



## Rights of Transgender: A Legal Transcend

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### ABSTRACT

*Indian law, in general, revolves practically around the rights and duties of binary genders of male and female, based on a person's sex assigned by birth, which permits gender system, including the law relating to marriage, adoption, inheritance, succession, taxation and in matters of welfare legislation as well. Social exclusion and discrimination on the ground of gender stating that one does not conform to the binary gender does prevail in India. Transgender people, in general, face multiple forms of oppression in this country. Discrimination is high at an alarming scale, more particularly in the field of health care, employment, education and social exclusion. But the law of the land has never been as harsh as has been the attitude and mind set of the people towards the transgender community. What is required at the moment is to direct the directives of the legal system towards this underprivileged class for the sake of their amelioration to the best possible extent.*

**KEYWORDS :** discrimination, binary, hijra, protection, transgender, eunuchs, equality, International Conventions,

### Some terms and definitions:

**Binary Gender:** a traditional and outdated view of gender, limiting possibilities to "man" and "woman"

**Binary Sex:** a traditional and outdated view of sex, limiting possibilities to "female" or "male"

**Cisgender:** a description for a person whose gender identity, gender expression, and biological sex all align with what they were assigned at birth. The term was created for referring to "non-transgender" people without alienating transgender people, e.g. if a doctor announces a baby as being a girl, and she is fine with being a girl, then she is cisgender.

**Fluid(ity):** generally with another term attached, like gender-fluid or fluid-sexuality, fluid(ity) describes an identity that is a fluctuating mix of the options available (e.g., man and woman, gay and straight)

**Third Gender:** (1) a person who does not identify with the traditional genders of "man" or "woman," but identifies with another gender; (2) the gender category available in societies that recognize three or more genders

**Transgender:** a blanket term used to describe all people who are not cisgender; encompasses many identities - transsexual persons, gender queer persons, cross-dressers, persons belonging to certain cultural communities like hijras, kothis, etc.

Transsexual: a person whose gender identity is the binary opposite of their biological sex, who may undergo medical treatments to change their biological sex, often times to align it with their gender identity, or they may live their lives as the opposite sex

Intersex: a person with a set of sexual anatomy that doesn't fit within the labels of female or male (e.g., 47,XXY phenotype, uterus, and penis).

**Introduction:** Transgender is ordinarily described as a broad term comprising persons whose gender identity or expression does not conform to their biological sex. Transgender may also include persons who do not identify with their sex assigned at birth, which include Hijras/Eunuchs who describe themselves as "third gender" for their not being identified either as man or woman. Hijras are not men by virtue of anatomy appearance psychologically, they are also not women, though they are like women with no female reproduction organ and no menstruation. Since Hijras do not have reproduction capacity as either men or women, they are neither

men nor women and claim to be an institutional "third gender". Among Hijras, they are emasculated (castrated, nirvana) men, non-emasculated men (non castrated/akva/akka) and inter-sexed persons (hermaphrodites). The term transgender also includes persons who intend to undergo sex re-assignment surgery (SRS) or have undergone SRS to balance their biological sex with their gender identity in order to become either male or female. They are generally called transsexual persons. Moreover, there are persons who like to cross-dress in clothing of opposite gender, i.e. transvestites. Therefore, transgender community comprises of Hijras, eunuchs, Kothis, Aravanis, Jogappas, Shiv-Shaktis etc. and they, collectively, have got a strong historical presence in our country in the Hindu mythology and other religious texts.

**Position of Transgender at International Law:** International Conventions and norms are germane in connection with interpretation of gender equality. Article 1 of the Universal Declaration of Human Rights, 1948, states that all human beings born free and equal in dignity and rights. Article 3 states that everyone has a right to life, liberty and security of person. Article 6 of the International Covenant on Civil and Political Rights, 1966 recognizes that every human being has the inherent right to life. Article 5 of the UDHR and Article 7 of the ICCPR provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. United Nations Convention against Torture and other cruel inhuman degrading treatment or punishment especially deals with protection of individuals and groups made vulnerable by discrimination or marginalization. Para 21 of the Convention states that States are obliged to protect from torture or ill treatment all persons regardless of sexual orientation or transgender identity and to prohibit, prevent and provide redress for torture and ill-treatment in all contexts of State custody or control. Article 12 of the UDHR and Article 17 of the International Covenant on Civil and Political Rights state that "no one shall be subjected to 'arbitrary or unlawful interference with his privacy, family, home or correspondence'. A comprehensive study of the foregoing International legal perspective leaves us with the idea that these noble legal principle are invariably applicable to all human beings irrespective of their being men, women or transgender.

