



**TRANSGENDERS IN INDIA: LAWS,
JUDGMENTS AND VITAL
AFFIRMATIVE MEASURES TO
ALIGN THEM IN MAINSTREAM**

By Ujjawal Gaur

From Faculty of Law, Delhi University

*"I am transgender and this doesn't mean
that I am unlovable."
- Lana Wachowski*

Abstract

Conventional classification of human gender into male and female is specifically based on the biological design of their genitalia. One has no right to opt for any of the two highly reputed prevalent genders in the society and goes by convention, getting the tag of male/female by the biological parts one is born with. However, some people don't satisfy this structure of biological classification and thus become eligible for societal ignorance. These are the "Third Gender" people or Hijra/Kinnar for better understanding. Society gifts them with Violation of fundamental human rights, exclusion from social participation, police atrocities, and whatnot, as a token of their unique identity. Although the crusader, i.e., the judiciary is putting in all the efforts to bring them inequality with the other two genders regardless of the strong pessimistic oppose of malice-minded ideology among the society. This paper throws light on the history of transgenders in India, the societal attitude towards the third gender and will look for the prevalent Indian laws and judgments which are acting as a building block in safeguarding their dignity. It further talks about the major schemes and development

programs run by the Ministry of Social Justice and Empowerment in India for skilling the members of the transgender community and would suggest affirmative measures to bring them along the mainstream and to transform societal attitude for a flourishing nation. It is hoped this paper will draw the attention of policy planners, concerned authorities, and lawmakers and necessary measures will be taken that would grant equal opportunities for growth, development, and welfare to all.

Keywords: Transgender, Third Gender, Equality, Indian Constitution, Human Rights

Introduction

Every soul craves certain rights which helps them in self-development and pave the path to grab the opportunities that come their way in life. Basic human rights are meant to be granted to all with due respect without discrimination in gender, religion, class, etc and if they are not served then it would lead to atrocities and sufferings to the deprived community. Transgender is one such community of people who are neglected at all parameters of life because of their sexual identity and orientation. The very true fact that the identity of sex is all Natural is overseen and considered as vague to carry forward the full-fledged discrimination. Transgender is a term for people whose sexuality identifies and orientation are different from the two quantitative heavy weighing genders. While transgender usually sounds a positive word but on the contrary is considered abusive in society. The substitute for transgender used in the Indian dialect is "Hijra" which is way too negative in its impact and can ignite hatred. Transgender people in India have been excluded from participating in social and cultural life,



political issues, discussions, and whatnot. The primary reason behind this exclusion if probed would raise fingers to the Legal system of India. They are not legally recognized with full potential and thus it acts as a barrier that often prevents them from exercising their civil rights.

History of Transgenders in India

India is a country of religious and traditional diversity. Transgenders in India isn't a new phenomenon rather it has their roots dug in our ancient history and have staunch occurring referred in the Hindu mythological and various Holy scriptures indicating their historical presence. Kamashastra, ancient Hindu literature, refers transgenders as 'tritiyapakriti'.

The sacred Hindu epic of Ramayana ascribed to the Maharishi Valmiki has a scene when Lord Rama was on His way to exile for 14 years to fulfill His father's promise, he was followed by the heavy-hearted crowd of his kingdom to show their devotion and faithfulness towards Rama. Seeing this, Ram turned towards his followers, asked them not to mourn, and asked them that all "men and women" should return to the kingdom. Following his request, they all left the place but the hijras found themselves not feel bound by his directions, decide to stay. Lord Ram was immensely Impressed with their devotion and sanctioned them the boon to confer blessings on auspicious occasions of childbirth, marriage, and inaugural functions. This is believed to frame the basics for the Custom of Badhai in which the transgenders happily sing, dance, and give out the blessings.

Furthermore, the Hindu epic, the Mahabharata is having multiple mythological

examples and references to transgenders. Shikhandini, a eunuch character in the Mahabharat, was the daughter of Panchla King Drupada who was believed to be the reincarnation of Amba to avenge Pitamaha Bhishma. The war between the Pandavas and Kauravas was going on at Kurukshetra and Pitamaha Bhishma, an undefeated warrior came out as the utmost challenge for the Pandavas. To get rid of him, Lord Krishna advised Arjuna who was a skilled archer to get help from Shikhandini by using her as a shield before him as Pitamah Bhishma vowed that he will lower his weapons on the battlefield while facing Shikhandini. Arjun got his hands on the opportunity and killed Bhishma.

