





**SENSITISATION MODULE FOR
THE JUDICIARY ON LGBTIQA+
COMMUNITY**



**e-Committee, Supreme Court Of India
November 2022**



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From the Desk of The Chief Justice of India



It was only 70 years after the adoption of the Indian Constitution that a section of the Indian population was able to secure the most basic of rights— the right to live as free individuals. The Supreme Court in *NALSA v. Union of India* declared that the rights that are granted under the Constitution are equally applicable to transgender persons, and recognised their right to self-identification. Four years later, in *Navtej Singh Johar v. Union of India*, the Supreme Court read down Section 377 of the Indian Penal Code, 1860 to exclude consensual relationships between adults— of the same sex or otherwise. The judgments of the Supreme Court have certainly provided members of the LGBTIQ+ community equal rights in the eyes of law. However, the members of the community still face structural barriers in public and private spaces which preclude them from accessing services such as justice delivery, education, employment, healthcare, and financial services. The structural barriers that the community faces stem from the widespread discrimination that operates in both subtle and significant ways.

Members of the LGBTIQ+ community interact with the justice delivery system in various capacities - as informants, accused persons, litigants, employees and much more. As such, judges and the judiciary at large play a crucial role in the realisation of the rights of members of the LGBTIQ+ community. Thus, it is all the more necessary that the interaction of members of the LGBTIQ+ community with the justice delivery system is not vitiated by discriminatory attitudes and prejudices. Innate discriminatory attitudes against the members of the LGBTIQ+ community due to social conditioning may influence the manner in which members of the LGBTIQ+ community are treated in various capacities both inside and outside the courtroom. This handbook seeks to sensitise members of the judiciary on concepts of gender and sexual diversity, on the usage of appropriate terminologies and makes certain recommendations on the protocol to be followed by courts while interacting with the members of LGBTIQ+ community. It is hoped that this handbook would aid judges in ensuring that the members of the LGBTIQ+ community are entitled to be treated as equal citizens under the Constitution.

Dr Justice Dhananjaya Y Chandrachud

1. OBJECTIVES AND OVERVIEW



1.1 OBJECTIVES

- Explaining the concepts of sex, gender, sexuality and queer relationships;
- Identifying the barriers faced by **LGBTIQA+** individuals in courtrooms and beyond, including the discriminatory practices;
- Promoting the usage of correct terminology to refer to members of the **LGBTIQA+** community;
- Eliminating negative attitudes and stigma against **LGBTIQA+** individuals;
- Providing an overview of the jurisprudence on the rights of the **LGBTIQA+** individuals in the Supreme Court and High Courts;
- Covering the impact of the existing legislative regime on **LGBTIQA+** individuals; and
- Providing recommendations and listing best practices for the equal treatment and welfare of the **LGBTIQA+** individuals

1.2 OVERVIEW

This handbook has been prepared for the purpose of sensitizing magistrates, judges, and other judicial staff on sexual and gender diversity with the aim of eliminating discriminatory attitudes and practices against **LGBTIQA+** individuals both within and outside the courtrooms. The judiciary has been at the forefront of expanding the rights of the **LGBTIQA+** community through a transformative interpretation of the provisions of the Constitution, and other statutes. However, there have been instances where judicial

intervention has fallen short of providing adequate protection to LGBTIQ+ individuals and has intentionally or unintentionally perpetuated stereotypes on gender roles and sexual behaviour.

This may be a consequence of the internalization of stereotypical gender roles and compulsory heterosexuality by the judges, who may find it hard to comprehend practices, identities, gender expression, and presentation that are at odds with what they have been socialised to think is natural, inherent, and inevitable. They may believe that there can be only two oppositional genders- that gender identity is determined at birth and is immutable. They may continue to hold the perception that heterosexuality is the only “*normal*” expression of sexuality. The handbook aims to address these assumptions about human nature that are reinforced constantly by society on everybody including judges. The dominant values of society, especially on the issues of gender and sexual diversity, are not reflective of human reality. The assumptions about appropriate gender and sexual behavior influence how LGBTIQ+ individuals are treated in courtrooms and how their cases are adjudicated. The hostility faced by LGBTIQ+ individuals in society often seeps into legal adjudication. This handbook aims to enable judges to overcome their biases and prejudices against LGBTIQ+ individuals.

The handbook provides a comprehensive understanding of the concepts of gender and sexual diversity. It also provides the correct vocabulary for addressing LGBTIQ+ individuals, which must become a part of the legal discourse, that not only includes the judgements and orders but also the conversations that flow in courts. It also provides an overview of the judgements of the Supreme Court and the High Courts that have broken new ground in upholding the rights of the LGBTIQ+ individuals. The handbook also discusses the impact of the existing legislative regime of LGBTIQ+ individuals. It also contains recommendations and best practices based on legislative mandates and judicial precedents that may be useful for courts while adjudicating cases relating to the LGBTIQ+ individuals.

2. Executive Summary



A. Relevant Concepts

Sex is commonly associated with physical attributes such as chromosomes, hormone prevalence and internal and external sexual anatomy. Sex assigned at birth typically categorises a person as male, female, or person of intersex variation (who may be ignorantly categorised as “*other*”). Intersex persons are those who may have a combination of sex characteristics typically characterised as male and female or have ambiguous or atypical sexual organs, whether internal or external. People often confuse intersex persons with transgender persons. However, it is important to note that intersex persons may identify as male, female or transgender. Transgender persons are not necessarily born with intersex variations. Intersex variations are a biological feature, a normal human variation of sexual characteristics, while *transgender* is a gender identity.

Gender can be defined as social characteristics, roles, and opportunities associated with being female and male. People are typically assigned a gender at birth based on their sex. However, a person’s internal and individual experience of gender, may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical, or other means) and other expressions of gender, including dress, speech, and mannerisms. People may identify with varied gender identities, some of which are explained in Section A.3 of Chapter 5.

Sexual Orientation is a person’s capacity to have emotional, affectional, and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender. There is nothing inherently “*natural*” about human activities. So, human activities cannot be classified into “*natural*” and “*unnatural*” sexual acts.

B. Prevailing Discrimination Against LGBTIQ+ Individuals

From an early age, LGBTIQ+ individuals face stigma, violence, and discrimination on the basis of their identity. This stigma is often rooted in beliefs and cultural norms that repress gender non-conforming behavior and expression. Although the experiences of LGBTIQ+ people differ according to their socio-economic status such as their caste identity, it would not be incorrect to say that the stigma and prejudice against them undermine their ability to participate in society on equal terms. Chapter 4 discusses the various facets of discrimination and violence faced by LGBTIQ+ individuals in public and private spaces and the barriers that they face in accessing education, employment, healthcare, and financial services. This discrimination and violence are perpetrated by, *inter alia*, the general public, employers, teachers, the judicial system, police, prison authorities, doctors, and families. The issues as stated have also been explained through real-life accounts of violence and discrimination faced by individuals or the community as a whole.

C. Appropriate vs. Inappropriate Terms

On multiple occasions, it has been found that institutions, as well as individuals, have been insensitive toward acknowledging the identities and pronouns used by the LGBTIQ+ community. In courts and outside, there are certain terms that are derogatory and are yet used intentionally or unintentionally for addressing people from the community. Chapter 5 lists appropriate terms and practices that may be adopted by courts for a sensitive approach towards matters that relate to the community.

This section attempts to summarise the many ways in which the **LGBTIQ+** community can be consciously included in their interactions with the judicial system. The section covers the inappropriate terms that are frequently used as well as stereotypes and practices that must be avoided. The Glossary is available under Section A.3. of Chapter 5.

D. The Development in Law

The legal history on the subject has largely been influenced by the criminalisation of the “carnal intercourse” under the Indian Penal Code. Chapter 6 lays out a chronological picture of the legal history and development in terms of the rights of the LGBTIQ+ community.

The trajectory flows from the criminalization of ‘carnal intercourse under *Section 377* of the IPC to the decision of the Supreme Court in Naz Foundation. The history of the rights of transgender persons before NALSA and Navtej Singh Johar assesses the state of affairs during colonial rule and the period thereafter. Part C under Chapter 6 is the summary of rights in favor of the LGBTIQ+ community primarily recognized by way of judicial precedents. The landmark decisions of the Supreme Court on the rights of LGBTIQ+ individuals are covered in this section.

E. Statutory Position

The legislative regime in India for protecting the rights of the LGBTIQ+ community is yet to develop properly. While legislation for the protection of transgender rights has put them on the map, there are no legislations or rules in place to protect other members of the community, such as gays, lesbians, bisexuals, asexuals, or other queer people from societal violence, stigma, or discrimination in general. Various studies show that the statutory regime in the country itself is discriminatory in nature. The community requires more inclusive marriage, adoption, surrogacy, guardianship, inheritance, employment, and education regulations. Chapter 7 explores the existing statutory regime in the country recognizing rights and protection in relation to specific requirements of the community both under the Constitution and otherwise that impact the community.

The Transgender Persons Act, 2019, and the constitutional challenge to it have been discussed in detail. This section also discusses how criminal law is often weaponized against the members of the LGBTIQ+ community.

F. How High Courts deal with the Issues

Despite Supreme Court judgments upholding the dignity of LGBTIQ+ persons, LGBTIQ+ persons still face many struggles and challenges to their dignity during their interaction with the justice system. This is essentially due to the systemic marginalisation faced by them. However, there are many judgments of the High Courts that appropriately address LGBTIQ+ issues. Chapter 8 is a compilation of the prominent judgments of High Courts that expound on the rights of LGBTIQ+ individuals vis-à-vis different aspects such as illegal confinement, marriage and live-in relationships.

G. Recommendations

The final chapter is a set of recommendations that may be adopted by courts and judges who come in direct or indirect contact with the community and can play a central role in the realisation of their rights. Chapter 9 also includes protocols that may be followed by the police and magistrates while adjudicating criminal complaints by or against LGBTIQ+ individuals. It also lists down factors that courts should consider while remanding or sentencing LGBTIQ+ individuals. It also includes protocols that may be followed by courts for adjudicating gender identity claims.

3. Introduction



A. Understanding Queer Bodies, Desires, and Relationships:

Courts have recently shown a progressive shift in protecting the rights and upholding the dignity of **LGBTIQA+** individuals. However, this progress is yet to permeate the judicial institutions/ system. Gender and sexual orientation norms are imposed on individuals through customs, laws and instances of violence that end up controlling how such individuals experience personal relationships and how they identify themselves.

The justice and law enforcement system marginalises individuals of the **LGBTIQA+** community in many ways. This document attempts to summarise the several ways in which the justice system can become more inclusive to address the needs of the **LGBTIQA+** community.

A.1. Sex and Gender

To use language that respects the dignity of **LGBTIQA+** persons, it is vital to recognise and appreciate the distinction between sex and gender.

Various definitions have sought to explain the underlying distinction between sex and gender: The European Institute for Gender Equality, an autonomous body of the European Union, defines sex and gender as follows:

“Sex: Biological and physiological characteristics that distinguish female from male humans. [1]

Gender: Social characteristics and opportunities associated with being female and male, as well as between women and men, and girls and boys”.[2]

[1] *European Institute for Gender Equality, ‘Sex’ (European Institute for Gender Equality) <<https://eige.europa.eu/thesaurus/terms/1361>> accessed 6 April 2022.*

[2] *European Institute for Gender Equality, ‘Gender’ (European Institute for Gender Equality) <<https://eige.europa.eu/thesaurus/terms/1141>> accessed 6 April 2022.*

But sex need not necessarily be definite. The Gender Equality Glossary of the Council of Europe[3] clarifies that:

- Sex refers to biological differences between males and females (e.g., gonads, sexual organs, chromosomes, hormones).
- **Sex is ordinarily assigned at birth**, however there are exceptions where the sex characteristics do not clearly indicate the sex of the infant, such as in the case of intersex persons.
- **However, sex can be altered.** In the case of transpersons who are born with the sex characteristics of one sex and the gender identity of the other, gender affirmative surgeries are performed. This includes a change of sexual organs and the administration of hormones.

Thus, ‘**Anatomical Sex**’ usually refers to the biological differences between femaleness and maleness. **Sex assigned at birth** typically categorises a person as male, female, or person of intersex variation (who may be ignorantly categorised as “other”).

Intersex persons are those who may have a combination of sex characteristics typically characterised as male and female. For instance, a person may be born with the appearance of a male sex (having male sexual organs), but may have a functional female reproductive system internally. But this is not the only way in which intersex variations can occur. Intersex births are lot more common that we think they are.

A.2. Gender Identity

The Yogyakarta Principles, an outcome of a 2006 International meeting in Yogyakarta, Indonesia addressed the application of International Human Rights Law to the rights of LGBTIQ+ persons. Yogyakarta Principles define **Gender Identity** as: “each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical, or other means) and other expressions of gender, including dress, speech and mannerisms”.

[3] Gender Equality Commission (Council of Europe), ‘Gender Equality Glossary’ (2016) <<https://edoc.coe.int/en/gender-equality/6947-gender-equality-glossary.html>> accessed 6 April.

People may identify with varied gender identities, some of which are explained in Section A.3 of Chapter 5.

Since we would be classifying persons as cisgender and transgender/gender non-conforming in the subsequent sections, it is important to define these terms. A **cisgender person** is a person whose gender identity and the gender assigned to them at birth are the same. For example, an individual who was assigned the gender male at birth based on certain biological markers and they identify as a man would be categorised as a cisgender man. A **transgender person** is a person whose gender identity is different from the gender assigned at birth. For example, an individual who was assigned the gender male at birth, but who now identifies as a woman, would be classified as a transgender woman. An umbrella term for persons who do not conform to the cis-binary of ‘man’ and ‘woman’ in terms of gender expression, is ‘**gender-nonconforming persons**’. Individuals may be gender-nonconforming in expression regardless of their gender identity.

A.3. Moving Beyond the Gender/Sex Binary

Gender binary refers to the widely held cultural belief that there are only two distinct and opposing genders: man and woman. However, gender diversity that challenges the idea of a gender binary has always been a part of human reality. For instance, *Two-Spirit* in Native America, *Hijras* in South Asia, *Waria* in Indonesia and *Muxe* in Mexico are examples of individuals who lived beyond the gender binary in indigenous societies and continue to do so. The imposition of binary genders begins as soon as a child is born and is assigned one of the binary genders based on certain anatomical markers. The child is taught that their gender expression should conform to existing gender norms, i.e., femininity belongs to women and masculinity to men. Any defiance of gender norms is recognised as something which is not “real”, or which should be punished. The policing of gender continues in adulthood. It is important to remember that there is no biological basis for why people who are assigned the gender male at birth cannot express themselves as women or be attracted to other men.[4]

The idea of binary genders also paves way for **compulsory heterosexuality**. Justice Chandrachud’s opinion in **Navtej Singh Johar v. Union of India**[5] succinctly summarises how compulsory heterosexuality functions on the basis of gender stereotypes. He states, “[i]f individuals as well as society hold strong beliefs about gender roles – that men (to be characteristically reductive) are unemotional, socially dominant, breadwinners that are attracted to women and women are emotional, socially submissive, caretakers that are

attracted to men – it is unlikely that such persons or society at large will accept the idea that two men or two women could maintain a relationship.”[6]

Compulsory heterosexuality sustains the illusion that everyone is heterosexual and that sexual relationships can be formed only between a man and a woman. Over time, as children are trained to act as men and women, and form relationships with opposite genders, the norm of heterosexuality (or heteronormativity) becomes entrenched.

Science does not exist outside of the culture that we exist in. The emphasis on **binary sex**, like binary gender, erases intersex people. This erasure has significant repercussions when doctors perform non-consensual surgeries on intersex children to “fix” them. Intersex persons are not accidents or flaws, but rather an example of human diversity.[7] Thus, the idea of binary sex is as much a social construction that is dictated by cultural beliefs as the idea of binary gender. Of course, biological differences exist, but how we interpret them and how we categorize humans on the basis of their sex or gender is what makes them a human idea, a **social construction**.[8] There is a gap between the reality of our bodies and how we describe them using the category of sex.

Take the example of Dutee Chand, a prominent sportswoman. It is assumed that testosterone, which although present in all humans, is a male hormone. Accordingly, it is believed that the presence of a certain level of testosterone indicates that a person is a “man”. But Dutee Chand’s body naturally produces high levels of testosterone that place her in the “male range” in competitive international sports, which initially led to her disqualification from international sports events.[9] But Dutee is a cisgender woman. Dutee’s case is no different from that of Michael Phelps, the celebrated Olympic swimmer, who has several genetic advantages over his counterparts.[10] However, he was not disqualified from performing in international sports. Although Dutee was able to successfully challenge the ban,[11] this discrimination simply originates from the idea of binary sex – the need to uphold the perceived biological differences between men and women, even if the reality of individual bodies suggests otherwise.[12] This has led to some theorists arguing that the difference between sex and gender is meaningless because in practicality, both operate in the same fashion to maintain the binary of male/men and female/women.[13]

[4] Alok Vaid-Menon, *Beyond the Gender Binary* (Penguin 2020)

[5] *Navtej Singh Johar v. Union of India* (2018) 10 SCC 1

[6] Paragraph 44 of Justice Chandrachud’s concurring opinion

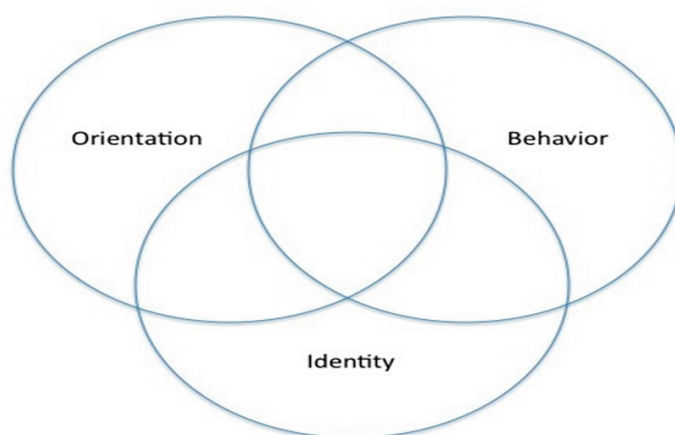
[7] Menon (n-4)

[8] See also, Thomas Laqueur, *Making Sex: Body and Gender from the Greeks to Freud* (Harvard University Press 1992).

A.4. Sexuality/Sexual Orientation

Sexuality refers to the total expression of who you are as a human being, your femaleness or your maleness. Our sexuality is an interplay between body image, gender identity, gender role, sexual orientation, eroticism, genitals, intimacy, relationships, and love and affection. A person's sexuality includes their attitudes, values, knowledge, and behaviours. How people express their sexuality may be influenced by their families, culture, society, faith, and beliefs.[14]

Components of sexuality



Source: <http://orinam.net/resources-for/friends-and-family/terminology/>

[9] Juliet Macur, 'Fighting for the body she was born with' (New York Times, 6 October 2014) <<https://www.nytimes.com/2014/10/07/sports/sprinter-dutee-chand-fights-ban-over-her-testosterone-level.html>> accessed 6 April 2022

[10] Sundeep Mishra, 'If Phelps and Usain Bolt can play so can Dutee Chand. How the sprinter defied hormone ban' (The Print, 22 June 2022) <<https://theprint.in/pageturner/excerpt/if-phelps-and-usain-bolt-can-play-so-can-dutee-chand/681908/>> accessed 20 July 2022

[11] 'Female Sprinter Dutee Chand wins right to compete in a historic judgement' (The Business Standard, 28 July 2015) <https://www.business-standard.com/article/current-affairs/dutee-chand-causes-historic-sports-judgement-wins-right-to-run-115072800542_1.html> accessed 20 July 2022

[12] Dr. Katrina Karkazis and Dr. Rebecca Jordan-Young, *Testosterone: An Unauthorised Biography* (Harvard University Press 2019)

[13] Judith Butler, *Gender Trouble* (Routledge 1990)

[14] Resource Center for Adolescent Pregnancy Prevention (ReCAPP) and ETR Associate, 'Sex and Sexuality: Understanding the Difference' <http://www.casey.org/media/CLS_ResourceGuides_subdocs_SexSexuality.pdf> accessed 6 April 2022.

The Preamble to the Yogyakarta Principles[15] defines **Sexual Orientation** as: each person’s capacity for profound emotional, affectional, and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.

There is nothing inherently “natural” about human activities. So, there is nothing like “**natural**” or “**unnatural**” sex.

The discourse around sex is often divided into a binary of “**good sex**” and “**bad sex**,” even as attitudes and practices regarding sexuality and sexual practices have evolved. Gayle Rubin, in her essay, “Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality”[16], examined how certain sexual practices, deemed as ‘good sex’, maintain a sense of legitimacy while others are seen as revolting. These are the various ways in which we attribute notions of good and bad (ideological formations) that permeate our views on sex. This creates a hierarchy between sexual acts wherein certain acts, like peno-vaginal sex, remain within the ‘Charmed Circle’ and are viewed as respectable. Whereas those on the outer limits are viewed as taboo or depraved.

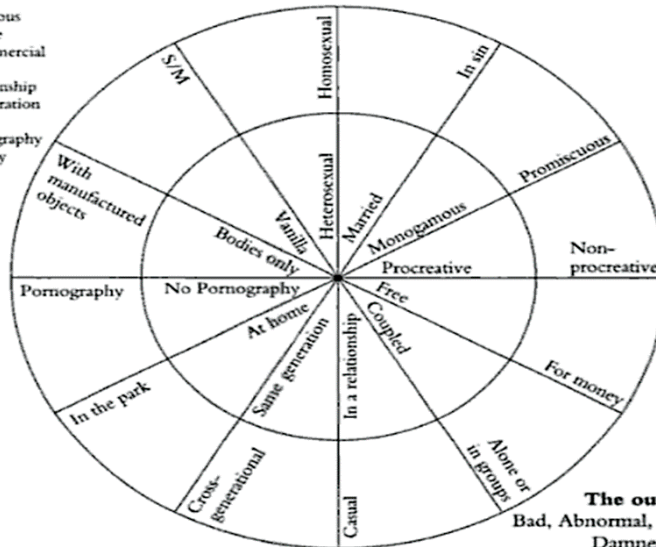
Similarly, the sex hierarchy demonstrates how conventional morality, which is grounded in heteronormative ideals, legitimises certain forms and participants in sex (heterosexual, married, reproductive, monogamous, at home) on the “good” side of the sex hierarchy. On the other bottom of this hierarchy are those forms of sexual conduct or activities which are considered abnormal or sinful, such as those by transgender persons, persons selling sexual labour and fetishists.

