_international\\_PERSPECTIVE/LINK/5D8257BA458515CB-D19730B0/download](http://www.researchgate.net/publication/316364157_Transgender_MOVEMENTS_IN_international_PERSPECTIVE/LINK/5D8257BA458515CB-D19730B0/download).

<sup>16</sup>  
<sup>8</sup> Ibid.

1950's the transgender phenomenon was mounting under medical regulations and socio-legal restrictions. This encouraged isolation and furtive activities. During the same time the Prince Foundation for Personality Expression laid a key point in political history of transgender identities.

By mid 1960's U.S witnessed several transformations in the light of large-scale movements starting from Liberal feminism to challenging the binary generational notion on accepting gender identities and sexual expressions.<sup>9</sup>

In May 1959, an incident between customers and police took place at Cooper's Donuts as a result of continuous instances of police officials arresting transgender people whose appearance did not match the designated gender in their ID's on the suspicion of prostitution, vagrancy, loitering etc. A similar act took place in 1965 at Dewey's Coffee house where young customers with non-conforming clothing were denied services. This incident was recorded as the first act of civil disobedience over anti-transgender discrimination. This incident further illustrates how minority rights activism fertilized different cross-sectional movements.<sup>10</sup> During the same time liberation and radical feminism movements were at rise which conceptualised homosexual people and women as oppressed social minority groups. The 1966 Crompton Cafeteria riots was another unpinning incident at Tenderloin, San Francisco where police atrocities has resulted in massive destruction to the restaurant, street fight and acts of vandalism.<sup>20</sup>

In the midst of such tensions the first gay and transgender youth organization was founded in 1966. The decade of 1960's witnessed significant development in transgender healthcare in U.S and Europe. This transformation of attitude to improve the quality of life of transgender people owes credit to Dr. Henry

Benjamin's book "*The Transsexual Phenomenon*"<sup>11</sup>. This sudden shift in medical paradigm gave force to positive changes in the social constructions as well.

Circumstances like discriminatory policies and practices, domestic consequences of U.S foreign wars, land-use policies, access to health care, civil rights activism aiming to expand individual liberties, social and structural injustice, sexuality and gender intolerance provided the backbone to transgender movements in US.<sup>12</sup>

In 1967, the first transgender peer support group in U.S named "Conversion our Goal" was formed with the focal point of seeking medical services, along with group support sessions, psychological counselling, hormone therapy and 'sex change' surgery. The year 1970 saw the emergence of transgender men coming out of their closets but the same was short lived firstly because passing of a transgender men as a women is difficult than as a women. Secondly, transgender man has barely raised their voices against the discriminations or

<sup>9</sup> Susan Stryker, TRANSGENDER HISTORY, 74 Seal Press (2008), [www.transreads.org/wp-content/uploads/2019/03/2019-0317\\_5c8eb1ebaced4\\_susan-stryker-transgender-history2.pdf](http://www.transreads.org/wp-content/uploads/2019/03/2019-0317_5c8eb1ebaced4_susan-stryker-transgender-history2.pdf).

<sup>10</sup> Ibid.

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<sup>11</sup> Ibid.

<sup>12</sup> Ibid.



fought being part of the larger transgender community.<sup>13</sup>In 1968, Mario Martino founded the Labyrinth, first U.S organisation devoted to the specific needs of Transgender men.

The “Stonewall riots” of 1969 further provided impetus to gay revolution by sparking the years of political agitations and social marginalities. This resulted in the formation of Gay Liberation Front Cells across U.S. The Stonewall riots play a significant role in the transgender legacy leading to Third World liberation and anti-imperialist movements. It is pertinent to notice that throughout the history of transgender riots in U.S, all the riots have taken place between police officials and transgender persons. In 2009 U.S passed a Federal Law which provides protection to transgender persons is The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009. The Act expands the scope of the 1969 United States Federal Hate-crime Law by including offences motivated by actual or perceived gender identity

The year 1973 witnesses a low-point in the transgender political history of U.S whereby even after sex change surgery the discrimination in terms of family, housing, employment persisted. The AIDS pandemic 1981 further had devastating new threat to the transgender existence.