**Transgender in Indian Legal Perspective:** Article 21 protects one's right of self-determination of the gender to which a person belongs. The meaning of the word 'life', 'liberty' and 'law' in Article 21 have been significantly enlarged by judicial interpretations. Concepts of justice, social, economic and political, equality of status and opportunity and of assuring dignity of the individual incorporated in the preamble, clearly recognize the right of one and

all amongst the citizens of these basic essentials designed to flourish the citizen's personality to its fullest extent. Besides this, Right to equality is one of the most important fundamental rights of individual. Articles 14 to 18 of the Constitution guarantee the right to equality to every citizen of India. Article 14 embodies the general idea of equality expressed in the Preamble. The succeeding Articles 15, 16, 17 and 18 lay down the specific application of the general rules laid down in Article 14. Article 15 relates to prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. Article 14 declares that "the State shall not deny to **any person** equality before the law or the equal protection of the laws within the territory of India". Both these expressions "equality before the law" and "equal protection of the law" found place in Article 14 of the Constitution owe their origin to the Universal Declaration of Human Rights. Article 7 of the Universal Declaration of Human Rights says "All are equal before the law and are entitled without any discrimination to equal protection of the law". It necessarily follows there from that as because there is no express exclusion of the rights of the transgender community in any of the legal provision that contains the word "person", the connotation of the word "person" stretches to include the rights of the transgender also. On the other hand, the words 'any person' in Article 14 denote that the guarantee of the equal protection of laws is available to any person, which includes any company or association or body of individuals. The protection of Article 14 extends to both citizens and non-citizens and to natural persons as well as legal persons. The rule of law embodied in Article 14 is the '**basic feature**' of the Indian Constitution and hence it cannot be destroyed even by an amendment of the Constitution under Article 368 of the Constitution. Hence it is needless to say that no law in the country can ever be made to abrogate the sacrosanctity of this provision. But the real life situation of the transgender community is not as beautiful as the theory of law is.

**Law relating to same sex sexual activity:** In 1860 when we got the Indian Penal Code, which was drafted by Macaulay, they inserted Section 377 which brought in the concept of 'sexual offences against the order of nature'.

"Now in India we didn't have this concept of something being 'against the order of nature'. It was essentially a Western concept, which has remained over the years. Now homosexuality as such is not defined in the Indian Penal Code, and it will be a matter of great argument whether it is 'against the order of nature.' Homosexual activity, as was thought to be an act against the law of nature, it was made an offence u/s 377 Indian Penal Code, 1980. In 2009, the decision of the Delhi High Court in the historic case of Naz Foundation v. Govt. of NCT of Delhi found Sec.377 and other legal prohibitions against private, adult, consensual, and non-commercial same sex conduct to be in direct violation of Fundamental Rights provided by the Indian Constitution.

It has now been a settled principle of law in India that, decision of a High Court on the constitutionality of a law apply throughout India, and the same is not confined to the territory of the state over which the High Court in question has jurisdiction.

On 23 February 2012, the Ministry of Home Affairs expressed its opposition to the decriminalization of homosexual activity, with the stated reason that, homosexuality is seen as immoral in Indian perspective. The Central Government subsequently reversed its stand on 28 February 2012 asserting that there was no wrong in decriminalizing homosexual activity. These mutually incongruous stands, for the obvious reason, made the Apex Court ask the Central Government for clarification of its stand on this crucial point in matter of homosexual activity to be pondered over. On 11 December 2003, the Supreme Court set aside the 2009 Delhi High Court order decriminalizing consensual homosexual activity within its jurisdiction and noted that parliament should debate and decide on the matter.

Human Rights groups, on the other hand, expressed worries that this would render homosexual couples vulnerable to police

harassment, saying, "The Supreme Court's ruling is a disappointing setback to human dignity, the basic rights to privacy and non-discrimination".

Of late on February 2, 2016, the Supreme Court decided to review criminalization of homosexual activity. In 2016, Kerala becomes the forerunner state in India to moot free sex-reassignment surgeries in Government hospitals after it introduced the first state government policy on transgender people.

**Immoral Traffic Prevention Act of 1956** which was amended in 1986 has become a gender neutral legislation. The provisions of the Act thenceforth apply to both male and female sex workers along with those whose gender identity was indeterminate. With the amendment, both the male and hijra sex workers became criminal subjects as this gives the police the legal basis for arrest and intimidation of the transgender sex workers.

**Transgender Rights: Present Scenario-** Tamil Nadu and Kerala are the states where it was, for the first time in India, introduced a transgender welfare policy. According to the said policy, the transgender people can access free Sex Reassignment Surgery in the Government Hospitals; free housing programme, various citizenship documents; admission in government colleges with full scholarship for higher studies, alternative sources of livelihood through formation of self-help groups and initiating income-generation programs. Tamil Nadu becomes the first state for formation of a Transgender Welfare Board with representatives from the transgender community.

