



**RIGHTS OF PEOPLE SUFFERING FROM
HUMAN IMMUNODEFICIENCY VIRUS (HIV)/
ACQUIRED IMMUNODEFICIENCY SYNDROME (AIDS)
AND THE RIGHTS OF LESBIAN, GAY, BISEXUAL,
AND TRANSGENDER (LGBT) PERSONS**

**National Human Rights Commission
India**

**RIGHTS OF PEOPLE SUFFERING FROM
HUMAN IMMUNODEFICIENCY VIRUS
(HIV)/ ACQUIRED IMMUNODEFICIENCY
SYNDROME (AIDS) AND THE RIGHTS
OF LESBIAN, GAY, BISEXUAL, AND
TRANSGENDER (LGBT) PERSONS**



**TRAINING & RESEARCH DIVISION
NATIONAL HUMAN RIGHTS COMMISSION
INDIA**

RIGHTS OF PEOPLE SUFFERING FROM HUMAN IMMUNODEFICIENCY VIRUS (HIV)/ ACQUIRED IMMUNODEFICIENCY SYNDROME (AIDS) AND THE RIGHTS OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER (LGBT) PERSONS

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Manav Adhikar Bhawan, C-Block

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E-mail : dolphinprinto2011@gmail.com

RIGHTS OF PEOPLE LIVING WITH HIV

India had around **2.14 million** people living with HIV in 2017 accounting for 0.22% of the people in the age group of 15-49 years in the country, according to the prevalence estimates released by the National AIDS Control Organisation (NACO). The range varied according to the age. 0.16% of the people above 15 years and 0.30% of the people up to 59 years old suffered from HIV.

The HIV prevalence in adults in the year 2017 was estimated at 0.25% (0.18-0.34) among males and at 0.19% (0.14-0.25) among females. The adult HIV prevalence at national level has continued its steady decline. Between the years, 2001-03, it was 0.38% but in 2007 it dropped to 0.34% and in 2012 it further declined to 0.28%. In the year 2015, the HIV prevalence in India was about 0.26% of the total population, which dropped to 0.22% in 2017¹.

According to the NACO Report, 2017, the total number of **people living with HIV (PLHIV)** in India was estimated at 21.40 lakhs (15.90 lakhs–28.39 lakhs). HIV/AIDS is, without a doubt, one of the biggest problems faced by India. Poor literacy rate, lack of information regarding safe sex and the socio-economic conditions of the country has played a major role in the spread of the disease.

HOW IS THE HIV TRANSMITTED?

HIV is transmitted primarily through sexual intercourse (including oral, vaginal, and anal sex), through transfusion of infected blood, by use of non-sterile HIV infected or contaminated syringes and needles and from an infected mother to her unborn child.²

As if the disease itself was not a great torment, people suffering from HIV/AIDS suffer discrimination everywhere they go due to the social stigma attached to the disease. People are looked down upon and ostracized by the society, and that is why they need special care and support.

However, there are existing laws, nationally and internationally, which prevent and safeguard the rights of people living with HIV.

¹<http://naco.gov.in/hiv-facts-figures>

²<http://naco.gov.in/faqs>



A quack doctor using an infected syringe on a patient

Case Illustration: *Rajnish was admitted to the hospital after a long spell of fever. After his blood was tested, it was found that he had HIV infection. Earlier he had visited a quack doctor, who used an infected syringe during his treatment. This was shocking and disturbing news for Rajnish. The news not only changed his life but his family was forced into isolation. His daughter was forced to leave school. After living in isolation for a long time, the family had to eventually shift to a nearby city. His life never went back to the way it was.*

INTERNATIONAL FRAMEWORK

India has signed various **treaties, agreements and declarations** relating to HIV/AIDS. These are concerned with the protection of rights of the people who are HIV positive, those who are affected by HIV/AIDS and also those people who are most vulnerable to it, in order to secure their human rights and prevent the spread of HIV/AIDS.

The two conventions that aim at non-discrimination on the basis of creed, political affiliation, gender, or race are the-

- International Covenant on Civil and Political Rights, and
- The International Covenant on Economic, Social and Cultural Rights.

They also cover within their ambit non-discrimination of the people infected with HIV.

People diagnosed HIV+ are also entitled to the rights enshrined in **Article 25(1) of the Universal Declaration of Human Rights (UDHR)**, which includes the right to adequate standard of living, assistance, medical care and necessary social services, and the right to security in the event of unemployment according to their needs and their treatment choices.



The United Nation AIDS (UNAIDS) Guidelines, 1996 stress on enactment of anti-discrimination and other protective laws that would protect HIV/AIDS diagnosed people from discrimination in both public and private sectors; ensure their privacy, confidentiality and ethics in research involving human subjects and would lay emphasis on education and conciliation and provide for speedy and effective administrative and civil remedies.

CONSTITUTIONAL GUARANTEE AND THE RIGHT TO LIFE

Although there is no direct reference to HIV/AIDS in the Indian Constitution, the following provisions ensure protection of an HIV patient against discrimination:

- ❖ **Article 14** guarantees the right to equality of treatment to the HIV/AIDS patients.
- ❖ **Articles 15** and **Article 16** protect those suffering from HIV/AIDS against discrimination.
- ❖ **Article 21** of the Constitution protects their right to life and personal liberty and ensures their right to privacy.
- ❖ The **Directive Principles of State Policy** also cast a duty upon the State to ensure the right to livelihood to the patients of HIV/AIDS and provide them with just & humane conditions of work.
- ❖ **Article 39** of the Constitution directs the State to ensure that all the citizens including the HIV/AIDS patients have an adequate means of livelihood.
- ❖ **Article 42** casts a duty upon states to make provisions for securing just and humane conditions of work.