[15] Preamble, ‘Yogyakarta Principles’ November 2006.

[16] Gayle S. Rubin, ‘Thinking sex: Notes for a radical theory of the politics of sexuality’ in Richard Parker and Peter Aggleton (eds), *Culture, Society and Sexuality* (Routledge 2006) 38.

The charmed circle:
Good, Normal, Natural, Blessed Sexuality

- Heterosexual
- Married
- Monogamous
- Procreative
- Non-commercial
- In pairs
- In a relationship
- Same generation
- In private
- No pornography
- Bodies only
- Vanilla



The outer limits:
Bad, Abnormal, Unnatural, Damned Sexuality

- Homosexual
- Unmarried
- Promiscuous
- Non-procreative
- Commercial
- Alone or in groups
- Casual
- Cross-generational
- In public
- Pornography
- With manufactured objects
- Sadomasochistic

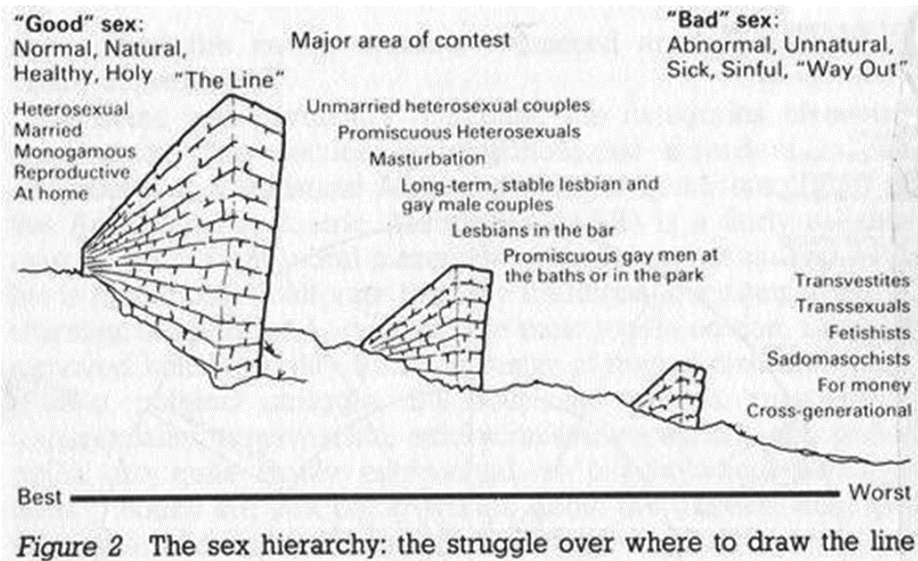
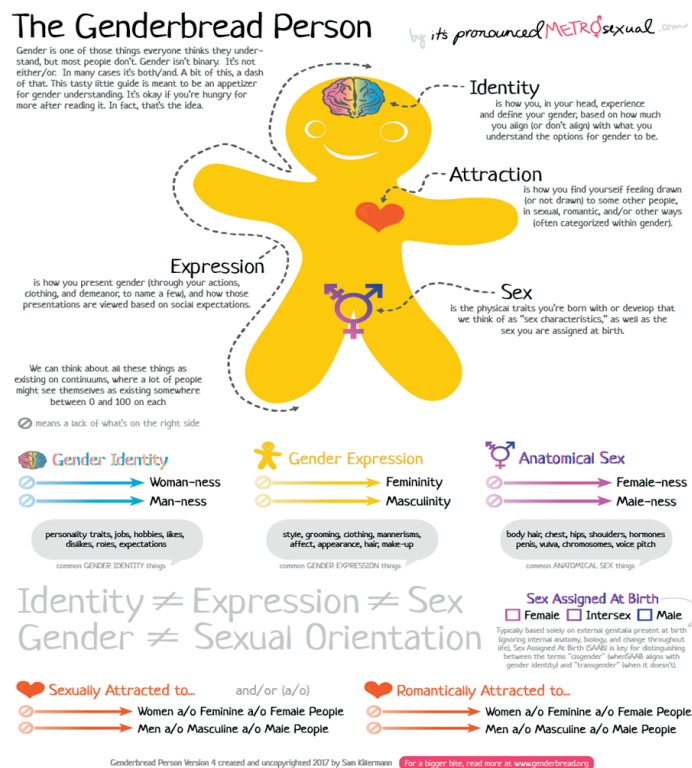


Figure 2 The sex hierarchy: the struggle over where to draw the line

A.5. The Genderbread Person

A Genderbread person is a visual teaching tool for summarising the ideas that have been discussed so far. The Genderbread Person deconstructs gender and sexuality to highlight the diversity and interrelationships of five aspects of human identity and behaviour, but not their interconnectedness. The following diagram highlights the separate, disjointed spectrums of gender identity, gender expression, biological sex, sexual desire, and romantic attraction. The diagram explains that each of these features is a spectrum, not a dichotomy.



It is understandable that these concepts may seem complex and contradictory. But humans are complex beings, and the need for concrete labels is unnecessary. However, understanding the various and complex concepts allows for better application of legal principles, upholding human dignity, and encouraging reflection and inclusion. It is important to note that these definitions are suggestive and not comprehensive. Every individual has their own unique way of identifying themselves, which should be respected. Further, it is not necessary to label and justify every attribute, identity, and behaviour of humans.

4. Discrimination and Need for Sensitisation



A. Societal Discrimination

For many LGBTIQ+ individuals, especially in India, expressing their gender identity or sexuality, is an act of defiance in a society that continues to set rigid cultural norms for gender identity and expression. From an early age, **LGBTIQ+** individuals face stigma, violence, and discrimination on the basis of their identity. This stigma is often rooted in inaccurate beliefs and cultural norms that repress gender non-conforming behaviour and expressions. Although the experiences of **LGBTIQ+** individuals differ according to their socio-economic status, it would not be incorrect to say that the stigma and prejudice against them undermines their ability to participate in society on equal terms.

The economic, social and political discrimination against them can have long-term impacts on their mental health, employability, access to education, housing and shelter, especially if such individuals experience familial rejection and isolation from social support systems. In the below sections, we discuss the various forms of discrimination experienced by LGBTIQ+ people.

B. Violence

B.1 Public Violence and Discrimination

LGBTIQ+ individuals often face violence and hostility in public places, which has also been noted in studies[17]. Ajita Banerjee argues that “public spaces are often constructed around particular notions of ‘appropriate’ codes of conduct, which exclude those who do

[15] Bibhwabijoy Mitra, ‘Where in Kolkata do members of LGBTIQ+ community feel safe?’, (*The Times of India*, 13 June 2022) <<https://timesofindia.indiatimes.com/city/kolkata/where-in-kolkata-do-members-of-LGBTIQ+community-feel-safe/articleshow/92166002.cms>> accessed 20 July 2022

[16] Ajita Banerjee, ‘Beyond Decriminalisation: Understanding Queer Citizenship through the access to public spaces in India’ (2019) *NUJS L. Rev.* <<http://nujlawreview.org/wp-content/uploads/2020/03/12-3-4-Ajita-Banerjee.pdf>> accessed 20 April 2022

[17] *Living with Dignity Sexual Orientation and Gender Identity Based Human Rights Violations in Housing, Work, and Public Spaces in India* (ICJ 2019) <<https://www.icj.org/wp-content/uploads/2019/06/India-Living-with-dignity-Publications-Reports-thematic-report-2019-ENG.pdf>> accessed 25 October 2022

not conform to heteronormative ideas”. [18]

For instance, queer couples often conceal their sexuality or relationships in public places, monitoring their self-expression due to the fear of homophobic and transphobic violence. [19] Public disavowal of heteronormativity carries with it the wrath of public violence. Making visible alternate sexuality or gender expression in public is more threatening to heteronormativity as opposed to conduct in private. [20] It is important to note that the susceptibility to public violence is higher for queer people belonging to socio-economically marginalised backgrounds who do not have access to safe private spaces. For such people, the right to privacy as a spatial entitlement does not offer much protection from harassment, discrimination, and violence. Working class queer men and transgender women, who do not have access to private quarters and often have sex in public spaces like isolated parks or engage in sex work, are prone to being targeted by state and non-state actors. Similar experiences have been noted in the context of underprivileged women. Maya Sharma in “Loving Women: Being a Lesbian in Underprivileged India” gives an example where a woman who dared to elope with another woman was beaten up, stripped and made to parade around the village with a blackened face and a garland of shoes around her neck. [21] The public punishment serves as a warning that public declarations of queer identities, especially by those lacking social and economic resources, would be dealt with by a heavy hand.

Another issue that crops up is that public spaces are mostly segregated along the lines of binary codes of gender. Take the example of security checks at airports and metros, public restrooms, changing rooms in shops, and religious places. This has a debilitating effect on transgender and gender non-conforming persons who do not fall within such binary conceptions of gender.

[18] Ponni Arasu and Priya Thangarajah, ‘Queer Women and Habeas Corpus in India: The Love that Blinds the Law’ [2012] *Indian Journal of Gender Studies* 413

[19] Maya Sharma, *Loving Women: Being Lesbian in Underprivileged India* (2nd edn, Yoda Press 2021)

[20] Banerjee (n-18)

[21] Aqsa Shaikh ‘The price that transgender folk pay to accept and assert their identity’, (*Youth Ki Awaaz*, 05 February 2020) <<https://www.youthkiawaaz.com/2020/02/violence-against-transgender-persons-the-truth-we-dont-want-to-talk-about-but-we-must/>> accessed on 6 April 2022

When these places are visited by queer persons, they face excessive surveillance, misgendering, and harassment.[22] During an interview by Anuj Behal, a transgender woman living in Delhi admitted that she avoids using public transport because of the inconvenience relating to security checks. She recalled that while she was standing in the women's queue, the women made an issue and asked her to shift to the other queue. Even the guards present there also compelled her to stand in the male queue. Other trans women also revealed that they have faced hostile behaviour from both men and women. They further said that if they sit in women's seats, women become uncomfortable, and if they sit in men's seats, they become uncomfortable as the men either hold their hands or sit really close to them. Public hostility can often turn into brutal acts of violence. In an incident, Alka a young transgender woman, had left her home at the age of 16 and was living on her own. When she left her place to visit the Tattapani festival ground in Balrampur, Chhattisgarh, she was killed and her genitalia was mutilated, allegedly because the two men travelling with her realised that Alka was a transgender woman.[23]

[22] Stephen T. Russel and Jessica N. Fish, 'Mental Health in Lesbian, Gay, Bisexual, and Transgender (LGBT) Youth' (National Library of Medicine, 16 January, 2016) <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4887282/>> accessed on 20 July 2022

[23] Bina Fernandez and Gomathy N.B, 'The nature of violence faced by lesbian women in India, Research Centre on Violence Against Women' (2003) Tata Institute of Social Sciences 40, 41 <https://www.tiss.edu/uploads/files/8The_Nature_of_violence_faced_by_Lesbian_women_in_India.pdf>

B.2 Familial Violence

Many **LGBTIQ+** youth face familial rejection, often from an early age. This rejection can take a devastating toll on individuals and isolate them from physical, emotional and economic resources that are essential to their well-being. In contrast, research shows that familial acceptance is a protective factor for young people belonging to the **LGBTIQ+** community and can contribute to lower rates of depression, anxiety, substance use, HIV acquisition, and suicide attempts.[24]

Most forms of familial rejection and isolation include being evicted from their homes or being physically harmed by family members. It has been noted that the violence that queer women and trans-men face at home is higher than the violence that they face in public. [25] Surabhi Shukla notes that “women have a precarious claim to privacy within their homes”, even if they choose to live-in with their partners independently. Live-in relationship litigation has emerged as a distinct area of litigation for queer women who seek to establish romantic relationships with other queer-women or trans-men. Various instances of queer women seeking protection orders have erupted across states because of the harsh treatment inflicted by the families.[26] In one such instance, Madras High Court[27], granted an order of police protection for a queer woman who was receiving life threats from her family members while pursuing a relationship with another woman. This is a result of the patriarchal control over the sexuality of women by their families. Thus, even if queer women leave home, they are susceptible to legal action by their families.[28] Often, families file habeas corpus petitions against the partner of their queer daughter. Cases of kidnapping and abduction have also been filed in such situations.[29]

[24] Surabhi Shukla, ‘The L word Legal Discourses on Queer Women’ (2019) *NUJS L. Rev.* <<http://nujlawreview.org/wp-content/uploads/2020/10/13-3-Shukla-The-L-World-.pdf>> accessed 20 July 2022.

[25] ‘Madras HC orders police protection for queer women after threats’ (*Hindustan Times*, 7 July 2021) <<https://www.hindustantimes.com/india-news/madras-hc-orders-police-protection-for-queer-woman-after-threats-101625598675700.html>> accessed 20 July 2022

[26] Shukla (n-26)

[27] *Arasu and Thangarajah* (n-20)

[28] *Bina Fernandez and Gomathy N.B* (n 25)

In such cases, it is important to recognise the family as a site of violence and control for many queer women, who they need protection from rather than any “guardianship”. A study conducted by TISS reveals forms of familial violence against queer women, such as, being forced to marry, aggression within the family, being physically confined to the house, and being forced to undergo conversion therapy.[30] Consider this incident of conversion therapy, where Mogli, a lesbian woman was forced to stay in a psychiatric ward after she disclosed her sexuality to her family. She was exposed to torturous psychosexual experiments, including sexual advances, in order to "check" how she responded, evaluate the success of the therapy, and determine whether she was indeed a lesbian.[31] Another incident comes from Kerala, where Anjana, 21, was forced into conversion therapy when she came out as bisexual to her family. She later committed suicide.[32]

Family members often misgender or reject the identities of their transgender children. When family members reject, deny or disown transgender individuals, it can have a devastating effect on their well-being and self-worth. It also makes them vulnerable to homelessness, where they may be forced to undertake begging and sex work.[33] Families can also be responsible for committing acts of violence against transgender people. For instance, a 17-year-old transgender girl was murdered in Tamil Nadu’s Salem district, allegedly by her brother, who did not approve of his sibling’s gender identity. The Tharamangalam police arrested 25-year-old Selvaraj, who reportedly said that he killed his sibling because he viewed her trans identity as a ‘shame’ to his family and relatives.[34] Violence and harassment from families has led many transwomen, especially among Hijra and Kinnar communities, to form gharanas, or adoptive families, where they live together and provide social, financial and emotional stability to each other. [35]

[29] Rashmi Patel, ‘Being LGBT in India: Some home truths’ (Livemint, 16 May 2020) <<https://www.livemint.com/Sundayapp/sAYrieZdZKEybKzhP8FDdbP/Being-LGBT-in-India-Some-home-truths.html>> accessed 20 July 2022

[30]Cris, ‘Kerala Student dies in Goa, death puts focus on inhuman “conversion therapy” on queer people’ (The News Minute, 27 August 2016) <<https://www.thenewsminute.com/article/kerala-student-dies-go-death-puts-focus-inhuman-conversion-therapy-queer-people-124683>> accessed 20 October 2022

[31]Living with Dignity Sexual Orientation and Gender Identity Based Human Rights Violations in Housing, Work, and Public Spaces in India’(ICJ 2019) <<https://www.icj.org/wp-content/uploads/2019/06/India-Living-with-dignity-Publications-Reports-thematic-report-2019-ENG.pdf>> accessed 25 October 2022

[32] Nirupa Sampath, ‘Trans girl murdered in TN: Why India’s preference for birth families is dangerous’ (The News Minute, 7 September 2021) <<https://www.thenewsminute.com/article/trans-girl-murdered-tn-why-india-s-preference-birth-families-dangerous-154974>> accessed 25 October 2022

[33] J Roy, ‘Translating hijra into transgender: performance and pehchān in India’s trans-hijra communities’ *Transgender Stud Q.* (2016) 3(3-4) 412

B.3 Violence by police and at prisons

The police is often identified by LGBTIQ+ individuals as a major perpetrator of violence. The forms of police harassment and violence against transgender persons in India include: (a) officers using the wrong pronouns; (b) officers asking about an individual's transition; (c) verbal harassment; (d) physical attack; (e) seeking forced sex to avoid arrest and (f) unwanted sexual contact and advances from an officer. Section 377 of the IPC which has now been read down to decriminalise same sex sexual intercourse was often used by the police to harass members of the LGBTIQ+ community. It also acted as a barrier for them in accessing police services owing to the fear of prosecution on disclosure of sexuality. Transgender communities' experience of discriminatory and violent policing can be a barrier to accessing critical support in the aftermath of violence, thus placing transgender people at a greater risk when they do experience violence.

According to a report in the Times of India, research undertaken by the National Institute of Epidemiology involving 60,000 transgender participants in 17 states indicated that the largest perpetrators of violence against transgender individuals are police and law enforcement authorities.[36] In an incident in Tripura, police arrested four transgender individuals on their way back from a party at a city-based hotel. It was reported that the police authorities ridiculed how they were dressed and mentally harassed them by taunting and bullying them. They were later taken to West Agartala Women's police station and forced to undress by the women police officers in the presence of a few male personnel around 11:30 pm in the night. They were also allegedly forced to write down a promise that they would never "cross dress" again, and if they did, they would be arrested.[37]

Since many transgender persons are forced into begging and sex work, they are especially vulnerable to the invocation of public indecency and nuisance laws by the police.[38]

[34] Shreya Ila Anasuya, 'The gender beat: Most Harassment of Transgender People is by Police; Kolkata Student Assaulted by Moral Police' (*The Wire*, 19 April 2016) <<https://thewire.in/gender/the-gender-beat-most-harassment-of-transgender-people-is-by-police-kolkata-student-assaulted-by-moral-police>> accessed 20 July 2022

[35] Debraj Deb, "'We were forced to strip to prove our identity": Transgenders arrested in Tripura files complain' (*The Indian Express*, 11 January 2022) <<https://indianexpress.com/article/north-east-india/tripura/tripura-transgenders-forced-to-strip-police-complaint-7717450/>> accessed 25 October 2022

[36] International Commission of Jurists, *Unnatural Offences: Obstacles to Justice in India Based on Sexual Orientation and Gender Identity* (ICJ, 2017)

[37] Kannabiran K, 'The complexities of the genderscape in India' (2015)

[38] Puja Bhattacharjee, 'Police violence against LGBTIQ+ People in Kolkata Highlight Need for Sensitisation' (*The Wire*, 30 July 2020) <<https://thewire.in/LGBTIQ/police-violence-against-lgtbia-people-in-kolkata-highlights-need-for-sensitisation>> accessed 25 October 2022

Such cases require a holistic view of the circumstances in which transgender people are compelled to resort to begging and sex work to meet their basic needs. There is a systemic ouster of transgender persons from avenues of education and employment.[39] One is only required to contemplate how many transgender persons they know in their own social circle.

Many queer men who do not appear “masculine” or display overt femininity are also subjected to violence at the hands of police. In July 2020, 23-year-old Sanjit Mondal, a gay man, was accosted by two men on a motorcycle while on his way home. They asked him to accompany them to a nearby police station. When he refused, he was verbally and physically assaulted and was forced to accompany them. On the way to the station, he was allegedly asked inappropriate questions about his sexual identity. Mondal was taken to the Narayanpur police station under the Bidhannagar City Police, where he was further humiliated, threatened and abused for his sexual orientation.[40]

Apart from being at the receiving end of police violence, it has been noted that the police is slow to register and investigate complaints filed by LGBTIQ+ individuals or on their behalf. Due to the fear of being subjected to arbitrary arrests by the police, many LGBTIQ+ individuals are also wary of coming forward as witnesses. For example, in a case where a transgender woman was murdered, no one from the transgender community was willing to assist the police in the investigation because they were worried about being implicated in the case.[41] There remains a trust deficit between the LGBTIQ+ community and the police.

In prisons, LGBTIQ+ individuals, especially transgender persons are vulnerable to harassment and violence, including sexual violence. Transgender women are lodged along with men in prisons. Kiran Gawali, a transwoman who was imprisoned in Nagpur Central prison with male prisoners recorded her ordeal in her diary titled, “Kiran-e-dastan” where

[39]Shreya Ila Anasuya, ‘The gender beat: Most Harassment of Transgender People is by Police; Kolkata Student Assaulted by Moral Police’ (*The Wire*, 19 April 2016) <<https://thewire.in/gender/the-gender-beat-most-harassment-of-transgender-people-is-by-police-kolkata-student-assaulted-by-moral-police> > accessed 20 July 2022

[40]Debraj Deb, “We were forced to strip to prove our identity”: Transgenders arrested in Tripura files complain (*The Indian Express*, 11 January 2022) <<https://indianexpress.com/article/north-east-india/tripura/tripura-transgenders-forced-to-strip-police-complaint-7717450/> > accessed 25 October 2022

[41] International Commission of Jurists, *Unnatural Offences: Obstacles to Justice in India Based on Sexual Orientation and Gender Identity* (ICJ, 2017)

she noted that she was subjected to mental, physical and sexual violence by jail staff and inmates. Uttam, another trans-woman lodged with Kiran, was subjected to similar ill treatment. She made an impassioned appeal to the judiciary through her lawyer in a letter where she stated, “[r]espected judge, is there no constitutional provision to safeguard transgender women’s rights in prison? Are we not Indian citizens? Are we placed among male prisoners only to satiate the lust of prison officials and other prisoners?”[42] At present, Kerala has decided to create separate blocks for transgender prisoners in its new prisons and is considering setting up separate blocks in existing Central prisons.[43] Uttar Pradesh also inaugurated a ‘Transgender Community Desk’ at a police station in Lucknow. The Police Station stated that the same was done to achieve the objective of ensuring inclusivity in the State.