During the decade of 1990 there has been rapid evolution and expansion in the trans activities/initiatives. This led to having the current definition of ‘transgender’ as a catchall term for all forms of non-conforming gender identities. The effort made by U.S. forms the starting point for transgender jurisprudence globally.

In *Planned Parenthood of Southeastern Pa. v. Casey*,<sup>14</sup> the United States Supreme Court had opined that matters which involve the most intimate and personal choices a person may make in the sphere of sexual orientation, , individual

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<sup>13</sup> Ibid.

<sup>14</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992)

inclination, expression of emotional and physical behaviour are choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.

The International Commission of Jurists and the International Service for Human Rights, on behalf of a coalition of human rights organisations, had undertaken a project to develop a set of international legal principles on the application of international law to human rights violations based on sexual orientation and gender identity to bring greater clarity and coherence to States' human rights obligations.

In recent years, transgender people around the world have made tremendous strides toward achieving legal recognition. The South African constitution says that "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."<sup>15</sup> The Parliament of South Africa in the year of 2003, enacted Alteration of Sex Description and Sex Status Act of 2003.

The Anti Sodomy laws prevalent in England and America have been repealed. The European Convention on human rights says that the anti sodomy laws infringe the right to privacy under Art 8 of the Convention.

Recital 3 of the Preamble to the Directive 2006/54/EC of European Parliament and the Council of 5 July 2006 makes specific reference to discrimination based on gender reassignment for the first time in European Union Law. The European Court of Justice in *P v. S*<sup>16</sup> in the context of rights of individuals who intend to or have undergone sex reassignment has observed, "where a person is dismissed on the ground that he or she intends to undergo or has undergone gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment".

The Hawaiian Supreme Court in *Boehr v. Lewin*<sup>17</sup> held that "if same sex marriage is prohibited then it is going against the principle of non-discrimination on the basis of sex". The Canadian Supreme Court has also taken the same view that the spousal benefits must also be given to the gays and lesbians.<sup>18</sup> In *Toonen v Australia*<sup>19</sup>, the Human Rights Committee of United Nation stated that the Anti Sodomy laws of Tasmania are violative of Art 17 and Art 26 of ICCPR 1966.

United Kingdom passed the General Recommendation Act in 2004 which provided legal recognition to the obtained gender even without undergoing surgery by a person and also lays down guidelines highlighting

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<sup>15</sup> SOUTH AFRICAN CONSTITUTION, Sec.9. Cl.3.

<sup>16</sup> Id. Note.11.

Supreme Court of Hawaii No. 20371(1999)

[1999] 2 S.C.R. 3.

<sup>17</sup> *Boehr v. Lewin* ,

<sup>18</sup> *M v. H*,

<sup>19</sup> *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994)



the consequences of the newly acquired gender status. Following this Hungary enacted the Equal Treatment and the Promotion of Equal Opportunities Act of 2003. The Act includes sexual identity as one of the grounds for discrimination.

In *Obergefell, et al. v. Hodges, Director, Ohio Department of Health, et al.*<sup>20</sup> the U.S. Supreme Court while highlighting the plight of homosexuals, observed that, same-sex intimacy shall no longer be condemned as immoral by the State.

Australia in 2013 enacted the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act, 2013 which amends the earlier statute on Sex Discrimination Act of 1984.

In the subsequent three years, four more countries- Colombia, Denmark, Ireland, and Malta- explicitly eliminated significant barriers to legal gender recognition. This evolution sets them apart from countries that either do not allow a person to change their “male/female” designation at all, or only allow them to do so when certain conditions have been met, which may include surgery, forced sterilization, psychiatric evaluation, lengthy waiting periods, and divorce. For the first time, people can change their gender marker on documents simply by filing the appropriate forms. In Ireland under Gender Recognition Act of 2015 same sex marriage was allowed the government instituted identity-based legal gender recognition.<sup>31</sup>

The LGBT community in India has been travelling through a roller-coaster ride for the past 20 years. From the liberating Delhi High Court Judgement in 2009 to the Supreme Court Bench decision in 2013 the sexual minorities have been marching parades insisting on their rights as equal citizens as guaranteed under the constitution.<sup>21</sup> With both the judgments becoming high profile media circuses, what happened was a psycho babbling summer sault. The Delhi High Court judgement came like a massive thump on the back of a still born child making it breath huge gulps of fresh air and get a life.<sup>33</sup> Literally, thousands of people came out of the closet into the open spaces in homes and offices. Subsequently, the 2013 Supreme Court judgement pushed the LGBT back to the closet by recriminalizing same sex or other non-peno vaginal sex.

