

Queering the



Making Indian Laws LGBT+ Inclusive

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Errors, if any, in the Report, are the authors' alone.

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Note

The Vidhi Centre for Legal Policy ('Vidhi') organised two consultations with some members of the LGBT+ community and persons working on gender and sexuality rights issues on all four chapters of this report namely: Identity, Violence, Family and Employment. The consultations took place on the 13th of April, 2019 on the chapters "Identity" and "Violence" and the 25th of May, 2019 on the chapters "Family" and "Employment" at Vidhi's office in New Delhi.

Draft version of these chapter was shared with the attendees and an open-ended discussion was carried out on the basis of the same. The discussions and issues raised at the consultation are reflected in the sections on "Issues for consideration" and the "Summary of Consultation" of each chapter. Further, they have been incorporated into the main text of the chapters where possible.

We would like to thank everyone who attended the consultations for taking out the time to read the draft reports, sharing their valuable insights and raising critical issues that require consideration for LGBT+ inclusion in our laws. We would also like to emphasise the importance of reading this report in light of the issues discussed at the same.



Queering the Law

Law: Making Indian Laws LGBT+ Inclusive

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Background Note

The Supreme Court of India ('Supreme Court') in its landmark judgment *National Legal Services Authority of India vs. Union Of India*¹ ('NALSA') recognised fundamental rights of transgender persons arising out of Article 14 ('right to equality'), Article 15 ('prohibition of discrimination'), Article 16 ('equality of opportunity in public appointment'), Article 19 (right to freedom of speech and expression) and Article 21 ('right to life with dignity') of the Constitution of India². This was followed by its judgment in *Navtej Johar vs. Union of India*³ ('Navtej Johar') which decriminalised consensual sexual relationships between adults of the same gender by reading down section 377 of the Indian Penal Code, 1860 ('IPC')⁴. With this judgment, the Supreme Court has affirmed and widened the scope of LGBT+ rights in India. While *Navtej Johar* is a relatively new judgment and one still awaits legal developments on the issue of further civil rights of the LGBT+ community, it has been almost five years since NALSA was delivered. The most important legal project post-NALSA was the drafting of a law which set out the precise framework for the exercise of rights by transgender persons. This exercise, which started in the year 2014 with a private member's Bill ('2018 Bill'), subsequently took the form of The Transgender Persons (Protection of Rights) Bill, 2018 ('2018 Bill') which went onto lapse in Rajya Sabha.

While the 2018 Bill suffered from major shortcomings and was heavily criticized by the transgender community⁵, it attempted to, albeit poorly, establish an anti-discrimination framework and extend welfare benefits to transgender persons. Further, unlike the 2014 Bill which provided for reservation for transgender persons in public

education and employment, it was completely silent on reservations. As the 2018 Bill has lapsed, one awaits the form a new bill may take in the future. It is hoped that such a Bill is based on sound data and research, compliant with the NALSA judgement and is drafted in consultation with the community. Further, while a legislation is an essential first step towards protecting the rights of transgender persons, access to justice will continue to be a challenge for them as long as the normative content of laws continues to be influenced by the binary assumption i.e. the belief that gender includes only male and female, or the presumption that everyone is a cisgender person i.e. their gender identity is the same as their sex and consequently gender assigned at birth. Similarly, while decriminalisation is an essential first step towards ensuring LGBT+ equality, access to core civil institutions continues to be a distant dream for the community at large. For instance, while marriages between transgender persons, and transgender and cisgender persons, are being registered under the Special Marriage Act, 1954⁶, the law only recognises persons of opposite genders in a romantic monogamous unit as the legitimate unit worthy of protection. At present, family laws (such as marriage, adoption, succession etc.), continue to recognise only male and female persons and do not permit same gender unions. Further, laws punishing sexual offences (such as section 375 & 376 of the IPC) continue to be gendered (i.e. recognising only the cisgender woman as the victim of sexual violence) thus leaving out multiple identities from their scope of protection. The implication of this was witnessed in 2017 when a lower court in Pune granted bail to four persons accused of raping a transgender person on the ground that sections 376 and 377 of the IPC

1. NALSA, Writ Petition (Civil) No.400 of 2012.

2. Ibid.

3. *Navtej Johar*, WP (CrI.) No.76/2016.

4. The Supreme Court in *Navtej Johar* struck down section 377 to the extent that it criminalised consensual sexual intercourse between adult individuals of the same gender. Section 377 can still be used in cases of rape and bestiality.