C. Educational and Employment Discrimination

Due to harassment and bullying, LGBTIQ+ children are forced to quit their education, thus impacting their chances of employment and societal integration. LGBTIQ+ individuals are bullied because their behavior is at odds with the expected forms of gender expression. Many students are excluded from peer groups or called derogatory terms like “homo.”[44] A gay cisgender man from Kochi recalled how he was hit and abused by his teachers when he could not read in a loud masculine voice in class.[45]

[42] Sukanya Shantha, ‘Misgendering, Sexual Violence, Harassment: What it Is to Be a Transgender Person in an Indian Prison’ (*The Wire*, 11 February 2021) <<https://m.thewire.in/article/LGBTIQ/transgender-prisoners-india>> accessed 25 October 2022

[43] Deekshitha Ganeshan and Saumya Dadoo, ‘Confinement at margins: Preliminary Notes on Transgender Prisoners in India’ (2020) *NUJS L. Rev* <<http://nujlawreview.org/wp-content/uploads/2020/09/13-3-Ganesan-Dadoo-Confinement-at-the-Margins.pdf>> accessed 25 October 2022

[44] *Living with Dignity Sexual Orientation and Gender Identity Based Human Rights Violations in Housing, Work, and Public Spaces in India* (ICJ 2019) <<https://www.icj.org/wp-content/uploads/2019/06/India-Living-with-dignity-Publications-Reports-thematic-report-2019-ENG.pdf>> accessed 25 October 2022

[45] *Ibid*

According to a 2015 survey, nearly six in ten transgender persons, in Kerala, had dropped out of school due to "severe harassment" and gender-related negative experiences.[46] It has been noted that "school uniforms, dress code and appearance, participation in sports, access to toilets, and sometimes even seating arrangements are frequently determined by dividing male and female students to the exclusion or discomfort of transgender and gender non-binary persons. These conditions make it difficult for students with gender expression or identity, at variance with the sex assigned at birth to realize their right to education." [47]

A report prepared by Sangama, a human rights organisation, interviewed 3,619 transgender persons and found that only 12% of the transgender persons surveyed were employed and half of them made less than Rs 5,000 per month.[48] A similar study conducted by the National Human Rights Commission (NHRC) in 2017 among 900 transgender persons in four districts of Uttar Pradesh and the National Capital Region (NCR) found that 3 in 4 transgender persons in NCR and 82% in Uttar Pradesh were never in school or dropped out before grade X. Nearly 15% had no jobs, and 69% were working in the informal sector, primarily engaged in singing, dancing, and 'blessing'. Out of this, around 53% were earning less than Rs 10,000 per month.[49] Transgender persons face additional problems in accessing employment because certain jobs have gender specific requirements. Many also face hurdles in obtaining required identity documents that reflect their correct name and gender identity. Further, there are also infrastructural limitations in gendered toilets at the workplace.[50]

Due to the fear of discrimination, many workers do not open up about their sexual orientation. They are often refused employment and denied promotions because of their sexual orientation and are 'treated differently because of their gender expression, including clothing, mannerisms, voice, etc. On a positive note, the private sector (mostly MNCs) has created more inclusive workplaces.

[46] Shreya Raman, 'Denied Visibility In Official Data, Millions Of Transgender Indians Can't Access Benefits, Services' (India Spend, 11 June 2021) <<https://www.indiaspend.com/gendercheck/denied-visibility-in-official-data-millions-of-transgender-indians-cant-access-benefits-services-754436>> accessed 25 October 2022

[47] ICJ(n-33)

[48] Shreya Raman (n 46)

[49] 'Denied visibility in official data millions of Transgender Indian's cant access social benefits' (The Scroll, June 2021) <<https://scroll.in/article/997580/denied-visibility-in-official-data-millions-of-transgender-indians-cant-access-social-benefits>> accessed 25 October 2022

[50] ICJ(n-33)

However, small-scale sectors as well as the government sector lie far behind in providing an inclusive workspace.[51] Sexual harassment at the workplace is another barrier to the opportunities that the community may seek to be part of or avail of. However, it must be remembered that LGBTIQ+ friendly work policies do not necessarily entail inclusiveness in the workplace. Policies must be accompanied by sensitisation programmes for the staff at workplaces.

D. Healthcare

The Indian healthcare system excludes LGBTIQ+ people. People from the community have reported abuse and discrimination that they have faced at hospitals on numerous occasions. The denial of first aid and medical examination, and taunts are only a few of the numerous traumas that the community faces in accessing healthcare services. As a result, many even avoid going to hospitals or clinics. In fact, an example of administrative diplomacy and discrimination, LGBTIQ+ individuals are not allowed to make health/medical decisions on behalf of their children or partners.

In an incident, a transgender person died unattended at a hospital because the doctors could not decide whether to admit her to a female or male ward.[52] Many LGBTIQ+ individuals are not able to access effective healthcare because they withhold information about their sexual history, which can be critical to diagnoses and treatment.

There is also inadequate information available about the medical complications that the community faces. Lack of knowledge, be it among community members themselves, their families, or healthcare professionals, has an adverse effect on them as well as on the overall development of the society.

[51] ILO's PRIDE Project, 'Discrimination at work on the basis of sexual orientation and gender identity' <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/briefingnote/wcms_368962.pdf> accessed on 10th April 2022

[52] Priti Salian, South China Morning Post, "How can you be raped? Doctor's words to transgender in India an example of the 'transphobia' that stops many getting health care" <<https://www.scmp.com/lifestyle/health-wellness/article/2159156/how-can-you-be-raped-doctors-words-transgender-india> > accessed on 14th June, 2022

[53] Jayna Kothari et al, 'Intersectionality: A Report on Discrimination based on Caste with the intersections of Sex, Gender Identity and Disability in Karnataka, Andhra Pradesh, Tamil Nadu and Kerala' (CLPR, 2019) <<https://clpr.org.in/wp-content/uploads/2019/08/Intersectionality-A-Report-on-Discrimination-based-on-Caste-with-the-intersections-of-Sex-Gender-Identity-and-Disability-in-Karnataka-Andhra-Pradesh-Tamil-Nadu-and-Kerala.pdf>> accessed 25 October 2022

Some of the specific medical needs of the community include the availability of gender-affirming surgery, access to Antiretroviral for persons living with HIV, and access to Pre-Exposure Prophylaxis and Post-Exposure Prophylaxis for persons/communities (sex workers, MSM) at risk/exposed to HIV. For example, due to a lack of nuanced understanding of intersex bodies, many minors are subjected to unnecessary surgeries. The sexual and reproductive health of the community is also one area that remains ignored in most medical settings. A study has noted that personal prejudices and preferences of clinicians and healthcare workers result in the denial of equitable healthcare to LGBTIQ+ patients.[53]

The homophobic and transphobic content of medical textbooks is one of the causes of the rampant prejudice against LGBTIQ+ people in the medical community. The National Medical Commission recently directed the authors of medical textbooks to remove unscientific and derogatory content on LGBTIQ+ people from such textbooks.[54]

Conversion therapy has been banned by certain High Courts.[55] However, presently in India, practicing conversion therapy only attracts a civil liability which is not enough to deter its widespread prevalence.[56]. The Indian Association of Clinical Psychologists, and The Association of Psychiatric Social Work Professionals, and the Centre of Mental Health Law and Policy have published statements against conversion therapy.[57] The National Medical Commission has also stated that conversion therapy would be classified as professional misconduct.[58] It should be kept in mind that under Section 3(1) of the Mental Healthcare Act, 2017, mental illness has to be determined in accordance with nationally and internationally accepted medical standards (including the latest edition of the International Classification of Disease of the World Health Organisation) as may be notified by the Central Government. “Homosexuality”[59] and “gender identity disorder”[60] are not mental disorders under the latest International Classification of Diseases (ICD-11). Section 106 of the provides that a mental health practitioner cannot specify or recommend any medicine or treatment not authorised by the field of his profession. This would include conversion therapy. However, despite such a mandate, the practice continues to exist.[61]

Medical processes and systems are often insensitive and too complex to navigate. For example, only 10–15% of transgender people in India effectively use a smartphone. This lack of digital literacy hinders members of the community from accessing online government and private healthcare services.[62]

While large-scale data doesn't exist, small sample studies indicate that **LGBTIQ+** people are less likely to be able to afford healthcare services.[63] There are also physical deterrents to accessing healthcare, for example lack of safe public transport to travel to a

hospital.[64]

On a positive note, in a recent study[4] conducted by three NGOs that came together including the VARTA Trust (Kolkata), SAATHI (Chennai) and Grindr for Equality (Los Angeles), it was concluded that West Bengal had the best covid services for the queer community. This study was conducted when the NGOs came together to create a platform in the form of a locator for easy availability of information regarding benefits under the covid schemes covid testing, vaccinations, quarantine centres, community kitchens, etc. in different states across the country.

[54] Vinod Kumar Menon, 'Remove false information on LGBTQ from medical textbooks: National Medical Commission to authors' (Mid-Day, 20 October 2021) <<https://www.mid-day.com/mumbai/mumbai-news/article/remove-false-information-on-lgbtq-from-medical-textbooks-national-medical-commission-to-authors-23197352>> accessed 25 October 2022

[55] S. Sushma v. Commissioner of Police, 2021 SCC OnLine Mad 2096

[56] Deepak S Nikarhil and Saahil Kejriwal, 'India's health systems exclude LGBTIQ+ people. This needs to change' (Times of India, October 29, 2021) <<https://timesofindia.indiatimes.com/blogs/developing-contemporary-india/indias-health-systems-exclude-lgbtq-people-this-needs-to-change/?source=app&frmapp=yes>> accessed 25 October 2022

[57] Jeet, 'Several Indian Mental Health Associations Oppose "Gay Conversion Therapy"' (Youth Ki Awaaz, 22 may 2020) <<https://www.youthkiawaaz.com/2020/05/several-indian-mental-health-associations-oppose-gay-conversion-therapy/>> accessed 25 October 2022

[58] Bindu Perappadan, 'Conversion therapy' is misconduct, declares National Medical Commission' (The Hindu, 2 September 2022) <<https://www.thehindu.com/news/national/nmc-declares-conversion-therapy-to-be-professional-misconduct/article65842557.ece>> accessed 30 October 2022

[59] Jack Drescher, 'Out of DSM: Depathologizing Homosexuality' (National Library of Medicine, 4 December 2015) <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4695779/#B64-behavsci-05-00565>> accessed 30 October 2022.

[60] Sophie Lewis, 'World Health Organization removes "gender identity disorder" from list of mental illnesses' (CBS News, 29 May 2019) <<https://www.cbsnews.com/news/world-health-organization-removes-gender-dysphoria-from-list-of-mental-illnesses/>> accessed 30 October 2022

[61] Simran Sonkar and Dev Vrat Arya, 'Why India must criminalize gay conversion therapy' (The Leaflet, 8 September 2021) <<https://theleaflet.in/why-india-must-criminalize-gay-conversion-therapy/>> accessed 25 October 2022

[62] Deepak S. Nikarhil and Saahil Kejriwal 'India's Healthcare Systems Persistently Exclude LGBTQ+ People. This Needs To Change' (The Wire, 31 October 2021) <<https://thewire.in/health/indias-healthcare-systems-persistently-exclude-lgbtq-people-this-needs-to-change>> accessed 25 October 2022

[63] Bindu Perappadan (n 58)

[64] Ibid

[65] Sumati Yengkhom, 'West Bengal tops in India for Covid services to LGBT community' (Times of India, 6 June 2022) <<https://timesofindia.indiatimes.com/city/kolkata/west-bengal-tops-in-india-for-covid-services-to-lgbt-community/articleshow/92030493.cms>> accessed 25 October 2022

E. Access to Financial Services and Economic Benefits

The insurance and banking sector has been slow in taking steps for the economic inclusion of **LGBTIQA+** people. Most insurance policies, including life and health insurance policies, do not allow queer couples to nominate their partner as a beneficiary. Transgender persons face an additional hurdle where gender affirmative medical procedures are not covered by the terms of their health insurance policies. Even group corporate policies do not cover such procedures to which some transgender persons may have access to as an employee of a company. [66]

While the Reserve Bank of India does not impose any limitations on who can open joint bank accounts[67], same-sex couples have faced difficulty in opening joint bank accounts. Since marriages between LGBTIQA+ individuals are not recognised in India,[68] they are not able to claim spousal benefits given under various statutes ranging from tax benefits under the Income Tax Act to compensation under labour laws like the Workmen's Compensation Act 1923. This has led to some filing a petition for recognition of same-sex marriages before the Delhi High Court.[69] Likewise, queer couples are unable to obtain joint home loans, which can only be undertaken by married couples whose marriage is legally recognised and registered.

[66] Preeti Kulkarni and Khyati Dharmasi 'Three years since Section 377 abolishment. Can LGBTIQA persons buy insurance, nominate each other, invest in MFs, take a home loan?' (Moneycontrol, 06 September 2021) <<https://www.moneycontrol.com/news/business/personal-finance/queering-the-equality-pitch-how-inclusive-are-financial-entities-with-LGBTIQA-persons-7100701.html>> accessed on 20 July 2022

[67] Ibid

[68] With the limited exception of *Arunkumar and Anr. v. Inspector of General Registration*, WP 4125 of 2019 where a marriage solemnised between a cis man and a transgender woman was upheld by the Madras High Court.

[69] Neon, 'Same-Sex Couple Shares Unpleasant Experience of Opening Account at Axis Bank' (The Quint, 1 November 2021) <<https://www.thequint.com/neon/social-buzz/same-sex-couple-shares-humiliating-experience-of-opening-account-at-axis-bank-twitter-LGBTIQA>> accessed 25 October 2022

F. Specific Issues Concerning Transgender People

F.1. Increased Vulnerability to Economic Deprivation

The increased visibility of transgender persons and persons with other gender non-conforming identities as opposed to cisgender members of the **LGBTIQA+** community leads to heightened social exclusion of such people, depriving them of educational and employment opportunities.

F.2. Lack of Adequate and Affordable Healthcare Access

Though not all transgender person and gender non-conforming persons may resort to hormone therapies and surgical intervention to affirm their gender identity, those who seek such gender affirmative medical treatments must have access to them. Such treatments must be affordable and available irrespective of geographical location.

F.3. Bureaucratic Hurdles in Availing Change of Name/Gender Identity

In April 2014, the Supreme Court by its judgment in **NALSA v. Union of India**[70] legally recognised transgender persons. This judgement provided a legal recourse for transgender persons to change their name and gender and acquire identity cards in their preferred name and gender. A valid identity card is a prerequisite for accessing any government welfare scheme or private service system, including schemes related to basic amenities such as healthcare, education, banking, and housing. Identity documents are important to avail basic civil rights such as the right to vote, right to education, health, and public services, etc.

Despite the legal recognition of the transgender community in 2014, the acquisition of an identity card in their preferred name and gender remains a challenge for transgender persons.

Only a third of the transgender persons interviewed in the Kerala government survey[71] had an Aadhaar card or a voter ID card, and only 2 percent had a PAN card. Three out of four respondents could not register their preferred gender identity. Similarly, around 16 percent of the transgender persons interviewed in UP and Delhi had an Aadhaar card or voter ID card where they were identified as transgender. Around 1 percent had an Aadhaar card and 2.5 percent had a voter ID card in the old name and gender.[72]

[70] *NALSA v. Union of India*, (2014) 5 SCC 438

[71] *Shreya Raman (n 46)*

[72] *Ibid*

5. Usage of Appropriate Terminology and Practices by Courts



Many LGBTIQ+ people are subjected to harassment on court premises. Some real-life examples have been discussed here to elucidate the numerous forms of harassment. A transman who had filed a case before the court of judicial magistrate in Thrissur, Kerala, noted how he would be ridiculed and laughed at in the court by everyone, including the judicial magistrate. A trans-woman in Kochi reported that when she appeared as a witness in a motor accident case, she was subjected to ridicule. In another incident from Bangalore, when the public prosecutor made the statement that there are no lesbians in India, he was not reprimanded by the presiding judge.[73]

Despite the decriminalisation of homosexuality in India with the judgment of the Supreme Court in Navtej Singh Johar, the judicial system and the Courts have not created a safe environment for the LGBTIQ+ community. The existence of an unsafe environment in courtrooms undermines the faith that the LGBTIQ+ individuals have in the justice system. It becomes difficult to comply with basic procedural requirements in courts where filings and affidavits have to be submitted addressing a transgender litigant as “son of/daughter of,” - especially when such a litigant’s identity documents do not reflect the gender identity and name of their choice. Many LGBTIQ+ litigants do not have effective legal representation because of poor financial conditions and a lack of lawyers who are willing to and have the experience to take up their cause.[74] Transgender and gender nonconforming persons also have to go through security checks and use bathrooms based on binary gender codes on court premises, where their gender identity is not respected.

The justice and law enforcement systems marginalise people of the LGBTIQ+ community in many ways. However, the courts have recently shown a progressive shift in protecting the rights and upholding the dignity of LGBTIQ+ persons.

[73] *India: end rampant discrimination in the justice system based on sexual orientation and gender identity* (ICJ, 24 February 2017) <<https://www.icj.org/india-end-rampant-discrimination-in-the-justice-system-based-on-sexual-orientation-and-gender-identity/>> accessed 25 October 2022

[74] *‘Unnatural Offences- Obstacles to Justice in India Based on Sexual Orientation and Gender Identity’*, (Refworld) <<https://www.refworld.org/pdfid/58d4fc074.pdf>> accessed 25 October 2022

This section attempts to summarise the many ways the LGBTIQ+ individuals can be consciously included in their interactions with the judicial system.

A working formula to uphold the dignity of persons belonging to the LGBTIQ+ community is to remember the principle of personal autonomy. There is nothing fixed and essential about sex, gender, and sexual orientation. A person need not be “born” with a specific sexual orientation or be “trapped” in the wrong body for their gender identity to be respected. While this may have been the experience of some people in the LGBTIQ+ community, it needs to be acknowledged that an individual has the ability to make fundamental choices about their life, which includes the right to identify their sexual orientation and gender.

The Madras High Court in **S. Sushma v. The Commr. Of Police**[75] attached a glossary of Tamil words prepared by Orinam and other queer communities, to the order. The Court preferred these terms over the ones given by the State Government. Justice Venkatesh observed that the alternative glossary depicts the persons belonging to the LGBTIQ+ community in a more dignified and inclusive manner. The Court further observed that the whole purpose of creating this glossary is to use the appropriate words, terms, and expressions while addressing the persons belonging to the LGBTIQ+ community, and such usage should not continue to derogate them in any manner.

It is also noteworthy that Justice Venkatesh while hearing the case volunteered to undergo psychological and educative sessions with a professional psychologist, to unlearn and overcome his prejudices against the queer community, and to understand their struggles better. He distinguished himself as an ally for the queer community by stating that “ignorance is no justification for normalising any form of discrimination.”

The judgement also observed that any issue relating to the LBGTQIA+ community must be addressed with sensitivity, and the necessary adaptive mechanism such as counselling, monetary support, and legal assistance must be adopted. The adaptive mechanism must be relative to the facts and circumstances of each case. The underlying intention behind these guidelines was to create a safe space for the queer community.

[75] WP No. 7284 of 2021 (Mad).

A. Inappropriate Terminology and Practices

Court rulings can go a long way in upholding the dignity of LGBTIQ+ persons within and outside the courtroom. One significant factor that must be inculcated in judicial officers is the usage of respectable language and terminology while referring to members of the LGBTIQ+ community. The following practices should be avoided by courts and judges:

A.1 Dos and Don'ts:

1. Terminology:

- Umbrella terms like “LGBTQ+” or “LGBTIQ+” or “Queer” should be used rather than “LGBT” or “the gay community” which are not inclusive terms.
- The terms “trans” or “transgender” should be used rather than “transsexual” or “Hijra” (unless referring to the specific Hijra community) or “Kothi” (unless referring to the specific Kothi community/culture) or “eunuch”, etc. The term “eunuch” is considered as a pejorative term. [76]
- Intersex people, for example, are labelled using broad and inaccurate terms such as transgender, eunuch, and Hijra. Intersex persons are not necessarily trans, even though the Transgender Persons Act includes intersex within the definition of transgender person. The term ‘Transgender person’ is defined to include intersex persons in the Transgender Persons Act solely confer the benefits of the rights legislation to intersex persons as well. The distinction between transgender and intersex persons must be maintained while referring to them.
- Descriptions like “the man became a woman” or “the woman became a man” should be avoided. Instead, use “They transitioned into a man/woman”.
- “Trans” or “transgender” should be used as an adjective, not a noun. Words like – “transgenders” or “transgendered” should not be used. One should say – “transgender person”, “transgender man”, “transgender woman”.
- One should refrain from using words like “lifestyle” or “choice” “sexual preference,” while referring to “sexual orientation”.

[76] Nazariya Queer Feminist Resource Group, ‘Nazariya Guidelines on LGBTIQ+ Reporting’ (Nazariya Queer Feminist Resource Group, 11 May 2017) <<https://nazariyaqfrg.wordpress.com/2017/05/11/resources-nazariya-guidelines-LGBTIQ-reporting/>> accessed 25 October 2022

2. Assumptions/stereotypes to avoid:

- Sexual orientation should not be termed as ‘abnormal’.
- One should refrain from assuming that intersex persons and transgender persons are the same.
- One should refrain from making assumptions about a person’s gender identity/expression based on their sexual orientation, and vice versa.
- A person’s preferred pronouns, their gender identity, or sexuality should not be assumed based on their name or appearance.
- A trans person’s method of transition should not be assumed. There is no “wrong” way to transition.
- One should refrain from assuming that a person who is transitioning needs to have gone through certain biological changes to identify as a certain gender.

3. Practices:

- Consider whether labels such as “gay”, “lesbian”, “bisexual”, or “transgender” are appropriate or necessary to the matter. Sometimes LGBTIQ+ persons may not like to disclose their personal information since it may expose them to violence and stigma.
- Different terms are regularly used in theories of sexuality and gender. It is important to be clear about the meanings of such terms so that they can be used appropriately.
- One should treat LGBTIQ+ persons as they would treat anyone else.
- One should avoid using “deadnames” (birth names that someone no longer uses) and respect chosen names.
- When discussing someone’s gender identity or sexual orientation, it is crucial to respect the person’s preferences rather than assuming anything. The parties preferred pronouns should be respected. If their gender identity is not clarified, it is best to use neutral terms like “them” instead of “he” or “she”.^[77]
- If a wrong pronoun has been used, one should apologize and be mindful of their use next time.