Case Illustration: Sarita, who was three months pregnant, got infected with HIV during the course of her pregnancy. She was denied treatment by the hospital. Her husband filed a complaint in the Court on her behalf and the Delhi High Court gave immediate directions to the hospital stating that there was an urgent need to issue directions to ensure the protection of the right to health and life of the women and her fetus. A direction was issued to immediately arrange one unit of blood and further quantity of blood as may be required, from any of the authorized blood banks.

INDIAN MEDICAL COUNCIL ACT, 1956

The Medical Council Act, 1956 lays down certain duties that should be observed towards HIV/AIDS patients. There is a **Code of Conduct** that the medical personnel, hospitals, medical institutions need to follow with regards to the patients suffering from HIV/AIDS.

The salient features of the Act are as summarized below:

- ❖ Duty to take informed consent from the patient for the treatment.
- ❖ Disclosure of information regarding disease, medications, precautions and risks to the patient.
- ❖ Provide information on options available along with consequences and their benefits.
- ❖ To admit patient in emergency without delay
- ❖ The physician should not abandon his duty for the fear of contracting the disease himself.

HUMAN IMMUNODEFICIENCY VIRUS AND ACQUIRED IMMUNE DEFICIENCY SYNDROME (PREVENTION AND CONTROL) ACT, 2017 OR THE HIV AND AIDS ACT, 2017

- ❖ This Act seeks to prevent and control the spread of HIV and AIDS and prohibits the discrimination against the infected/affected persons. The act itself provides for informed consent and confidentiality with regard to their treatment, places an obligation on the establishment to safeguard their rights, and creates the mechanisms for redressing their complaints.
- ❖ **Prohibition of discrimination against HIV positive persons:** The Act lists the various grounds on which discrimination against HIV positive persons and those living with them is prohibited. These include the denial, termination, discontinuation or unfair treatment with regard to:
 - (i) Employment, (ii) educational establishments, (iii) health care services, (iv) residing or renting property, (v) standing for public or private office, and (vi) provision of insurance (unless based on actuarial studies). **The requirement for HIV testing as a pre-requisite for obtaining employment or accessing health care or education is also prohibited.**Every HIV infected or affected person below the age of 18 years has the right to reside in a shared household and enjoy the facilities of the household. The Act also prohibits any individual from publishing information or advocating feelings of hatred against HIV positive persons and those living with them.
- ❖ **Prohibition of certain Acts:** The Act requires that no person shall communicate by any means, the feeling of hatred against any HIV positive person.
- ❖ **Informed consent and disclosure of HIV status:** The Act requires that no HIV test, medical treatment, or research will be conducted on a person without his informed consent. No person shall be compelled to disclose his HIV status except with his informed consent, and if required by a court order. Informed consent for an HIV test will not be required in case of screening by any licensed blood bank, a court order, medical research, and epidemiological purposes where the HIV test is anonymous and not meant to determine the HIV status of a person. Establishments keeping records of information of HIV positive persons shall adopt data protection measures.

- ❖ **Role of the central and state governments:** Section 13 of the Act says that central and state governments shall take measures to:
(i) prevent the spread of HIV or AIDS (ii) provide anti-retroviral therapy and infection management for persons with HIV or AIDS, (iii) facilitate their access to welfare schemes especially for women and children, (iv) formulate HIV or AIDS education communication programs that are age appropriate, gender sensitive, and non-stigmatizing, and (v) lay guidelines for the care and treatment of children with HIV or AIDS. Every person in the care and custody of the state shall have a right to HIV prevention, testing, treatment and counseling services.
- ❖ **Role of the Ombudsman:** An ombudsman shall be appointed by every state government to inquire into complaints related to the violation of the Act and the provision of health care services. The Ombudsman shall submit a report to the state government every six months stating the number and nature of complaints received, the actions taken and orders passed.
- ❖ **Guardianship:** A person between the age of 12 to 18 years, who has sufficient maturity in understanding and managing the affairs of his HIV or AIDS affected family shall be competent to act as a guardian of other sibling below 18 years of age. The guardianship will be applied in matters relating to admission in educational establishments, operating bank accounts, managing property and care and treatment, among others.
- ❖ **Court proceedings:** Cases relating to HIV positive persons shall be disposed off by the court on a priority basis. In any legal proceeding, if an HIV infected or affected person is a party, the court may pass orders that the proceedings be conducted (a) by suppressing the identity of the person, (b) in camera, and (c) to restrain any person from publishing information that discloses the identity of the applicant. When passing any order with regard to a maintenance application filed by an HIV infected or affected person, the court shall take into account the medical expenses incurred by the applicant.

RIGHT TO TREATMENT

THE HIV and AIDS ACT, 2017 provides a special right to persons with HIV/AIDS regarding treatment. While providing the treatment, this Act specially mentions the treatment of Anti-Retroviral Therapy (ART) and makes the governments responsible for the treatment.

The following provisions are very important in this regard:

– Section 13

The Central Government and every State Government, as the case may be, shall take all such measures as it deems necessary and expedient for the prevention of spread of HIV or AIDS, in accordance with the guidelines.

– Section 14

(1) The measures to be taken by the Central Government or the State Government under section 13 shall include the measures for providing, as far as possible, diagnostic facilities relating to HIV or AIDS, Anti-retroviral Therapy and Opportunistic Infection Management to people living with HIV or AIDS.

(2) The Central Government shall issue necessary guidelines in respect of protocols for HIV and AIDS relating to diagnostic facilities, Anti-retroviral Therapy and Opportunistic Infection Management which shall be applicable to all persons and shall ensure their wide dissemination.