We also have Arjuna's gender variance story. On refusing Urvashi, Arjun was cursed by her to which he became a member of the third gender. Using this as an opportunity of perfect disguise to complete his exile, he went to the Kingdom ruled by King Virat and named himself Brihanala where he started teaching dance and singing to the princess Uttara, daughter of King Virat.

The Bhagavata Purana, one of Hinduism's eighteen great Puranas, has a reference to Mohini who was the female incarnation of Lord Vishnu. The famous Ardhanarishvara, a form of Shiva in Indian legends represents the masculinity of Shiva blended with the femininity of Maa Parvati. All this stands as a solid argument to prove the fact and state it all loud to everyone that Transgenders are blended within the Indian society and have an origin similar to that of the prevalent two genders.



Transgender and the Indian Laws

Criminal Tribes Act, 1871

In 1865, R Simson, the secretary to the North-Western Provinces had written to the Inspector General of Police that the administration's aim was "to prevent an increase in the number of Eunuchs and thus gradually lead to their extinction." The 1871 law targeted to eliminate Hijras by preventing castrations and deeming the transgender persons as 'criminals', and penalized certain criminal tribes and eunuchs who dressed or ornamented like a woman in a public place. It was made a non-bailable offense and persons involved could be arrested without a warrant and sentenced to imprisonment up to two years or a fine of both.

Section 377, Indian Penal Code

This section is before the enactment of the Criminal Tribals Act, 1871, and criminalized all penile- non-vaginal sexual acts between persons, including anal sex and oral sex, at a time when transgender persons were also typically associated with the prescribed sexual practices. The reference judgment for it is that of the Allahabad High Court in Queen-Empress vs Khairati (1884) ILR 6 All 204, where a transgender person was arrested and prosecuted under section 377 of IPC on the suspicion that he was a 'habitual sodomite' and was later acquitted on appeal.

NALSA Judgement: Identifying Transgenders in mainstream

This case was filed by the National Legal Services Authority of India (NALSA), has been constituted under the Legal Services Authorities Act, 1987 to provide free legal

services to weaker sections of society, to legally recognize the persons who identify as "third gender". The question before the court was whether persons who fall outside the male/female gender can legally be recognized as "third gender" persons and if such recognition is not allowed then will it be a breach of fundamental rights guaranteed by the Constitution of India. It referred to an "Expert Committee on Issues Relating to Transgender" constituted under the MOSJE to build its judgment. Justice K.S. Radhakrishnan while dealing with the case remarked that "*Recognition of transgenders as a third gender is not a social or medical issue but a human rights issue*". The court further observed, "Seldom, our society realizes or cares to realize the trauma, agony, and pain which the members of Transgender community undergo, nor appreciates the innate feelings of the members of the Transgender community, especially of those whose mind and body disown their biological sex. Our society often ridicules and abuses the Transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are side-lined and treated as untouchables, forgetting the fact that the moral failure lies in society's unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change". A two-judge bench of the Supreme Court comprising of Justice K.S. Radhakrishnan and Justice A.K. Sikri passed the historic landmark judgment on Transgender rights. The Court clarified that gender identity did not refer to biological characteristics but rather referred to it as "an innate perception of one's gender". Thus, the court legally recognized third gender/transgender persons for the first time and discussed "gender identity" at length. It



upheld the right of all persons to self-identify their gender and that no third gender persons should be subjected to any medical examination or biological test that would breach their right to privacy in any sense. They recognized that transgender persons were entitled to fundamental rights under the Constitution of India and international law and further directed all the state governments to develop mechanisms to realize the rights of transgender persons.

Transgender Persons (Protection of Rights) Act, 2019

This Act provides for the protection of rights and the welfare of transgenders and extends to the whole of the Indian nation. It defines transgenders as “a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman, person with intersex variations, genderqueer and person having such socio-cultural identities as kinnar, hijra, aravani and jogta”. The Act forbids the inequity against transgenders and is a strong critique of societal behavior against the transgenders concerning: (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 the 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. It even enforces a minor’s right of residence compelling any trans person below 18 to cohabit with their natal family and criminalizes begging.