^[77] *Ibid.*

A.2. Note on Use of Pronouns That Reflect a Person's Gender Identity:

Everyone has pronouns that are used when referring to them – and getting those pronouns right is not exclusively a trans issue. Pronouns are how we identify ourselves apart from our names. We typically assume pronouns from a person's name or appearance, but such assumptions should be avoided. Many individuals prefer to choose their pronouns due to the diversity of one's gender expression, and the inability of language to properly account for them. Some people may even prefer to not use pronouns at all and may prefer to be addressed only by their chosen names.

Pronouns are how someone refers to you in conversation. When you are speaking to people, it is a simple way to affirm their identity. Pronouns may be influenced by how one wants their masculinity or femininity to be perceived by society.

The Orissa High Court gave due recognition to the self-determined gender identity and pronouns of a petitioner who was a transgender man and addressed him as he/him/his throughout the judgement.[78] While sexual and gender labels are defined for many, they might not be so for many, and the use of preferred pronouns respects the person's choice and expression. Courts too are spaces where inclusion can be fostered by giving respect to the party's preferred pronouns. Gender pronouns too are part of the LGBTIQ+ communities fight for inclusivity.

Similar to using gender-neutral pronouns, many also use gender neutral honorifics like Mr, Mrs, Misc.

How is “they” used as a singular pronoun:

“They” is already commonly used as a third person singular pronoun when we are talking about someone, and we 'do not know who they are. For instance, “Somebody left their umbrella in the office. Could you please let them know where they can get it?”. It is a neutral pronoun that represents neither masculine nor feminine. Some people use both binary and neutral pronouns. This is probably because they feel uncomfortable with those who tend to use binary pronouns. For example, a person may indicate that they For

[78] *Chinmayee Jeena @ Sonu Krishna Jena v. State of Odisha & Ors., WP (Crl.) No. 57 of 2020.*

example, a person may indicate that they use both he/him and them/they pronouns because people tend to use, he/him, and they do not feel any less non-binary. It is important to learn the practice of using they/them as their pronouns instead of automatically using he/him. Using they/them is a simple way to remove gendered language from our vocabulary. It is also important to note that non-binary people need not use they/them pronouns exclusively and may use say, she/her or he/him exclusively.

A.3. Glossary of Appropriate Terminology

An understanding that begins with a conscious use of sensitive and inclusive language is the foundation for evolving legal principles that uphold the dignity of persons and foster reflection and inclusion. It is important to note that these definitions are suggestive and not comprehensive. Every individual has their own unique way of identifying themselves, which should be respected. Further, it is not necessary to label and justify every attribute, identity, and behaviour of humans.

Glossary of terminology[79]

[79] Table created from the following sources:

- 1. List of terminology with English and Tamil Terms developed by Queer Chennai Chronicles, Orinam and The News Minute, building on the work done by QCC-TNM media reference guide and Orinam's terminology: http://orinam.net/content/wp-content/uploads/2022/01/Glossary_LGBTIQA_Jan2022.pdf*
- 2. Nazariya Queer Feminist Resource Group, 'Terminology Related to Gender and Sexuality' <https://nazariyaqfrg.wordpress.com/2017/05/24/terminology-gender-sexuality/> accessed 25 October 2022*
- 3. Human Rights Campaign, 'Glossary of Terms' < <https://www.hrc.org/resources/glossary-of-terms>> accessed 25 October 2022*

S.No.	Terms	Description
	Terms related to Sex	
1.1.	Anatomical Sex (maybe referred to as 'Sex')	<p>Usually refers to the biological differences between femaleness and maleness – reproductive or sexual anatomy, genes, and hormones – external or internal.</p> <p>Note: Sex is ordinarily assigned at birth, However, there are instances where it is assigned later, such as when sex characteristics do not clearly reveal the sex of the infant.</p> <p>Note: Sex can be changed in the case of transgender people, who are born with the sex characteristics of one sex and gender identity of the other, sex affirmative surgeries are performed. This includes a change of sex organs and the administration of hormones.</p>
1.2.	Sex characteristics	<p>Refers to an individual's physical sexual/reproductive features that are formed on the basis of their sex. This includes genitalia (vagina/uterus or penis/testicles etc), sex chromosomes (XX, XY, XXY, XYY, XO, etc), dominant sex hormones present in their body (estrogen, progesterone, testosterone etc), secondary sexual features (breasts, facial hair, deep voice etc), ability to menstruate or breastfeed, among others.</p> <p>Sex characteristics may influence a person's gender identity, expressions, sexual orientation, or sexuality, but are not the cause of it.</p>

S.No.	Terms	Description
1.3.	Intersex variations	<p>Human bodies have many variations, and these could be at multiple levels – reproductive, hormonal, physical, etc.</p> <p>Intersex variations are congenital differences in reproductive parts and/or secondary sexual characteristics, and/or variations invisible to the eye such as chromosomal and/or hormonal differences.</p> <p>Note: It’s wrong to assume that all persons with intersex variations are trans* or that they have similar sexual characteristics. They also have diverse intersections of gender identity, gender expression and sexuality. Like any individual, intersex persons are the only ones who can determine their gender identity, sexuality, and sexual orientation.</p> <p>Note: Several children with intersex variants are compelled to undergo surgical operations by doctors and parents/guardians in order for their bodies to ‘conform’ to a binary sex, although this is unethical and can result in trauma, health concerns, and other complications.</p>

S.No.	Terms	Description
2	Terms Related to Gender	
2.1.	Gender	<p>‘Gender’ is how society perceives persons, based on the norms, behaviours and roles associated with the sex assigned at birth. It refers to the attitudes, feelings, and behaviours with a person’s biological sex in a specific culture.</p> <p>For instance, a person assigned as a male is expected to grow up to be a ‘man’ and be powerful and assertive; a person assigned as a female is expected to grow up to be a ‘woman’ and to be sweet and nurturing. (or, for example, a male is supposed to grow up to be a ‘man’ who is forceful and aggressive, whereas a female is expected to grow up to be a ‘woman’ who is lovely and nurturing.) It is a social construct, and what each gender is ‘expected’ to do changes with the evolution of the society over time.</p> <p>Note: Behaviour that is compatible with cultural expectations is referred to as gender-normative; Behaviour that is viewed as incompatible with these expectations constitute gender nonconformity.</p>
2.2.	Gender Identity	<p>‘Gender Identity’ refers to how an individual defines their own gender. It depends on a person’s deeply felt internal experience of gender. It need not correspond to the sex assigned to the person at birth, and the expectations that society has from this assigned sex or associated gender.</p> <p>‘Gender Identity’ is self-determined – that is, only an individual can declare what their gender identity is. There is no ‘medical test’ for gender identity.</p> <p>Note: ‘Gender Identity’ need not correspond to the sex assigned to the person at birth, and/or the expectations that society has for them.</p>

S.No.	Terms	Description
2.3.	Gender Expression	<p>Gender expression is the way in which we present ourselves to the outside world. This can be in terms of our behaviour, clothing, hairstyle, body language or voice. This manifestation or expression may or may not conform to socially defined behaviours and characteristics typically associated with being either masculine or feminine. There is no wrong or right way to present yourself. A person's chosen name and pronouns may also be common ways of expressing gender.</p> <p>Gender expression does not determine one's identity. For instance, a woman may dress in a manner not typically associated with the female gender, but it does not imply that they identify as a man. A person assigned male at birth, who wears a saree should not be wrongly assumed to identify as a woman.</p>
2.4	Transgender	<p>A transgender person is someone whose gender identity does not match with the gender they were assigned at birth. People assigned male or female at birth, and persons with intersex variations, can be transgender.</p> <p>Note: A person can be transgender irrespective of whether they have been undergone gender affirmative surgery.</p> <p>Note: "Transgender" is an adjective, not a noun. The term 'Transgender person' should be used instead of merely 'transgenders'</p>

S.No.	Terms	Description
2.5.	Trans*	<p>An umbrella term that refers to all persons whose sense of their gender does not match the gender assigned to them at birth.</p> <p>The ‘*’ is shorthand that is used to a variety of identities: transgender, transman, transwoman, transsexual, transfeminine, transmasculine, genderqueer, agender, gender non-conforming, genderfluid, non-binary, among others. The common denominator to all these identities is that they are not typical cisgender man or woman.</p> <p>Note: For most part of the last two decades, ‘transgender’ has been the umbrella term of choice for labels like transmasculine, or transvestite were considered to denote specific identities that fell within its scope. Before that, the most widely used term was usually transsexual, which fell out of favour in part because it focused attention narrowly on physical sex. Now, Trans* is being positioned as a simpler and more inclusive alternative to a broader variety of non-cisgender identities.</p>
2.6.	Transitioning	<p>There are a series of processes that some transgender people may undergo in order to live more fully as their true gender. This typically includes social transition, such as changing name and pronouns, medical transition, which may include hormone therapy or gender affirming surgeries, and legal transition, which may include changing legal name and sex on government identity documents. Transgender people may choose to undergo some, all, or none of these processes.</p>
2.7.	Transman	<p>A transman is a transgender person who was assigned gender of a female at birth but whose gender identity is that of a man.</p>
2.8.	Transwoman	<p>A transwoman is a transgender person who was assigned gender of a male at birth but whose gender identity is that of a woman.</p>

S.No.	Terms	Description
2.9.	Gender dysphoria	<p>It is the psychological distress that results from an incongruity between a person's self-perceived gender identity, and the gender they are associated with by society based on the sex they were assigned at birth.</p> <p>Note: Not all trans persons may experience gender dysphoria. Many may experience gender dysphoria from childhood, while others may experience it later – such as after puberty.</p>
2.10.	Gender incongruence	A marked and persistent incongruence between the gender felt or experienced by a person, and the gender associated by society with the sex they were assigned at birth.
2.11.	Deadname	<p>The name that was given to a trans person by their family, and one by which they were identified. However, the transgender individual may no longer use that name. The name a transgender person has 'left behind' or 'killed', Usually, this refers to the name they were given by their parents/guardians.</p> <p>Note: One should refrain from asking for a person's 'old name' or 'original name' or deadname. Especially if it is not an important detail. It is desirable to stick to the name they have given. Referring to a person by their deadname is considered disrespectful and termed as 'Deadnaming'.</p>
2.12.	Cisgender	A person whose gender identity conforms with the gender corresponding to the sex assigned at birth. A person who is not transgender or non-binary is cisgender.
2.13	Abortion Seekers	Abortion seekers in a more inclusive terminology to refer to individuals who may be in the need of accessing abortion services, which not only include cisgender women but also transmasculine persons.

S.No.	Terms	Description
3.	Terms Related to Sexuality	
3.1.	Sexuality	<p>‘Gender’ is how society perceives persons, based on the norms, behaviours and roles associated with the sex assigned at birth. It refers to the attitudes, feelings, and behaviours with a person’s biological sex in a specific culture.</p> <p>For instance, a person assigned as a male is expected to grow up to be a ‘man’ and be powerful and assertive; a person assigned as a female is expected to grow up to be a ‘woman’ and to be sweet and nurturing. (or, for example, a male is supposed to grow up to be a ‘man’ who is forceful and aggressive, whereas a female is expected to grow up to be a ‘woman’ who is lovely and nurturing.) It is a social construct, and what each gender is ‘expected’ to do changes with the evolution of the society over time.</p> <p>Note: Behaviour that is compatible with cultural expectations is referred to as gender-normative; Behaviour that is viewed as incompatible with these expectations constitute gender nonconformity.</p>
3.2.	Sexual orientation	<p>“Sexual orientation” refers to person(s)/gender(s) that one is physically, emotionally, and/or romantically attracted to.</p> <p>For instance, ‘heterosexual’ orientation refers typically to attraction between a man and a woman. ‘homosexual’ refers to attraction between two men or two women.</p> <p>Note: ‘Sexual orientation’ is different from ‘Gender Identity’. Just like a cisgender woman can be heterosexual, bisexual or homosexual (straight, bisexual, or lesbian), a transgender woman, can be heterosexual, homosexual or can have any of a wide variety of sexual orientations.</p>

S.No.	Terms	Description
3.3.	Heterosexuality/ Heterosexual	Heterosexuality typically refers to the sexual and/or romantic attraction between men and women. A “heterosexual man” is a man who is attracted to women. A “heterosexual woman” refers to a woman who is attracted to men.
3.4	Homosexuality	“Homosexuality” refers to a sexual and/or romantic attraction to a person of their same gender as their own. A “homosexual man” or a “gay man” is a man who is attracted to men; a “homosexual woman” or “lesbian” refers to a woman who is attracted to women.
3.5	Bisexuality/Bisexual/Bi	<p>“Bisexuality” refers to the attraction towards persons of one’s own gender, and persons of another gender. Bisexuality need not imply an equal degree of attraction to both genders – just a significant attraction to both.</p> <p>In the past, bisexuality has been defined as attraction to both men and women. However, as our understanding of gender and gender identity evolves beyond the man/woman dichotomy, so does the notion of bisexuality.</p>
3.6.	Pansexuality/Pansexual	<p>“Pansexual” refers to attraction towards persons of multiple genders/all genders, or attraction irrespective of gender.</p> <p>“Pansexuality” need not imply equal attraction to all genders.</p> <p>Note: Pansexuality is broader than bisexuality, and people who identify as pansexual may be attracted to people of all genders. Bisexuality is the attraction to two or more genders, but not necessarily all.</p>

S.No.	Terms	Description
3.7.	Asexuality	<p>A person who does not desire sexual activity, either within or outside of a relationship.</p> <p>Asexuality should not be confused with celibacy i.e., the conscious decision to not act on sexual feelings, usually due to religious reasons. While asexual people are physically non-sexual people, they are nonetheless quite capable of loving, showing affection, and establishing romantic ties with other people.</p>
3.8.	Romantic orientation	<p>‘Romantic orientation’ refers to an individual’s romantic/emotional attraction, independent of their sexual attraction. People can be ‘homoromantic’, ‘heteroromantic’, ‘panromantic’, ‘aromantic’ etc.</p> <p>Romantic orientation need not correspond to a person’s sexual orientation. For instance, a person who is pansexual – that is, they are sexually attracted to people of all genders – can be homoromantic, which means they want to have romantic/emotional relationships only with persons of their own gender.</p>
4.	Umbrella/Collective Terms	
4.1.	Queer	<p>“Queer” is an umbrella term used to refer to diverse sex characteristics, genders and sexualities that are not cisgender and/or heterosexual. It is a “reclaimed” word—the word was used as a slur for people who did not align to the societal assumptions of gender and sexuality in the past.</p>
4.2.	LGBTQ+ LGBTIQA+ LGBTIQA+	<p>These are terms used to collectively refer to gay, lesbian, bisexual, transgender, queer, intersex, asexual, pansexual people and people of other non- cisgenders and non-hetero sexual orientations.</p>

S.No.	Terms	Description
5.	Other community terms	
5.1.	Coming Out	<p>‘Coming out’ is the process of disclosing one’s gender and/or sexual identity to others. Usually, LGBTQ+/queer persons ‘come out’ multiple times throughout their lives in different interactions with different people. That is, it’s not a ‘one-time’ event.</p> <p>Note: There is criticism and discourse around the fact of whether LGBTIQ+ persons have to ‘come out’ at all – because the assumption in society is that everyone is, or ought to be, cisgender and heterosexual. While mentioning ‘coming out’, please do so with an understanding that this should not have to be the norm for queer persons.</p>
5.2.	Gender binary	A system in which gender is constructed into two strict categories of male or female. Gender identity is expected to align with the sex assigned at birth and gender expressions and roles fit traditional expectations.
5.3.	Conversion Therapy, SOGIE (Sexual Orientation Gender Identity and Gender Expression) -change efforts	Practices that aim to ‘change’ or ‘convert’ people from queer to heterosexual, from trans to cisgender, or gender nonconforming to gender conforming. Some of these attempts stem from superstitions and religion-based beliefs. These are unethical, illegal, and unscientific.

S.No.	Terms	Description
6.	South Asian Queer Identities/Terms	
6.1.	Hijra	A socio-cultural trans feminine identity, predominantly in northern and central India. These people are assigned the male gender at birth but identify as women, or not men or in-between men and women, or as neither men, nor women. They are typically members of communities or gharanas. It is important to remember that unless someone uses the term 'hijra' for themselves, they should be referred to as a transgender person and not 'hijra'.
6.2.	Kinnar	A term used by transgender persons in India. It is important to remember that unless someone uses the term 'kinnar' for themselves, they should be referred to as a transgender person and not 'kinnar'.
6.3.	Aravani	A term used by transgender women in Tamil Nadu. They may also prefer to be called 'Thirunangi'.
6.4.	Jogappa	Trans-feminine persons in North Karnataka, parts of Andhra Pradesh, and Maharashtra. They worship the Goddess Yellamma.
6.5.	Jogti Hijras	Transwomen who devote their lives to a particular God in different temples.
6.6.	Kothi	Kothi refers to a heterogeneous group of people who were assigned the male gender at birth but show varying levels of femininity, which may be situational. They may identify as bisexual and marry women.

6.7.	Shiv Shaktis	They are typically persons born with a male sexual characteristics who are said to be possessed by or married to Lord Shiva and have a feminine gender expression, specifically during rituals and religious festivals. They are a community in Andhra Pradesh.
6.8.	Nupa Maanba	Socio-cultural trans masculine identity in Manipur
6.9.	Nupi Maanbi	Socio-cultural trans feminine identity in Manipur

6. Legal History and Developments



A. History and Impact of Section 377 before Navtej Johar

Section 377 of the IPC was introduced by Thomas Macaulay. This section referred to ‘unnatural offences; and criminalised ‘carnal intercourse against the order of nature with any man, woman, or animal’, which was modelled after the legislation in England-Buggery Act of 1533. The Buggery Act 1553 was later repealed by the Offences Against Persons Act of 1861. Section 377 dealt with “unnatural offences” and stated that:

“whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.”

Section 377 (before Navtej Johar) disproportionately impacted members of the LGBTIQ+ community in three ways. First, this section by criminalising “unnatural sex” pathologised and created a negative social identity of persons who engaged in same-sex intercourse. In **Mirro v. Emperor** (1947), a person engaging in same-sex sexual intercourse was termed as a “man of depraved morality”. Second, even though the provision was neutrally worded and did not explicitly mention same-sex intercourse, it indirectly targeted persons of the LGBTIQ+ community since it criminalised specific sexual acts. Any deviation from peno-vaginal sex (a heteronormative conception) was termed as perversion and a basis for conviction. Third, Section 377 became a tool for state violence, harassment, extortion, illegal arrest, and detention.[80]

[80] Saptarshi Mandal, ‘Section 377: Whose Concerns Does the Judgment Address?’ Vol 53(37) *Economic and Political Weekly* (2018) < <https://www.epw.in/engage/article/section-377-whose-concerns-does-judgment>> accessed 25 October 2022

Working class LGBTIQ+ persons, who typically became targets of such violence, were mostly from the marginalised communities, without any access to facilities for seeking justice. Some were disowned by families, and others regularly faced harassment due to their gender presentation/identity, irrespective of whether they committed any “unnatural” acts or not.

Section 377 was one of the main reasons that violations against LGBTIQ+ people continued to be hidden. Those whose sexualities were deemed to be “deviant” from the heterosexual norm were extremely vulnerable to HIV/AIDS because of the denial of healthcare. As such, a culture of silence was propagated by the law. Section 377 reinforced the stigma against the LGBTIQ+ community. This resulted in HIV/AIDS prevention programs that catered only to heteronormative cisgendered persons. More significantly, activities related to reducing the risk of HIV infection, such as condom promotion/distribution among the LGBTIQ+ community, were construed as abetting and aiding a criminal act under Section 377. Information on safe sex practices for MSM (men who have sex with men) was also labelled as “criminally obscene” material and then confiscated by state actors.

The legal battle against the decriminalisation of Section 377 began in 1994. In 1994, when a large number of HIV/AIDS cases were discovered among prison inmates in Delhi’s Tihar jail, the police refused to allow physicians to distribute condoms on the grounds that it would amount to abetting an illegal act (physical intimacy between same sex adults). As a result, ABVA, (AIDS Bhedbhav Virodhi Andolan), an NGO, filed a social action litigation in the Delhi High Court, demanding the repeal of Section 377 but failed to follow through. In 2001, workers of Bharosa Trust and Naz Foundation International, NGOs working on HIV/AIDS related issues with MSM in Lucknow, were arrested for the abetment and conspiracy of offence under Section 377.[81]

Following this incident, an NGO, Naz Foundation, along with the Lawyer’s Collective, filed a petition before the Delhi High Court challenging the constitutional validity of Section 377. Initially, the Delhi High Court dismissed this petition in 2004, holding that the petitioner did not have any standing in the matter. On the direction of the Supreme Court in 2006, it was reconsidered and remanded to the High Court.

[81] *Rights For All: Ending Discrimination Against Queer Desire Under Section 377*, A Compilation by Voices Against 377 (2004) <https://www.ohchr.org/sites/default/files/lib-docs/HRBodies/UPR/Documents/Session1/IN/PLD_IND_UPR_S1_2008anx_VoicesReport.pdf> accessed 25 October 2022

In 2009, the Delhi High Court in the case of **Naz Foundation v. NCT of Delhi**[82] decriminalised homosexuality among consenting adults. Subsequently, several appeals were filed before the Supreme Court against the Delhi judgement. Pursuant to these appeals, the Supreme Court in 2013, overturned the Delhi High Court judgement in the case of **Suresh Kumar Koushal v. Naz Foundation**[83] thereby criminalising homosexuality once again. The Supreme Court then recommended that the Parliament address the matter. However, when a Member of Parliament, Shashi Tharoor, introduced a private member's Bill to decriminalise homosexuality, the Lok Sabha voted against it. Thereafter, petitions were filed LGBTIQ+ persons before the Supreme Court, challenging section 377. A Constitution Bench finally decriminalised consensual same-sex sexual conduct in the historic ruling of **Navtej Singh Johar v. Union of India (supra)**.

B. History of transgender persons' rights before *Nalsa and Navtej Singh Johar*

During colonial times, the Hijra community was viewed as a threat to colonial authority and order. Colonial officials often misgendered feminine Hijras as men and termed them as “professional sodomites.” Transgender persons were considered a public nuisance. Since Hijras often migrated to neighbouring villages, they were seen as “wandering people”. In the colonial view, mobility and migration were collapsed into this singular category of ‘criminal tribes’. The authorities classified Hijras as separate castes or tribes.

