



**ORIGINAL RESEARCH PAPER**

**Law**

**ATROCITIES ON TRANSGENDER (HIJRAS) IN COLONIAL INDIA**

**KEY WORDS:** Transgender, Third Gender, Moral Panic, Criminal Tribe Act

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**ABSTRACT**

Transgender community has played an important role in ancient Indian culture over millennia. They have been recognized in various religions such as Hinduism, Buddhism and Jainism. Moreover they have been portrayed in Hindu religious scripture such as Vedas, Ramayana and Mahabharata. They played important roles such as political advisors, administrators and generals during Mughal period. However, their social status witnessed a downfall shortly after the coming of the British colonial rule during 18th century. The British championed Victorian morality and loathed the community. Several harsh measures were taken against them from taking away their basic rights to being blacklisted and criminalized for their identity as a transgender. They were deemed a taboo for the society. It was only by the remedial measure taken by the legal community that in the year 2014, the Supreme Court of India gave a lawful recognition to Transgender community as 'third gender', providing them with access to equal opportunity in the society. In 2018 the Supreme Court decriminalized the consensual sexual conduct between the same sexes. Despite all the efforts and legal protection still the transgender people have been living in destitution and struggling to maintain the par with the binary gender minded society. This article explores the trajectory of the status of the Hijras from the British colonial rule till present day.

**INTRODUCTION**

The word 'Transgender' is an umbrella term wherein it comprises of *Hijras, Eunuchs, Kothis Aravanis, Shiv-shakthis, etc.* The term used encompass people who have a gender identity or expression that may differ from the gender at birth. These people are often classified as the 'third sex' or 'third gender'.

Indian culture is rich, unique and diverse. It is deep rooted, most valuable, rich informative, present and future oriented ideas. We have a rich history and various sources of immense knowledge and culture.

During the 18<sup>th</sup> century the Hijras and the Eunuchs were major sects of the transgender which were spread across the Northern Provinces of India. In 1865, the British rulers of the North India made vehement efforts to bring about the gradual extinction of transgender Hijras and Eunuchs through laws and state enforcement agencies as well as several policies.

Both Hijras and Eunuchs were distinctive groups, each possessing distinct characteristics. The Hijras embodied a feminine gender identity by wearing women clothes. Culturally, they performed at marriages or public places and asked for gifts following the births of children. Hijras usually followed a social organization of their group though 'discipleship lineage' which linked generations through *guru* and *chelas*. While the Eunuchs often dressed up like women and were described as being castrated or born that way.

**Early Attempt To Erase 'Third Gender'**

The prejudice against the Hijra community was explicit during the British raj and the British judiciary made no efforts to hide its contempt for the community. For example, in one instance, on 17<sup>th</sup> August 1852, a Hijra named *Bhoorah* was found brutally murdered in northern India's Mainpuri district. *Boorah* had attained status of a *guru* and had two disciples and a male lover, with whom she lived. Later she had left her lover for another man before she was killed. During the trial the British judges were convinced that the lover had killed her in revenge of leaving him.

Even though *Bhoorah* was the victim and brutally murdered, the judiciary made some derogatory comments against *Bhoorah* and criminalized whole Hijras community stating them as the cross-dresser, beggars and unnatural prostitutes. One of the judges called the community to be 'opprobrium upon colonial rule'. Another claimed that their existence to be a 'reproach' to the British Government. *Bhoorah* was a victim of the crime but her death was interpreted as an evidence and criminality for the whole *Hijras* community.

The British officials considered *Hijras* and *Eunuchs* as danger to the public morals and a threat to colonial political authority. They openly declared the community as 'ungovernable', habitual sodomites, beggars, an obscene presence in public space and the kidnapers and castrators of children.

Essentially, the root of the disgust of the Britishers against the transgender community was that their identity challenged the preconceived British mindset of binary gender and heteronormative sexual perspective. The Britishers considered themselves both the guardian and tutor of the social and gender morality and the existence of such a group which fell outside the frame of conception was perceived as a threat to their authority. The process of civilizing the Orientals against the British morality involved eliminating any offshoots which were a threat to such a process.

Before the colonial rule, the *Hijras* used to get protection and benefits by few Indian provinces like as land, right to food and smaller amount of money from agricultural households. Even during the Mughal period the *Hijras* played important role such as political advisors, administrators, generals and also guardian of harem (where royal women used to reside). They were considered trustworthy, clever and fiercely loyal. They had cultural accesses to population so they also played crucial role in politics, received huge money from king and queen and had very esteemed position.