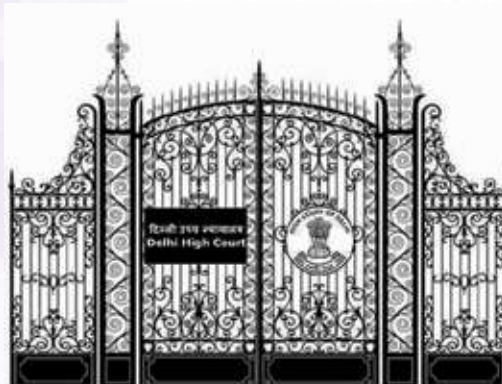


Image Courtesy : Delhi High Court

Case Illustration: Shyam, who tested HIV positive, was denied Antiviral Therapy (ART) against AIDS after his release from prison. He then went to the Delhi High Court and filed a petition. The Court ruled in his favor and commanded the government to reinstitute Shyam's treatment procedure and continue to provide him ART. The High Court directed the government to provide ART to Shyam under the ARV roll-out programme and reimburse AIIMS for the costs incurred.

Case Illustration: Mohan, who had worked as a dispatch clerk in a publishing house for 7 years, contracted HIV. When his boss, Mr. Sunil Sharma came to know of this, he asked Mohan to tender his resignation. He said it was not anything personal but he did not want him to infect anyone else and he should probably stay home for everyone else's good. Mohan filed a petition against Mr. Sharma in the Allahabad High Court and the court issued an order directing Mr. Sunil to hire Mohan back and compensate him for the trouble caused. The HIV and AIDS Act, 2017 clearly states that an HIV test cannot be a pre-requisite for hiring an employee and a working employee cannot be fired if he/she has contracted HIV unless an authorized doctor gives a report stating that the infection is transmittable by conventional means.

SUPREME COURT ON HIV/AIDS



Guardian of Indian Constitution: Supreme Court

Responding to the **Public Interest Litigation filed by Naz Foundation India**, the Supreme Court of India stated that children living with or affected by HIV (that is, children who are HIV positive and children who are HIV negative but whose parent[s] is HIV positive) should be given protected status and included as a 'child belonging to a disadvantaged group' under

India's Right of Children to Free and Compulsory Education (RTE) Act, (2009). The extension of protected status to children living with or affected by HIV means that they are now entitled to special protections and measures, under the terms of the RTE Act. These include:

- Measures to prohibit and eradicate discrimination, harassment, and victimization of children from disadvantaged groups
- Eliminating discrimination in relation to the admissions process including denying or limiting access to any benefits of enrolment or through segregation in separate study, sports, playground, canteen areas or any other amenities provided by the school
- Protection from financial extortion or forced expenditure
- The guarantee that private schools will allocate a minimum of 25% of places in each class to children from disadvantaged groups
- Special mechanisms are available for complaints of discrimination

In the matter of Mr. Anil v/s Hospital Z

*The **Supreme Court of India** held that the patients suffering from 'AIDS' deserve full sympathy and are entitled to all respect as human beings. They cannot be denied jobs on the basis of their HIV/AIDS status. It further held that although the doctor-patient confidentiality is an important part of the medical ethics (incorporated by the then Medical Council Act), a patient's right to confidentiality was not enforceable in a situation where the patient is HIV positive, if he stood the risk of spreading it to his prospective spouse. Since acts that are likely to spread communicable diseases are a crime, the failure of the hospital to inform the spouse of the disease would make them participant criminals. Since Indian matrimonial laws provide venereal disease as a ground for divorce, a person suffering from a VD had no right to get married till he/she is fully cured and such a right must be treated as a 'suspended right'.³*

In another case of Mr. Ashwin v/s Hospital Z

*The **Supreme Court** has held that its earlier judgment in **Mr. Anil v/s Hospital Z**, to the extent that it suspended the right of people living with HIV/AIDS to marry is no longer a good law and restored the right of an HIV + person to marry. However, it further held that this does not take away the duty of those who know their HIV+ status to obtain informed consent from their prospective spouse prior to marriage.⁴*

³1998 (6) SCALE 230; 1998 (8) SCC 296; JT 1998 (7) SC 626.

⁴<http://www.helpline.law.com/civil-litigation-and-others/RHPI/rights-of-hiv-aids-patients-in-india.html>

The High Court heard the matter and gave direction to the Lady Hardinge Hospital:

*“There is an urgent need to issue direction to ensure the protection of the right to health and life of the woman and her foetus. A direction is accordingly issued to the Medical Superintendent, Lady Hardinge Medical College and Smt. Sucheta Kriplani Hospital immediately to arrange one unit of blood and further quantity of blood as may be required, from any of the authorized blood banks. *”*

Case Illustration: Aarti, who was living with her brother Krishna and his wife, contracted HIV at the age of 23 years. Aarti overheard them talking about throwing her out of the house. Since Aarti was living in a shared household, and, as per the provision in the HIV and AIDS Act of 2017, she was entitled to live in the shared household even though she did not own it. If her brother and his wife would throw her out of the house, they would be committing a crime, punishable by 3 months to 2 years in prison or a fine of up to 1 lakh or both.

