



## Recognition of a Third Gender-A Way Forward

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### ABSTRACT

*This article is an attempt by the author to throw some lights on the most sensitive issue of the present day, i.e., regarding the position and recognition of the transgender people, who by virtue of their birth only, are facing lot many discriminatory activities everywhere. Being devoid of all enjoyments which every human being have a right to avail, the Trans people raise their voice throughout the World, resulting the activism of the judiciary as well as the legislature. Finally their battle is over getting the recognition as a third gender in most of the countries. No more they have to live their life under the cover of a man or woman, they are free now to touch the sky with independent identity.*

**KEYWORDS : Discrimination, Intersex, Recognition, Supreme Court, Third gender, Transgender.**

### Introduction

For years together, there has been a controversy regarding the recognition of the transgender people in the society. They become breathless under the cover of a conflict between man and woman. The recent judgment of the Indian Supreme Court pronounced on 15th April 2014 had thrown water on the fire of the long debated controversy all over the world on the rights of the transgender. In the absence of any concrete definition of the term, everybody tries to define it according to one's own perception. Defining the term, the Transgender ASIA says, "Trans people are those males or females of any age who are unhappy living in the gender identity ascribed to them at birth. Transgender, transsexual, or Trans persons are people whose psychological sex/gender, or sense of their own innate gender identity is different from their physical sexual characteristics."

### Position of the Transgender in the Society

From time immemorial people belonging to transgender category face a wide variety of discriminatory barriers in enjoying full equality throughout the World. Even sometimes these people face difficulties in meeting their basic needs also like getting a job, housing, or health care or in having their gender identity respected like getting the facility of a public restroom. Throughout their life the transgender people face the worst challenges, regardless of which country they are coming from or situated in. Though the type of challenges vary from country to country due to the difference in political and social environment in that country, but usually the Trans people are on the borders of the society, being the most marginalized ones.

These people do not face only the societal dangers, but also a huge number of other challenges arising due to medical access in the country they live in depending upon the fact that how it legalizes the gender markers in their documents like birth certificates etc. For example, if a person could not be able to legally change his/her name and gender in the ID book by any means, he/ she cannot be able to get employment anywhere. This concludes that in such kinds of situations they will never be able to be employed and will certainly have no income which will ultimately lead to having no livelihood. This is how a transgender is being deprived of his basic citizenship rights.

### Recognition of Transgender in International Scenario

#### 1. The United Kingdom

The UK is having a number of legislations to protect the rights of the transgender people as follows-

- The Sex Discrimination Act 1975 makes it unlawful to discriminate on the ground of sex in employment, education and the provision of housing, goods, facilities and services.
- The Sex Discrimination (Gender Reassignment) Regulations 1999 extended the Sex Discrimination Act to make it unlawful to discriminate on grounds of gender reassignment, but only in the areas of employment and vocational training. These Regulations do not apply to discrimination in education or in the provision of housing, goods, facilities and services.

- The Gender Recognition Act, 2004 (GRA) gives legal recognition to transsexual people in their acquired gender. If an application to the Gender Recognition Panel is successful, the transsexual person's gender becomes for all purposes the acquired gender and they will receive a full gender recognition certificate (GRC). The GRC allows for the creation of a modified birth certificate reflecting the holder's new gender.
- The Equality Act 2006 introduced the Gender Equality Duty, which places an obligation on public bodies to pay due regard to the need to address and eliminate the unlawful discrimination and harassment of transsexual people in employment, related fields and vocational training (including further and higher education) and in the provision of goods, facilities and services.
- The Sex Discrimination (Amendment of Legislation) Regulations, 2008 has extended the Sex Discrimination Act to make it unlawful to discriminate on grounds of gender reassignment in the provision of goods, facilities and services as well as in employment and vocational training.

With a view to make transgender equality a reality, the present Government is seriously looking for, thus in March 2011, the Government published 'Working for Lesbian, Gay, Bisexual and Transgender Equality: Moving Forward', which included Government's commitments to tear down barriers and advance equal opportunities for lesbian, gay, bisexual and transgender people in all areas of society – including in schools, at workplace and in healthcare.