In India, a group of transgender called Hijra, were legally granted voting right as a third sex in 1994. On 15 April 2014, the Supreme Court of India declared the transgender people as a socially and economically backward class with the right to reservations in education and job and also gave directions to both the Union and the State Governments to frame welfare schemes for them.

On 24 April 2015, the Rajya Sabha passed the Rights of Transgender Personal Bill, 2014 guaranteeing rights and entitlements, reservations in education and jobs (2% reservation in government jobs), legal aid, pensions, unemployment allowances and skill development for transgender people. It also contains provisions to prohibit discrimination in employment, prevent abuse, violence and exploitation of transgender people. The Bill also provides for the establishment of welfare boards at the Centre and State level, and for Transgender Rights Courts. The Bill was introduced by DMK MP Tiruchi Siva, and marked the first time the House had passed a private member's bill in 45 years. The Bill was passed unanimously by the House. However, the Bill contains several anomalies and a lack of clarity on how various ministries will co-ordinate to implement its provisions. Social Justice and Empowerment Minister Thaawar Chand Gehlot stated on 11 June 2015 that the Government would introduce a comprehensive Bill for transgender rights in the Monsoon session of Parliament. The Bill will be based on the study on transgender issues conducted by a committee appointed on 27 January 2014. According to Gehlot, the Government intends to provide transgender people with all rights and entitlements currently enjoyed by Scheduled Castes and Scheduled Tribes. These various steps taken by the government concerned, in fact, works as ray of hope for the transgender community to amalgamate them in the main stream of the society.

#### **Supreme Court on Transgender:**

The Supreme Court of India has concluded its views in matter of the legal position of transgender in the following declarations:-

1. Hijras, Eunuchs, apart from binary gender, be treated as 'third gender', for the purpose of safeguarding their rights under Part-III of our Constitution and the laws made by the Parliament and State Legislature.

2. Transgender persons' right to decide their self-identified gender is also upheld and the Centre and State governments are to grant legal recognition of their gender identity such as male, female or as third gender.

3. The Centre and State Governments are directed to take necessary steps to treat them as socially and educationally backward classes of citizens and extend all kinds of reservations in cases of admission in educational institutions and for public employments.

4. Centre and State Governments are directed to operate separate HIV Sero-surveillance Centers since Hijras/Transgender face several sex issues.

5. Centre and State Governments should seriously address the problems being faced by Hijras/Transgender such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma etc. and any insistence for SRS for declaring one's gender is immoral and illegal.

6. Centre and State Governments should take proper measures to provide medical care to Transgender community in the hospitals and also provide them with separate public toilets and other facilities.

7. Centre and State Governments should also take steps for framing various social welfare schemes for their betterment.

8. Centre and State Governments should take steps to create public awareness so that Transgender community will feel that they are also part and parcel of the social life and be not treated as untouchables.

9. Centre and State Governments should also take necessary measures to regain their respect and place in the society which once they enjoyed in our cultural and social life.

**Conclusion:** The history makes us notice that Hijras/transgender persons had played a prominent role in the society. It is only with the onset of colonial rule from the 18<sup>th</sup> century onwards, the situation changed drastically with the changed mind set of the society towards them. The transgender people are also human beings like the men and women and by virtue of their birth as human being, they are endowed with certain natural rights at par with men and women. This inherent entitlement to such human rights is natural but their being denied of those rights is man-made. Deliberate ignorance to transgender by the so called civil society is but artificial and as such requires urgent attention before it is too late. The Union Government along with the State Governments should take a lesson from the State of Kerla and Tamil Nadu and act accordingly for it is the demand of the day for the well being of the transgender persons. All should join hands and come forward to act sensibly and more than that, with empathy towards transgender, to cater to the needs of the said community to see them live a life, life-like.

#### **Suggestions:-**

1. Transgender are also citizens of the country. Besides having the economic, social and cultural rights, they also do have the civil and political rights by virtue of their being born as human being. They should be given voter identity card so that they can actively participate in the election system.

2. They are entitled to adhar cards, the way other common people are provided with.

3. They are also under certain conditions entitled to BPL cards.

4. Government should without further delay take necessary steps for providing them with free medical treatment.

5. Practice shows that transgender stray landless for their being ostracized from the society. They should be provided with

residence.

6. They should be allotted residence under Rajib Abas- if it is urban area and under Indira Abas in case of rural area, as the case may be.

7. There should be special educational institutes for transgender community so that they will get a platform to make true their dreams.

8. They should be given the facility of opening bank accounts in their own name.

9. There should be provision for allotment of identity cards for *kinnars* of different states.

10. Based on their castes they should be provided with Caste Certificates like other common people.

11. In order to see them in the mainstream of the society, there should be reservation of a certain percentage in matter of employment in government as well as private sectors.

12. There should be made separate toilets for transgender wherever there are toilets for men and women.

13. If the demand doesn't seem intemperate, there should be provisions for reservation of seats for transgender people in public transport.

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