NATIONAL POLICY ON HIV/AIDS AND THE WORLD OF WORK

- ❖ The National Policy on HIV/AIDS and the World of Work is a policy document formulated by the Ministry of Labour & Employment, launched at the 43rd Session of the Standing Labour Committee. The policy was developed by the Ministry of Labour & Employment after consultations with (International Labour Organization) ILO, (National Aids Control Organisation) NACO and other social partners.
- ❖ The policy aimed at generating awareness about HIV/AIDS, encourage actions to prevent its spread and further improve and develop the support and care initiatives of the people at the workplace.
- ❖ The main objective is to prevent transmission of HIV infection amongst workers and their families; protect rights of those who are infected and provide access to available care, support and treatment facilities. It also focuses on dealing with issues relating to stigma and discrimination related to HIV/AIDS by assuring them equity and dignity at the workplace and ensuring safe migration and mobility with access to information services on HIV/AIDS. The policy says that HIV/AIDS screening should not be required for job applicants or persons in employment or for purposes of exclusion from employment or worker benefits. In order to assess the impact of HIV, employers may wish to do anonymous, unlinked HIV prevalence studies in their workplace. These studies may occur, provided it is undertaken in accordance with the ethical principles of scientific research, professional ethics and the protection of individual and of confidentiality.
- ❖ Wherever such research is done, workers should be consulted and informed that it is occurring along with reasons and consequences. Testing will not be considered anonymous if there is a reasonable possibility that a person's HIV status can be deduced from the result. It also provides that HIV infection is not a cause for termination of employment. Persons with HIV related illnesses should be able to work for as long as medically fit in appropriate conditions.



Case Illustration: The blood of an HIV positive person was negligently donated to Pragya, who was six months pregnant at the time. Due to this, Pragya contracted HIV, putting the life of her unborn child at risk as well. On her behalf, Pragya's brother Sameer filed a petition in the Court. The Court found the medical organization at fault and directed that Pragya be compensated with a Government job at Kolkata or the place where she desired, accommodation on her appointment on the usual terms and conditions, a sum of Rs. 10 lakhs from the date of filing of the writ petition @ 18% interest and medical treatment at the cost of the Government.

OTHER LEGISLATIONS, POLICES AND AGENCIES WHICH PROVIDE PROTECTION TO THE HIV/AIDS PATIENTS ARE:

- ❖ Daman & Diu Public Health Act, 1985 Goa, 1986
- ❖ Indian Penal Code, 1860
- ❖ Drugs and Cosmetic Act, 1940
- ❖ Juvenile Justice (Care and Protection of Children) Act, 2000 and 2006
- ❖ Maharashtra Protection of Commercial Sex Workers Bill, 1994
- ❖ Medical Termination of Pregnancy Act, 1971

- ❖ Narcotic Drugs and Psychotropic Substances Act, 1985
- ❖ National AIDS Control Organisation (NACO), Department of AIDS Control, Policies and its Guidelines
- ❖ National AIDS Prevention and Control Policy
- ❖ Suppression of Immoral Traffic in Women and Girls Act, 1956
- ❖ Young Persons (Harmful Publications) Act, 1956
- ❖ National AIDS Prevention and Control Policy
- ❖ The Indian Employers' Statement of Commitment on HIV/AIDS
- ❖ Joint Statement of Commitment on HIV/AIDS of the Central Trade Unions in India
- ❖ ILO Code of Practice on HIV/AIDS and the World of Work
- ❖ State AIDS Control Societies.
- ❖ Antiviral Therapy Guidelines for HIV infected Adults and Adolescents including Post-exposure
- ❖ Operational Guidelines for Condom Promotion by State Aids Control Societies (SACS)
- ❖ Data Sharing Guidelines by National AIDS Control Organisation (NACO)
- ❖ Guidelines for HIV Care and Treatment in Infants and Children, 2006
- ❖ Guidelines for HIV Testing, 2007
- ❖ Guidelines for Network of Indian Institutions for HIV/AIDS Research (NIHAR)
- ❖ Guidelines for Prevention and Management of Common Opportunistic Infections (OIs)
- ❖ Guidelines for Setting up Blood Storage Centres
- ❖ Operational Guidelines for Link Worker Scheme (LWS)
- ❖ NACO Ethical Guidelines for Operational Research
- ❖ Operational Guidelines for NACO Information Education and Communication (IEC)

- ❖ NACO Research Fellowship-Scheme under NACP-III
- ❖ National Guidelines on Prevention, Management & Control of Reproductive Tract Infection
- ❖ National Guidelines on Prevention, Management & Control of Reproductive Tract Infections (RTI) including Sexually Transmitted Infections (STI)
- ❖ National Policy on HIV/AIDS and the World of Work
- ❖ Procurement Manual for National AIDS Control Programme National AIDS Control Programme (NACP)-III.
- ❖ Standards for Blood Banks and Blood Transfusion Services
- ❖ Operational Guidelines for HIV Sentinel Surveillance (HSS)
- ❖ Operational Guidelines for Targeted Intervention for Migrants under NACP-III
- ❖ Targeted Interventions for High Risk Groups (HRGs)
- ❖ Operational Guidelines for Targeted Interventions for Truckers
- ❖ Operational Guidelines for Voluntary Blood Donation
- ❖ National AIDS Control and Prevention Policy (NACPC)
- ❖ National Blood Policy (NIHFW)
- ❖ National AIDS Control Programme (NIHFW)

HELPLINE NUMBERS FOR HIV/AIDS PATIENTS

State AIDS Control Societies (SACS)	Whether it is 1097 or any other number	Name of the place where the helpline is installed
Andhra Pradesh SACS	1097, 040-27714881, 27714355	Hyderabad
Assam SACS	1051	Guwahati
Chandigarh SACS	1097	Chandigarh
Himachal Pradesh SACS	1299	Shimla
Kerala SACS	0484-237020, 0484-2237030	Cochin
Puducherry SACS	1097	Puducherry & Karaikal
Punjab SACS	1800 180 2008	Punjab
Uttar Pradesh SACS	0522 - 2700419	Lucknow
Uttarakhand SACS	1097	Dehradun
West Bengal SACS	1097	Kolkata

In case a person infected with HIV/AIDS is denied treatment or any other facility to which a common man is entitled or is discriminated against in any field on the basis of his/her HIV/AIDS status, the aggrieved person can file a petition before the Court for redressal.