In 1871, the Criminal Tribes Act 1871 (‘CTA’) was passed by British India’s governor-general, which targeted ‘eunuchs’ (a stigmatised colonial term for transgender persons). In a letter between two British officials, it was said that the aim of the Tribes Act was to gradually lead to their extinction and erase their presence from public spaces. The intent behind its provisions was to associate criminality with transgender communities. Colonial administrators claimed that Hijras were the kidnappers and castrators of children. This was due to the practice of adults as well as children being initiated into the Hijra community as chelas (disciples) of senior gurus.

[82] *Naz Foundation v. Government of NCT of Delhi* 2009 SCC OnLine Del 1762

[83] *Suresh Kumar Koushal v. Naz Foundation* Civil Appeal No. 10972 of 2013.

The law potentially impacted all Hijras, because, under the government policy, key Hijra cultural practices (namely, performance and feminine clothing) were defined as proof that an individual could be “reasonably suspected” of kidnapping, castration, and Section 377 offences, and thus should be registered by the police.[84] Under the CTA, the police were required to register the names and residences of all ‘eunuchs’ reasonably suspected of sodomy, kidnapping, castration, or of committing offence under Section 377 of the IPC. Then those listed in the ‘eunuch’ register were prohibited from wearing feminine clothing and performing in public. Section 27 of the CTA permitted the arrest of transgender individuals without a warrant and their imprisonment if found with a boy below the age of 16. Although Hijras were the primary target of the law, other gender-non-conforming people were also registered as ‘eunuchs,’ including Zananas, the so-called ‘effeminate men’ who were often performers. Although the CTA was repealed, many have noted that it “continues to exist as part of the living culture of law.”[85]

C. Critical Supreme Court Cases

The continued struggle for equality by the LGBTIQ+ community paved the way for many landmark judgments. The following trajectory of Supreme Court cases highlights how India has made progress in the realisation of the rights of the LGBTIQ+ community.

i) Suresh Kumar Koushal v. Naz Foundation

A number of appeals were filed before the Supreme Court against the judgement of the Delhi High Court in **Naz Foundation**. **The Supreme Court**, in 2013, overturned the judgment of the Delhi High Court in the case of **Suresh Kumar Koushal v. Naz Foundation** (supra) and upheld the constitutional validity of Section 377 of the IPC. The Court observed that the respondents failed to present particular incidents involving harassment and abuse by the government against sexual minorities. It was also held that Section 377, third gender as a socially and educationally backward class of citizens thus entitling them

[84] Jessica Hinchy, ‘The long history of criminalising Hijras’ (Himal, 2 July 2019) <<https://www.himalmag.com/long-history-criminalising-hijras-india-jessica-hinchy-2019/>> accessed 25 October 2022

[85] Harsh Mander, ‘Equal in every way’ (The Hindu, 14 May 2022) <<https://www.thehindu.com/features/magazine/mag-columns/equal-in-every-way/article5973147.ece>> accessed 25 October 2022

to reservations in fields of education and employment; and most important, recognising “third gender” as a valid on its face, did not create the risk of arbitrary enforcement against certain groups, reasoning that the law only criminalises sexual acts “against the order of nature,” and not those in the ordinary course. The Court observed that a very small fraction of the LGBTIQ+ persons being charged and prosecuted under Section 377 “cannot be made a sound basis” for declaring the law as unconstitutional. The Court held that the mere fact that the section is misused by police authorities and others is not a reflection on the vires of the provision.

ii) NALSA v. Union of India

In 2012, the National Legal Services Authority (NALSA), filed a writ petition in the Supreme Court of India seeking to declare the non-recognition of the gender identity of the transgender community as violative of Article 14 and 21 of the Constitution of India. The petition was joined by a non-governmental organisation representing the Kinnar transgender community, and an individual who belonged to the Hijra community. The Supreme Court in **NALSA v. Union of India** (supra) recognised the identity of transgender persons as the ‘third gender’ and recognised their right to self-identify their gender. It was observed that *“each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity, and freedom and no one shall be forced to undergo medical procedures [...] as a requirement for legal recognition of their gender identity.”*

The Court held that Article 14 affords protection to ‘any person’, thus transgender persons fall within the expression ‘person’ and are, hence, entitled to legal protection of laws in all spheres of State activity as enjoyed by any other citizen of this country, including in employment, healthcare, education, as well as equal civil and citizenship rights. The Supreme Court ruled that the right to freedom of expression guaranteed under Article 19(1)(a) of the Constitution “includes one’s right to expression of his self-identified gender,” and notwithstanding reasonable restrictions pursuant to Article 19(2) of the Constitution, “no restriction can be placed on one’s personal appearance or choice of dressing.” Lastly, the Court extended the protection of Article 21 “those aspects of life which go to make a person’s life meaningful,” including one’s right to dignity by self-determination of the gender to which a person belongs. Further, the Court directed that proactive action must be taken on the part of the Union and State governments for advancement of rights of the transgender community. The directions included taking steps to frame social welfare schemes for the community; making provisions for recognising

gender identity in all documents. The court also addressed the right of the community to proper medical and healthcare facilities, separate public toilets, social welfare schemes, recognition in the society, legal protection under all spheres of state activity, equal opportunity in matters of employment, etc.

iii) K.S. Puttaswamy v. Union of India^[86]

The 2017 judgement in **K.S. Puttaswamy and Anr. v. Union of India** recognised the right to privacy as an inherent part of Article 21 of the Constitution. The Court observed that the right to privacy includes personal choices governing a way of life, that it is not lost or surrendered merely because an individual is in a public space. This articulation of right to privacy paved the way for the decriminalisation of same-sex intimacy. The court concluded that “it is imperative to widen the scope of the right to privacy to incorporate a right to 'sexual privacy' to protect the rights of sexual minorities”. The Court also referred to the landmark US Supreme Court decision in *Obergefell v. Hodges*,^[87] where the US Supreme Court upheld the right to marriage equality for persons in queer relationships.

iv) Navtej Singh Johar v. Union of India

The overruling of the Delhi High Court’s judgement in **Suresh Kumar Koushal v. Naz Foundation** (supra) led to large scale protests by the **LGBTIQ+** community. Many came forward and filed a petition challenging the constitutional validity of Section 377 of the IPC arguing that it was violative of their right to privacy, equality, freedom of expression and protection against discrimination. Finally, the Supreme Court in **Navtej Singh Johar v. Union of India** (supra) in September, 2018, overruled the holding of **Suresh Kumar Koushal v. Naz Foundation** (supra). The five-judge bench of the Supreme Court unanimously held that Section 377, as far as it applied to consensual sexual conduct between adults in private, was unconstitutional. The SC noted that a “distinction has to be made between consensual relationships of adults in private, whether they are heterosexual or homosexual in nature” and non-consensual relationships. Moreover, consensual relationships between adults could not be classified along with offences of sodomy, bestiality and non-consensual relationships.

^[86] *KS Puttaswamy v. Union of India* (2017) 10 SCC 1.

^[87] *Obergefell v. Hodges*, 2015 SCC OnLine US SC 6

The Court relied on **NALSA v. Union of India** (supra) to reiterate that gender identity is intrinsic to one's personality and denying the same would be a violation of one's dignity.

The Court also relied on **Shafin Jahan v. Ashokan KM**[88] to hold that persona has the right to choose their partner. The Court held that “the choice of whom to partner, the ability to find fulfilment in sexual intimacies and the right not to be subjected to discriminatory behaviour are intrinsic to the constitutional protection of sexual orientation”.

The Court relied upon its decision in **K.S. Puttaswamy v. Union of India** (supra) and held that denying the **LGBTIQA+** community their right to privacy on the ground that they form a minority of the population would be a violation of their fundamental rights.

It was observed by that the right to privacy includes the right of **LGBTIQA+** persons to navigate public spaces on their own terms. Privacy has to be understood as decisional autonomy rather than as spatial privacy. Justice Chandrachud observed, “*the right to sexual privacy, founded on the right to autonomy of a free individual, must capture the right of persons of the community to navigate public places on their own terms, free from state interference.*” Justice Dipak Mishra, writing for himself and Justice Khanwilkar also defined privacy as “intimacy in privacy as a matter of choice”. Justice Dipak Mishra and Justice Khanwilkar in their opinion also recognised the right to speech and freedom of expression of people belonging to the **LGBTIQA+** community under Article 19 of the Constitution. They noted that public displays of affection by **LGBTIQA+** people cannot be bogged down by majoritarian morality. They are permissible and do not amount to indecency or violate public order.

The Court held that discrimination on the basis of sexual orientation is violative of right to equality. The Court observed that the “*choice of LGBTIQA+ person to enter into intimate sexual relations with persons of the same sex is an exercise of their personal choice, and an expression of their autonomy and self-determination*”. Justice Chandrachud in his opinion observed that while Section 377 is neutrally worded, it disproportionately impacts members of the **LGBTIQA+** community. Section 377 is premised on stereotypes about men and women, which constitutes discrimination on the basis of sex prohibited under Article 15 of the Constitution. It was observed that provisions such as Section 377 give people ammunition to say “this is what a man is” by giving them a law which says “this is what a man is not.”

[88] *Shafin Jahan v. Ashokan KM* 2018 (5) SCALE 422

Thus, laws that affect queer people rest upon a normative stereotype: “*the bald conviction that certain behavior—for example, sex with women—is appropriate for members of one sex, but not for members of the other sex.*”

The Court also imposed positive obligations on the Union of India to publicise the judgment and further to take steps for sensitise the plight of the community. The court emphasised the equal constitutional citizenship of **LGBTIQA+** persons, including access to civil rights like right to equality, right against discrimination, right to dignity, right to freedom of speech and expression and the right to decisional autonomy of choosing their sexual partner.

v) Shanavi Ponnusamy v. Ministry of Civil Aviation[89]

The Supreme Court relying on the NALSA framework of reasonable accommodation advised the Central Government to frame policies for equal opportunities in avenues of employment for transgender persons. The writ petition was filed by the petitioner seeking recourse under the Transgender Persons Act after their application against the vacancy for the post of an airhostess was rejected since the vacancy was released only for the ‘female category’.

vi) The Principle Secretary Health and Family Welfare Dept. Govt. of NCT of Delhi and Anr.[90]

The Medical Termination of Pregnancy Act 1971 provides that ‘women’ can terminate pregnancies. The Supreme Court in this judgement clarified that the definition of woman would also include, “persons other than cis-gender women who may require access to safe medical termination of their pregnancies.” This also enables transmasculine persons to access safe abortion procedures.

vii) Deepika Singh v. Central Administrative Tribunal[91]

The Supreme Court while granting the relief of maternity leave to a Central Government employee who had already availed childcare leave for the children of her husband from his previous marriage, observed that atypical family units are entitled to the equal protection of law. . Such familial relationships, in the words of the court included “domestic, unmarried

[89] *Shanavi Ponnuswamy v. Ministry of Civil Aviation Writ Petition (Civil) No. 1033 of 2017, Supreme Court*

[90] *X v. The Principle Secretary Health and Family Welfare Department Government of NCT of Delhi and Anr. C.A. No. 5802/2022*

[91] *Deepika Singh v. Central Administrative Tribunal Civil Appeal No 5308 of 2022, Supreme Court*

partnerships or queer relationships.” These observations are significant in expanding the traditional understandings of what constitutes a family. The Supreme Court has made observations that may shape jurisprudence affecting the right of the **LGBTIQA+** community, even though the cases themselves do not directly relate to the rights of **LGBTIQA+** community. Many laws are based on stereotypical assumptions about the gender and sexual identity of persons, which in law is mostly assumed to be cisgender and heterosexual. The Supreme Court has increasingly held that stereotypes on the basis of sex violate the guarantee of non-discrimination under Article 15 of the Constitution.

viii) Other prominent cases

In *Secretary, Ministry of Defence v. Babita Puniya* [92], the Court addressed the stereotypical and constitutionally flawed notion on gender identities. The Supreme Court questioned the gender based roles prescribed by the society that is premised on stereotypes. In *Colonel Nitisha v. Union of India*[93], the Supreme Court observed that any law or policy lacking a nuanced understanding of substantive equality would be indirectly discriminatory. Indirect discrimination is an insidious phenomenon which, while purporting to be prima facie equal, creates certain inherently unequal barriers, thereby putting the marginalised communities at a disadvantage. The court adopted the two-step Fraser test from Canadian jurisprudence to determine the presence of indirect discrimination, which has the following two prongs - First, the Court has to investigate whether the impugned policy disproportionately affects a certain section of the society. This may, but not always necessarily, be done by undertaking an in-depth examination of the statistical evidence available. Second, the Court must look at whether the law has the effect of reinforcing, perpetuating, or exacerbating disadvantage or exclusion, be it economic, social, psychological, physical or political, and these factors must be viewed in light of “any systemic or historical disadvantages faced by the claimant group.” The Supreme Court’s judgment in *Vikash Kumar v. UPSC*[94] offers a glimpse of hope in the realm of rights of the marginalised. The court stressed on the constitutionally-sanctioned rights including right to live a life of dignity and equality, a violation of which would result in a particular class being relegated as second-class citizens.

[92] *Secretary, Ministry of Defence v. Babita Puniya* (2020) 7 SCC 469

[93] *Colonel Nitisha v. Union of India* 2021 SCC OnLine SC 261

[94] *Vikash Kumar v. UPSC* (2021) 5 SCC 370

The Supreme Court relied on its previous judgement in **Jeeja Ghosh v. Union of India**[95], wherein it was held that the right to equality, as enshrined in Article 14 of the Indian Constitution, is not just limited to the prevention of discrimination but also extends to a wide variety of positive rights, including “reasonable accommodation”. The Court went on to observe that, The Court went on to observe that, as a counter-majoritarian institution, it was the court’s duty “to protect the rights of socio-economic minorities”.

[95] *Jeeja Ghosh v. Union of India* (2016) 7 SCC 761

7- Existing Legislative Regime



The legislative regime in India for protecting the rights of the LGBTIQ+ community is yet to develop holistically. First and foremost, while The Transgender Persons Act has put them on the map, there are no legislations or rules in place to protect other members of the community, such as gays, lesbians, bisexuals, asexuals, or other queer people, from societal violence, stigma, or discrimination in general. There is no anti-discrimination law in place. [96] In fact, the Transgender Persons Bill was also a development otherwise affected through a series of judicial interventions. It was only after the decision in **NALSA v. Union of India** (supra) that a legislative note was taken toward the need for protecting the rights of transgender individuals.

It has been argued by legal practitioners and academics that the statutory regime in the country itself is discriminatory in nature. [97] The LGBTIQ+ community has raised demands for more inclusive marriage, adoption, surrogacy, guardianship, inheritance, employment, and education regulations.[98]

A. Rights under the Constitution

The Constitution rests on the pillar of equality, in fact, on substantive equality,[99] which embodies the value that special provisions may be made for certain classes. Article 14 of

[96] *The state of LGBTQ+ rights: "India does not have anti-discrimination code"* (Business Standard, 12 July 2020) <https://www.business-standard.com/article/current-affairs/the-state-of-lgbtq-rights-india-does-not-have-anti-discrimination-code-120071200179_1.html> accessed 25 October 2022

[97] Dipika Jain and Kavya Kartik, 'Unjust Citizenship, The Law that Isn't' 13 NUJS L. Rev. 3 (2020) <<http://nujlawreview.org/wp-content/uploads/2020/08/13-2-Jain-Kartik-Unjust-Citizenship.pdf>> accessed 25 October 2022

[98] Yatin Gaur, 'Evolution of LGBT Rights in India and taking the narrative forward: Living free and equal' (Ipleaders, 21 June 2021) <<https://blog.ipleaders.in/evolution-of-lgbt-rights-in-india-and-taking-the-narrative-forward-living-free-and-equal/>> accessed 25 October 2022

[99] Vidhi Centre for Legal Policy, 'Making the laws LGBTIQ+ inclusive' (Vidhi Centre for Legal Policy, <https://vidhilegalpolicy.in/wp-content/uploads/2020/06/Queering-the-Law_Introduction.pdf> accessed 25 October 2022

the Constitution guarantees equal treatment before the law and equal protection under the law within the territory of India. In **NALSA v. Union of India** (supra), it was held that persons who are neither male nor female, i.e., those persons who do not subscribe to the gender binary, would also fall within the expression “any person” as provided under Article 14 and hence are entitled to all the rights as guaranteed under the same.

Article 15 of the Constitution of India prohibits discrimination on grounds of religion, race, caste, sex, or place of birth.

“(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.”

Both Articles 15 and 16 prohibit any form of gender bias and gender-based discrimination. It has also been established that the prohibition of discrimination on grounds of sex includes grounds of gender identity and sexual orientation. Article 21 is of relevance here since the Supreme Court has, in its decisions, accorded the right to choose one’s own identity and partner as intrinsic to right to privacy and dignity under Article 21 of the Constitution which protects the right to life and liberty.

B. The Transgender persons (Protection of Rights) Act, 2019

The legal recognition of a person’s chosen gender identity is crucial for ensuring access, enjoyment, and exercise of a range of human rights. Non-recognition of trans persons’

gender identity has led to a denial of their full enjoyment and exercise of their rights. The case of **NALSA v. Union of India** (supra) was significant in upholding trans persons'

Act was passed. However, while the Act allows a person to be recognised as a transgender person without any medical intervention, it mandates a trans persons to undergo gender affirmative surgery to receive legal recognition from authorities in order to be identified as male or female.[100] The Transgender Persons (Protection of Rights) Rules 2020 use a wider term "medical intervention" as opposed to "surgery" (used in the Act) for enabling the issuance of a gender identity certificate for a trans- person to be identified as male or female.[101] Medical intervention is defined in the rules as including any gender-affirming medical intervention undertaken by an individual to facilitate the transition to their self-identified gender, including but not limited to counselling, hormonal therapy, and surgical intervention if any.[102]

The Transgender Persons Act prohibits discrimination against transgender individuals in the fields of education, employment, healthcare, accommodation, facility, benefit, privilege or opportunity dedicated to the use of the general public or customarily available to the public, the right to movement, the right to "reside, purchase, rent or otherwise occupy any property", the opportunity to stand for or hold public or private office, and in government or private establishments.[103]

The Transgender Persons Act was, soon after its enactment, challenged by different transgender activists. The first writ petition challenging the constitutional validity of the Act was filed by Swati Bidhan Baruah[104] and the second by Grace Banu and Vyjayanti Vasanti Mogli (through the Centre for Law and Policy Research)[105]. Yet another writ petition was filed by Rachana Mudraboyina. All of these writ petitions were tagged together by the Supreme Court by an order dated 21 January 2022.[106] The writ petitions are currently pending.

[100] Section 7 of the Act

[101] Rule 6

[102] Rule 2(i)

[103] Sushmita Pathak 'India Just Passed A Trans Rights Bill. Why Are Trans Activists Protesting It?', (NPR, 4 December 2019) <<https://www.npr.org/sections/goatsandsoda/2019/12/04/784398783/india-just-passed-a-trans-rights-bill-why-are-trans-activists-protesting-it> > accessed 25 October 2022

[104] Challenges to Transgender Persons Act' <https://www.scobserver.in/cases/swati-bidhan-baruah-union-of-india-challenges-to-transgender-persons-act-case-background/> accessed 25 October 2022

[105] A copy of the WP is available at https://clpr.org.in/wp-content/uploads/2020/06/Grace-Banu-Trans-Act-PIL-SC_Final.pdf

[106] Case Status available from main.sci.gov.in in WP(C) 51 of 2020.

The collective grounds of challenge in the said petitions are:

- The Act violates the fundamental rights of the community; it violates the right to determine one's own sexual orientation, privacy, and body autonomy. Section 4 appears to uphold the principle of self-identification, yet it does not embody its true spirit.[107]
- The provisions of the Act are contradictory to the judgments in NALSA, KS Puttaswamy, and Navtej Singh Johar. The Act also disregards the comments on reservations in public education and employment. The affirmative action provided in the NALSA judgment, which stated that the transgender community was to be treated as a socially and educationally backward class, has not been dealt with under the provisions of the Act.[108]
- Sections 5 and 6 subject transgender persons to further documentary requirements, which again directly exposes and leaves them at the behest of a paternalistic and bureaucratic system.
- Section 7 (provision to undergo medical surgery) violates the right to bodily integrity, which includes identifying with a gender of one's own choice.
- Section 12(3) only provides two choices, which are either to reside with their birth family or be placed at rehabilitation centres. Such provisions are demeaning, and they violate one's right to choose and right to live as a capable individual.
- The presence of inherent inequality since similar offences have been dealt with different degrees of punishment when committed against a transgender or cisgender individual. For example, punishment for sexual abuse against a transgender is only two-years of imprisonment, whereas a similar offense committed against women attracts serious punishment under the IPC, extending up to seven years of imprisonment.
- The Act does not deal with specific crimes committed against transgender persons. Section 18 only recognises crimes that are committed against persons in general.

[107] *Grace Banu Ganeshan & Ors. v. Union of India & Anr.* : A constitutional challenge to The Transgender Persons (Protection of Rights) Act 2019' <<https://clpr.org.in/litigation/grace-banu-ganeshan-ors-v-union-of-india-anr/>> accessed 25 October 2022

[108] Gautam Bhatia, 'The Constitutional Challenge to the Transgender Act', (*Indian Constitutional Law, and Philosophy Blog*, 2020) <<https://indconlawphil.wordpress.com/2020/01/31/the-constitutional-challenge-to-the-transgender-act/>> accessed 25 October 2022

C. OTHER LAWS THAT IMPACT LGBTIQA+ COMMUNITY

The LGBTIQA+ community faces discrimination in matters of housing, work, healthcare, education etc. There are no regulatory provisions to deal with the problems that arise in availing the simplest of benefits.[109] Criminal laws are often disproportionately invoked to target LGBTIQA+ individuals. It is also imperative to note that the individuals who belong to the LGBTIQA+ community may also belong to marginalised regions, religions, castes, and classes which can exacerbate the disadvantage they face in the society.[110]

I. LAWS AGAINST BEGGARY

There are several laws that continue to criminalise queer relationships and expression. Police often rely on provisions in state-level police laws to harass queer persons in public spaces. These state-level provisions grant certain police powers and also set out specific state-level criminal offences and their punishments. For example, anti-beggary laws seek to explicitly regulate trans persons and remove their presence from public spaces as part of “cleanliness drives”.

