

## Socio-Legal Rights Of Transgender- A Matter Of Great Concern In Present Era

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Received: 31 August 2023, Accepted: 01 Sep 2023, Published with Peer Reviewed online: 03 Sep 2023

### Abstract

This Paper Is An Attempt To Analyse The Socio-Legal Position Of The Transgenders And Their Identity. According To Census 2011, There Are 4.8 Million Transgender Population Is Living In India. The Transgender Population Is A Marginalised Group Of Society And Has Created Their Own Way Of Developing Their Community. Transgender Persons Are People Whose Identities Are Distinct From The Stereotypical Gender Norms, Which Identity Genders Only As Male Or Female. Gender Identity Is Well Within A Person's Rights. In National Legal Services Authority V. Union Of India Supreme Court Has Declared The Right Of Every Indian Citizen To Choose Their Gender Identity Anyway Of Gender Affirmation Surgery. On **15 April 2014**, The Supreme Court Of India Declared Transgender People A Socially And Economically Suppressed Class Entitled To Reservations In Education And Jobs, Also Directed Union And State Governments To Frame Welfare Schemes For Them.

**The Transgender Persons (Protection Of Rights) Act 2019** With Aim To Provide For Protection Of Rights Of Transgender Persons And Their Welfare And Other Related Matters. Transgender People In India Face A Variety Of Problems Like, Employment, Health Care, Education, Housing, Welfare Measures And Violation Of Human Rights. In This Paper, The Author Main Objective Has Been To Throw Light On The Status Of Transgender In India. For This, Existing Laws And Their Social Backgrounds Are Analysed. The Author Philosophically Figure Outs The Socio Legal Rights Of Third Gender In India By Resorting To Analytical, Comparative And Critical Methods. Towards This Several Social Practices, Laws, Judgements And Related Documents Have Been Referred To.

**Keywords-** Transgender, Identity Of The Gender, LGBT Group, Gender Discrimination.

### Introduction

Transgender persons are people whose identities are distinct from the stereotypical gender norms, which identify genders only as male or female. Gender identity is well within a person's rights. In National Legal services Authority V. Union of India Supreme court has declared the right of every Indian citizen to choose their identity anyway of gender affirmation surgery.<sup>1</sup>

According to oxford dictionary-Describes a person whose lifestyle appears to conflict with the gender norms of a society or culture. Such a person might express a different gender in their clothing or in how they present themselves. Transgender people are born with male or female anatomies but they feel different from their body structure as their gender expression, identity or behaviour differs from their birth sex. Transgender people have long been a part of Indian culture. Transgender people have been mentioned in Indian mythology, according to Mahabharata Shikhandi was a famous transgender. Who was responsible for the death of Bhishma Pitamah. The Lord Shiva (Ardhanarishvara) and Mohini (female avatar of Vishnu and Krishna) are also mentioned in this group. Transgender is also mentioned extensively in mediaeval history. It is mentioned in Mughal history that transgender women were used to serve the Begums of Mughal rulers.

Lots of misconception about the term “transgender” is not a term limited to persons whose genitals are intermixed but it is a blanket term of people whose gender expression, identity or behaviour changes from the socially expected from their birth sex. People often confuse gender identity with sexual orientation. But being transgender is not the same thing as being lesbian, gay, or bisexual. Gender identity, whether transgender or cisgender, is about who you are inside as male, female, both, or none of these. Lots of categories are including this group like- **transgender male, transgender female, male to female (MTF) and Female to male (FTM)**<sup>1,2</sup>

The common transgenders identities are **Hijras, Aravanis, Kothis, Jogtas/jogappas, Shiv sakthis**. In the past, they have received great respect. "Hijra" is a Persian word translated as eunuch and is used as the common language of the transgender community in India. Castration mode. Kothi is used to play female roles in same-sex relationships, but not people who live in communes like Aravanis. Jogtas / Jogappas found in Maharashtra and Karnataka is male to female transgender people who are dedicated to serving specific gods. Shiv Shakti's found in Andhra Pradesh is a man who thinks he is married to a god, especially Shiva. They usually work as psychotherapists or astrologers<sup>3</sup>

Still, the total population of transgender people was estimated at around 4.8 million (Census of India, 2011). The top five states with highest number of TG/Hijras were Maharashtra (10057), Uttar Pradesh (8001), Odisha (7854), West Bengal (6788) and Andhra Pradesh (5401). Together, these five states comprised of a total of 38101 TGs/Hijras across the 17 states - 61% of the estimated total TG population.