Development programs by MOSJE

As per the Right to Information raised by RTI activist Ujjawal Gaur, The Ministry of Social

Justice & Empowerment is in the process to finalize a Scheme "Support for Marginalized Individuals for Livelihood and Enterprise", which is a Central Sector Scheme for skilling the members of the transgender community. It has mainly two components -

- (i) Comprehensive Rehabilitation for Welfare of Transgender Persons
- (ii) Comprehensive Rehabilitation of persons engaged in the act of Begging

Budget Estimate for the year 2021-22 for skilling members of the transgender community is Rs. 20 crores. Last year, an amount of Rs.2 crore approximately has been released through *the National Institute of Social Deference* for setting up of 13 Garima Grah on a pilot basis, consisting of 25 Transgender Persons each. During the Covid-19, the Ministry through its Public Sector Unit National Backward Classes Finance & Development Corporation (*NBCFDC*) has incurred an expenditure of Rs.93.80 lakhs to 6,440 members of the Transgender Community across 28 States, which includes Rs.89.10 lakhs to 5,940 Transgender people at Rs.1,500 each, who applied for immediate subsistence and Ration Kit of Rs.4.70 lakhs to 500 Transgender persons at Rs.940 each. Free Helpline assistance is set up to give psycho-social support to the Transgender community during the Covid period. Further, Municipal Corporations of Delhi, Mumbai, Chennai, Kolkata, Hyderabad, Bangalore, Lucknow, Patna, Nagpur, and Indore cities were requested to open feeding centers for providing free meals.

Suggestions

- The Government schemes and development programs should revolve around increasing



the literacy rate of transgenders by providing them with the best of educational facilities and training of all sort in areas the community members are interested in.

- Steps should be taken to involve transgenders in the mainstream from the lowermost hierarchy of society by setting up regional committees such as Social Adjustment of Transgender in schools and their progress should be monitored quarterly.
- Regional and National reservations should be provided to all the members of the transgender community in the central sector as well as in state-owned sectors as getting them a job would help them to step away from the exploiting practices of earning
- The transgender community has always suffered atrocities and found no way out to get rid of them. The best way to deteriorate this exponential increase in the sufferings of the community is by setting up special cells in Police stations as well as in hospitals exclusively for transgenders.
- Government should provide funds exclusively for transgender-oriented NGOs and should promote the setting up of such NGOs by providing them with ample opportunities to grow.
- Government should provide rebates to transgender in electricity, gas, and water bill and should emphasize interest-free loans to transgenders. All this would help in their economic development and societal elevation.
- Rehabilitation programs and projects should be launched to help the transgenders involved in addictions of any kind.

- Giving birth to transgender is still taboo in society so government should set up “a specific day” in a year exclusively for transgenders to enlighten society and to uproot the stigma.
- Government should come up with a statute to Legally recognize transgenders and help them with the identity documents which serve as a ladder for all the citizens to avail themselves civil rights such as voting rights, education rights, inheritance rights, health, and public services, etc.
- Social attitudes towards transgender persons are discriminatory and this could only be transformed with optimism by setting up exclusive counseling centers to cure the mental health and social stigma.

Conclusion

The right to life and the right to live with dignity is vested by the Indian Constitution to all persons regardless of their gender identity. The need of the hour is to balance transgender rights with human rights. Transgenders can be merged with the mainstream if the society respects their origin and consider the rights to be prerogative and have a positive approach in their behavior by considering them as humans before any divisions. Although various bills and judgments have been served to shift attitudes towards transgenders by making the lives of the Transgender community at ease and in line with the other two genders but the humanitarian goal to let them live a dignified life is still a dream yet to be achieved. Research methodology should strategize across various disciplines to address transgender issues and create an ecosystem to improve their life more effectively by addressing their necessities,



promoting equality, and reducing vulnerability.

References

Books:

Transgender History, Susan Stryker

Redefining Realness, Janet Mock

Acts/Codes:

Indian Penal code, 1860

Criminal tribes Act, 1871

The Rights of Transgender Persons Bill, 2015

Transgender Persons (Protection of Rights) Act, 2019

Webliography:

A way forward for Trans persons, The Hindu

Transgender Issues, The New York Times

People think we wake up and decide to be Trans, The Guardian

Understanding the Transgender Community, Human Rights Campaign

Building an understanding of Transgender care, The Lancet