RIGHTS OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER (LGBT)



LGBT parade with placards in their hands demanding rights

The Lesbian, Gay, Bisexual, and Transgender (LGBT) community has long been a part of the Indian culture and civilization. They have played important roles in shaping the history of the nation in one way or the other and most of all, they have always been a subject of interest among the common folk. Gender is something which we presume to be binary, and those who do not align with this idea have to often face discrimination and are ostracized by the society, these people are excluded from mainstream society and are forced to live in lesser humane conditions.

Although the stigma attached with homosexuality has reduced in the past decade, a majority of people still remain closeted, fearing discrimination from their families, who might see homosexuality as a matter of shame. The problem, while more severe in rural areas, also extends to urban spaces, where LGBT people face rejection from their families and are often forced into marriage with the opposite sex.

According to the World Health Organization (WHO), 'transgender' is an umbrella term that includes people whose sense of gender does not match with the gender assigned to them at birth.⁵ For example, a person born as a man may identify with the opposite gender, i.e., a woman.⁶ ***According to the 2011 Census, the number of people who do not identify as 'male' or 'female' but as 'other', stands at 4,87,803 (0.04% of the total population).***⁷

This 'other' category applies to persons who did not identify themselves as either male or female, and are therefore called transgender persons.

CONSTITUTIONAL PROVISIONS SAFEGUARDING RIGHTS OF LGBT PEOPLE:

- ❖ **Until recently, there were effectively no laws that safeguarded the rights of the LGBT community, now at least the Indian Constitution provides for the rights of the third gender. [Transgender Persons (Protection of Rights) Act, 2019]⁸**
- ❖ **Sexual activity between people of same gender was a crime until September, 2018, when the Supreme Court decriminalized homosexuality by declaring Section 377 of the Indian Penal Code.**
- ❖ **The Transgender people have been permitted to change their gender without the sex reassignment surgery since 2014. They have also been given a constitutional right to register themselves under a third gender.**

⁵Primary Census Abstract Data for Others (India & States/UTs), Census 2011

⁶Standards of Care, 7th Version, The World Professional Association for Transgender Health, [https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20\(2\)\(1\).pdf](https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20(2)(1).pdf).

⁷https://www.prsindia.org/billtrack/transgender-persons-protection-rights-bill-2016#_edn3

⁸ <http://socialjustice.nic.in/writereaddata/UploadFile/TG%20bill%20gazette.pdf>

The ***striking down of the Section 377 of the Indian Penal Code as unconstitutional*** has been the biggest breakthrough for the LGBT community.

Navtej Singh Johar v/s Union of India

The Supreme Court struck down Section 377 of the IPC by leaning on **Article 15 (Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth)**, of the Indian Constitution. The Supreme Court ruled that the Indian Constitution bans discrimination based on sexual orientation via the category of "sex". The court found that the criminalization of sexual acts between consenting adults violated the right to equality, guaranteed by the Constitution of India. While reading the judgment, Chief Justice Misra pronounced that the court found "criminalizing carnal intercourse" to be "irrational, arbitrary and manifestly unconstitutional". The court ruled that LGBT people in India are entitled to all constitutional rights, including the liberties protected by the Constitution of India. It held that "the choice of whom to partner, the ability to find fulfillment in sexual intimacies and the right not to be subjected to discriminatory behaviour are intrinsic to the constitutional protection of sexual orientation". The judgement also made note that LGBT community is entitled to equal citizenship and protection under law, without discrimination.

Below are excerpts of statements made by the **five judges** – The former Chief Justice **Dipak Misra** and Justices - **Dhananjaya Y. Chandrachud**, **Ajay Manikrao Khanwilkar**, **Indu Malhotra**, and **Rohinton Fali Nariman**, who gave separate but concerted judgements.

➤ **ON INDIVIDUALITY**

The emphasis on the unique being of an individual is the salt of his/her life. Denial of self- expression is inviting death... This realisation is one's signature and self- determined design. One defines oneself. That is the glorious form of individuality."

—**Chief Justice Dipak Misra (for himself and J. Ajay Manikrao Khanwilkar)**

➤ **ON STANDING UP FOR A MINORITY**

“The court, as the final arbiter of the constitution, has to keep in view the necessities of the needy and the weaker sections. The role of the court assumes further importance when the class or community whose rights are in question are those who have been the object of humiliation, discrimination, separation and violence by not only the state and the society at large but also at the hands of their very own family members. The development of law cannot be a mute spectator to the struggle for the realisation and attainment of the rights of such members of the society.”

—**Justice Misra (for himself and J. Ajay Manikrao Khanwilkar)**

“The mere fact that the LGBT persons constitute a miniscule fraction of the country’s population cannot be a ground to deprive them of their fundamental right. Even though the LGBT constitute a sexual minority; members of the LGBT community are citizens of this country who are equally entitled to the enforcement of their fundamental rights...”

—**Justice Indu Malhotra**

➤ **ON KEEPING UP WITH THE TIMES**

“In the contemporary world where even marriage is now not equated to procreation of children, the question that would arise is whether homosexuality and carnal intercourse between consenting adults of opposite sex can be tagged as against the order of nature. It is the freedom of choice of two consenting adults to perform sex for procreation or otherwise and if their choice is that of the latter, it cannot be said to be against the order of nature. Therefore, sex, if performed differently, as per the choice of the consenting adults, does not per se make it against the order of nature.”