5. Shreya Ila Anasuya, 'Why the Transgender Community is Angry Over a Bill Meant to Protect Their Rights', *The Wire*, available at <https://thewire.in/lgbtqia/why-the-transgender-community-is-angry-over-a-bill-meant-to-protect-their-rights> (Last accessed on February 11, 2019); PUDR, 'Statement opposing draconian transgender bill', available at <http://sanhati.com/articles/19029/> (Last accessed on January 14, 2019).

used the terms man and woman, and thus did not entitle a transgender person from seeking relief under them⁷. Such laws thus operate as a barrier to justice for LGBT+ persons since they prevent them from effectively accessing the criminal justice system as well as core civil institutions. Further, in the absence of legal clarity on the issue of the status of rights and liabilities of persons post a change in gender identity, the rights of transgender persons (specifically once they self identify as a transgender person or the gender other than the one assigned at birth) continue to remain unclear.

The limitations of existing laws has been recognised by the Supreme Court in Navtej Johar as well as NALSA. In the former, the Supreme Court declared that LGBT+ persons have a constitutional right to equal citizenship in all its manifestations⁸. It went on to state that laws which deprive LGBT+ persons of their entitlement to full and equal citizenship will fall foul of the Constitution and emphasised the supremacy of constitutional morality over tradition and culture⁹. Similarly, NALSA spoke about the need to make civil rights meaningfully accessible to transgender persons¹⁰. It observed the limitations of a legal system which recognises only the paradigm of the binary genders of male and female¹¹, and indirectly noted the conflict between the rights guaranteed by the trinity of Articles 14, 19 and 21 and such a binary legal system¹². The Standing Committee of the Ministry of Social Justice and

Empowerment has also made this point, albeit in a more limited fashion, in its report on the 2016 Bill¹³.

In light of the above, there is a need to reimagine our legal regime for the purpose of LGBT+ inclusion. The first step in this process involves carrying out an identification exercise wherein laws which continue to operate on the binary of male and female, and laws which are patently discriminatory towards LGBT+ persons are identified. We focus on four areas of law for this purpose: a) Identity, b) Violence, c) Family, and d) Employment. Each area of law will be analysed in detail in a separate chapter, and the need to reform them will be contextualised in the background of the discourse on inclusion of LGBT+ persons in the legal regime, and the debates that exist on these issues generally. In each chapter, we make a brief reference to how countries around the world have addressed similar challenges. However, amendments to these laws will not be recommended since we believe that law reform is a consultative process and the call for specific amendments, if necessary, must come from the LGBT+ community. However, as far as laws concerning identity are concerned amendments have been recommended to the extent that compliance with NALSA is necessary. We call this project “Queering the Law: Making Indian laws LGBT+ Inclusive” and hope it serves as a useful resource for the LGBT+ community while debating and discussing the movement towards legal inclusion.

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6. The Indian Express, ‘Kerala witnesses first transgender marriage’ available at <https://indianexpress.com/article/india/kerala-witnesses-first-transgender-marriage-5172148/>, The Indian Express, (Last accessed on February 21, 2019); The Times of India, ‘Akkai Padmashali is 1st transgender to register for marriage in Karnataka’, available at <https://timesofindia.indiatimes.com/india/akkai-padmashali-is-1st-transgender-to-register-for-marriage-in-karnataka/articleshow/62639638.cms> (Last accessed on February 12, 2019).
 7. Anupriya Chatterjee, ‘Loopholes in third gender law aid four rapists to get bail’, The Pune Mirror, available at <https://punemirror.indiatimes.com/pune/civic/loopholes-in-third-gender-law-aid-4-rapists-to-get-bail/articleshow/59960595.cms> (Last accessed on January 12, 2019); The Logical India, ‘Pune: Loopholes In Section 377 Enable Bail For Four Men Accused Of Raping Transgender Woman’, available at <https://thelogicalindian.com/news/transgender-rape-accused-gets-bailed-loopholes-of-law/> (Last accessed on January 12, 2019).
 8. Navtej Johar, pg. 270.
 9. Navtej Johar, pg. 437-38.
 10. NALSA, Para 113.
 11. NALSA, Para 49.
 12. NALSA, Para 74.
 13. Standing Committee on Social Justice and Empowerment, Ministry of Social Justice and Empowerment, ‘The Transgender Persons (Protection of Rights) Bill, 2016: Forty Third Report’, pg. 92.