Tracing their historical existence in India it us found that their existence was recognised in the various texts of Vedic period and ancient Hindu Law. Vatsyayana defines transgender in Kama sutra as a third order of human called the “**tritiiyaa prakriti**”. In other words, ancient Hindu society did not consider homosexuals as perverts or sinners. In Dharmashastra they were recognised as a part of courtesans, musicians, dancers and performers and had legal protections of their incomes and sustenance ensured.

During the Mughal period Hijras played a famous role in the royal courts as political advisors, administrators and closest to Kings and Queens. They occupied high positions because of their loyalty during

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Mughal era but during the British period their position deteriorated as the Britishers tried to eradicate the transgender community from India and categorized them as ‘**criminal tribes**’ under the Criminal Tribes Act 1871

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<sup>20</sup> *Obergefell, et al. v. Hodges, Director, Ohio Department of Health, et al.* 576 US (2015) <sup>31</sup>

Ibid.

<sup>21</sup> Legal Notes 46, (Feb. 2018), Vol. 1.

<sup>33</sup> Ibid.

In India, the LGBTQ movement started in 1994 when the AIDS Bhedbhav Virodhi Andolan (ABVA) filled a petition in Delhi H.C for deleting Section 377 on the ground that Section 377 violates one's right to privacy and health.

Section 377 of IPC was a major stumbling block which imposed a legal criminalizing sanction on homosexuality. Ruth Lister opines that "such laws undermine the exercise of citizenship rights and create an atmosphere not conducive to their enjoyment and anti-sodomy laws foster such atmosphere". Sec 377 of IPC talks of "unnatural offences" even if voluntarily, of "carnal intercourse" against the order of nature with any man, woman or animal i.e. sec 377 makes carnal intercourse against the order of nature with any man, woman or animal punishable with imprisonment for life or a term which may extend to 10yrs.

In September 2001 a signature campaign was started by NLS Bangalore which establishes "gay rights as human rights and Sec377 was upfront to Human Rights". In December 2001 NAZ Foundation filed a writ petition before Delhi High Court for reading down Section 377 as it breached Fundamental Rights under Articles 14, Art 15, Art 19 and Art 21 of the Constitution of India. It was finally in 2014 that a legal protection was granted to the transgender persons as 'third gender'.

The landmark judgement of Supreme Court in NALSA v. UOI<sup>22</sup> on 15<sup>th</sup> April 2014 has uplifted the transgender from the age old stigma and discrimination by recognising them as third gender but their social recognition is still at halt. Thereafter 2014 witnessed the enactment of the first piece of legislation for Transgender as The Rights of Transgender Persons Bill 2014 followed by the Transgender Persons(Protection of Rights) Bill 2016, Transgender Persons(Protection of Rights) Bill 2018 and Transgender Persons(Protection Of Rights) Act 2019.

#### TABULAR REPRESENTATION OF THE VARIOUS EVENTS IN TRANSGENDER HISTORY

YEAR	EVENT
1959	<ul style="list-style-type: none"> <li>Cooper's Donut incident</li> </ul>
1961	<ul style="list-style-type: none"> <li>Virginia Prince founded the Prince Foundation For Personality Expression</li> </ul>
1962	<ul style="list-style-type: none"> <li>Illinois becomes the first U.S. state to remove sodomy law from its criminal code.</li> </ul>
1963	<ul style="list-style-type: none"> <li>The first gay rights demonstration in the USA takes place on September 19th at the Whitehall Induction Centre in New York City, protesting against discrimination in the military</li> </ul>
1965	<ul style="list-style-type: none"> <li>Deweey's Coffehouse incident.</li> <li>1<sup>st</sup> Civil Disobedience movement against transgender discrimination.</li> </ul>
1966	<ul style="list-style-type: none"> <li>Crompton Cafeteria Riot</li> </ul>
1967	<ul style="list-style-type: none"> <li>First transgender support group named "Conversion our Goal"</li> </ul>

<sup>22</sup> NALSA v. UOI [AIR 2014 SC 1863].