The Britishers got repulsed by the sight of *Hijras* and could not comprehend to why they were so much respected in India. Usually they saw *Hijras* as kidnapers, beggars, sodomites and obscene people. In Between 1852-1971 in region of Northern India many intense wave of moral panic were created against the *Hijras*. It started with the series of the court cases against the Hijras, sparking panic among the administrators and the public by generalizing and stereotyping the whole community. The tool of **moral panic** was known well to be the centre of how colonial regime operated. The idea was to present colonial state as the defender of the 'public morals' by repeated denunciation and criminalization of the *Hijra* community.

The judiciary began to label *Hijras* as prostitutes and people who castrate themselves to have sex with men. The judges viewed *Hijras* feminine gender appearance as morally offensive and described them as 'pollution'. They claimed the *Hijras* discipline lineage of *guru* and *chelas* as a form of alternative or internal government that challenged the colonial rule. Therefore following the judgement of the court in *Government v. Ali Buksh* the East India Company officials

were ordered to compile a report on the *Hijra* community in order to create a special legislation required to control the *Hijras*.

Yet in another case which added another dimension to the panic against the *Hijras* which claimed them not only as publically immoral but also a threat to children as they were indulged in child kidnapping and castration. In the case 5 people were charged with stealing, purchasing and emasculating a nine-years-old boy named Gupoo. The boy was kidnapped and sold to a *Eunuch* named Nurm Buksh. The young boy was castrated by an elderly eunuch named Munsa which was witnessed by two other eunuchs. The accused were convicted for 10-14 years of imprisonment. This provided an opportunity to the judicial officials to mark them as a threat to the children. Following this incident the government decided that creating a new law to control the *Hijras* was becoming necessary.

Such incidents of kidnapping and castration of young boys and adult men were in highlights and the judiciary was not satisfied even if it happened with their own consent as it was conceived as unacceptable due to likelihood of death or grievous injury and most importantly publically immoral. It created a moral outrage among the judiciary, bureaucracy and the police. In 1865 the government launched the widest investigation into the *Hijra* community to date. The officials were ordered to discover the whole extent and the manner of the atrocious crimes committed by the *Hijras*. Collection of the ethnographic information and all colonial archives of previously compiled information about the *Hijras*.

The seemingly unknowable scale of the *Hijra* population was seen as a threat to colonial rule. This emerged out as panic to the colonial authorities about its intelligence inadequacy which were structural and enduring. With all the knowledge and information they perceived could not mesh it with the sentiments of the locality. Therefore they propelled stereotyping the *Hijra* community by spreading rumors and fragmentary information into intelligible narratives of earlier instances.

### **Criminalizing Hijras**

The Britishers introduced The Criminal Tribe Act in the year 1871. The Act was divided in two parts wherein the first part the CTA targeted the so called 'criminal tribes' i.e. the socially marginalized community that were labeled by the Britishers as criminals by heredity caste occupation or for being habitual criminals.

Second part of the CTA criminalized the gender non-conforming people as 'eunuchs'. The police registered the eunuchs who were reasonably suspected of sodomy, castration and kidnapping. They were even suspected merely if they wore women's clothing or performed in public, which had adverse impact on *Hijras* daily life.

The castes and tribes "notified" under the Act were labeled as Criminal Tribes for their so-called "criminal tendencies". As a result, anyone born in these communities across the country was presumed as a "born criminal", irrespective of their criminal precedents. This gave the police sweeping powers to arrest, control, and monitor their movements.

The *Hijra* community in particular was targeted under the legislation. The law impacted all *Hijra* communities across the country as their livelihood and cultural practices were determined as a proof that an individual could be "reasonably suspected" of sodomy, kidnapping, and castration or offences under Section 377 (unnatural offences) of the Indian Penal Code, 1860. People identified as eunuchs were deemed suspect merely if they wore women's clothing or performed in public.

The applicability of the CTA was limited to the North West

Provinces of India i.e. presently Uttrakhand, Uttar Pradesh and Punjab. The real purpose to bring this law was to bring about the extinction of the *Hijra* community.

Individual listed on the eunuch register were prohibited from wearing feminine dress or performing in public therefore this action reduced their livelihood and way of expressing themselves. It became the reason behind their poverty and social exclusion. The *Hijra* were the primary target of the law, but other gender non-confirming people were also registered as eunuchs were affected.