Law's relationship --- with gender and sexuality

The relationship of the law with non-normative gender identities, and sexual orientations has been complicated. It is thus important to provide a brief overview of the various discourses and debates around the law and its relationship with gender and sexual identities. These insights intend to bring to light the systemic issues concerning law's attempt to regulate gender and sexual orientation, as well as to flag the limitations of this project.

A. The transgender identity and law

The transgender identity demonstrates the relational and fragmented nature of identity, and challenges the distinct separation of categories¹⁴ specifically on the basis of parameters such as sex and gender. This is a radical departure from the traditional approach of equality law i.e. wherein discrimination is prohibited on the basis of human traits that are immutable i.e. traits that were not chosen¹⁵. Simply put, the language of rights, including the right to equality, presumes that the subject of rights has certain immutable characteristics and it is wrong to discriminate on the basis of the characteristics that one was born into and by implication cannot be altered. This line of reasoning has also been intrinsic to the gay rights movement where the negotiation for equal rights was rooted in the premise of sexuality not being a choice. However, this presumption of immutability is challenged by various strands of the transgender rights movement which argues for the recognition of fluidity, as opposed to immutability, when it comes to one's gender identity and gender expression. With the increasing recognition of the role that social construction theory, as illustrated by the case of the transgender identity (i.e. the recognition that gender is a social construct), plays in determining people's identities, it is time for equality law and rights discourse to re-negotiate its relationship with the politics of identity.

Scholarship speaks of the transgender identity as broadly encompassing those individuals who do not identify with the sex (and consequently gender)

assigned to them at birth¹⁶. However, the transgender community is difficult to capture in a single definition given that a transgender person could identify 'anyhow' other than the sex and consequently gender assigned at birth: as the opposite gender, as not possessing a gender, as gender-fluid, as gender-queer, etc. In the Indian context, the term transgender has also been understood as incorporating multiple cultural identities that do not fit into the strictly defined identities of male or female. Similarly, persons with intersex variations whose genitalia do not fit into the neat boundaries of either sex male or sex female¹⁷, challenge the sexed foundations of the society as well¹⁸. In a culture where discrete and binary gender divisions are essential and based on "objective" biological attributes of genitalia, bodies that threaten such divisions threaten the whole system upon which such binary gender rests¹⁹. However, despite the biological, behavioural and psychological diversity of identities, distinct separation on the basis of sex and gender continues to be enforced by the law - a body of knowledge whose normative basis is deeply entrenched in the binary gender/sex model. The law, as a consequence has invisibilised all those identities and bodies that do not fit into the strict categories of strictly male or strictly female, and privileges those who do²⁰.

In the Indian context, NALSA is precisely radical for this reason. By recognising that genders exists outside of the binary, the judgment not only visibilises these identities but also operates as a tool of subversion by challenging the cisgender and binary foundations

14. Graham Mayeda, 'Reimagining Feminist Legal Theory: Transgender Identity, Feminism and the Law', *Canadian Journal of Women and Law*, Vol. 17 (2005).

15. Jessica A Clarke, 'Against Immutability', *The Yale Law Journal*, Vol 125 (2015).

16. Paisley Currah, 'Gender Pluralism under the Transgender Umbrella', *Transgender Rights* (University of Minnesota Press, 2006); NALSA, Para 11.

17. *Ibid.*

18. Ana Lúcia Santos, 'Beyond Binarism? Intersex as an Epistemological and Political Challenge', *Revista Crítica de Ciências Sociais*, Vol. 6 (2014).

19. Erin Lloyd, 'Intersex Education, Advocacy & the Law: The Struggle for Recognition and Protection', *Cardozo Women's Law Journal*, Vol. 11 (2005).

20. Dorian Needham, 'A Categorical Imperative: Questioning the Need for Sexual Classification in Quebec', *Les Cahiers de Droit*, Vol. 52 (2011).

of the legal system. Further, by recognising the right to one's chosen gender identity independent of any medical intervention²¹, the Supreme Court departs from regressive legal practice of requiring medical certification for proof of gender. Despite this, NALSA struggles with defining who a "transgender person" is, showcasing the tense relationship between the law and the politics of gender identities. The Supreme Court runs through a range of identities including: individuals whose gender does not conform with the sex assigned at birth²², those who identify as neither male or female²³, the various cultural identities in India such as *kothis*, *arvanis*, *jogtas*, etc.²⁴ At the end, as evident in the operational part of the judgment, specifically Direction 1, the Supreme Court reduces the transgender identity to the most visible non-normative gender identity in India i.e. the hijra identity²⁵. Further, the judgment only makes a passing reference to transgender men²⁶, thereby relegating them to the background. At the Consultation, it was stated that despite the NALSA judgment, gender continues to be treated as a legal category and not a constitutional category. This is not the case with sex which was and continues to be treated as a constitutional category. Thus while the categories of male and female are viewed through the lens of sex, it is only the category of transgender that is viewed through the lens of gender. As a consequence, "transgender" is the first gender (unlike male and female which are still considered categories of sex) as opposed to the third gender