1968	<ul style="list-style-type: none"> <li>• Mario Martino founded the Labyrinth.</li> </ul>
1969	<ul style="list-style-type: none"> <li>• Stonewall Riot.</li> <li>• Modern LGBT movement.</li> <li>• Third world Liberation and anti- imperialist movement.</li> </ul>
1970	<ul style="list-style-type: none"> <li>• Transgender men started raising their voice.</li> <li>• The first “Gay Liberation Day March” is held in New York City</li> </ul>
1973	<ul style="list-style-type: none"> <li>• Homosexuality continues to be pathologized by appearing as Sexual Orientation Disturbance in the DSM-II</li> <li>• The board of the American Psychiatric Association votes 13-0 to remove homosexuality from its official list of psychiatric disorders, the DSM-II</li> </ul>
1977	<ul style="list-style-type: none"> <li>• Harvey Milk becomes the first openly gay person to be elected to public office in California</li> </ul>
1980	<ul style="list-style-type: none"> <li>• Democrats are the first political party to add “gay rights” to their platform</li> </ul>
1981	<ul style="list-style-type: none"> <li>• AIDS pandemic had posed devastating threat to the existence of transgender persons.</li> </ul>
1984	<ul style="list-style-type: none"> <li>• Virginia Uribe begins Project 10, a program to support LGBTQ students in a Los Angeles high school</li> </ul>
1989	<ul style="list-style-type: none"> <li>• Denmark becomes the first country in the world to legally recognize same-sex unions</li> </ul>
1994	<ul style="list-style-type: none"> <li>• Toonen v Australia, the Human Rights Committee of United Nation stated that the Anti Sodomy laws of Tasmania are violative of Art 17 and Art 26 of ICCPR 1966.</li> </ul>
	<ul style="list-style-type: none"> <li>• AIDS Bhedbhav Virodhi Andolan (ABVA) filled a petition in Delhi H.C for deleting Section 377 on the ground that Section 377 violates one’s right to privacy and health.</li> </ul>
1998	<ul style="list-style-type: none"> <li>• Tammy Baldwin became the first openly lesbian candidate ever elected to Congress</li> </ul>
1999	<ul style="list-style-type: none"> <li>• GLSEN conducts its first National School Climate Survey to assess the experiences of LGBTQ youth with regards to their experiences of schoolbased harassment and victimization.</li> <li>• <i>Boehr v. Lewin</i>, The Hawaiian Supreme Court held, prohibition of same sex marriage is against the principle of non-discrimination.</li> </ul>

2001	<ul style="list-style-type: none"> <li>• NAZ Foundation filed a Writ petition before Delhi High Court for reading down Section 377 as it breached Fundamental Rights under Articles 14, Art 15, Art 19 and Art 21 of the Constitution of India.</li> </ul>
2002	<ul style="list-style-type: none"> <li>• The definition of “gender” has been expanded to include protections for transgender and gender non-conforming people in employment, housing, and public accommodations in the NYC Human Rights Law.</li> </ul>
2003	<ul style="list-style-type: none"> <li>• The U.S. Supreme Court overturns sodomy laws, proclaiming rights to privacy and decriminalizing “homosexual” behaviour.</li> <li>• The Parliament of South Africa enacted Alteration of Sex Description and Sex Status Act of 2003</li> <li>• Hungary enacted the Equal Treatment and the Promotion of Equal Opportunities Act of 2003</li> </ul>
2004	<ul style="list-style-type: none"> <li>• Massachusetts becomes the first U.S. state to legally recognize same-sex marriage.</li> </ul> <p>United Kingdom passed the General Recommendation Act</p>
2006	<ul style="list-style-type: none"> <li>• The European Union Legislations on transsexuals. Recital 3 of the Preamble to the Directive 2006/54/EC reference to discrimination based on gender reassignment for the first time in European Union Law.</li> <li>• Yogyakarta Principles were formulated relating to human rights in the areas of sexual orientation and gender identity.</li> </ul>
2007	<ul style="list-style-type: none"> <li>• Supreme Court of Nepal, in a sweeping 2007 ruling, ordered the government to recognize a third gender category based on an individual’s “self-feeling”</li> </ul>
2009	<ul style="list-style-type: none"> <li>• <i>NAZ Foundation v. Govt. of NCT of Delhi</i> case the court held that treating consensual homosexual sex between adults as a crime is a violation of fundamental rights protected by Indian Constitution.</li> <li>• Supreme Court in Pakistan recognised the third gender category.</li> <li>• U.S enacted The Matthew Shepard and James Byrd. Jr. Hate Crimes Prevention Act of 2009.</li> </ul>
2012	<ul style="list-style-type: none"> <li>• Argentina made a ground breaking declaration that anyone over the age of 18 can choose their gender identity</li> </ul>
2013	<ul style="list-style-type: none"> <li>• Australia enacted Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act, 2013.</li> </ul>