#### 2. United States of America

With a view to ensure equal protection and due process clauses in Article 1 of the U.S. Constitution, that would implicitly include transgender and transsexual persons, as well as any other identifiable group, the Fourteenth Amendment to the U.S. Constitution was made with ratification. As per the Article,

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws". Though the Supreme Court has not fully embraced the Amendment's implications for transgender rights, these clauses will presumably form the basis of future rulings.

Since 2003, pursuant to the landmark ruling of the U.S. Supreme Court in **Lawrence v. Texas** that made same-sex sexual activity legal in every U.S. state and territory, sexual activity between consenting adults and adolescents of a close age of the same sex has been legal nationwide. In fact, while deciding the case, the Court overturned its previous ruling on the same issue in the 1986 case of **Bowers v. Hardwick**, where upholding a challenged Georgian statute, it did not find a Constitutional protection of sexual privacy.

Another important issue relating to transgender activists came up before the U.S. Senate in November 2013, when the Senate approved

the Employment Non-Discrimination Act, which would ban workplace discrimination on the basis of gender identity as well as sexual orientation.

### 3. Germany

Providing solution to a long debated question, Germany became the first European country to officially recognize a "third gender" category on birth certificates for intersex infants. Previously, German parents had just a week's time to decide whether their intersex children were male or female, and register them appropriately at the registry office. This resulted heavy pressure on the parents to take decisions, which often made them in a state of panic and frequently lead to forced medical operations in the genital area. Thankfully, on 1<sup>st</sup> November, 2013, Germany became the first country in Europe as well as one of the first countries in the world to allow the parents of babies without "clear gender-determining physical characteristics" to register them not as male or female, but to choose a third blank box instead. If their children show both male and female characteristics, parents can now mark their birth certificates with an "X", for undetermined gender.

Proceeding further, the new law also gives right to the intersex children to decide their gender identity once they reach an adult age, and not to be labeled male or female at birth without their will. This law is definitely a step towards a new horizon.

### 4. New Zealand

Although New Zealand does not have specific transgender anti-discrimination laws, but in course of time its anti-discrimination laws are broadened enough to cover members of the transgender communities also. In 2005, the country's Human Rights Commission opined that it considered transgender people to fall within the definition of sex discrimination, and would accept complaints from transgender people. The battle for transgender rights continued for a longer period and finally in 2012, the Government of New Zealand gave its transgender citizens a new gender category on their passports, by introducing the option of "X" for "undetermined or unspecified" category. Thus now the Transgender of New Zealand can change their gender category to "X" on their passports with a simple declaration. However, a declaration of the Family Court is still required if citizens want to change their gender identity from male to female, and vice versa, on citizenship documents.

### 5. Australia

The highest Court of Australia on April 2, 2014, delivering a historic decision with far-reaching implications for institutions and individuals across the country, formally upheld the right of transgender person Norrie to be registered as neither a man nor a woman with the NSW Registry of Births, Deaths and Marriages. Norrie's battle started in 2010 when she asked to be registered as having a "non-specific" gender. Though the New South Wales Registry of Births, Deaths and Marriages first supported Norrie's application, but subsequently revoked it. Being aggrieved by the registry's decision, Norrie appealed before the highest court. Recognizing the rights of the transgender, the highest court held that "sex" is not binary - it is not only "male" or "female" and that this should be recognized by the law and in the basic legal documents. The Court further ruled that people are not unambiguously male or female, thus people belonging to transgender category should be provided with legal protection. The category is now known as "indeterminate".

Recently the Government of Australia has released new **Australian Government Sex and Gender Recognition Guidelines** as per which people who are intersex, transgender and gender diverse will now be able to establish or change their gender identity on personal records in a consistent way. For example, whether it's a record with the Department of Human Services, the Department of Immigration or the Department of Health and Ageing, the same criteria should apply, reducing complications and simplifying the process changes.