Given the diversity of gender identities and expressions that fall within the ambit of "transgender", countries around the world that recognise the rights of transgender persons, instead of treating "transgender" as a protected category, recognise the right to "gender identity" and "gender expression"²⁷. This avoids the risk of the law being under-inclusive, and in addition to protecting an identity, also protects gender-based expression - which may or may not be linked to one's

gender identity. However, in India, the approach towards transgender rights has been different. The 2016 Bill explicitly defined the category of "transgender" and guaranteed certain rights to such category of persons. While the 2016 Bill conflated the transgender identity with persons with intersex variations²⁸, an issue that led to outrage among transgender persons, the 2018 Bill amended the definition and broadly defined transgender persons as persons whose gender does not match with the gender assigned to them at birth²⁹. However, it continued to bring persons with intersex variations within the scope of the definition of transgender³⁰.

India's distinct approach towards protecting transgender rights possibly stems from the fact that NALSA directs transgender persons to be treated as "Other Backward Classes" and guaranteed positive rights in the form of reservations in matters of public employment and education³¹. To extend positive rights, in the form of reservations, to a class of persons, it is important to first clarify which persons fall within such class, thus requiring such class to be defined. This has been the approach of the 2016 Bill (as well as the 2018 Bill) where instead of protecting gender identity and gender expression, the Bill has defined the category of "transgender". However, while both the 2016 and 2018 Bills imposed an obligation on the State to extend welfare benefits to transgender persons³², they continued to be silent on the issue of reservations. Further, though judgments post NALSA have directed governments to grant reservations to transgender persons³³, this issue is yet to be resolved at a policy level and reflected in legislation. It was recommended at the Consultation that given the intersecting nature of identities, particularly gender and caste, horizontal reservations cutting across vertical categories of caste may be considered for transgender persons. It is yet to be seen whether a future Bill on transgender rights will address the various shortcomings of the 2018 Bill and finally break the silence on reservations

21. NALSA, Para 129(2) read with Para 20.

22. NALSA, Para 11.

23. Ibid.

24. NALSA, Para 44.

25. NALSA, Para 129(1).

26. NALSA, Para 46.

27. Paisley Currah, 'Gender Pluralism under the Transgender Umbrella', *Transgender Rights* (University of Minnesota Press, 2006); See Malta's Gender Expression, Gender Identity, and Sex Characteristic Act, 2015; Argentina's Gender Identity Law, 2012; Australia's Sex Discrimination Act, 1984 as amended by Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act, 2013.

28. Clause 2(i), 2016 Bill.

29. 2018 Bill.

30. 2018 Bill.

31. NALSA, Direction 3.

32. Clause 9, 2016 Bill.

33. See, S. Tharika Banu vs. The Secretary to Government, Health and Family Welfare Department and Ors. (W.P.No.26628 of 2017 and W.M.P.Nos.28349 and 28350 of 2017), Swati Bidhan Baruah vs. The State of Assam and Ors. (PIL 15/2017).

B. Persons with intersex variations and the law

Another major shortcoming of the law lies in its conflation of persons with intersex variations³⁴ with transgender persons, and the consequent invisibilisation of persons with intersex variations⁵. Such conflation was first witnessed in the NALSA judgment³⁶ and subsequently in the 2016 Bill as well as the 2018 Bill. While at a fundamental level, both the intersex and transgender rights movements share a common goal in eliminating harmful practices based on sex and gender stereotypes³⁷, issues faced by the two communities are largely distinct and separate. For starters, persons with intersex variations may not identify as transgender persons. Instead one of the primary concerns of the intersex community lies in the pathologisation of their bodies, and their consequent otherisation. Such pathologisation starts at infancy when persons with intersex variations are subject to surgery³⁸ such that their bodies can be coerced into one of the two recognised sex categories i.e. male or female. Such surgeries are

generally not medically necessary, and may end up destroying reproductive capacities, sexual functions and pleasure, as well as eliminating options for the expression of gender and sexual identity³⁹. When performed without informed consent, such surgeries amount to discrimination based on a failure to live up to the stereotypes associated with male and female genitalia⁴⁰. In India, there is no law which prohibits the practice of such surgeries at birth⁴¹. Further, while the category of “sex” in Article 14 and 15 can be argued to also include “intersex” there is no direct judicial pronouncement recognising intersex status as falling within the category of sex, and courts continue to often conflate persons with intersex variations with transgender persons, thus creating a messy and deeply problematic legal jurisprudence⁴². While legislating and judicially pronouncing on transgender rights and intersex rights, the government and the judiciary must keep in mind the above concerns.