	<ul style="list-style-type: none"> <li>Germany allows the parents to register the sex of the children as “not specified” in the matter of children with intersex variation</li> </ul>
2014	<ul style="list-style-type: none"> <li>Supreme Court of India passed a landmark judgment thereby recognizing transgender persons as “Third Gender”</li> <li>India initiated its first legislative effort by enacting Tights of Transgender Persons Bill, 2014</li> </ul>
2015	<ul style="list-style-type: none"> <li><i>Obergefell, et al. v.Hodges, Director, Ohio Department of Health, et al</i>, U.S. Supreme Court held same-sex intimacy shall no longer be condemned as immoral by the State.</li> <li>Ireland under Gender Recognition Act of 2015 same sex marriage was allowed the government instituted identity-based legal gender recognition.</li> <li>12 UN technical agencies—ranging from UNICEF to the World Food Programme called on governments to ensure legal recognition of the gender identity of transgender people</li> </ul>
2016	<ul style="list-style-type: none"> <li>The Transgender Persons( Protection of Rights) Bill 2016</li> </ul>
2017	<ul style="list-style-type: none"> <li>Yogyakarta principles were expanded to include gender expression and sex characteristics with an objective to address the International Human Rights of LGBTI people.</li> <li>UNDP, in partnership with Global Action for Trans Equality and Organisation Intersex International Australia, carried out two global capacity building webinars on advancing the rights and inclusion of intersex people</li> </ul>
2018	<ul style="list-style-type: none"> <li>The Transgender Persons( Protection of Rights) Bill 2018</li> </ul>
2019	<ul style="list-style-type: none"> <li>Enactment of Transgender Persons (Protection of Rights) Act 2019</li> </ul>

## CONSTITUTIONAL VALIDITY OF THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT 2019.

The Constitutional Validity of the Transgender Persons ( Protection of Rights) Act 2019 was challenged in the case of Grace Banu Ghaneshan & Ors v/s UIO & Anr<sup>23</sup> on the ground that Sec 4, Sec 5, Sec 6 Sec 7, Sec 12(3), Sec 18(a) and Sec 18(d) of the Act 2019 violates the fundamental rights of Transgender Persons pertaining to their life, liberty, privacy, dignity and autonomy guaranteed U/A 14, 19 and 21 of the Constitution of India. The challenges has been summaries as follows:

<sup>23</sup> Grace Banu Ghaneshan & Ors v/s UIO & Anr [W.P (Civil) No. 406/ 2020].