British deemed *Hijra* community as ungovernable as they challenged their legal system that was based on heterosexual, reproductive sexuality and the family.

As it is said that life finds a way, likewise despite such strict laws the *Hijra* community survived. They broke the law, escaped from police surveillance, adapted to the situations, migrated temporarily or permanently from province to province where they weren't registered. They continued collecting *badhai* and kept performing and expressing their gender identities be it legally or illegally.

In 1952, the government of India replaced the Criminal Tribes Act with the Habitual Offenders Act. As a result the former Criminal Tribes Act was denotified, these tribes are today known as Denotified Tribes or Vimukta Jati.

### **Contemporary Situation And The Judicial Response**

Before discussing upon the measures which have been introduced through the medium of the Judiciary, it is important to understand the background context of the whole issue. While the Criminal Tribes Act no longer exists, but the cultural stigma which it had built in the years of its life-shell remained. The repealment of the Act only towed down one arsenal in the hands of State and society to beat the transgender community. But the contempt and outright disgust for any person who identified himself as a transgender remained and was visible in every aspect of the social and civil life. The plight of the people of the community can be understood from the fact that the transgender people are often disowned by the family and society, shunned from public facilities, denied education, health services and even public spaces. The State does not recognize and often outright restrict their basic rights such as right to marry, denial of equal livelihood opportunities, availing of identity card, ration card or driving license. Though going by the Statute book, they are granted the right to vote and contest elections, but the execution of such rights is a very problematic affair in practical terms.

To summarize, we can conclude in the terminology of the Indian Constitution, that they face a blatant denial of the rights under Article 14, 15, 16 as well as 21, which the State has otherwise, promised to guarantee to them in all spheres of public life. While some positive welfare schemes were initiated in some states such as Tamil Nadu and Kerala, a nation-wide recognition of the identity of the transgender community as well as their social marginalization was yet to attain a legal sanctity.

It was in this backdrop that NALSA (National Legal Service Authority) took upon itself to partake the issue to the Supreme Court in the year 2012. A PIL (Public Interest Litigation) petition was filed by them under Article 32 of the Indian Constitution to recognize transgender community as the third gender and to issue directions for their assimilation and rehabilitation in the civil society.

On 15 April, 2014, Supreme Court of India made a landmark ruling by declaring Transgenders as 'third gender' and provided them with equal access and opportunity in the society. Reading into several international instruments on

human rights as well as the judicial prudence established in the past decisions, the Court reached the conclusion that those principles which are not inconsistent and in harmony with the fundamental rights enshrined in the Constitution must be recognized and legitimized. The court identified that the Indian law only recognized 'the paradigm of binary genders of male and female, based on one's biological sex.' Relying on the conclusions drawn by Australian Judiciary in the case of *Attorney General for the Commonwealth v. Kevin and Jennifer & Human Rights and Equal Opportunities Commission*, the Supreme Court preferred the 'psychological test' over the prevailing 'biological test' for identification of one's gender. The court asserted that gender is what a person perceives of oneself. A person maybe born as a male but perceives himself as a female, hence one must be identified by the gender that person recognizes himself to be. The Court said, "When we examine the rights of transsexual persons, who have undergone SRS (Sex Assignment Surgery), the test to be applied is not the biological test" but the "psychological test", because psychological factor and thinking of transsexual has to be given primacy than binary notion of gender of that person." Therefore the Court concluded that everyone has right to self-identify their gender. A different view would have otherwise deprived the transgender community from availing the benefits of the welfare schemes as well as the protection of law. The Court differentiated between the concept of 'sex' and 'gender', and preferred the latter as an indicator of one's sexual identity marker than the former. Moreover, the Constitution of India, explicitly prohibits the State from discriminating anyone on the basis of their sex and gender. By introducing the concept of 'Psychological test', the Supreme Court extended the protection not only to the people who have undergone SRS but also to the ones who have not, or could not owing to the lack of financial constraints and medical expertise. Moreover, there are many subcategories within the Transgender community which constitute distinct groups. Laying down a self-determined, self-perceived psychological test benchmark, the Court has extended protection to all such sub-groups as well, whether recognized or not. The court directed the central government to place transgender people in the Other Backward Classes to classify their caste denoting their socially and economically marginalized status in society. Moreover the court directed to provide access to education, healthcare and public facilities for them.

