

# A Study of Transgender Community's Plight under Human Rights Regime

Dr. Jasbir Singh

*Assistant Professor, University College Benera, Dhuri.*

Himani Thakur

*Research Scholar, Punjabi University, Patiala*

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## **Abstract**

Transgenders most commonly known as hijras are fighting since long back, for their basic human rights. Indian society specially is the witness of the sufferings, humiliations, and discriminating treatment against transgenders from the ancient time. Where one segment of the human fraternity is equipped with all the amenities of life and are planning to visit and make their next home on the moon, Hijra community on the other hand are still crying for their recognition as a normal human being. The rapid economic and cultural development of the entire globe could not make a difference in the status of transgender worldwide and even in the current time they are victimized by social superiors. Indian Constitution and many other international laws talk about equality of all persons and protection of their various rights. The apex court of the country has also recognized transgender as the third gender in the case of *NALSA v. UOI*. But this is the bare truth that abuse, assault, ill-treatment, sexual and other harassments are very common crimes that usually happen with these people. Many countries around the world are now becoming sensitive on transgender issue and enacting laws protecting their rights. It is now high time to break the general myth that the human society can be based only on binary structure of male and female and will have to accommodate transgenders in our social framework.

Against the backdrop, the paper will try compare and evaluate the various legal framework on transgender adopted by the countries across the globe on and will also try to suggest some measures by which this vulnerable section of society could not feel neglected and discriminated and can lead a dignified life like other human beings.

**Key Word:** *Transgender, Human Right, Legal Framework.*

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## **I. Introduction**

Transgender are those people who usually feel that the sex with which they came into existence does not match their gender identity, or the gender that they feel they are inside. For example, an individual who born female may identifies as male is a trans man and a person born male may identifies as a female is trans woman. Thus, this category of people is neither male nor female but has traits of both. They are also known by the various local names like, hijras, Kinnars, Shiv-Shaktis, Aradhis etc. Today transgender term has become so wide that anyone whose identity and behavior falls outside the conventional gender norms is now regarded as transgender. The transgender community was existed in almost all the nation, society, and culture from the ancient times, but they were considered not more than a mere chattel and were often subjected to humiliation, cruelty, assault and were devoid of basic human rights. Due to the non-recognition of transgender community in the society they are denied of right to equality under Art 14 and right to life under Art. 21 of the Constitution. It is true that the apex court of the country, time and again always protected this vulnerable section of the society but the unfavorable mind set of the people and societal approach towards this community is a serious concern and needs to be corrected.

### **History of Transgender in India:**

**Ancient period:** Transgenders had always been an integral part of Indian community. This community is well recognized in our ancient history. They have got a strong presence in Hindu mythology and religious textbooks. In *Kama Sutra*, a Hindu text on human sexual behavior written sometime between 400 BCE and 200 CE this community have been referred as '*tritiyapakriti*' or third gender has been an integral part of Vedic and puranic literatures, it categorizes men who desire other men as a 'third nature'. The term namely '*napunsaka*' has been commonly used to denote the absence of reproductiveability of a person. We also find the mention of hijra community in the two-holy epic of Hindu mythology namely *Ramayana* and *Mahabharata*. It is said that Lord Rama in the epic *Ramayana* while leaving for the forest upon being exiled from the kingdom for 14 years, turns

around to his followers and asks all the 'men and women' to return to the city. Hijra community on his direction did not feel bound to return and they decided to live with him. Lord Rama being impressed by their such devotion sanctions them the power to confer blessings on people on auspicious occasions like childbirth and marriage, and also at inaugural functions which, it is believed set the stage for the custom of badhai in which hijras sing, dance and confer blessings.