- Section 4,5 and 6 of the Act relates to rights of Transgender persons to be recognised as a Transgender persons. Section 4 provides that a Transgender shall have a right to self perceived gender identity. This indicates that the natural gender identity of a transgender person must be recognized.
  - In the light of Sec 4 the requirement of Sec 5 and Sec 6 contradicts the provision of right to self identify their gender identity. Self- identification of one's own gender is a basic human rights to every individual in general. Hence, requiring a Transgender person to make an application to District Magistrate for issuing Certificate of Identity in accordance with prescribed form and manner contradicts one's right to self-determine one's gender identity. Requiring documentary proof's, further requires the transgender persons to undergo medical/ psychological test reports against their willingness as unconstitutional.
  - Section 7 provides an additional grounds of discrimination/ violation by requiring the transgender persons to undergo medical surgery in order to align with identity of their choice.
  - Moreover, Certification process identifies of transgender person as a transgender, not as male or female unless the person has undergone Sex Reassignment Surgery.
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- Section 12(1) compels a transgender person to continue living with their immediate family or to reside in rehabilitation centre upon the orders by a competent court are violative of Art 21. Denial of decisional autonomy for alternative arrangement to be violative of Art 21 . It was criticised that indulgence in forced / bonded labour as prescribed offence u/s 18 (a) as the same may be applied arbitration against the transgender community in terms of their equality and employment. Moreover, the punishment provided u/s 18 (a) and 18(d) are derogatory to the right to equality as the punishment prescribed are discriminatory as compared to other gender's under IPC. Hence, violative of Art 14.
  - The 2019 Act is also silent on giving reservation in education and employment to transgender community which was recognised by the judiciary in NALSA v/s UOI<sup>24</sup>. The Petitioner strongly mirrors on the landmark S.C. Judgment in NALSA v/s UOI<sup>25</sup> which recognised the Fundamental Rights of transgender persons and other non-conforming gender individuals. Apart from referring to other relevant judgements upholding one's right to privacy and non-discrimination in Puttaswamy<sup>26</sup> and Navtej Johar<sup>27</sup> case respectively, the petition also relies heavily on the Yogyakarta Principles to deduce the International Human Rights Law pertaining to rights to self determination, dignity and freedom for the gender diverse individuals.
  - Self identification has been upheld as a fundamental right U/A 19 (1) (a) and Art 21. Therefore, the Act 2019 falls short to recognise the same u/s 5, 6 and 7 of the Act thereby infringing the right to bodily integrity, autonomy and privacy.

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<sup>24</sup> Id. Note 4.

<sup>25</sup> Ibid.

<sup>26</sup> Justice K.S.Puttaswamy v/s UOI (2017) 10 SCC 1.

<sup>27</sup> Navtej Singh Johar v. UOI (2018) 10 SCC 1.

<sup>40</sup> Id. Note 36.



- Section 4 of the Act 2019 provides merely the right to be recognised as transgender persons. There is no scope to self-determine oneself as male or female which is limiting their right, hence unconstitutional. Moreover, the requirement of undergoing sex reassignment surgery (SRS) u/s 7 in order to identify with the gender of their choice further violates one's right to bodily integrity, autonomy and privacy. This also contradicts the landmark judgement of NALSA<sup>40</sup>. Therefore, the petitioner sought that the direction given by the Supreme Court in NALSA case must be applied in totality and provisions u/s 4, 5, 6,7, 12(3), 18(a)and 18(d) or any other provision of the act which contravenes Fundamental Rights must be declared unconstitutional.

Hence, the Petitioners prayed for a stay order until the decision of the Honourable Supreme Court

#### CRITICAL ANALYSIS OF THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT 2019.

1. The Act does not provide the appropriate authority who shall have jurisdiction to address grievances relating to violation of transgender rights.
2. Chapter V only provides the obligation of the establishments not to discriminate against transgender persons u/s 9, 10 and 11 but no such obligation is imposed upon the immediate family u/s 12 or upon the Government. Moreover, Sec 11 provides for designation of a complaint officer in every establishment but it is silent on similar requirement in relation to complaint against immediate family.
3. Section 13 is silent on the requirement of compulsory education as enshrined U/A 21A and Right to Education Act 2009. These three provisions must be aligned for better inclusive and quality education in line with the New Education Policy 2020. Section 13 is restrictive in nature as it limits the scope of the right to access education by a transgender person through a private institution. Section 13 is also silent on the requirement of reservation as directed by the NALSA<sup>28</sup> judgement.
4. Section 15 falls short to specify separate provision for mental healthcare of the Transgender persons. In the midst of existing social stigma and normative binary mindsets separate provision for 'healthcare safety' and "mental healthcare safety" is also mandated for better accessibility of the right to healthcare.
5. Sec 15 is silent on providing medical insurance. The appropriate government must take sufficient steps to provide holistic healthcare facility and reduce their financial burden in terms of Sex Reassignment Surgery, hormone therapy, medicines etc which falls heavily upon the transgender persons. Moreover, Government subsidies must be made available to them in terms of healthcare.
6. The requirement of Certificate of Identity u/s 5 and 6 must be limited to those who has undergone sex reassignment surgery. This would give an impetus and validity to sec 7 of the Act.
7. Section 4, Section 5 and Section 6 are contradictory in nature as on one hand section 4(2) provides the right to self perceived gender identity whereas Sec 5 and Sec 6 states the requirement of Certificate of Identity issued by the District Magistrates upon his personal satisfaction as to forms and procedures. This leaves ample space for normative biasness/prejudices at the hands of law enforcement agencies,