➤ **Justice Misra (for himself and J. Ajay Manikrao Khanwilkar)**

➤ **ON FIGHTING DISCRIMINATION**

“We are inclined to believe that if section 377 remains in its present form in the statute book, it will allow the harassment and exploitation of the LGBT community to prevail. We must make it clear that freedom of choice cannot be scuttled or abridged on the threat of criminal prosecution and made

paraplegic on the mercurial stance of majoritarian perception.”

— **Justice Misra (for himself and J. Ajay Manikrao Khanwilkar)**

➤ **ON TRANSGENDER RIGHTS**

“The very existence of section 377 IPC criminalizing transgender, casts a great stigma on an already oppressed and discriminated class of people.

This stigma, oppression, and prejudice has to be eradicated and the transgender have to progress from their narrow claustrophobic spaces of mere survival in hiding with their isolation and fears to enjoying the richness of living out of the shadows with full realization of their potential and equal opportunities in all walks of life. The ideals and objectives enshrined in our benevolent Constitution can be achieved only when each and every individual is empowered and enabled to participate in the social mainstream and in the journey towards achieving equality in all spheres, equality of opportunities in all walks of life, equal freedoms and rights and, above all, equitable justice. This can be achieved only by inclusion of all and exclusion of none from the mainstream.”

— **Justice Misra (for himself and J. Ajay Manikrao Khanwilkar)**

➤ **ON SOCIAL ATTITUDES**

“The stereotypes fostered by section 377 have an impact on how other individuals and non-state institutions treat the community. While this behaviour is not sanctioned by Section 377, the existence of the provision nonetheless facilitates it by perpetuating homophobic attitudes and making it almost impossible for victims of abuse to access justice. Thus, the social effects of such a provision, even when it is enforced with zeal, is to sanction verbal harassment, familial fear, restricted access to public spaces, and the lack of safe spaces. This results in a denial of the self. Identities are obliterated, denying the entitlement to equal participation and dignity under the Constitution. Section 377 deprives them of an equal citizenship.”

— **Justice Dhananjaya Y. Chandrachud**

➤ ON SEXUAL HEALTH

“The operation of Section 377 denies consenting adults the full realization of their right to health, as well as their sexual rights. It forces consensual sex between adults into a realm of fear and shame, as persons who engage in anal and oral intercourse risk criminal sanctions if they seek health advice. This lowers the standard of health enjoyed by them and particularly by members of sexual and gender minorities, in relation to the rest of society.”

—**Justice Dhananjaya Y. Chandrachud**

IN CONCLUSION

“History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries. The members of this community were compelled to live a life full of fear of reprisal and persecution. This was on account of the ignorance of the majority to recognize that homosexuality is a completely natural condition, part of a range of human sexuality...”

—**Justice Indu Malhotra**

PROTECTION AGAINST DISCRIMINATION

Article 15 of the Indian constitution protects all Indian citizens from discrimination, including the LGBT community. The article states:

1. The State shall not discriminate against any citizen on the grounds of religion, race, caste, sex, and place of birth or any of them.
2. No citizen shall, on grounds of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to:
 - a. Access to shops, public restaurants, hotels and palaces of public entertainment; or
 - b. The use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.



People marching for equality, equity

National legal services authority vs. Union of India

In 2014, the **Supreme Court** recognized a transgender person's right to self-identification as male, female or the third gender. Further, the Court directed central and state governments to grant legal recognition to transgender persons, address issues of social stigma and discrimination, and provide social welfare schemes for them.

Rights of the Transgender

- ❖ In 1994, the Transgender people were legally granted voting rights as a third sex.
- ❖ On 15 April 2014, the Supreme Court of India declared transgender people a socially and economically backward class entitled to reservations in education and jobs, and also directed union and state governments to frame welfare schemes for them.
- ❖ The Court also ruled that the Indian Constitution mandates the recognition of a third gender on official documents, and that Article 15 bans discrimination based on gender identity.

- ❖ In light of the ruling, government documents, such as voter ID cards, passports and bank forms, have started providing a third gender option alongside male (M) and female (F), usually designated "other" (O), "third gender" (TG) or "transgender"(T).

In 2013, transgender and gender activists- S. Swapna and Gopi Shankar Madurai from Srishti Madurai, staged a protest in the Madurai collectorate on 7 October, 2013 demanding reservation and to permit alternate genders to appear for examinations conducted by TNPSC, UPSC, SSC and Bank exams. Swapna was successful in her endeavours and successfully moved the Madras High Court in 2013 seeking permission to write the TNPSC Group II exam as a female candidate. Swapna is the first transgender person to clear TNPSC Group IV exams.



Celebrations at the Pride Parade

Case Illustration: Exercising her right to vote and contest elections, Kamla Jaan won the position of the mayor of Katni in MP. Shabnam Mausi, another transgender was elected to the Legislative Assembly in 2002. In the huge political machinery, Heera won a seat at the city council of Jabalpur, Meera won a similar position in Sehora, and so did Gulshan in Bina. In December 2000, Asha Devi became the mayor of Gorakhpur, and Kallu Kinnar was elected to the city council in Varanasi. The tide is beginning to shift and hopefully there will be more transgender representation in Indian politics.

In 2013, the government set up an Expert Committee to examine issues related to transgender persons. The Committee stated that transgender

persons faced issues of social stigma and discrimination, which affected their access to education, healthcare, employment and government documents.