**Problems faced by transgender people:** Transgenders face a lot of issues in this country including physical abuse, mental abuse, verbal abuse, not giving them the equal rights as other genders. This community faces tremendous discrimination and the differences are in education, employment, justice, media and entertainment, politics, business opportunities, religion, and medical care. Gender Dysphoria: Gender dysphoria is a term that psychologists and doctors use to describe the distress, unhappiness, and anxiety that transgender people may feel about the mismatch between their bodies and their gender identity. A person may be formally diagnosed with gender dysphoria to receive medical treatment to help them transition. Psychologists used to call this gender identity disorder.<sup>3</sup> Hijras migrate from smaller towns to a larger metropolis in search of their identity and to escape from their families. They are forced to leave the house resulting in expulsion from property rights and other family entitlements. In the absence of family support, many hijras join the hijra community for security. Hijras perform rituals like childbirth and marriages. People believe that hijras have the power to bless or curse because of their religious-cultural background.

Transgenders have no access to bathrooms/toilets and public spaces. The lack of access to bathrooms and public spaces access is illustrative of discrimination faced by transgenders in availing each facility and amenities. They face similar problems in prisons, hospitals, and schools. In some cases, when children dare to reveal transgender to their peers and family members, they face so much emotional and mental trauma due to stereotypes, that they eventually decide to abandon go to school or college to avoid stress. Not only socio-economic problems, but hijras also face problems in exercising their citizenship rights. Though hijras have contested and have had won local, state, and national elections and were Mayors and MLAs, in the absence of a national policy, they do not enjoy basic fundamental rights<sup>9</sup>

Kamla Jaan was elected as the first mayor of Katni, Madhya Pradesh. She resumed her position in the year 2000 but gave up in the year 2003. The reason was that the political opposition filed a petition

at a lower court, and then later at the Jabalpur High Court stating that Kamla Jaan had lied about her gender. Some basic rights denied to hijras include ration (family) card, right to vote, right to marriage, child adoption, opening a bank account, and many other fundamental (transgender) rights. Some of the legal issues faced by transgenders in India such as legal recognition of their gender identity (difficulty in getting legal recognition as a woman or a transgender woman), inheritance, wills and trusts, immigration status, employment discrimination, and access to public and private health benefits.

**Recognition as third gender-** To protect their rights and to solve their problems, The Constitution of Indian has provided them with their own rights and The Supreme Court has given them the right to be recognized as “Third Gender” and provided them with some welfare measures. The judgement of **National Legal Services Authority vs. Union of India** is considered to be the landmark judgement for the transgender community. This case was a Supreme Court landmark judgment which was passed on 15th April 2014. This case was benched by Justice K.S. Radhakrishnan and Justice A.K. Sikri. The Judgment passed by them stated that transgender must be considered as the 3rd gender and the rights given under the Indian Constitution is equally applicable to them also. And the judgment also provided the transgender community the right to self-identification (male, female, 3rd gender)<sup>2&10</sup>

The suffering of transgender community is long and they are being tortured and humiliated. On 15 April 2014, the Supreme court of India declared transgender people a socially and economically suppressed class entitled to reservation in education and jobs and directed union and state governments to frame welfare schemes for them.

Analysis of the laws- The preamble to the constitution mandates every citizen Justice: – social, economic, political equality of status. The court provides the transgender with equal rights and protection under the Article 14, 15, 16 and 21. The court stressed out on the importance of right to dignity and gave due recognition to their gender identity which was based upon reassigned sex after undergoing Sex Reassignment Surgery as the person has a constitutional right to get recognized as a male or female. Thus, the transgender was entitled to legal protection of law in all the spheres of state activity including the education and employment.

The rule of law is supreme and everyone is equal in the eyes of law in India.

Yet, the transgender community is in a constant battle as they have to fight oppression, abuse and discrimination from every part of the society, whether it's their own family and friends or society at large. The life of transgender people is a daily battle as there is no acceptance anywhere and they are ostracized from the society and also ridiculed.

**Article 14, 15 and 16** provides right to equality and **Article 21** which provides right to freedom for each and every Indian citizen but transgender person where deprived from their basic right to freedom and equality. Article 15 which deals with the prohibition of discrimination on the ground of religion, race, caste and sex includes the third gender under its ambit as being the citizens they have the right to not to be discriminated on the ground of their religion, caste race and sex

The most important case regarding the recognition of the **Third Gender is NALSA case**. Transgenders are also entitled to enjoy economic, social, cultural and political rights without discrimination because forms of discrimination on the ground of gender are violative of fundamental freedoms and human rights. It was also held in this judgment that values such as privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community. The right to identify transgenders as a third gender comes under Article 21<sup>3</sup>

Transgenders have been clearly accepted as a legal entity in Transgender Persons Bill, 2016 whose preamble clearly states- “A bill to provide for protection of transgender persons and their welfare and for matters concerned therewith and incidental thereto”.