<sup>28</sup> 41 Ibid.

leading to epistemic injustice. In other words, the legibility to be recognised as a transgender or selfperceived gender identity is at the mercy of the District Magistrate. Sec 5 is silent upon the right of the minor on whose behalf an application can or finally accept the same upon attaining maturity. Providing such right is mandatory because it is the child who would be experiencing the biological changes during adolescence and youth age transition. Denial of such right would be derogatory to the basic human rights of the minor to identify himself. In a nutshell the provision to enabling the parents/guardians to apply for Certificate of Identity on behalf of the minor must be a provisional certificate and the final certification must be issued to the minor upon attaining majority u/s 5. The appropriate Government must make provision for online registration of Certification which would help in record keeping/ data base.

8. Provision of section 8(4) contradicts provision of section 12(3) as on one hand Sec 8 (4) provides the obligation of the government to take measures for rescue, protection and rehabilitation of transgender person whereas u/s 12 (3) states that in order to reside in a rehabilitation centre the order from competent court is required. This brings the executive and judiciary into a clash. Moreover, the Act falls short to define the term "Competent Court". There is a need to bridge the gap in exercising powers between the executive and the judiciary.
9. Section 14 also fails to recognise the need for reservation in terms of employment, unless they are better assimilated in the society in terms of employment. A special comprehensive insurance scheme specially targeted for the transgender persons for SRS, hormonal therapy, laser therapy must be designed in pursuance of Sec15 (g) but till date no special scheme has been formulated.
10. Section 16 provides for the constitution of National Council for transgender persons. Out of 9 category representation only nine category has been provided for transgender representative. This under representation lays the foundation for marginality against the transgender community. The Council was constituted on 21<sup>st</sup> Aug 2020 but till date there no comprehensive National Policy has been formulated so far which is one of the core functions of the Council. There is a need for constituting a State Council because majority of the developments or initiatives are been taken at the State level rather than at National Level.
11. Section 17 is also silent on the procedure to be followed for addressing grievance by the transgender persons.
12. The punishment prescribed u/s 18 is minimal with no stringent measure been taken against any gross violation of human right of the transgender persons. This makes the entire legislation a toothless tiger.
13. The amount of revenue grant by the Central Government to the NCT must be included in the budget u/s 19. Allocation of revenue in the budget would enhance transparency. The Central Government must continuously monitor and audit the NCT for better accountability under Chapter IV. Without any monitoring the NCT might become an unruly horse.
14. Section 21 provides that no legal action can be brought against Government, local authorities or any government officials. Immunity from any action civil or criminal itself violates provisions of CPC and

CRPC. In order to claim immunity from legal action the Government must define the term “good faith” for the purpose of this Act.

15. Section 17 does not provide the function of either advising the State Government in matters of formulation of rules nor provides the authority to monitor the rules framed by the State Government in pursuance of Section 22 (4). This may lead to formulation of arbitrary rules and policies by the State Government.

COMPARATIVE ANALYSIS OF THE RIGHTS OF TRANSGENDER PERSONS BILL 2014,  
TRANSGENDER PERSONS (PROTECTION OF RIGHTS) BILL 2016 AND TRANSGENDER PERSONS  
(PROTECTION OF RIGHTS) ACT 2019