A private member Bill was introduced in Rajya Sabha by Mr. Tiruchi Siva in 2014 to guarantee rights and provide welfare measures for transgender persons. This Bill was passed in Rajya Sabha in 2015.⁹ The Transgender Persons (Protection of Rights) Bill, 2019 was introduced in Lok Sabha on July 19, 2019 by the Minister of Justice and Empowerment, Mr. Thawarchand Gahlaut. The Lok Sabha passed the Transgender Persons (Protection of Rights) Bill, 2019 by a voice vote on 5th August, 2019. This Bill is intended to enforce the right to perceived gender identity.¹⁰

SALIENT FEATURES OF ‘THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019’

- ❖ **Definition of a transgender person:** The Act defines a transgender person as one whose gender does not match the gender assigned at birth. It includes trans-men and trans-women, persons with intersex variations, gender-queers, and persons with socio-cultural identities, such as *kinnar* and *hijra*. The intersex variations are defined to mean a person who at birth shows variation in his or her primary sexual characteristics, external genitalia, chromosomes, or hormones from the normative standard of male or female body.
- ❖ **Prohibition against discrimination:** The Bill prohibits discrimination against a transgender person, including denial of service or unfair treatment in relation to: (i) education; (ii) employment; (iii) healthcare; (iv) access to, or enjoyment of goods, facilities, opportunities available to the public; (v) right to movement; (vi) right to reside, rent, or otherwise occupy property; (vii) opportunity to hold public or private office; and (viii) access to a government or private establishment in whose care or custody a transgender person is.
- ❖ **Certificate of identity for a transgender person:** A transgender person may make an application to the District Magistrate for a certificate of identity, indicating the gender as ‘transgender’. A revised certificate may be obtained only if the individual undergoes surgery to change their gender either as a male or a female.

⁹<https://www.prsindia.org/billtrack/transgender-persons-protection-rights-bill-2016>

¹⁰<https://pib.gov.in/newsite/PrintRelease.aspx?relid=195089>

- ❖ **Right of Residence:** Every transgender person shall have a right to reside and be included in his household. If the immediate family is unable to care for the transgender person, the person may be placed in a habilitation center on the orders of a competent court.
- ❖ **Employment:** No government or private entity can discriminate against a transgender person in employment matters, including recruitment, and promotion. Every establishment is required to designate a person to be a complaint officer to deal with complaints in relation to the Act.
- ❖ **Education:** Educational institutions funded or recognized by the relevant government shall provide inclusive education, sports and recreational facilities for transgender persons, without discrimination.
- ❖ **Health care:** The government must take steps to provide health facilities to transgender persons including separate HIV surveillance centers, and sex reassignment surgeries. The government shall review medical curriculum to address health issues of transgender persons, and provide comprehensive medical insurance schemes for them.
- ❖ **Certificate of identity for a transgender person:** A transgender person may make an application to the District Magistrate for a certificate of identity, indicating the gender as 'transgender'. A revised certificate may be obtained only if the individual undergoes surgery to change their gender either as a male or a female.
- ❖ **Welfare measures by the government:** The Bill states that the relevant government will take measures to ensure the full inclusion and participation of transgender persons in society. It must also take steps for their rescue and rehabilitation, vocational training and self-employment, create schemes that are transgender sensitive, and promote their participation in cultural activities.
- ❖ **Offences and Penalties:** The Bill recognizes the following offences against transgender persons: (i) forced or bonded labour (excluding compulsory government service for public purposes), (ii) denial of use of public places, (iii) removal from household, and village, (iv) physical, sexual, verbal, emotional or economic abuse. Penalties for these offences vary between six months and two years, and a fine.
- ❖ **National Council for Transgender persons (NCT):** The NCT will consist of: (i) Union Minister for Social Justice (Chairperson); (ii) Minister of State for Social Justice (Vice- Chairperson); (iii) Secretary of the Ministry of Social Justice; (iv) One representative from ministries including

Health, Home Affairs, and Human Resources Development. Other members include representatives of the NITI Aayog, and the National Human Rights Commission. State governments will also be represented. The Council will also consist of five members from the transgender community and five experts from non-governmental organizations.

- ❖ The Council will advise the central government as well as monitor the impact of policies, legislation and projects with respect to transgender persons. It will also redress the grievances of transgender persons.

LEGAL RECOGNITION OF TRANSGENDER IDENTITY

The earlier version the concerns were raised towards an inadequate understanding of transgender identity rooted in biological determinism. While the current Act manages to amend the definition of 'transgender', it conflates intersex persons with transgender people and, as stated earlier, fails to mention self-affirmation of gender.¹¹ Consequently, it manages to neglect various articulations of gendered expressions and complex lived realities.

Scholars have illustrated how categories like 'transgender' and 'hijras' have often been deployed interchangeably¹². Whereas hijra connotes a structured community of feminine identifying persons (which may include transfeminine individuals, kothis and women) with specific religious and linguistic practices, transgender serves as an umbrella category for a wide range of people on the gender spectrum who may not identify with the gender, they were socialised in.