After the Bombay Prevention of Begging Act, 1959 was extended to Delhi by a central government amendment in 1960, the act of begging in Delhi became a criminal offence. The Act prescribes a penalty of three years of detention for a beggar that can be extended to ten years for a subsequent offence. This Act disproportionately impacted transgender persons, some of whom migrate from smaller towns after being shunned by their families and rely on seeking alms to sustain themselves. Under the anti-beggary provisions and laws governing public nuisance and obscenity, transgender persons are criminalised and subjected to harassment, arbitrary arrest, illegal detention, and custodial torture.

The Delhi High Court in its judgment **Harsh Mander v. Union of India** and **Karnika Sawney v. Union of India**[111] held that the Bombay Prevention of Begging Act, 1959 was unconstitutional for violating Article 14 and 21 as these persons had no other means of

[109] *Living with Dignity Sexual Orientation and Gender Identity Based Human Rights Violations in Housing, Work, and Public Spaces in India* (ICJ 2019) <<https://www.icj.org/wp-content/uploads/2019/06/India-Living-with-dignity-Publications-Reports-thematic-report-2019-ENG.pdf>> accessed 25 October 2022

[110] Priya Thangarajah and Ponni Arasu, *Queer Women, and the Law in India*, 2019

[111] *Harsh Mander v. Union of India and Karnika Sawney v. Union of India* WP(C) 10498/2009.

sustenance. The Court noted that begging should not be a crime if it is done because of poverty and helplessness, and that *“If we want to eradicate begging, artificial means to make beggars invisible will not suffice.”* The Court observed that the state cannot fail to do its duty in providing for a dignified life for its citizens and then add insult to injury by arresting, detaining and incarcerating poor persons as “offenders.” The Court observed that the application of the Act has been arbitrary, leading to the detention of poor persons who may not be engaged in begging, but could be daily wage workers, sex workers, homeless persons and/or people who have ‘fallen through the socially created net’.

Beggary laws, which provide the police with the authority to arrest without a warrant, have a disproportionate impact on transgender individuals, who often rely on begging and other traditional means of seeking alms for survival. After the decriminalisation of Section 377, the Transgender Persons (Protection of Rights) Bill was introduced. The Bill also included a section that criminalised forced beggary. Due to heavy criticism, the word ‘begging’ was struck out of the final act.

II. LAWS ON PUBLIC NUISANCE AND IMMORAL TRAFFICKING

There are also other seemingly neutral laws, such as those relating to public nuisance, which are often misused or abused by law enforcement officials to harass or detain queer persons. These provisions broadly target individuals deemed ‘undesirable’, ‘immoral’ or ‘illegal’ who might be suspected of criminal activity. These laws disproportionately target trans persons and sex workers. Some of these are mere status crimes, and the provisions allow the police to misuse their authority to arrest, harass, or extort transgender persons occupying public spaces.

While Indian laws do not criminalise sex work per se, they do criminalise several aspects of it, including “soliciting” and *“living on the earnings of prostitution”* through the Immoral Trafficking Prevention Act, 1956. After the amendment in 1986, the law became gender-neutral and applied to both men, women, as well as those with indeterminate gender. Section 4 of this Act punishes living on the earnings of prostitution. Section 8 punishes seducing and soliciting for the purpose of prostitution. Many transgender persons rely on sex work as a means of livelihood. There is also a perception that transgender individuals are involved in sex work, even when they may not be. The police often use legal provisions designed to regulate sex work against transgender individuals, to arrest and detain them.

In **Budhadev Karmaskar v. The State of West Bengal**[112], a three-judge Bench of the Supreme Court held that sex workers have a right to live with dignity and to be treated with human decency in accordance with Article 21 of the Constitution. The Court issued a slew of directions to the Centre and State Governments regarding the rights of sex workers under Article 142 of the Constitution:

- Sex workers are entitled to equal protection of the law. Criminal law must apply equally in all cases, on the basis of ‘age’ and ‘consent’. When it is clear that the sex
- Worker is an adult and is participating with consent, the police must refrain from interfering or taking any criminal action. There have been concerns that the police view sex workers differently from others. When a sex worker makes a complaint of criminal/sexual/any other type of offence, the police must take it seriously and act in accordance with the law.
- Any sex worker who is a victim of sexual assault should be provided with all facilities available to a survivor of sexual assault, including immediate medical assistance in accordance with Section 357C of the Code of Criminal Procedure, 1973.
- The State Governments may be directed to conduct a survey of all Protective Homes so that cases of adult women, who are detained against their will, can be reviewed and processed for release in a time-bound manner.
- It has been noticed that the attitude of the police towards sex workers is often brutal and violent. It is as if they are a class whose rights are not recognised. The police and other law enforcement agencies should be sensitised to the rights of sex workers who also enjoy all basic human rights and other rights guaranteed to all citizens in the Constitution. Police should treat all sex workers with dignity and should not abuse them, both verbally or physically, nor subject them to violence, or coerce them into any sexual activity.
- The Press Council of India should be urged to issue appropriate guidelines for the media to take utmost care not to reveal the identities of sex workers, during arrest, raid and rescue operations, whether as victims or as accused,

[112] *Budhadev Karmaskar v. The State of West Bengal Criminal Appeal No(s).135/2010; 19-05-2022*

and not to publish or telecast any photos that would result in disclosure of such identities. Besides, the newly introduced Section 354C of the IPC which makes voyeurism a criminal offence, should be strictly enforced against electronic media, in order to prohibit telecasting of photos of sex workers with their clients in the garb of capturing the rescue operation.

- Measures that sex workers employ for their health and safety (e.g., use of condoms, etc.) must neither be construed as offence(s) nor seen as evidence of commission of an offence.
- The Central Government and the State Governments, through National Legal Services Authority, State Legal Services Authority and District Legal Service should carry out workshops for educating the sex workers about their rights vis-a-vis the legality of sex work, rights and obligations of the police and what is permitted/prohibited under the law. Sex workers can also be informed as to how they can get access to the judicial system to enforce their rights and prevent unnecessary harassment at the hands of traffickers or police.
- No child of a sex worker should be separated from the mother merely on the ground that she is in the sex trade. Further, if a minor is found living in a brothel or with sex workers, it should not be presumed that he/she has been trafficked. In case the sex worker claims that he/she is her son/daughter, tests can be done to determine if the claim is correct and if so, the minor should not be forcibly separated.

The Union of India was directed to file its response to the recommendations made by a panel that was set up by the Court to look into prevention of trafficking, rehabilitation of sex workers and recommend conditions that are conducive for them to continue working with dignity as sex workers. These recommendations had been converted into the aforementioned directions.

Queer individuals are often arbitrarily arrested and detained by the police. In the case of **Jayalakshmi v. Tamil Nadu**[113] before the Madras High Court, it came to light that a transgender woman was repeatedly raped and tortured by the police during the course of investigation into an alleged case of theft. This torture

[113] *Jayalakshmi v. Tamil Nadu* (2007) 4 MLJ 849.

continued for a period of one month, and she immolated herself. She was taken to the hospital where she eventually succumbed to her injuries. The Court ruled unequivocally that this was a case of custodial violence and there is no doubt that the physical and sexual abuse of the deceased at the hands of the police officers caused her to commit suicide. There were multiple attempts to tamper with the evidence by hiding Pandian's dying declaration, signing a false statement of suicide, and misrepresenting the nature of interrogation. Based on a report prepared by an enquiry commission, statements of doctors and acquaintances, and deceased person's dying declaration, the Court directed disciplinary action against the perpetrating police officers and directed the Government of Tamil Nadu to provide Rs. 5 lakhs in compensation to Jayalakshmi. The Court recognised that custodial violence, which violates a person's right to dignity, is one of the worst crimes.

III. Habeas Corpus Petitions and Queer Women/ Transgender Men

Section 361 of the IPC deals with kidnapping from lawful guardianship. If a person 'entices' or takes a minor from the legal guardian without the consent of the guardian, then he/she can be charged with kidnapping the minor. The consent of a minor is irrelevant. Many families take advantage of this law to restrain women who run away, especially if they are in queer relationships. Another such provision is Section 362 concerning abduction. Lesbian women who leave their abusive homes are also charged with Section 366, which is related to kidnapping done with the intention of compelling someone to marry them. Families often institute habeas corpus petitions or file missing person's complaints if their daughter voluntarily decides to pursue a queer relationship and live-in with their partner. On the other hand, queer women also institute habeas corpus petitions against families of their same-sex partners for detaining the latter against their will, to restrain them from pursuing the relationship.[114]

There have been some instances where the habeas corpus petitions have involved gay men and transgender individuals. Perhaps the litigation in relation to habeas corpus petitions reflects the larger issue of the lack of recognitions of queer relationships under Indian law.

[114] *Arasu and Thangarajah (n-20)*

IV. Penal Laws

Section 377 led to the abuse of other provisions of law to harass same-sex desiring people and transgender persons, including: (i) Section 268 IPC – any conduct in a public place that causes injury/danger/annoyance to the public; (ii) Section 292/3 IPC – Sale of obscene books/objects: impedes publication and distribution of material on safe sex practices for sexual minorities; and (iii) Section 294 IPC – Obscene acts – punishes public acts, including songs: which were used to impede HIV interventions.

The misuse of Section 292 (Obscenity) of the IPC was seen when a parcel from the United States to a gay group in Calcutta was confiscated because it consisted of gay and lesbian magazines. The customs regarded it as offensive to the morality of the country.[115]

Considering all the developments and discrimination against individuals from the **LGBTIQA+** community, it is invariably clear that the existing legislative regime in the country is not sufficient to provide a life of freedom, dignity, and equality to the community.

V. Other Relevant Laws

The Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act, 2017 attempts to control and prevent the spread of HIV and AIDS. Gay men and transgender individuals are often affected by the Virus. The Act prohibits discrimination against persons having the Virus. Some of the anti-discrimination provisions under the Act include prohibition on denial or discontinuation of healthcare services, right to reside, purchase, rent or occupy property, right of movement and the right to hold public or private office. The Act has an important role in redressing discriminatory attitudes and practices against sexual minorities who have contracted the Virus. Section 18(1) and (2) of the Human Immunodeficiency Act read with Section 21 (1) (a) of the Mental Healthcare Act, 2017 provides that every person has a right to access mental health care without any discrimination, including on grounds on sexual orientation or gender.

[115] Anuradha Parasar, 'Homosexuality in India- The Invisible Conflict' <<https://www.delhihighcourt.nic.in/library/articles/legal%20education/Homosexuality%20in%20India%20-%20The%20invisible%20conflict.pdf>> accessed 25 October 2022

8 - Trends in the High Courts



Despite Supreme Court judgements upholding the dignity of **LGBTIQA+** persons, they still face many struggles and challenges to their dignity during their interaction with the justice system essentially due to the systemic marginalisation faced by them. However, numerous High Court judgements have appropriately addressed **LGBTIQA+** issues.

A. Recognition of Self-identified Gender

In **Nangai v. Superintendent of Police** (Nangai I)[116] (prior to The Transgender Persons Act), the Madras High Court held that no law provided for a definitive set of tests to determine when a person may qualify as male or as female. The Court found that transgender and third gender individuals are not accommodated within the binary arrangement of laws and that, for specific purposes, they must be categorised either as male or female. The Court held that the Services Board had violated the privacy rights of the Petitioner by disqualifying her from applying as a woman, as she had determined herself as a female.

The Calcutta High Court in **Chanchal Bhattacharya v. State of West Bengal**[117] held that the President of the West Bengal Council of Higher Secondary Education Board ought to have given recognition to the choice exercised by the child of the petitioner and let him change his name and gender on the admit cards, registration certificates, and mark sheets. The Court directed the Board to make necessary changes to the relevant certificates.

In **G. Nagalakshmi v. Director General of Police** (Nangai II)[118] the Madras High Court held that the Petitioner had the right to her self-determined “sexual identity” under Article 19(1)(a). The Court also found that the Petitioner has a right to identify as either female or third gender, regardless of the medical examiner’s findings. The Tamil Nadu

[116] *Nangai v. Superintendent of Police (Nangai I)* 2014 (2) LLN 511 (Mad).

[117] *Chanchal Bhattacharya v. State of West Bengal* 2016 SCC OnLine Cal 2124.

[118] *G. Nagalakshmi v. Director General of Police (Nangai II)* WP No. 15223 of 2014 (Mad).

Uniformed Services Board was directed to reinstate the Petitioner in her service as a female constable.

In **Atri Kar v. Union of India**[119], the Calcutta High Court held that not having a gender column for transgender applicants is a violation of their fundamental rights. The Court held that all state authorities within the meaning of Article 12, including a public sector bank, would be bound by the judgment of the Supreme Court in NALSA.

In **Jeeva M. v. State of Karnataka** [120], the Karnataka High Court directed the Educational Department of the State to issue a circular to the concerned authorities to allow transgender individuals to change their name and gender on educational certificates in accordance with their self-identified gender.

In **Anjali Guru Sanjana Jaan v. State of Maharashtra**[121], the Bombay High Court held that a trans woman can contest elections from wards reserved for women. The Court further observed that she would be entitled to claim reservations as a transgender person, if they were provided in future.

In **Hina Haneefa v. State of Kerala**,[122] the Kerala High Court held that the petitioner, a transwoman, had the right to self-identity, and she could be a part of the female division of the NCC. The Kerala High Court held that the unavailability of the third gender in enrolment cannot be a sufficient justification and as the petitioner had the right to self-identity, she can be a part of the female division of the NCC. The Court observed that the Transgender Persons Act not only upholds the right of a person to be recognised as transgender, but also the right to a self-perceived gender identity. Further, the Court held that the 2019 Act would trump any discriminatory provisions of other legislations that exclude transgender individuals from equal participation.

In **Christina Lobo v. State of Karnataka**[123], the Karnataka High Court held that transgender individuals are not required to obtain a District Magistrate's certificate to request a change of name and gender in their documents even if the request is made after the Transgender Persons Act came into force, as long as their gender identity has been recorded before the Act came into effect. In this case, the gender identity was already recorded in the Aadhar card and passport.

[119] *Atri Kar v. Union of India* 2017 SCC OnLine Cal 3196

[120] *Jeeva M. v. State of Karnataka* WP No 12113 of 2019

[121] *Anjali Guru Sanjana Jaan v. State of Maharashtra* WP (Stamp) No 104 of 2021 (Bombay High Court)

[122] *Hina Haneefa v. State of Kerala* WP(C) No. 23404/2020.

[123] *Christina Lobo v. State of Karnataka* WP No. 8024 of 2020

B. Conversion Therapy and Illegal Confinement

The Madras High Court's ruling in **S. Shushma v. Commr. Of Police** (supra) has explicitly prohibited conversion therapy. It stated that the right to exercise self-determination includes the right to choose and that someone with a competent mental faculty can efficiently choose between different medical treatments. Similarly, the Kerala High Court in **Queerala v. State of Kerala**[124] upon being informed that forced conversions of sexual orientation were prevalent among medical practitioners, directed the State Government to look into the matter and constitute an expert committee to study the issue, if necessary. Based on this study report, the State was required to frame guidelines and produce the same before the Court within 5 months.

In **Shivani Bhat v. Union of India**[125] the Delhi High Court held that no person could be illegally confined in their home, as it is a violation of their basic rights. Shivani (Shivy) was an India origin citizen who identified as a transgender man and had grown up in the United States of America. When he visited his ancestral home in Uttar Pradesh, his family confiscated his passport and Green Card and forcibly enrolled him in a local college. He was also subjected to harassment and violence. The Court observed that “there is, thus, no gainsaying the fact that transgender people enjoy basic human rights, including protection from violence and discrimination. They have the right to dignity and self-determination.” The Court directed the family to return the Petitioner's passport and other documents.

C. Marriage

In **Arunkumar and Anr. v. Inspector of General Registration**[126] a marriage solemnised between a cis man and a transgender woman was upheld by the Madras High Court. The Court noted that a ‘bride’ can include any intersex/trans person who identifies as a woman. The Court added: “[t]he only consideration is how the person perceives herself.” While marriage has been traditionally recognised between a cisgender man and a cisgender woman under the law, by validating this marriage, the Court interpreted marriage beyond its traditional understandings.

[124] *Queerala v. State of Kerala WP(C) NO. 21202 OF 2020(A) (Ker).*

[125] *Shivani Bhat v. Union of India 223 (2015) DLT 391.*

[126] *Arunkumar and Anr. v. Inspector of General Registration WP(MD)No.4125 of 2019 and WMP(MD)No.3220 of 2019.*

In **Mansur Rahman v. Superintendent of Police**[127] the Madras High Court held that a petitioner, a cis gender man who married a transgender woman is entitled to police protection from his family. The Court also recognised the marriage between the couple and expressed its profound appreciation for the same.

Petitions for marriage equality, including by same-sex couples, are currently pending before the Kerala High Court[128] and Delhi High Court[129].

D. Right to Queer and Consensual Relationships

LGBTIQA+ individuals are vulnerable to being persecuted by their families and law enforcement authorities. Women's queer intimate relationships are often attacked and face excess scrutiny. In **Shreeja S. v. Commr. Of Police**[130], the Kerala High Court observed that a live-in relationship between two women was neither a crime nor illegal. Holding that the women had consented and were past the age of majority, it held that 'the Courts cannot, as long as the choice remains, assume the role of *parens patriae*'.

In **Madhu Bala v. State of Uttarakhand**[131] it was alleged by a woman in a same-sex relationship that her partner was wrongfully detained by her relatives. The Uttarakhand High Court observed that the Constitution protects the right to self-determination with regard to one's gender identity and the freedom to choose one's partner, irrespective of sexual orientation.

In the case of **S. Sushma v. Commr. Of Police** (supra) the Madras High Court noted the need for the legislature to come up with an enactment, and the need for the protection of queer persons from the hostile environment till then. The guidelines issued were for the sensitisation of police and prison authorities, the judiciary, educational institutions, as well as physical and mental health care professionals regarding **LGBTIQA+** issues.

[127] *Mansur Rahman v. Superintendent of Police* 2018 SCC OnLine Mad 3250

[128] *Nikesh PP v. Union*, WP(C) 2186/2020

[129] *Abhijit Iyer Mitra v. Union of India*, (W.P.(C) 6371/2020); *Vaibhav Jain v. Union of India*, (W.P.(C) 7657/2020); *Dr. Kavita Arora v. Union of India*, (W.P.(C) 7692/2020); *Udit Sood v. Union of India*, (W.P.(C) 2574/2021); and *Joydeep Sengupta v. Union of India*, (W.P.(C) 6150/2021).

[130] *Shreeja S. v. Commr. Of Police* 2018 SCC OnLine Ker 3578.

[131] *Madhu Bala v. State of Uttarakhand Habeas Corpus Petition No. 8 of 2020*.

The Court further held that the police must close missing persons complaints once they find that the concerned queer person is in a consensual live-in relationship.

Gujarat High Court[132], Orissa High Court[133], Telangana High Court[134], Calcutta High Court[135], Punjab and Haryana High Court[136] and Allahabad High Court[137] have passed similar orders granting police protection to same-sex couples.

E. Affirmative Action and Discrimination

In **Mx. Suman Pramanik v. Union of India**[138], the petitioner sought reservation for transgender persons in the Joint CSIR-UGC NET. The petitioner also sought age relaxations and fee concessions as are granted for other reserved categories. The Calcutta High Court held that the denial of reservation, age relaxations, and fee concessions to transgender persons are violative of Articles 14 and 21 of the Constitution. The Court observed that while UGC had made provisions in this regard, they had not yet been implemented and directed the exam authorities to immediately implement them at all levels of examination.

In **Swapna & Ors. v. Chief Secretary**[139], a petition was filed before the Madras High Court for reservation of transgender individuals in employment and education. It was suggested that instead of granting reservation as a part of the most backward class category, a percentage or post based reservation for transgender persons be granted, i.e., one post is reserved in different categories. The Court directed the government to look into the matter and observed that it merits consideration.

[132] *Vanitaben Damjibhai Solanki v. State of Gujarat (Spl. CrI. App. 3011 of 202*

[133] *Chinmayee Jena @ Sonu Krishna Jena v. State of Odisha (W.P. (CrI.) No. 57/2020)*

[134] *Vyjayanti Vasanta Mogli Vs. State of Telangana (2020 SCC OnLine)*

[135] *Shampa Singha v. State of West Bengal (W.P. 23120(W) of 2018)*

[136] *Paramjit Kaur and another v. State of Punjab (CRWP No. 5025of 2020)*

[137] *Sultana Mirza and another v. State of U.P. (W.P. (C) No .17394 of 2020)*

[138] *Mx. Suman Pramanik v. Union of India WP Appeal No. 9187 of 2020*

[139] *Swapna & Ors. v. Chief Secretary WP No. 31091 of 2013*

In **Sangama v. State of Karnataka**[140], an intervention application (IA) was instituted before the Karnataka High Court by a trust “Jeeva” in a plea which challenged the notification relating to the recruitment of police constables on the ground that it excluded transgender individuals. In the IA, horizontal reservation for the transgender community was sought. While the IA was pending, the State Government passed an amendment to the Karnataka Civil Services (General Recruitment) Rules providing a grant of one percent horizontal reservations to transgender individuals. The Karnataka High Court further asked the State to consider providing similar reservation in employment in state owned corporations and statutory bodies.[141]

In the case of **Chairman v. Aradhana** [142], the Madras High Court affirmed the interim order of a Single Judge bench which ordered that the Chairman of the Tamil Nadu Uniformed Services Recruitment Board should keep one post vacant for a transgender woman who had applied for the post of Grade II constable. Aradhana had argued that she was not granted age relaxation to apply for the post. The Court observed that in *NALSA v. Union of India* (supra), the Supreme Court had observed that transgender persons are entitled to reservation in education and public employment and, thus, age relaxations granted to ex-servicemen and destitute widows should also be extended to them.

In **Ashish Kumar Misra v. Bharat Sarkar**[143], the Allahabad High Court, while relying on the provisions of Section 13 of the National Food Security Act 2013, held that the law needs to travel beyond non-discrimination, by recognising an affirmative obligation of the State to provide access to social security. Food security lies at the foundation of it. Transgenders must have both. Transgender persons are entitled to food security and can be given the status of “head of household” in a ration card.