34. “Intersex people are born with sex characteristics (including genitals, gonads and chromosome patterns) that do not fit typical binary notions of male or female bodies. Intersex is an umbrella term used to describe a wide range of natural bodily variations.” Solidarity Foundation, ‘What if it is Neither?’, available at http://www.vartagensex.org/download.php?name=admin/document/_1540443194000-slf-intersex-issues-sem-report-23oct17.pdf (Last accessed on February 19, 2019).

35. Ibid.

36. NALSA, para 107.

37. Julie A Greenberg, ‘Intersexuality and the Law’, New York University Press, 2012, pg. 4.

38. The presumption that sex is dimorphic i.e. either male or female has been disputed by scientific studies which have gone on to indicate that sex exists on a spectrum. Thus, the performance of surgeries on intersex infants, specifically without their informed consent, constitutes a violation of their bodily autonomy and integrity, and is based on the outdated presumption that intersex bodies are “abnormal”. (Human Rights Watch and InterAct, ‘I Want to be Like Nature Made Me’, available at https://www.hrw.org/sites/default/files/report_pdf/lgbtintersex0717_web_0.pdf (Last accessed on November 9, 2018)).

39. Supra note 14 and 36.

40. Ibid.

41. Malta is the first country which has outlawed surgery on intersex infants via the Gender Expression, Gender Identity, and Sex Characteristic Act, 2015. Similarly, California via its Senate Concurrent Resolution No. 110 has formally condemned surgery on intersex infants.

42. The conflation of persons with intersex variation and the transgender identity is reflected in several judgments including NALSA, Nangai vs. Superintendent of Police (W.P.No.587 of 2014) and G. Nagalakshmi vs. Director General of Police (W.P.No.38029 of 2015).

C. Sexual Orientation and the Law

In academic writing sexual orientation has been defined as the “relationship the sex of the object(s) of one’s sexual desire bears to one’s own sex, i.e., whether the object(s) of one’s desire are of the same or of a different sex than oneself.”⁴³ Thus, sexual orientation is always understood as relational i.e. it requires consideration of the sex of the person in question and the sex of the person to whom such person is attracted to. Therefore while gender, sex⁴⁴, and sexual orientation may often be conflated, they are distinct conceptual categories. These connotations however occur both socially and in the law, where orientation is seen as a sexual performance of gender where gender is determined by sex. In simpler terms, both law and society often see gender as being determined by sex⁴⁵. Thus a person with so-called male genitalia is expected to conform to masculine behavioural traits. At the next level there is also a conflation between gender and sexual orientation where a person who displays masculine behavioural traits is thus expected to be attracted to a person displaying feminine behavioural traits of the opposite sex.

Orientation is an intrinsic part of one’s identity and is an incident of sexual attraction. Law’s relationship with sexual orientation has traditionally been associated with criminalisation in the form

of anti-buggery laws⁴⁶. In India, section 377 of the IPC criminalised “carnal intercourse against the order of nature” thereby criminalising all non-procreational sex between adults. While instances of prosecution under the provision were limited, it had seen widespread use as a tool of persecution⁴⁷. Further, while ostensibly the provision criminalises an “act” it had a disproportionate impact on LGBT+ individuals since their orientation does not conform with notions of heteronormative gender and sex, which are then seen as being against the “order of nature”. Section 377 thus ended up criminalising the LGBT+ identity.

In 2009 the High Court of Delhi read down section 377 to exclude consensual sexual conduct between adults of the same gender in private, by holding it as violative of Articles 14, 19 and 21 of the Constitution of India⁴⁸. This ruling was however reversed by the Supreme Court in 2013 in *Suresh Kaushal vs. Naz Foundation & Ors*⁴⁹, while observing that LGBT+ persons constituted a ‘miniscule minority’, and therefore were not deserving of constitutional protection⁵⁰. In 2018 the Supreme Court finally reversed its 2013 decision and decriminalised the LGBT+ identity by reading down Section 377 to exclude consensual intercourse between adults of the same sex/gender⁵¹. The

43. Mary Ann Case, ‘Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence’, Vol. 105 (1995), pg. 13.

44. Here sex is used in its traditional sense of male/female genitalia. Admittedly, it has been convincingly showed that “sex” itself is not immutable and is in fact socially constructed. See Judith Butler, ‘Gender Trouble: Feminism and the Subversion of Identity’, Routledge (2010).