### 6. Nepal

Geographical size doesn't matter, even a small Country can be a pathfinder of a new horizon, which becomes true with Nepal being world's first country that had shown a new horizon to the whole world by recognizing the status of the transgender by including a third gender option in its census forms in the year 2011. It is actually the result of the landmark decision of the Supreme Court in 2007 between **Sunil**

**Babu Pant, Executive Director of Blue Diamond Society and Others v. Nepal Government**, where a writ petition was submitted by Blue Diamond Society (BDS) and three sexual minority groups, demanding protection of their legal rights. Their demands were threefold: to recognize the civil rights of transgender people without requiring them to renounce one gender identity for another; to create a new law preventing discrimination and violence against LGBT communities; and to require the state to make reparations to LGBT victims of state violence or discrimination. The Supreme Court acknowledging the growing ascendance of the notion that homosexuals and third gender people are not mentally ill or sexually pervers, has held that their rights should be protected and they should not be discriminated in the enjoyment of rights guaranteed by the constitution and human rights instruments. The Supreme Court hearing the matter has passed a ruling against gender identity discrimination. The country has also introduced a third gender category on its passports.

### 7. Pakistan

After being neglected for decades together, Pakistan's transgender minority has been offered new hope following the decision of the Supreme Court. Earlier in 2009, the local police had allegedly attacked, robbed and raped eight Hijra wedding dancers near Islamabad. That traumatic event led Muhammad Aslam Khaki, a lawyer specializing in Islamic law, to file a private case in the country's Supreme Court, asking to recognize Hijras as third gender. Pronouncing a judgment of far reaching importance, the Supreme Court of Pakistan on November 14, 2011, presided over by Chief Justice Iftikhar Mohammad Chaudhry, has issued a direction saying that transgender should be given equal basic rights as all citizens. The Court has also ordered the government to conduct a census of Hijras living in the country and Court issued a ruling ordering the country's election commission to collect data from the transgender community and register them as voters. The decision said that transgender should be given equal inheritance and job opportunity rights, amongst others.

### 8. Bangladesh

After a long awaited recognition for the Hijras in Bangladesh, finally the new government policy announced on November 11, 2013 has identified them as a separate and distinct gender from the binary norm on all official documents, including the passports. The new legislation has been created with the intention of addressing discrimination faced by the Hijra community in regards to public services. Though they have had the right to vote since 2009, but it wasn't practically available until the end of 2013 when actually their gender identity was given a legal status. In November 2013, the Prime Minister Sheikh Hasina herself announced the recognition of "Hijra" as a third gender category in all national documents and passports.

### 9. India

For quite a long period of time, the second populous country of the world, India has recognized the transgender as a separate community, known as 'Hijras' as citizens who don't identify themselves as either male or female. They were even grouped together for many years under the term "eunuchs" despite the fact that only few of them are identified as such. Their status has further been changed in the year 2009, when the Election Commission of India has decided to formally allow for intersex or transgender voters an independent designation which meant that the citizens could choose an "other" category indicating their gender in voter forms. It is pertinent to mention here that now after the recent judgment of the Supreme Court in **National Legal Services Authority v. Union of India**, the transgender are now categorically recognized as third gender having the right to vote, own property, marry and to claim formal identity more meaningfully. The Apex Court even proceeding a further directed both the centre and the states to treat the transgender as socially and educationally backward classes of citizens and to ensure that they are not discriminated against in obtaining basic needs like health care, employment and education.

### Conclusion

The most important point to be considered by every human being is that the transgender people are not like this by their choice, rather it is due to their physical structure by birth which they cannot change. It is thus a matter of concern for all, to regard them with dignity with all rights which being human everybody is entitled to enjoy. While discussing on the status of the transgender throughout the world, it

is quite evidently visible that in almost all countries the judiciary has really played the most important role in upholding the rights of the transgender. But it is not the end rather it is the beginning of a new era. Now it is open for all to go deep into the matter and to work hard to increase consciousness amongst people to recognize the transgender people not only legally but also socially and to allow them to live a dignified life.