Transgender Persons (Protection of Rights) Bill, 2016, which was initially introduced to Parliament in August 2016, was re-introduced to Parliament in late 2017. Some transgender activists have opposed the bill because it does not address issues such as marriage, adoption and divorce for transgender people. Akkai Padma Shali criticised the bill's definition of transgenderism, which states that transgender people are "based on the underlying assumption of biological determinism". The bill passed the Lok Sabha on 17 December 2018 with 27 amendments, including a controversial clause prohibiting transgender people from begging. The bill was sent to a parliamentary committee, but lapsed with the dissolution of the 16th Lok Sabha.

A government bill, the *Transgender Persons (Protection of Rights) Bill, 2019*, was reintroduced to Parliament after the 2019 general election. The bill was approved on 10 July by the Cabinet of India. The bill defines transgender persons as those "whose gender does not match the gender assigned to that person at birth and includes trans-men or trans-women, persons with intersex variations, gender-queers, and persons having socio-cultural identities such as kinnar, hijras, aravani and jogta". A person would have the right to choose to be identified as male, female or "transgender". However, transgender people are required to go to a district magistrate to have their gender identity certified, and require proof of sex reassignment surgery. The bill prohibits the 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.<sup>4</sup>

**Navtej Singh Johar & Others. v. Union of India through Secretary Ministry of Law and Justice** (2018) is a landmark decision of the Supreme Court of India that decriminalised all consensual sex among adults, including homosexual sex.

The court was asked to determine the constitutionality of Section 377 of the Indian Penal Code, a colonial-era law which, among other things, criminalised homosexual acts as an "unnatural offence". While the statute criminalises all anal sex and oral sex, including between opposite-sex couples, it largely affected same-sex relationships. On 6 September 2018, the court unanimously declared the law unconstitutional "in so far as it criminalises consensual sexual conduct between adults of the same sex". The verdict was hailed as a landmark decision for LGBT rights in India, with campaigners waiting outside the court cheering after the verdict was pronounced.<sup>5</sup>

Elements of Section 377 relating to sex with minors, non-consensual sexual acts such as rape, and bestiality remain in force.

On 25 November 2022, the Supreme Court of India agreed to hear the case that could legalize same-sex marriage as the nine petitions pending before the Kerala and Delhi High Courts are transferred to the Supreme Court for a uniform ruling.

On 1 April 2023, Mahmood Asad Madani representing the Islamic organisation Jamiat Ulema-e-Hind sought to intervene as an opponent to legalizing same-sex marriage in India. Several other Islamic organisations including Jamaat-e-Islami Hind, All India Muslim Personal Law Board, and Telangana Markazi Shia Ulema Council also voiced their opposition to legalizing same-sex marriage.

Oral arguments began on 18 April 2023. During the hearings, Solicitor General Tushar Mehta, who's representing the government noted that five individuals should not decide for the entire nation and issues related to human relationships, such as marriage should be addressed by parliament. The Chief Justice Dhananjaya Yashwant Chandrachud responded: "There is no absolute concept of a man or a woman at all. You can't tell us what to do. I won't allow this in my court".<sup>10</sup>



On 20 April 2023, a five-judge Constitution bench led by Chief Justice D. Y. Chandrachud hinted at their intention to legalize same-sex marriage, despite objections by the Indian government and religious groups. The State Governments of Andhra Pradesh, Assam, Gujarat, Madhya Pradesh and Rajasthan have opposed the legal recognition of same-sex marriages and not a single Indian State Government has expressed support for same-sex marriage

LGBT people are banned from openly serving in the Indian Armed Forces. In late December 2018, Member of Parliament Jagadambika Pal (BJP) introduced a bill to the Indian Parliament to amend the Army Act 1950, the Navy Act, 1957 and the Air Force Act, 1950 that would allow LGBT people to serve in the Armed Forces. The bill was lapsed in the Lok Sabha.<sup>8</sup>