45. Francisco Vldes, ‘Unpacking Hetero-patriarchy: Tracing the conflation of sex, gender and sexual orientation to its origins’, Yale Journal of Law and the Humanities Vol. 8(1) (1996), pg. 168.

46. Such criminalisation has been associated with the application of a Judeo-Christian conception of morality, generally see, Navtej Johar,

47. “Unnatural Offences” Obstacles to Justice in India Based on Sexual Orientation and Gender Identity, International Commission of Jurists’, available at <<https://www.icj.org/wp-content/uploads/2017/02/India-SOGI-report-Publications-Reports-Thematic-report-2017-ENG.pdf>> (Last accessed on November 8, 2018).

48. *Naz Foundation vs. Government of NCT of Delhi*, 160 Delhi Law Times 277.

49. Judgement dated 11 December 2013 in *Suresh Kumar Koushal vs. Naz Foundation and Ors.*, Civil Appeal No. 10972 of 2013.

50. *Ibid.*

51. Navtej Johar.

ruling, which marks the culmination of more than two decades of legal struggle for LGBT+ rights is landmark since it not only decriminalises same-sex/gender relations but also builds on NALSA to recognise equal moral citizenship of LGBT+ citizens.

Apart from criminalisation, law's relationship with sexual orientation becomes relevant in the context of other civil rights which were previously not available to them due to criminalisation. These include the right against discrimination, freedom from sexual assault, marriage, adoption etc. Decriminalisation is therefore an entry point into a host of other civil rights which are ordinarily enjoyed by heterosexual persons and cisgender persons. Moreover, the heteronormative assumptions of various laws that are based on only the heterosexual orientation can be questioned through the recognition of different sexual orientations and gender identities. While equal access to all civil institutions has been viewed as the logical way forward for the LGBT+ movement, critics have pointed out that such a strategy assumes that mimicking heterosexual lives is the only legitimate means to ensure LGBT+ equality⁵². Such assimilation has been viewed as problematic not only because heterosexual norms of family continue to be deeply patriarchal⁵³, but also come at the cost of delegitimising all other forms of

intimacy besides the monogamous romantic couple. This tension between the alternative narratives of LGBT+ equality and the law's idea of equality will continue to persist as long as the law continues to treat the existing monogamous sexual unit and the family as being the only form of intimacy worthy of legal recognition and protection.

52. Ratna Kapur, 'There's a problem with the LGBT rights movement - it's limiting freedom', *The Conversation* (17 September 2018) available at <<http://theconversation.com/theres-a-problem-with-the-lgbt-rights-movement-its-limiting-freedom-101999>>(Last accessed on 10 November 2018).

53. For further information, see the Chapter on "Family".

D. Gender Neutrality and the Law

While the Constitution of India recognises equality before the law⁵⁴ and the equal protection of laws, gendering of laws is the norm and in many instances is even desirable⁵⁵. Gendering of laws refers to the law covering only certain gender identities, particularly women, within its scope. For instance, the Constitution recognises and protects “any special provision for women and children” under Article 15(3). Such a provision is indicative of substantive equality based on the recognition that the guarantee of equality should be amongst equals. Substantive equality implies equality of outcomes and the equality of opportunity instead of mere equality of treatment. Since different degrees of vulnerability may be associated with identities, formal equal treatment may not result in true emancipation. Thus laws have to recognise identities, including gender identities, in order to accommodate the different vulnerabilities associated with them. The Constitution of India thus, while recognising that laws should not discriminate on the basis of sex, allows for special provisions for women and children, thereby acknowledging historical disadvantages associated with such identities as compared to cisgender men.

Gendering of laws however is not only restricted to considerations of substantive equality and in many cases the content of law may be informed by the deep-seated assumptions of the gender binary⁵⁶. Laws that operate in the binary, however automatically discriminate against identities such as transgender persons, who exist outside this binary.