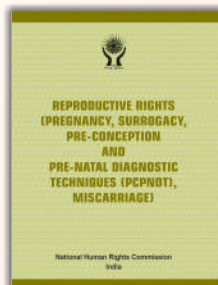
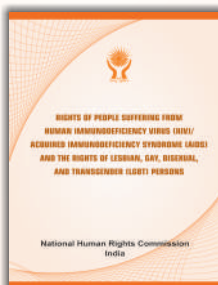
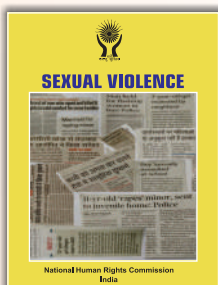
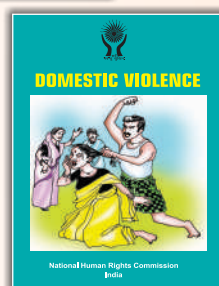
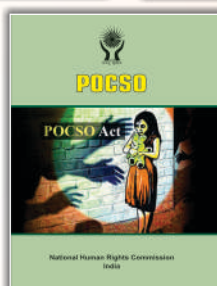
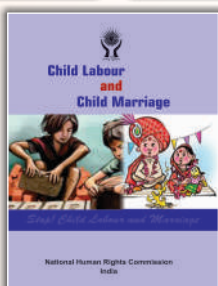
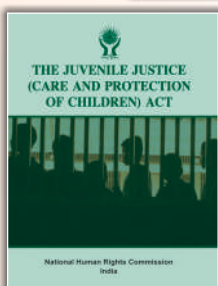
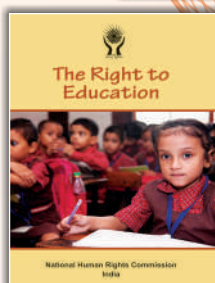
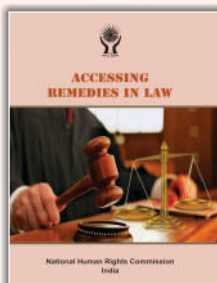
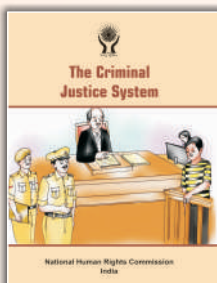
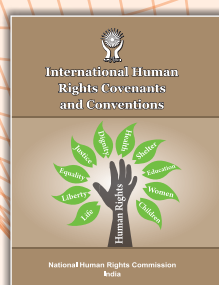
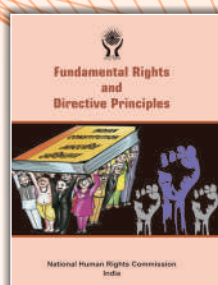
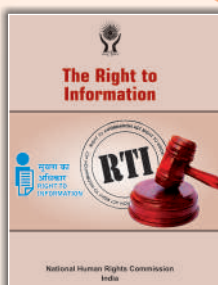
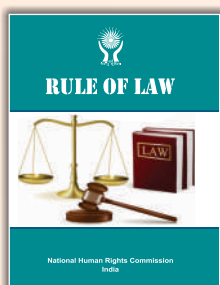
The Parliament of India represents all public opinion at the national level

STATE LAWS FOR THE WELFARE OF TRANSGENDER PEOPLE

- ❖ The States of Tamil Nadu and Kerala were the first Indian states to introduce a transgender welfare policy. According to the policy, transgender people can access free sex reassignment surgery (SRS) in government hospitals (only for male-to-female), free housing program; various citizenship documents, admission in government colleges with full scholarship for higher studies, alternative sources of livelihood through formation of self-help groups (for savings) and initiating income-generation programmes (IGP). Tamil Nadu was also the first state to form a transgender welfare board with representatives from the transgender community. Kerala started providing free surgery in government hospitals in 2016.
- ❖ In July, 2016, the state of Odisha enacted welfare benefits for transgender people, giving them the same benefits as those living below the povertyline.
- ❖ The states of Tamil Nadu, Gujarat, Uttar Pradesh and Maharashtra have Transgender Welfare Board. In August, 2017 Chandigarh became the first union Territory to have a Transgender Welfare Board.
- ❖ In April, 2017, the Ministry of Drinking Water and Sanitation instructed states to allow transgender people to use the public toilets of theirchoice.
- ❖ In October, 2017, the Karnataka Government issued the "State Policy for Transgenders, 2017", with the aim of raising awareness of transgender people within all educational institutions in the state. Educational institutions will address issues of violence, abuse and discrimination against transgender people. It also established a monitoring committee designed with investigating reports of discrimination.
- ❖ On 28 November, 2017, N. Chandrababu Naidu, the Chief Minister of Andhra Pradesh, announced the enactment of pension plans for transgender people. On 16 December, 2017, the Andhra Cabinet passed the policy. According to the policy, the State Government will provide an amount of 1,500 per month to each transgender person above the age of 18 for social security pensions. In addition, the Government will construct special toilets in public places, like malls and cinema halls, for transgender people.

- ❖ The Uttarakhand High Court directed the state Government in late September 2018 to provide reservation for transgender people in educational institutions. The court also asked the Government to frame social welfare programmes for the betterment of transgender people.
- ❖ In February 2019, the Maharashtra Government set up a "Transgender Welfare Board" to conduct health programmes and provide formal education and employment opportunities to transgender people. The board provides skill development programmes to help transgender people find a job and free accommodation for those seeking scholarships. A similar board was also set up in the neighboring state of Gujarat that same month. The Gujarat board provides various welfare programmes for employment and education, and coordinates with state departments to ensure that the transgender community is able to take advantage of government schemes. An educational campaign was also established in order to sensitize the public.

Looking back at it, our Constitution has come a long way from treating homosexuality as a crime to making provisions for making lives of the LGBTs easier, but there is a lot more that needs to be done. There are many issues facing the LGBT community, which need to be addressed so that they can live their lives to the fullest.



सर्वे
भवन्तु सुखिनः

NATIONAL HUMAN RIGHTS COMMISSION

Manav Adhikar Bhawan, C-Block, GPO Complex
INA, New Delhi - 110 023

Email : covdnhrc@nic.in Website : www.nhrc.nic.in