In the case of Nangai vs, the Superintendent of Police, the petitioner in the present case had applied for the post of a woman police constable. The Tamil Nadu Uniformed Services Recruitment Board, Chennai conducted the application tests. Petitioner's application was successful and she received an order of appointment from the Superintendent of Police at Karur district. During the course of her training at the Police Recruit School in Vellore, she underwent a medical examination. The examination declared that she was "transgender" on the basis of chromosomal pattern and genitalia. The result of the medical examination contradicted her birth certificate, medical records, and educational certificates. Later on the Superintendent ordered her termination from the post of woman constable. The Hon'ble High Court upheld that the petitioner has liberty to choose a different gender identity as a third gender in future based on the medical declaration and the impugned order of termination from service issued by the Superintendent of Police, was set aside by the Hon'ble court to protect her right as a transgender person.<sup>6</sup>

Indian athlete Dutee Chand won a case against the IAAF in 2015, enabling women athletes with high testosterone levels to compete as women, on the basis that there is no clear evidence of performance benefits<sup>7</sup>

**EDUCATIONAL RIGHTS OF TRANSGENDERS-** The 'third gender' nomenclature is in itself a problem: it treats sexuality like a ladder in which the queering community takes over the lowest class. It does not alleviate their exact conditions, although it gives them legal recognition, since they remain part of the oppressed section of society and are considered not equal to the other indigenous people. The inclusive principle, which has long been hoped for but has not acted on, is finally successfully adopted by India, which is important also to highlight the various forms of failure, and will be regarded as OBCs for the third sex person. The Indian Supreme Court said that they will receive reservations for education and work as OBCs.

The Bill envisages setting up a number of authorities and forums – **National and State Commissions for Transgender Persons**. The Commissions work will be mostly in the nature of inquiry or recommendations in the inconsistencies in the application of the law or violations of right of transgender persons. The Commissions can issue summons to witnesses, receive evidence, etc. There is penalty by way of imprisonment for up to a year for hate speech against transgender people.<sup>4</sup>

### **Directions to the central and state government**

The court as issued certain directions to the central and state government which are:

- Hijras, eunuchs should be treated as third gender for the purpose of safeguarding their fundamental rights,
- Recognize the persons' need to identify his own gender,
- Providing reservations in public education and employment as socially and educationally backward class of citizens,

- Making special provisions regarding HIV sero-surveillance for transgender persons and provide appropriate health facilities,
- Tackle their problems such as fear, gender dysphoria, shame, depression, suicidal tendencies, etc.
- Measures should be taken to provide health care to transgender people in hospitals such as making separate wards and also provide them separate public toilets,
- Frame social welfare schemes for their all-round development,
- To create public awareness so that the transgenders feels that they are part of the society and are not to be treated as untouchables.

The judgment has marked a break from otherwise paternalistic and charitable approach of the state towards the transgender community by framing their concerns as a matter of rights<sup>9</sup>

**Transgender rights in other countries:-** Denmark and Argentina top the list in recognising rights for the transgender. In Argentina's senate approved the gender identity law making the sex-change surgery legal. Denmark is the only country that require no diagnoses or any certificate by the medical professional as to be identified as Transgender.

Sweden was the first country in Western Europe to adopt the procedure to change their legal gender. Russia ranks the below because of the anti- LGBT campaign around passage. They prosecute the doctors who perform sex reassignment surgery.

In US, under the case **Obergefell v Hodges** it recognises same-sex marriage, giving the transgender people the right to marry regardless of whether their partners are legally considered to be same-sex or opposite- sex. It establishes equal protection to all jurisdictions.

UK parliament passed The Gender Recognition Act 2004, which granted full legal recognition for the binary Transgender People. The surgery of sex reassignment is available on National Health Service or privately. They may issue birth certificate after their details have been entered to Gender recognition Register<sup>11</sup>

**CONCLUSION:-** Transgender in India belongs to LGBT category which stands for Lesbian, Gay, Bisexual and Transgender. Transgender is a biological change which make people to behave differently from the stereotypes of males and females. Because of this biological change, they are excluded from society. These people are as normal as any other person living in this planet but unfortunately, they are treated very badly in India. They are treated as untouchables, no human rights were provided to them, and there were not able to enjoy the constitutional rights. Even after being harassed and facing lot of difficulties they only give blessing to others. They are collectively fighting to get recognized in this society.

They must treat with equal love, respect, and they must the basic rights that are available to the other citizens of the country. And they must be provided with educational facilities and be given proper medical facilities when needed. These people are as normal as any other person living in this planet but unfortunately, they are treated very badly in India. They are treated as untouchables, no human rights were provided to them, and there were not able to enjoy the constitutional rights. Even after being harassed and facing lot of difficulties they only give blessing to others. They are collectively fighting to get recognized in this society.

However, with continued legal efforts and public relations campaigns, India can acquire the ability to fully embrace and support people from all backgrounds regardless of sexuality or gender orientation

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