Further, laws operating in the binary may also flow from heteronormative assumptions and therefore may not account for non-heterosexual orientations. For instance, laws operating in the binary may assume that only men and women can have a sexual relationship thereby erasing sexual attraction/ experiences that may fall outside the binary. Navtej Johar and NALSA’s recognition of the rights of LGBT+ persons brings questions of discrimination through the operation of gendered laws to the fore since it recognises gender identities besides male and female and sexual orientations besides heterosexuality.

In this context, ‘gender neutrality’ or the neutral treatment of all genders in laws becomes an intuitive response. However, the operation of gender neutrality is far more complex in practice than it appears in theory. In India, while debates regarding gender neutrality have largely centered around criminal law, laws governing inheritance, employment and marriage continue to treat males and females differently, and do not recognise genders outside the binary. While non-discriminatory treatment against identities existing outside the binary has become an imperative post NALSA, conceptually on the basis of the same principles, the legal treatment of the binary in the law itself may merit re-examination. We discuss these issues in detail in our chapters on “Violence” and “Family”.

54. Gendering of laws is distinct from the gendered drafting of laws since the former comprises situations where law covers only a particular gender identity within its scope. For instance, rape laws recognise only (cis) women as victims of the offence. Gendered drafting of laws on the other hand are a form of drafting where all nouns and pronouns used in the drafting of laws are male, thus presuming that the norm of humanity is male.

55. Gendering of laws is desirable since the recognition of particular gender identities such as female is necessary to make special provisions in the law. Neutral application of law that is agnostic to identities may actually result in discriminatory outcomes since such neutral laws may not account for the vulnerabilities associated with identities.

56. For further information, see Chapter on “Identity”.

Scope and Methodology

This report evaluates laws in four broad categories: a) Identity, b) Violence, c) Family, and d) Employment. These categories are based on our manual, *The Law Isn't Straight: A Queer Person's Guide to Accessing Rights*, which was aimed at providing practical guidance to LGBT persons in accessing rights in a legal regime that continues to be LGBT exclusionary. The categories in the manual were finalised after consultations with LGBT persons, allies and lawyers, and continue to be reflected in this project.

We further undertook an analysis of twenty one judicial decisions of the higher judiciary⁵⁷ since NALSA and Navtej Johar between 2014 and 2019⁵⁸ (see, Annexure A), which dealt with the rights of transgender persons and non-heterosexual persons in order to determine areas of contestation where the courts have been asked to implement their rights as recognised in NALSA and Navtej Johar. We analysed whether the cases fell into the four categories that had been identified by us in our manual and to what extent issues relating to the rights of transgender persons and non-heterosexual persons were being litigated before the higher judiciary.

The twenty-one decided cases we came across span nine High Courts across India with a large number of them brought by transgender persons themselves. A majority of these cases dealt with identity documents or situations where transgender persons were trying to establish their gender identity thereby indicating that the question of the legal recognition of gender identity remains dominant. Moreover, the

question of identity remains intrinsically linked to employment and there have been several reported cases where either the litigants have been terminated from service for being a transgender person or having intersex variations, or the recruitment criteria did not provide for a gender category other than male/female. Cases of termination of employment also highlight the persisting discrimination on ground of gender identity and perceived gender identity. In one instance, the High Court was also approached to implement NALSA's directive on reservations in public educational institutions and employment. Cases relating to violence have also been reported, where apart from the invisibilisation of the transgender category in substantive law, the issue of persecution by law enforcement agencies has also been brought to judicial notice. The approach of courts has been inconsistent when it comes to issues of violence being faced by transgender persons. While in one case the Court directed that police protection be extended to a transgender person and her partner since they were being subject to harassment, in another cases with similar facts the Court refused to intervene on the ground that it was not feasible for the state to grant separate protection to every individual facing harassment. However, the High Court of Delhi in a fairly path-breaking judgment read section 354-A of the IPC ('sexual harassment') as recognising transgender women within its ambit. As far as family law is concerned, the issue of succession amongst transgender persons has also been litigated.

57. Higher judiciary includes the Supreme Court of India and the High Courts.

58. We looked up judgments/orders till February 15, 2019.



The judicial decisions broadly fell into the categories identified by our manual thereby indicating that areas of identity, violence, family and employment remain problematic from the perspective of realising rights of transgender persons. As far as non-heterosexual persons are concerned, the Supreme Court in *Navtej Johar per Chandrachud J.* has held the members of the LGBT+ community are entitled to the full range of constitutional rights, freedom to choose a partner, right to not be subjected to discriminatory behaviour and to equal citizenship⁵⁹. This implies that the content of the rights recognised in Articles 14, 15, 19 and 21 on the basis of which same-gender relations have been decriminalised is much broader and will encompass a range of civil rights. *Navtej Johar's* impact may specifically impact laws relating to violence and family since they largely operate on heteronormative assumptions. This report therefore also looks into these areas of law and analyses them post the Supreme Court's declaration in *Navtej Johar*. The one judgment we came across was the Kerala High Court's decision in *Sreeja vs. Commissioner of Police*⁶⁰ wherein the Court recognised the right of adult same gender partners to live together.