In 2018, Supreme Court in a landmark judgement repealed section 377 of Indian Penal Code, where in the court decriminalized homosexuality. The LGBTQ (Lesbian, Gay, Bisexual, Transgender, and Queer) individuals are now legally allowed to engage in consensual intercourse. This move provided a breath of open air and a sense of security for the Hijra community, as for majority of the transgender people homosexuality is a form of identity rather than a behavior.

The Transgender Persons (Protection of Rights) Act, 2019 was introduced in the parliament by the Ministry of Social Justice and Empowerment with objective to provide for protection of rights of the transgender people and prohibit discrimination against them in employment, education, housing, healthcare and other services. The Act was passed on 5 December, 2019 brought in to implement the recommendations made by the Supreme Court in the judgement of *NALSA v. Union of India 2014*. It provides for strict penalty for discrimination against transgender persons on grounds related to education, occupation, healthcare, right to reside, etc. It puts an obligation on central and state government to formulate steps for secure and active participation for their inclusion into society. Moreover, steps are been taken to provide separate health facilities to them including HIV surveillance centers, sex reassignment surgeries and comprehensive insurance schemes.

Though the Act has made an effort to improve the conditions

of the transgender community, however it has faced much backlash from the transgender community on several grounds. One prominent ground for its opposition is that the Act did not provide for the self-determination of gender, issuing of identity certificate for recognition of their identity is unfair and arbitrary. On a broader spectrum there are three contested problems with the 2019 Act.

Firstly, while Section 4 recognizes the autonomy of a person to be identified as a transgender person on the basis of his self-perceived gender identity, it is virtually nullified by Section 6 of the Act. Section 6 stipulates that such person must mandatorily obtain a certificate from the District Magistrate certifying his gender identity as a transgender person. The application, procedure and certification requirement, in effect, outsources the determination of one's gender identity, clearly established to be something private, from an individual's choice to the bureaucracy.

Secondly, the prescribed punishment for sexual abuse or physical abuse of transgender persons under the Act is much less than what has been provided for same offences against women.

Thirdly, no affirmative action in terms of employment or education was stipulated in the Act despite the Supreme Court's mandate in *NALSA v. Union of India 2014*.

The constitutionality of the 2019 Act has been challenged by Swati Bidhan, the first transgender judge, and is currently pending in the Supreme Court.

## CONCLUSION

As per the Census of India 2011, the total transgender population in India is 4,87,803. The community has a 56.07% literacy rate compared to 74% for the general population. A larger number of people had not been identified under this number as most of the parents deny identifying their children as belonging to the 'third gender'. The estimated real population of transgender is 19 lakhs according to a 2011 survey by NGO Salvation of Oppressed Eunuchs. The battle for their civil rights post-independence was long drawn, but in the last decade, it has seen tremendous success. While there is still a lot left to be done, especially in the domain of the wider social and cultural acceptance of the transgender community by the society, we can at the least witness the trajectory of the laws and judiciary in the right direction. Compared to the goal of fully realized constitutional equality of the community, these are indeed baby steps, but giant leaps in terms of legitimizing their status in the law of the land. Many urban areas are witnessing an increasing cultural acceptability of the community. The increasing proactive role of the Judiciary in this regard cannot be negated. The Joseph Shine judgment went to put a final nail in the coffin of the ghost of the Criminal Tribes Act, 1871, ending any possibility of its resurgence in future. The High Courts across different parts of the country are also playing a conscious role in securing the rights of the community. One such case by the Madras High Court is notable in this regard. In this case, namely, *Arun Kumar and another v. The Inspector General of Registration and others*, the issue was whether the marriage between a transgender person and a binary oriented person valid as per the Hindu Marriage Act, 1955. The Court extended the meaning of the word 'bride' in Section 5 of the Hindu Marriage Act, 1955 to include women, transwoman as well as an intersex person/transgender person. The High Court gave a beautifully worded verdict which summarizes and concludes the current legal position of the transgender community, that:

"Sex and gender are not one and the same. A person's sex is biologically determined at the time of birth. Not so in the case of gender. That is why after making an exhaustive reference to the human rights jurisprudence worldwide in this regard, the Honorable Supreme Court held that Article 14 of the Constitution of India which affirms 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 would apply to transgenders also. Transgender person who are neither male/female fall within the expression 'person' and hence entitled to legal protection of laws in all spheres of State activity as enjoyed by any other citizen of the country."*

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