[140] *Sangama v. State of Karnataka W.P. No.8511/2020 (EDN-RES) (PIL)*

[141] Rintu Mariam Biju, ‘Karnataka High Court asks State to consider providing 1% quota in jobs for transgender persons in all State owned corporations, statutory bodies’ <<https://www.barandbench.com/news/litigation/karnataka-high-court-state-provide-1-quota-jobs-transgender-persons-state-owned-corporations>> accessed 25 October 2022

[142] *Chairman v. Aradhana WA 330/2018*

[143] *Ashish Kumar Misra v. Bharat Sarkar MANU/UP/0332/2015*

F. Access to Healthcare Facilities

In **Sivakumar TD v. State of Tamil Nadu**[144], a petition was instituted under Article 226 of the Constitution before the Madras High Court seeking the issuance of writ of mandamus to direct the State Government to re-open a specialty Transgender Clinic and to allow transgender persons above the age of 18 to access its services without parental consent. The Court observed that the State Government has filed a status report stating that the clinic is functional and transgender persons above the age of 18 do not require parental approval or for parents to accompany them when accessing the services at the clinic.

G. Inheritance

In **Sweety v. General Public**[145], the Himachal Pradesh High Court recognised the customs of inheritance of property within the Guru-Chela system, prevalent in certain transgender communities, regardless of the religious identity of a person.

H. Intersex persons

In **Mulla Faizal v. State of Gujarat**[146], Mulla Faizal was assigned the gender female at birth even though he had intersex characteristics. As an adult, he developed more male characteristics naturally and obtained medical/psychological certificates indicating his gender as male. He also went through surgical procedures to align himself with the new gender. He sought to change his name and gender on his birth certificate. However, his application was rejected. The Gujarat High Court observed that there exists a difference between intersex persons and transgender persons. The Court noted that Mulla Faizal did not change his sex through an operation, rather he was born with “some deformity”[147] to his sexual organs. The Registrar of Births was directed to conduct an enquiry into the claim of Mulla Faizal and held that the Registrar was obligated to correct an erroneous entry made in the birth register.

[144] *Sivakumar TD v. State of Tamil Nadu* 2021 SCC OnLine Mad 5089

[145] *Sweety v. General Public* MANU/HP/1242/2016

[146] *Mulla Faizal v. State of Gujarat* MANU/GJ/1098/2000

[147] *The Court should have stated that Mulla Faizal was born with intersex characteristics rather than saying he had a congenital deformity. The language would have been more appropriate.*

In **Vinod HN v. State of Karnataka**[148], the Karnataka High Court held that an intersex individual is entitled to have their medical documentation changed to indicate their self-identified gender.

In **Nangai- III v. the Secretary to the Government of Tamil Nadu**[149] , Nangai-III was asked to undergo a medical examination prior to her deputation as a Grade II police constable. The examination noted that the uterus was absent in her body. Nangai-III identified as a woman, which was also reflected in all her gender identity documents. However, the recruitment board termed her as a transgender person and revoked her employment. The Madras High Court held that the absence of a uterus is to be considered as a genital defect and Nangai-III is entitled to self-identify her gender. A person's gender identity cannot be the deciding element of a medical examination. The Court terminated the order of termination and directed the board to appoint her as a woman constable.

In **Arun Kumar vs. The Inspector General of Registration**[150], the Madras High Court held that a marriage between a male and a transwoman was a valid marriage and that refusal of registration of such marriage by the Registrar was violation of fundamental rights of the petitioners. The Court also addressed a related issue of sex reassignment surgery or intersex genital mutilation, and held that no one shall be forced to undergo medical procedures as a requirement for legal recognition of their gender identity. The Court directed the Government of Tamil Nadu to issue a Government Order to ban sex reassignment surgery on intersex infants and children.

I. Freedom of expression

In **Pramod Kumar Sharma v. State of UP**[151], the appointment of the petitioner to the position of home guard was terminated because a video of his was made “viral” by someone. In the video, it appeared that he had engaged in a public display of affection with a person of the same sex. The termination of appointment was reversed by the Allahabad High Court. The Court reiterated that it was observed in *Navtej Singh Johar v. Union of India* (supra) that public displays of affection by members of the **LGBTIQ+** community towards their partners cannot be “bogged down by majority perception” as long as it does not disturb public order or amount to indecency.

[148] *Shri Vinod HN v. State of Karnataka*, W.P. 32978/2013

[149] *Nangai- III v. the Secretary to the Government of Tamil Nadu* (2014) 4 MLJ 12

[150] *Arun Kumar vs. The Inspector General of Registration* 2019 SCC OnLine Mad 8779

[151] *Pramod Kumar Sharma v. State of UP* Writ A No. 8399 of 2020

9 - Recommendations and Suggestions



A. General Principles

(Refer Chapter 4 Sections A and B)

- i. All LGBTIQ+ individuals shall be treated with dignity and respect by all state authorities, including the police, judges, prison officials, and concerned staff.
- ii. No member of the LGBTIQ+ community shall be subjected to verbal, emotional, physical, or sexual abuse. The conduct of officials would be abusive if LGBTIQ+ individuals (a) are questioned or scrutinised on their sexual orientation or gender identity, which includes asking intrusive or offensive questions about one's sexual practices, body, or identity; (b) are asked to prove their sexual or gender identity; and (c) are dehumanised by remarks or gestures.
- iii. The authorities must not discriminate against members of the LGBTIQ+ community. The authorities also possess a positive obligation to make the surrounding environment comfortable and conducive for members of the community. Adopting a stance that cases which involve LGBTIQ+ individuals are no different than other cases may not be sufficient to ensure that courts are accessible to communities that have been previously marginalised and targeted by the law. Depending on the case, positive measures may need to be adopted, such as conducting an in-camera proceeding, suppressing the identity of a litigant, amongst others.
- iv. Authorities, while dealing with complaints and petitions involving members of the LGBTIQ+ individuals, must deal with such complaints sensitively and shall refrain from initiating a roving inquiry about the nature, morality, and legitimacy of any relationships. Families often file false complaints against adult LGBTIQ+ persons, either ostensibly for missing person or for kidnapping, abduction, etc, knowing fully well that adult LGBTIQ+ persons had left their houses of their volition. The police also tend to actively assist the families by harassing young

queer individuals with false police complaints. Instead of facilitating the exercise of fundamental freedoms of choice and autonomy by LGBTIQ+ persons, the police facilitate the actions of the families in curbing the said freedoms. Pertinently, it is to be clearly understood that there is no victim or accused in cases of adult LGBTIQ+ couples amongst the couple. The police should try to close the complaints, if it comes to their knowledge that the concerned persons are adults and have left on their own, instead of rushing to lodge FIRs at the behest of families, or insisting that adult persons go back to their families or go back to the home jurisdictions to record their statements. Annexure-I contains recommendations relating to the protocol police authorities must follow while receiving complaints against or from LGBTIQ+ individuals.

- v. Authorities shall strictly abide by the law, and not allow their personal predilections to interfere with the administration of justice, including having homophobic or transphobic views or having sympathy with the family.
- vi. In all cases involving liberty and security of LGBTIQ+ persons, authorities shall ensure that the judicial adjudication is swift, sensitive and takes into account the enormous effort and courage required by the LGBTIQ+ persons to approach the justice delivery system.
- vii. Through all stages of the adjudication process - admissions, fact-finding/evidence collection, determining the applicable law, judicial reasoning, and ascertainment of appropriate remedies – authorities must acknowledge that members of the LGBTIQ+ community face several structural barriers that lead to their marginalisation in both law and society. This understanding of social, economic, and cultural barriers must influence how the authorities approach procedural and substantive law in cases involving LGBTIQ+ people. Annexure-II contains recommendations relating to the protocol courts must follow while adjudicating cases relating to LGBTIQ+ individuals.’.
- viii. The authorities shall ensure that when it is a case involving LGBTIQ+ individuals, the criminal law is not misused against the individuals.
- ix. Avoid making assumptions about gender and sexuality-based identities based on prejudices or personal perceptions. Always ask the person the way they want to identify before making assumptions.
- x. Courtrooms, police stations and prisons must have an inclusive infrastructure for persons coming from LGBTIQ+ communities, and it must be a ‘safe-space’.

B. Infrastructural and Administrative Action-Reforms

(Refer Chapter 4 Section F and Chapter 7 Section C)

- i All police stations and court complexes should have “Gender Neutral” toilets. Labeling such toilets as ‘Third Gender’ or ‘other’ or ‘transgender’ must be avoided. Premises having additional disabled friendly toilets may also designate these toilets as “gender neutral” for temporary purposes. While an active gender-neutral toilet happens to be the need of the hour, the understanding of ensuring queer individuals, for example, trans* identities, get the option of choosing between gender-neutral toilets as well as general/sex-specific toilets is also necessary.
- ii Authorities shall conduct sensitisation programmes at regular intervals, in association with NGOs working for the welfare of the LGBTIQ+ community and/or by the LGBTIQ+ persons themselves, in accordance with the directions given by the Hon’ble Supreme Court of India in Navtej Singh Johar v. Union of India (supra), and in S. Sushma v. Commissioner of Police (supra). In such sensitisation programmes, there should be an emphasis on the rights of the LGBTIQ+ community, on prevention of offences against the LGBTIQ+ community, and on the guidelines and best practices to be followed while dealing with cases involving LGBTIQ+ individuals. (See Chapter 6 Sections A and B)
- iii Court procedures, including entry into court premises, should be inclusive of diverse gender and sexual identities. For e.g., the court staff should refrain from insisting on gender congruent identity documents to issue a pass to enter the court premises, or for filing of petitions. Court staff should refrain from divulging confidential and personal details of the LGBTIQ+ petitioner to other persons.
- iv LGBTIQ+ individuals should be addressed in their preferred pronouns in all official documents including petitions, orders and judgments, with all efforts made not to misgender them, and address them in their self-identified gender, irrespective of the official identity documentation.

- v. Dress codes must be prescribed in such a manner that members of the LGBTIQ+ community are not forced to present themselves in courtroom spaces in ways that contradict their self-determined gender identity.
- vi. The authorities must endeavor to make the work atmosphere conducive for LGBTIQ+ individuals.
- vii. The authorities shall use correct pronouns while referring to individuals identifying from the trans and gender non-conforming spectrum. Rather than assuming a persons' pronoun by their appearances one must make sure to ask them their preferred pronoun.
- viii. Display of awareness generation materials within court premises like displaying of banners containing awareness pointers on queer & trans lives will help in holistic ways of raising awareness within judicial premises.

C. Action-Based Institutional Reforms For Judiciary

(Refer Chapter 5)

- i. Across all levels of judicial training, sensitisation and training programmes on adjudication involving members of the LGBTIQ+ community should be mainstreamed. The curriculum in national and state judicial academies should include modules on LGBTIQ+ issues.
- ii. Employment of LGBTIQ+ individuals in judicial institutions in various positions and ranks is crucial to sustaining any gender-sexuality diversification and inclusivity in judicial spaces. The diversity within the workforce of the judiciary will encourage more queer & trans individuals to access the judiciary. This will help judicial institutions understand the true meaning of diversity and inclusivity.
- iii. All the courts across the country must commission data gathering exercises, that include judges, law clerks, and administrative staff, to understand perceptions and common issues that members of the judiciary face in navigating adjudication involving members of the LGBTIQ+ community. Based on trends in adjudication involving members of the LGBTIQ+ community, the judiciary must develop judicial protocols containing guidelines for adjudication. For instance, Indian High Courts often confront cases involving the exclusion of transgender persons from employment opportunities, the establishment of the transgender identity through a change in identity documents, and habeas corpus

petitions involving partners in intimate relationships who face violence from their natal families, etc. The Judicial Academy can develop protocols containing guidelines for approaching common cases to assist individual judges in adjudication. Some illustrative guidelines have been added to Annexure-II, which should be adopted by the Judges.

- iv. There should be mandatory participation of judicial staff members apart from judges, in workshops that generate awareness on gender-sexuality with a focus on lived experiences of gender /sexual minority persons, across different spectrums of LGBTIQ+ identities.

In addition to the abovementioned reforms focused on the judiciary and other stakeholders of the criminal justice system, we have proposed reforms to eliminate discrimination against LGBTIQ+ individuals in employment, healthcare, and education. The courts can be a platform through which a dialogue is initiated with different state and private actors for the initiation of such reforms. While the executive remains responsible for structuring and implementing many of these reforms and policies, the courts can scrutinise the existing policies that perpetuate discrimination against LGBTIQ+ individuals. The courts provide a forum for dialogue, where the citizenry and the executive can come together to provide possible solutions to redress the systemic discrimination against the LGBTIQ+ community. These reforms are provided in Annexure-III.

Annexure -I: Protocol to be followed by police authorities

Protocol for Handling Missing Person Complaints or Allegations of Kidnapping/Wrongful Confinement by Family/Relatives

I. Missing Person/Kidnapping Cases by Family Members

- a. If the police of a local jurisdiction receive complaint of a missing person from either a family or relative of an adult individual, the police may ascertain whether the individual is a major. Families often file false complaints against the partners of LGBTIQ+ individuals based on false allegations of their adult child being passed off as minor.
- b. It should then be ascertained as to whether the concerned individual has left voluntarily or is involved in a consenting relationship with another person. If it is apparent that the adult individual left their house on their own or is in a

consensual relationship with another adult person, the police should close the complaint, upon recording the statement of the concerned LGBTIQ+ individual, without any harassment to the individual concerned.

- c. If the concerned person is traced within the jurisdiction of the home State, that is, the same State where the person has left their home from, the police should make all reasonable efforts to record the concerned person's statement at the place where they are residing, and not insist on the person's presence at the police station where the missing person complaint is registered. If at all, the police require the concerned person to be present at the police station, in order to close the missing person complaint, the police should ensure an environment in the police station that is conducive to the individual to freely express their wishes. Family members should not be called into the police station in the presence of the said individual, and that the contact details (new place of residence, phone number, email etc.) of the individual should not be divulged to the family members.
- d. If the family members are present at the police station, the police should ensure that the concerned person is not forced to interact with their family against their wish, or no pressure/coercion is being put on the concerned person by their family. The police should further ensure that the statements of such LGBTIQ+ individual must be recorded separately, and not in the presence of family members, as families may try to manipulate LGBTIQ+ individuals to give statements in accordance with the wishes of the family.
- e. If the home State Police still comes to the other State, pursuant to a missing person complaint or a FIR, the police station, where the person is residing that already has information and also recorded the statement, can provide the said statement to the home State police. There is no need to record an additional statement and, if necessary, confirmation may be taken by the home State Police via video call. Only in exceptional cases should the police make the queer individual/couple come to the police station to get their statement recorded again.
- f. In cases where the police has registered a FIR on the basis of false allegations of kidnapping, theft, wrongful confinement, etc against the partner filed by or at the behest of the family of the LGBTIQ+ individual, if upon enquiry/investigation, it is revealed that the said individual is safe and secure with their partner, , then the police should follow the above-noted procedure for recording of statement of

statement of the LGBTIQ+ individual before the Judicial Magistrate under Section 164, CrPC, and should undertake all efforts to close the FIR as soon as possible. In no case should the police detain or arrest the person accused of purportedly kidnapping their partner, without conducting an investigation or recording the statement of the LGBTIQ+ individual. In some States, the police register a FIR even in missing complaint cases, and in those cases, the police should follow the protocol as mentioned before.

- g. In case of inter-state cases, if the police registers a complaint of missing LGBTIQ+ individual from the family, and the missing person is traced to another State, then the following procedure can be adopted:
 - i. If the police have prior information that the person has left out of their own will or gets intimation from another police station, whether in the same state or another state, that the concerned person has already approached the jurisdictional police where they are residing and recorded their statement, the police ought not to register a missing person's complaint or a FIR of kidnapping/theft against the partner.
 - ii. If the home State police does come to another state, then it should first approach the jurisdictional police in that state, in accordance with the CrPC procedures, and take note of the statement already recorded by the queer couple at the police station, and close the complaint. In case no such statement is recorded, the home State police, in coordination with jurisdictional police, can record the statement of the concerned person on video call. Only in exceptional cases, should the police make the queer couple come to the police station to get their statement recorded again. In no situation, whatsoever, should the home State police take the individual/couple back to the home State against their will.
 - iii. In case there is a FIR registered by the family against the partner, and there is a requirement of statement to be recorded before the Judicial Magistrate ('JM') under Section 164, CrPC, the home State police, in coordination with jurisdictional Police, should get the statement recorded before the nearest JM in the jurisdiction where the couple is residing, and not where the FIR is registered. It may be kept in mind that Section 164, CrPC is not limited by territorial jurisdiction and the individual's statement can be recorded in the district/state where they have taken up residence. In no situation, whatsoever,

should the home State police take the individual or couple back to the home State against their will. Statements, both under Section 161 CrPC and 164 CrPC can be recorded where the individual is residing and not where the FIR/complaint was registered. Such an approach would be consistent with the decision of the Hon'ble Supreme Court in *Laxmibai Chandaragi B. v. State of Karnataka*[152].

- iv. The home State police should not take the family members along in cases of inter-State missing person complaint or FIR.

II. Disciplinary Action

- h. Courts may consider if any disciplinary or penal consequences shall follow the harassment of the LGBTIQ+ persons, and/or of the activists/NGO workers assisting the LGBTIQ+ persons by the police.

III. Sensitisation Programmes

- i. Courts may consider if any disciplinary or penal consequences shall follow the harassment of the LGBTIQ+ persons, and/or of the activists/NGO workers assisting the LGBTIQ+ persons by the police.

Protection of Adult LGBTIQ+ Couples

- i. If an adult couple belonging to the LGBTIQ+ community approaches police for seeking protection or for the purpose of recording statement, the police authorities can follow the following procedure:
 - a. If an adult couple belonging to the LGBTIQ+ community approaches police for seeking protection or for the purpose of recording statement, the police authorities can follow the following procedure:
 - b. The police should record the statement of the couple in the jurisdiction where they are residing, and the statement may be forwarded to the home State jurisdictional police station where there is a likelihood of the missing complaint/false FIR being registered. The new address and contact details of the complainant should be removed before forwarding the complaint for the

[152] (2021) 3 SCC 360

purposes of safeguarding the privacy and security of the LGBTIQ+ individuals;

- c. Provide protection to the couple, and assist them in finding accommodation in a safe shelter, in compliance with the directions of the Supreme Court in *Shakti Vahini v. Union of India*³, as well as the short stay homes ('Garima Grehs') set up by the Ministry of Social Justice and Empowerment, Government of India, which should be established in each district of the country with adequate infrastructure and security facilities in consultation with the jurisdictional District Magistrate, except where the number of transgender individuals in a particular district is less than 20;
- d. A list of such LGBTIQ+ friendly shelter homes should be maintained by each district under the supervision of the Senior Superintendent of Police (SSP) or Superintendent of Police (SP) and should be made available to each police station. The police can also refer to the list of NGOs, including community-based, published by the Ministry of Social Justice & Empowerment ('MSJE'), in accordance with the order dated 07.06.2021 passed in **S. Sushma v. Commissioner of Police (supra)**; (See Chapter 8 Section D)

Annexure-II: Protocol to be followed by Courts

A Habeas Corpus Petitions, Missing Persons Complainants and FIR against LGBTIQ+ Individuals

(Refer Chapter 7 section C. III)

- i A court while entertaining a habeas corpus petition filed by a partner, friend or parent or any other family member of an LGBTIQ+ individual should ensure that once the missing/detained person is found and produced in court, they are allowed to give a statement of their own free will in the absence of, and without any undue influence from their parents or family members. If the LGBTIQ+ individual is claimed to be minor by the family, then the police authorities should conduct a preliminary inquiry on whether the alleged person is indeed a minor. To this end, the court may strongly consider conducting in-camera proceedings, and only limit the proceedings to the detenu's statement, and not involve the family of the detenu;
- ii The Judges should strictly abide by the law, and not allow their personal predilections to interfere with the administration of justice, including having homophobic or transphobic views or having sympathy with the family. Judges should ensure that if an adult LGBTIQ+ individual is detained against their will by their parents/relatives/in-laws, they should be released forthwith upon production, and not allow the proceedings to be delayed by the family.
- iii The Registry should not raise objections to the locus standi of a friend or partner to file a habeas corpus petition. The Registry officials ought not to lose sight of the fact that LGBTIQ+ individuals might be detained by their family and their friend or partner may be the only person able to file the case.
- iv In cases where an LGBTIQ+ individual or couple has approached the Court for police protection, the Court should consider the immediate grant of protection to the couple as an ad-interim measure, without establishing a threshold of being at grave risk of violence and abuse. It should further direct the jurisdictional police to grant the necessary protection to the LGBTIQ+ couple, while maintaining the privacy and dignity of the couple.

- v. In case of a missing complaint or a FIR registered against the partner, the Judicial Magistrate should not insist on the presence of the LGBTIQ+ individual at the home State jurisdiction, where the missing complaint or FIR is registered, but should accept the statement recorded under Section 164, CrPC before the Judicial Magistrate of the local jurisdiction where they are residing.
- vi. Judges may appreciate that a neutral stand towards LGBTIQ+ persons who approach the court as litigants even in general cases may not be sufficient to undo the years of marginalisation that the community has faced. Judges may consider adopting some small but important measures in such cases, which include considering an in camera proceeding if the case requires, ensuring that the individual concerned is referred to in their chosen name, pronouns and gender by the court staff, the lawyers and the judge themselves, and acting swiftly against queerphobic and homophobic conduct of lawyers, litigants, and court staff within the courtroom premises.
- vii. When the Judicial Magistrate records the statement of the LGBTIQ+ person, they should ensure that an environment conducive for expressing the free will of the individual is created. For the purpose of creating a safe environment, the Judicial Magistrate may direct that the individual maybe separated from members of the family or third persons who might influence the free will of the individual. The Judicial Magistrate should undertake all efforts to ensure that the statement is recorded out of the free will of individual and not under duress.

B. Remand/Sentencing of Transgender Individuals and Protection in Prison (Refer Chapter 4 Section B.3)

When a transgender person has been arrested in relation to the commission of any offence, the following may be considered:

- i. In making a determination as to whether a person identifies as a transgender person, it must be kept in mind:
 - a. The broad definition of a transgender person under Section 2(k) of the Transgender Persons Act should be taken into account. A transgender transgender person would include any person whose gender does not match

with their gender assigned at birth, and would include a trans man, a trans woman, gender queer persons, intersex persons and socio-cultural identities such as aravani, hijra and jogta.