59. *Navtej Johar*, Para 156.

60. WP (CrL).No. 372 of 2018 (High Court of Kerala).

ANNEXURE 'A'

Mapping of cases on LGBT+ rights post NALSA and Navtej Johar

S No.	Case Name	Identity	Violence	Family	Employment
1	Nangai vs. Superintendent of Police ⁶¹	Applicable			Applicable
2	G. Nagalakshmi vs. Director General of Police ⁶²	Applicable			Applicable
3	T. Thanusu vs. The Secretary of Government of Tamil Nadu ⁶³	Applicable			Applicable
4	Ashish Kumar vs. Bharat Sarkar ⁶⁴	Applicable			
5	Shivani Bhat vs. State of NCT ⁶⁵		Applicable		
6	Prithika Yashini vs. Chairman, Tamil Nadu Uniformed Services Board ⁶⁶	Applicable			Applicable
7	Seety (Eunuch) vs. General Public ⁶⁷			Applicable	

61. W.P.No.587 of 2014 and M.P.Nos.1 and 2 of 2014 (High Court of Madras).

62. (2014) 7 MLJ 452 (High Court of Madras).

63. WP No. 165399 of 2014 (High Court of Madras).

64. 2015(4) ADJ 146,(High Court of Allahabad).

65. W.P.(CRL) 2133/2015 (High Court of Delhi).

66. (2015) 8 MLJ 734 (High Court of Madras).

67. AIR 2016 HP 148 (High Court of Himachal Pradesh).



8	Shivam Santosh Dewangan vs. State of Chhattisgarh ⁶⁸		Applicable		
9	Swapna vs. Government of Tamil Nadu ⁶⁹				Applicable
10	Chanchal Bhattacharyya vs. State of West Bengal ⁷⁰	Applicable			Applicable
11	Atri Kar vs. Union of India ⁷¹	Applicable			Applicable
12	K. Gowtham Subramaniam vs. Controller of Examination Anna University ⁷²	Applicable			
13	Ganga Kumari vs. State of Rajasthan and Ors. ⁷³	Applicable			Applicable
14	S. Tharika Banu vs. The Secretary to Government, Health and Family Welfare Department and Ors. ⁷⁴				Applicable

68. MCRC No. 1804 of 2016(High Court of Chhattisgarh).

69. 2016 SCC OnLine Mad 15973 (High Court of Madras)

70. 2016 SCC OnLine Cal 2124 (High Court of Calcutta)

71. 2017 SCC OnLine Cal 3196 (High Court of Calcutta)

72. W.P. No. 7536 of 2017 (High Court of Madras)

73. S.B. Civil Writ Petition No. 14006/2016 (High Court of Rajasthan).

74. W.P. No. 26628 of 2017, W.M.P. Nos. 28349 and 28350 of 2017 (High Court of Madras).

15	Swati Bidhan Baruah vs. The State of Assam and Ors. ⁷⁵	Applicable			
16	Tessy James vs The Director General of Police, Thiruvananthapuram and Ors ⁷⁶	Applicable			
17	Sreeja vs. Commissioner of Police ⁷⁷		Applicable		
18	Sangeeta Hijra vs. State of Bihar ⁷⁸	Applicable			
19	Mansur Rahman vs. Inspector ⁷⁹		Applicable		
20	Anamika vs. Union of India & Ors. ⁸⁰		Applicable		
21	Gulfam Malik & Anr. vs. State of UP & Ors. ⁸¹		Applicable		

75. PIL 15/2017 (High Court of Gauhati).

76. WP(Crl.) No. 215 of 2018 (High Court of Kerala).

77. WP(Crl.).No. 372 of 2018 (High Court of Kerala).

78. Civil Writ Jurisdiction Case No. 8164 of 2017 (High Court of Patna).

79. Cr. OP. No. 25269 of 2018 (High Court of Madras).

80. W.P (CRL) 2537/2018 (High Court of Delhi).

81. Writ C No. – 32683 of 2018 (High Court of Allahabad).

Queering the



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