BILL 2014	BILL 2016	ACT 2019	ANALYSIS
Right to equality and non-discrimination (Sec 4)	Right to recognition (Sec4)	Right to recognition (Sec4)	Under Act 2019 Section 4 is subject to section 5 and section 6.
Section 4 (2) ensures reasonable accommodation for transgender Freedom of choice in terms of community living/ residence (Sec7)	Sec 13 compels the transgender person to reside with their immediate family and denies the choice of alternate residence without prior approval/ order from the competent court.	Section 12(3) compels a transgender person to continue living with their immediate family or to reside in rehabilitation centre upon the orders by a competent court are violative.	Act 2019 denies a transgender person the right to alternate accommodation. Act 2019 is also silent on who would be the competent court for the purpose of giving consent order u/s 12(3).
Guarantees equal enjoyment of human rights by transgender children at par with other children including the right to express themselves. (Sec 5)	D.M shall issue Certificate of Identity subject to section 6	Transgender children can identify themselves through their parents/ guardian subject to approval by District Magistrate. (Sec 5)	Act 2019 is silent on freedom of expression of transgender children which contravenes provision of Art 19 (1) (a) of the Constitution of India. Denies the right to self identify themselves hence unconstitutional.
Right to respect for one's physical and mental integrity. (Sec 8)	No provision for one's right to respect.	No provision for one's right to respect.	Act 2019 falls short to include not only one's right to respect but also

			ignores one's right to mental wellbeing.
Imposes obligation upon the local authorities as well the police (Sec10)	No provision imposing obligation on local authorities or police officials.	No provision imposing obligation on local authorities or police officials.	Act 2019 fails to incorporate the role of local authorities as a major stakeholder in relation to welfare and protection of transgender persons.
No provision for complaint officer	Appointment of complaint officer u/s 12	No provision for complaint officer	Act 2019 fails to incorporate such provision which deemed pertinent to address violation of transgender rights at the grassroot level.
Right to education in government funded or recognised institutions with an aim to ensure inclusive education. 2% reservation in education (Sec 13)	Sec 14 of the Act ensures the right to education of transgender persons only in Government funded institutions	Sec 13 of the Act ensures the right to education of transgender persons only in Government funded institutions.	The Act is silent on reservation. Transgender Persons can avail benefit only through Government funded Institution.
Provision for vocational training and self employment u/s 15. Government is to formulate schemes and programmes for the same	No provision	Provision only for vocational training.	Act 2019 fails to incorporate provision for self employment.
Sec 26-45 deals with constitution and functions of National Commission and State	Sec 17 provides for constitution and functions of National	Sec 16 provides for constitution and functions of National	There is underrepresentation of the transgender
Commission for transgender persons respectively.	Council for transgender persons	Council for transgender persons.	community in the Act 2019. The Act 2019 does not provide for the

			constitution of State Council.
Section 46 provides for the establishment of special Transgender Rights Court.	No provision for Transgender Court.	No provision for Transgender Court.	Act 2019 largely watershed such provision.
Sec 49 calls for vicarious liability for an offence committed in an establishment.	No provision for vicarious liability.	No provision for vicarious liability.	Act 2019 falls short to incorporate such provision.
Sec 50 imposes punishment only upto 1yr.	Sec 19 imposes punishment upto 2 years with fine	Sec 18 imposes punishment upto 2 years with fine	Both the Bills and Act fails to incorporate stringent punishment making both the laws paper tigers.

## CONCLUSION

The demand for legal gender recognition provokes moral panic in many governments. But it is a crucial fight to wage. If transgender communities are to thrive, and if the rights to privacy, free expression, and dignity are to be upheld for all, the human rights movement needs to prioritize eliminating abusive and discriminatory procedures that arbitrarily impede the right to recognition. Governments should acknowledge that the state should no longer be in the business of denying or unjustly restricting people's fundamental right to their gender identity. There must be a judicious nexus between the judicial reasoning and contemporary law reforms to establish an imprint around the transgender individuals. Failure to incorporate progressive legislation and equity makes a law repressive and regressive. In the light of the above analysis the following suggestions are put forward:

1. There is a need to revisit and redraft the law relating to transgender persons protection and rights in India.
2. Importance must be accorded to the directions pronounced by the Supreme Court in the laudatory judgement of NALSA case.
3. Re-sexing through sex reassignment surgery should be at the desire of the transgender person and not a criteria for availing benefits or accessing rights.
4. The appropriate government must make provision for online registration of certificate which would help creating a data base.
5. Stringent punishments must be incorporated to give justice to transgender victims of crime.
6. A minor transgender must have the right to alter the certificate of identity upon achieving majority.
7. A transgender person must have the right to choice of residence.
8. The comprehensive law demands active role of the State Government and other local authorities.