- b. At the time of remand, the Magistrate should not subject a transgender individual to any form of medical or physical examination to decide whether they are transgender. Section 2(k) of the Transgender Persons Act makes it amply clear that Sex Reassignment Surgery is not a precondition for recognition of a person as a transgender individual. Thus, a medical examination to determine the gender of a person would be inappropriate. However, it is clarified that a regular medical examination to determine if any injuries have been sustained by an accused person in police custody is permissible.
- c. A transgender person could be identified by the Magistrate in three ways:
 - i. If a person has been issued a certificate of identity either under Section 6 (as a transgender person) or Section 7 (as a male or female person) of the Transgender Persons Act, this identification should be respected.
 - ii. If a person has recorded their self-identification in any official identity documents like Aadhaar, Voter's ID, PAN card, etc., then the gender recorded in those documents should be respected.
 - iii. If a person neither has a certificate of identity under Sections 6 or 7 of the Transgender Persons Act nor any official identity documents recording their self-identified gender, then the person's gender identity should be on the basis of self-identification of the person, instead of a medical or physical examination. This is in line with the decision of the Supreme Court in *NALSA v. Union of India* (supra) as well as Section 4 of the Transgender Persons Act. The self-identified gender of the person should be recorded in the warrant for detention.
 - iv. The lack of documentation under the Transgender Persons Act should not be a basis for refusing to recognise a person in their self-identified gender identity.

Advisory No. 17013/26/2021-PR titled ‘Treatment and Care of Transgender Persons in Prisons’ issued by the Ministry of Home Affairs (“MHA Advisory”) has also recognised this, and has also required the prison departments to facilitate person’s acquiring their identity cards under the Act from prison. For this purpose, legal aid as part of district legal services authority in prison settings can be provided to transgender persons.

ii. It may be kept in mind that transgender individuals are susceptible to violence and abuse in police custody. If police remand is necessary, the Magistrate should direct police remand or police custody for the minimum days and that too at a mahila thana. In case of granting police custody, the Magistrate ought to undertake the following:

- a. A strict direction to the police to respect the gender of the transgender individual,
- b. Speak to the accused transgender individual freely without any police presence to determine whether any harassment or violence was being committed on them by the police,
- c. To direct medical examination of the transgender individual every 48 hours of the police remand or custody,
- d. To house the transgender individual in a cell separate from male or female cell,
- e. To direct the police to provide all medical requirements, if any, of transgender individuals in police custody
- f. Only women police personnel to handle cases of transgender individual.

iii. With respect to transgender persons in prison settings:

- a. Advisory No. 17013/26/2021-PR titled ‘Treatment and Care of Transgender Persons in Prisons’ issued by the Ministry of Home Affairs (“MHA Advisory”) should be scrupulously followed.
- b. A transgender individual’s specific needs must be adequately addressed. It may be useful to refer to Rule 2(41) of Delhi Prison Rules, 2018 where transgender individuals are categorised as ‘Prisoner with Special Needs’.

The search of transgender individuals should only be conducted by a person of their preferred gender or by a trained medical professional or a para medic. There should be no search or examination, in order to segregate an incoming prisoner based on their body to determine their gender [Para (e), MHA Advisory]. All transgender individuals should be searched with due regard to decency and reasonable privacy, and not in the presence of other prisoners. There should be no strip searches, and if required, full body scanner or other technology may be used to prevent smuggling of prohibited articles etc. It may be useful to refer to Rule 276, Delhi Prison Rules, 2018.

- c. Prisons should provide for a separate barrack to lodge transgenders in accordance with their gender identity. A separate ward should be created for transgender persons, trans men and trans women [para (b), MHA Advisory]. This has also been done under Rule 5 of Delhi Prison Rules, 2018. This includes separate toilets, lodgings, recreational spaces and appropriate work assignments. If local prisons do not have the space for a separate barrack for transgender persons, then the Magistrate should send the transgender undertrial to the nearest Central prison, and ensure that the transgender undertrial is kept in a separate barrack. State Government should notify appropriate diet charts based on the needs of transgender prisoners.
- d. Prison authorities should ensure that that LGBTIQ+ are not subject to “protective” solitary confinement or other physical, psychological, emotional, or sexual abuse in detention. This has also been recognised under Principle 9, Yogyakarta Principles. The Yogyakarta principles have been extensively referred to by the Hon’ble Supreme Court in the Navtej Johar and NALSA judgement. In Navtej Johar, the Hon’ble Supreme Court has added that Yogyakarta principles ‘conform to our constitutional view of the fundamental rights of the citizens of India and persons who come to this Court’ (paragraph 84, Indu Malhotra, J.).
- e. A transgender individual’s medical history ticket should contain details of their SRS, HRT or other special medical assistance, but should contain no sex-based markers or information as a means to identify them. Medical professionals in prison shall ensure that history tickets are filled using the

gender self-identification used by the prisoner in question. In this regard, it may be useful to refer to Rule 314, 315, Appendices 6 and 7 of Delhi Prison Rules, 2018.

- f. Prison authorities should ensure that LGBTIQ+ individuals have regular access to medical personnel, medication and treatment based on any special needs. This includes commencement and continuation of gender affirming treatment and medical care, Sex Reassignment Surgery (SRS), Hormone therapy, Anti-Retroviral Therapy (ART), access to sanitary products, counselling or any other special medical needs. Where the expertise does not exist in the prison, the individual should be referred to a specialist [para (f), MHA Advisory; Section 15(b) and (c), Transgender Persons Act].

- g. Prison authorities should not subject prisoners to any form of psychological counselling against their wishes for seeking aforesaid medical assistance. LGBTIQ+ prisoners should not be subjected to any form of conversion therapy at any point during their detention. Section 106 read with Section 3 of the Mental Healthcare Act, 2017 prohibits conversion therapy. Strict disciplinary action should be taken against the offending authority and the jailor for any breach of this rule.

- h. Transgender persons convicted of offences should be given work assignments in their prison enclosures only with the condition that adequate safety and security measures are deployed. It may be useful to refer to Rule 1089 of Delhi Prison Rules, 2018.

- i. Refusal to wear clothing, which violates their gender expression, shall not constitute prison offence or indiscipline. Transgender and genderqueer prisoners have the right to maintain their appearance according to their preferred gender expression, including cutting of hair. These principles have been recognised under Rule 376(c) and Rule 1269(XLVII) of Delhi Prison Rules.

- j. Relevant rules should be made to determine when transgender and/or genderqueer convicted prisoner may become eligible for remission under Section 433A of the CrPC.
- k. Relevant amendments should be made in the Prison Rules to penalise any jail official or staff who mistreats a transgender prisoner, whether under trial or convict, or inflicts any form of physical, mental, sexual, emotional or psychological violence on them, besides undertaking disciplinary proceedings against the offending jail staff under the relevant laws and rules.

C. FACILITATION OF RECORDING of Gender Identity

- i. Judges, while dealing with transgender persons, must be aware of the following legislative provisions and considerations:
 - a. In terms of the Supreme Court judgment in *NALSA v. Union of India* (supra) and Section 4 of the Transgender Persons Act, transgender persons have the right to self-determination of their gender identity.
 - b. The Act and the Transgender Persons (Protection of Rights) Rules, 2020 framed thereunder prescribe a process for changing a person's gender markers and name by filing applications before jurisdictional District Magistrates, who issue "certificates of identity".
 - c. First, under Section 5 of the Transgender Persons Act, an individual can apply to a District Magistrate for issuance of certificate of identity as a transgender person. The District Magistrate shall issue the certificate of identity under Section 6 of the Transgender Persons Act following the procedure stipulated in the rules. Under Rule 4 Transgender Rules, the Magistrate after verifying the application, which is submitted with an affidavit, without any medical or physical examination, shall issue the certificate of identity. Under Section 6 of Transgender Persons Act and Rule 5 Transgender Rules, this certificate of identity is sufficient for requesting change in other official documents that are mentioned in Annexure 1 of the Transgender Rules. These include birth certificates, secondary education certificates, Aadhar card, passport etc.

- d. Second, under Section 7 of the Transgender Persons Act, an individual can apply to the District Magistrate for a revised certificate of identity in the binary gender of male or female after undergoing surgery. A medical certificate issued by the Medical Superintendent or the Chief Medical Officer of the medical institution where the procedure was undertaken has to be produced in this regard along with the application. However, it is crucial to note that Rule 6 Transgender Rules provides that an individual can apply for change of gender identity as male or female if they have undergone a medical intervention for gender affirming procedure. The rules define medical intervention inclusively as “any gender affirming medical intervention undertaken by an individual to facilitate the transition to their self-identified gender, including but not limited to counseling, hormonal therapy, and surgical intervention, if any”. The revised certificate of identity can be used to request a change of gender marker and name in official documents. There is currently a constitutional challenge pending at the Supreme Court against Section 7 of the Act on the ground that it violates the principle of self-determination of gender identity as upheld in *NALSA v. Union of India* (supra).
- e. Persons who have recorded a change in their gender identity and name prior to 10th January, 2020 (when the Transgender Persons Act came in force) are not required to make the above-mentioned applications in terms of Rule 3(3) of the Transgender Rules.
- f. However, courts should also be cognizant of the various ways in which individuals identify and express their gender identities, which can often not be reduced to simplistic legal definitions of “transgender”, “male” or “female”. Transgender individuals can identify as male, female, non-binary, gender fluid and in a multitude of ways. While the Act and the Rules may mandate that for the purpose of being recognised as “male” or “female”, a transgender person has to undergo a medical intervention, many individuals do not feel the need or desire to undergo any medical procedure to self-identify with a gender which is different from the gender that they were assigned at birth.

- g. It is also important to note that while the legal definition of “transgender person” includes a person with intersex variations, it is necessary to conceptually differentiate between the two terms for respecting the autonomy of intersex and transgender individuals and identifying the different legal and societal barriers that they face. The Act itself defines a person with intersex variations as “a person who at birth shows variation in his or her primary sexual characteristics, external genitalia, chromosomes or hormones from normative standard of male or female body.” Intersex variations are an anatomical condition where the anatomy of an individual does not align with the typical perception/understanding of “male” or “female” bodies. On the other hand, the anatomy or biology of transgender individuals at birth typically conforms to the normative understanding of “male” or “female” bodies, however, transgender individuals may choose to identify with a gender that is different from the traditional gender associated with their sex at birth. Persons with intersex variations may identify as transgender, male, female, genderfluid, non-binary etc. However, neither every transgender individual is a person having intersex variations nor every person having intersex variations identifies as transgender. Persons with intersex variations are often subject to unnecessary and non-consensual medical procedures at birth to “fix” their anatomy in terms of the normative understanding of male/female bodies. Persons with intersex variations should have the autonomy to decide if and what medical procedures they should undergo when they are of the age to give informed consent.

Annexure-III: Elimination of Discrimination against LGBTIQ+ Individuals

(Refer Chapter 7 section C. III)

A. General

- i. There is a need for a comprehensive Anti-Discrimination law in India that is applicable to both public and private sectors, which prohibits discrimination on the grounds of sexual orientation, gender identity and inter-sex variation, amongst others.
- ii. No LGBTIQ+ person should be discriminated against in all public spheres, including education, health, employment, housing, insurance, and public services, amongst others.
- iii. All service rules should specifically include a clause making discrimination against LGBTIQ+ individuals a punishable misconduct.
- iv. Reservation should be granted to transgender persons in public education and in public employment, in accordance with the direction of the Hon'ble Supreme Court in National Legal Services Authority v. Union of India. Reservation should be horizontal in nature across caste and economic categories in view of the intersectional nature of the discrimination against them.
- v. All public institutions, including court premises, should have "Gender Neutral" toilets. Labelling such toilets as "Third Gender" or "Other" or "Transgender" must be avoided. Offices/buildings/institutions already having disabled-friendly toilets may consider additionally designating these as "Gender Neutral" toilets as an interim measure.

B. Education

- i. Educational byelaws should be revised to include transgender identity, and to allow individuals to change their educational certificates, after they have passed out of school, in order to record their self-identified gender in the educational certificates, in compliance with Section 7(3) of the Transgender Persons (Protection of Rights) Act, 2019 ('2019 Act') read with Rules 7(3), 7(5), 7(6) along with Item No. 3 of Annexure I of the Transgender Persons (Protection of Rights) Rules, 2020 ('2020 Rules').
- ii. Transgender persons should not be charged any fee to change their identity documents or educational certificates, whether from a public or private institution.
- iii. Legal, and administrative measures should be undertaken to create a culture of acceptance and respect for fellow students, regardless of perceived sexual orientation, gender identity, or gender expression.
- iv. Anti-bullying and anti-ragging policies applicable to educational institutions should be strictly implemented. Where such non-implementation comes to the knowledge of the court, it should proceed with the adjudication of the matter with sensitivity, empathy, and urgency.
- v. School curriculum should be revised to impart age-appropriate sexual health information, including regarding sexual and gender diversities. The following steps should be taken:
 - a. Suitably revising the teacher training curricula.
 - b. Adoption of gender-neutral uniforms, washrooms and sports in schools, and no child should be forced into gender specific activity.
 - c. For transgender persons in particular, the Courts must ensure that the appropriate governments fulfil their obligations under the Transgender

Persons (Protection of Rights) Act, 2019 ('2019 Act') and the Transgender Persons (Protection of Rights) Rules, 2020 ('2020 Rules'), particularly those under Ss. 3(a), 8, 10, 11, 13, and 14 of the 2019 Act read with Rules 10(2), 10(3), 10(7), 10(8), 11(1), 12 and 13 of the 2020 Rules in the context of education.

- vi. Training manuals and modules should be published by relevant authorities on the inclusion of LGBTIQ+ individuals in school education and curriculum, after having meaningful consultations with LGBTIQ+ persons, civil society activists working on gender diversity in schools, teachers, principals, parents, and non-teaching staff, amongst others.
- vii. Trainings and sensitisation of different stakeholders as mentioned above should be conducted, after the training manuals have been approved and published.
- viii. Provision of "Gender Neutral" toilets in all educational institutions, private or public, should be ensured.
- ix. All requirements, including eligibility, age and any other, should be relaxed, to reflect the historical exclusion of LGBTIQ+ persons from mainstream education.

C. Healthcare

- i. There should be a strict implementation of the Transgender Persons (Protection of Rights) Act, 2019 ('2019 Act') and the Transgender Persons (Protection of Rights) Rules, 2020 ('2020 Rules'), especially Sections 3(d), 3(e), 3(i), 8, 10, and 15 of the 2019 Act read with Rules 10(2), 10(3), 10(5), 10(6), 10(9), 11(1), 12 and 13 of the 2020 Rules.
- ii. At least one government hospital should be established in every State to provide safe, quality and free gender affirmation medical services, ranging from counseling to surgery. Medical personnel in the said government hospital should be adequately qualified and trained in trans* health issues. Urgent and comprehensive overhaul of the medical curriculum is required in India, especially in the MBBS courses, to include a deeper and more current study of issues related to sex, gender, and sexuality and to inform medical professionals about them

- iii. while sensitising them to different forms of sexuality and sexual practices, which fall outside the heteronormative procreative paradigm.
- The advisory dated 13.10.2021 issued by the National Medical Commission ('NMC')[153] should be strictly implemented, wherein the NMC has
- a. Requested *“all the Medical Universities/Colleges/Institutions that while teaching UG and PG students, wherever the issue of gender or similar kind arise, the mention of clinical history or complaints or signs/symptoms, examination findings or history about nomenclature shall not be taught in such a way that it becomes/perceived in any way derogatory/discriminatory/insulting to LGBTIQ+ community”*;
 - b. Instructed all authors of medical text books *“to amend the information about virginity, LGBTIQ+ community, homosexuals, etc in their text books according to the available scientific literature, guidelines issued by the Government, and directions passed by the Hon’ble Courts”*;
 - c. Requested *“all the Medical Universities/Colleges/Institutions not to approve as books as recommended books by the University if the books have unscientific, derogatory and discriminatory information about virginity, LGBTIQ+ community, and homosexuals”*.
- iv. The recommendations of the Expert Committee set up by the Undergraduate Medical Education Board ('Expert Committee'), which have suggested modifications in the Competency Based Medical Education Curriculum[154], should be sent to all the Medical Colleges/Institutions, the Registrars and Directors of all Medical Universities and Medical Education Boards of India, and the State Medical Councils[155].

[153] Advisory regarding the issue of LGBTIQ+ Community and necessary changes in competencies of CBME curriculum, issued by the National Medical Commission, vide Notification No.

NMC/Secy/2021/41/025834 dated 13.10.2021 <https://www.nmc.org.in/information-desk/all-news/>

[154] *“Recommendation of Expert Committee on issues relating to LGBTIQ+”*, Undergraduate Medical Education Board, National Medical Commission, vide No.U.11029/49/2022-UGMEB dated 18.08.2022 <https://www.nmc.org.in/information-desk/all-news/>

[155] Order dated 08.04.2022 and 22.08.2022 in WP No. 7284 of 2021 (Mad)

- v. Conversion Therapy needs to be urgently and expressly prohibited. The Expert Committee has already recommended that the practice of conversion therapy shall constitute professional misconduct on the part of the medical professionals under Chapter 7 of the *Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulation, 2002*[156]. This should be included in the National Medical Commission Registered Medical Practitioner (Professional Conduct) Regulations, 2022 which are being drafted at this stage.
- vi. Further, “ego-dystonic homosexuality” that refers to the significant distress caused due to same-sex attraction should be de-pathologised since most sexual identity questions cause some level of distress and could become a backdoor for subjecting persons having same-sex sexual attraction to unnecessary psychiatric therapy.
- vii. Persons practicing non-allopathic medicines governed by regulatory bodies of the other systems of medicine including Indian Medicine (Ayurveda, Unani, Sidha and Sigwa Rigpa) and Homoeopathic, which are covered under the *National Commission for the Indian System of Medicine Act, 2020* and the *National Commission for Homoeopathy Act, 2020* should also be prohibited from practicing conversion therapy.
- viii. Uniform medical guidelines on gender affirming services should be formulated, in consultation with transgender persons and organisations who are well-versed in trans* health issues, and give wide publicity to the same across the country.
- ix. Regular sensitisation of healthcare providers, particularly those working in public health facilities, including regarding sexual health and HIV prevention services, should be conducted.

[156] Order dated 18.02.2022 in WP No. 7284 of 2021 (Mad) at para 25

- x There should be a strict implementation of the Mental Healthcare Act, 2017, including establishment of the grievance redressal mechanism, i.e., the State Mental Health Authorities and Mental Health Review Boards.
- xi Queer affirmative counseling practices to be developed and imparted in all education and training of the mental health professionals.
- xii Provision of “Gender Neutral” toilets in all healthcare institutions, private or public, should be ensured.

D. Employment

- i. There should be a strict implementation of the Transgender Persons (Protection of Rights) Act, 2019 (‘2019 Act’) and the Transgender Persons (Protection of Rights) Rules, 2020 (‘2020 Rules’), especially Sections 3(b), 3(c), 8, 9, 10, 11 and 14 of the 2019 Act read with Rules 10(2), 10(4), 10(6), 10(7), 10(9), 11(1), 12 and 13 of the 2020 Rules.
- ii. All establishments, whether public or private, should formulate Equal Opportunity Policy for LGBTIQ+ persons, in accordance with Rules 12(2) and 12(3) of the 2020 Rules, including the appointment of complaint officers in each establishment.
- iii. There should be review of all rules, regulations and service conditions of employees of all establishments to ensure that LGBTIQ+ persons are not discriminated against in employment, and are able to avail all the benefits, and policies applicable to non- LGBTIQ+ employees.
- iv. All requirements, including eligibility, age and any other, should be relaxed, to reflect the historical exclusion of LGBTIQ+ persons from mainstream employment.
- v. If, in the course of recruitment, promotion or any other employment related process, the employer or any employee becomes aware of the sexual orientation or gender identity of a specific employee or potential employee, they ought to

maintain confidentiality of the information within the workplace, except where the disclosure is in the interest of the LGBTIQ+ employee.

- vi. No employer should be allowed to insist on gender congruent educational documents, if the applicants/employees have official identity documents in their self-identified gender or are in the process of procuring the same. No discrimination or unfair treatment to be meted to any LGBTIQ+ individuals on account of gender non-congruent documents.
- vii. Where an LGBTIQ+ individual informs an employer of their preferred pronouns, such an employer (including all employees thereof) must respect such preference without any question, and use such preferred pronouns, while addressing the said individual. All employment records must reflect the preferred name, gender, and prefix (Mr./Ms./Mx.) of the individual.

E. Police and Prisons

- i. The Police Officers' Conduct Rules should be amended to specifically provide that any harassment by the police of the LGBTIQ+ persons, and/or of the activists/NGO workers assisting the LGBTIQ+ persons, shall be treated as misconduct, and would entail punishment for such misconduct. It would be useful to refer to Tamil Nadu Subordinate Police Officers' Conduct Rules[157] in this regard.
- ii. A separate enclosure or ward for transgender persons in prisons should not be in the nature of an isolating cell. Periodic sensitisation of prisoners and prison authorities need to be conducted.

[157] Government Gazette on 16.02.2022 that provides

24-C. No police officer shall indulge in any act of harassment of any person belonging to the LGBTIQ (Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual) + Community and the persons working for the welfare of the said community.

Explanation: For the purpose of this rule, harassment does not include the right of police to make any enquiry as per the procedure established by law

- iii. According to the Training Manual for Basic Courses for Prison Officers, 2017, which was implemented after the Supreme Court's order on Inhuman Conditions in 1,328 Prisons (2013), transgender individuals are included under 'unspecified special categories of prisoners', along with prisoners with disabilities and mental healthcare needs. A similar categorisation is also present in Section 2(41) of the Delhi Prison Rules, 2018, where transgender prisoners, along with women, comprise 2.7 % of the prisoner population, as per the National Prisons Information Portal. This is a violation of the NALSA judgment because transgender persons constitute a separate legal category and not an "unspecified" category. The Prison Admission register should, therefore, make the necessary changes at the earliest to include 'transgender' as a category.

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