In the other epic Mahabharata, we also find reference of this community. In one of the episodes of Mahabharata Arjuna who was the hero of this epic was sent into exile. He there assumed an identity of a hijra and performs rituals during weddings and child births that are now performed by transgenders. There is also another story in Mahabharata epic relating to transgender. One Aravan was the son of Arjuna and Nagakanya in Mahabharata. offer to be sacrificed to Goddess Kali to ensure the victory of the Pandavas in the Kurukshetra war, the only condition that he made was to spend the last night of his life in marriage. Since no woman was willing to marry one who was doomed to be killed, Krishna assumes the form of a beautiful woman called Mohini and married him. The Hijras of Tamil Nadu considered Aravan their progenitor and call themselves Aravanis. In Hindu mythology one of the many forms of Lord Shiva where he involves him merging with his wife Parvati to become the androgynous *Ardhanari*, who holds special importance to many in the *Hijra* community.

**Islamic Period:** Hijra Community also played a considerable role during Islamic period specially in the Ottoman empires and the Mughal rule in the Medieval India. They used to hold substantial positions like political advisor, administrator generals as well as guardians of the harems. They were considered clever, trustworthy, and loyal to the royal crown. They had free access to all spaces and sections of population, thereby playing a crucial role in the politics of empire building in the Mughal era. They were also considered to hold spiritual power and were sought out for blessings, particularly during religious ceremonies.

**British Period:** In the beginning of British rule transgender communities were given protections by some Indian States. They were entitled to provision of land, rights of food and smaller amount of money from agricultural households. Such benefits were withdrawn from them during British Period and lands were also snatched through British legislation as it was not inherited through blood relations. British colonial rule identified people of the *Hijra* community as criminals. They were considered to be separate caste or tribe during colonial administration. The Criminal Tribes Act, 1871, considered all were hijras who were concerned in kidnapping and castrating children and dressed like women to dance in public places. The punishment for such activities was up to two years imprisonment and a fine or both.

**Contemporary Period:** In current time transgender communities is enjoying better position in society in comparison to British Rule. They are beneficiary of many welfare schemes of the government. This community is entitled to cast their vote and part of census and are also issued citizenship id card. MGNREGA is a major initiative of the 11th Five Year Plan period which brought employment opportunities for transgender people. The apex court of the country also declared for transgender as third gender in National Legal Service Authority V. UOI and conferred on them all legal and constitutional right of a citizen.

**Problems Faced by Transgenders:** Despite the glorious ancient past and several government initiatives to improve the condition of trans people in India it is bare truth that transgender community is the most vulnerable and marginal in Indian society. They are subjected to humiliation, discrimination, assaults, harassment and are victimized in all sectors. The historic judgement given by supreme court of India in NALSA case entitles him to be equally treated under Indian Constitution. Not only that the verdict gives them right to self-identification i.e., identifying one's gender as male, female, or third gender, and they were to be recognized as socially and economically backward classes, thereby making them eligible for reservations in jobs and educational institutions. The practical implication of this judgement of the Supreme Court is far from the reality and trans people are bound to live a helpless life in India and facing many problems.

**Discrimination and Social Exclusion:** The trans people faces discrimination from their birth. The discrimination against them starts from the family in which he takes birth. They don't get equal treatment like of their normal siblings which hinders their early growth. Society is also not ready to accept them their part. They don't have right to enter into public places like restaurants, cinemas, shops, malls etc. Even access to public toilet is denied to them and they are bound to use male toilet where they are susceptible to sexual assault and harassment. Not only that they face discrimination in employment opportunity, medical treatment, inheritance of property, adoption and many more. Due to lack of family and social support they become bound to leave their houses, attempts to commit suicide and sometimes indulges themselves into criminal activities.

**Homelessness:** Transgenders are not gladly accepted even in the educated society. Most of the family throw out their child from their houses if they behave in a way which are considered to be feminine or inappropriate and not

expected from a male child. Homeless transgenders are living on city's street and are without any financial support. This led to them to sexual abuse, drug abuse, and mental disorder.

**Denial of Educational Opportunity:** Most of the trans people are illiterate or less literate due to which they cannot take part in social, cultural, political, and economic activities. Indian census reveals that there are 4.9 lakhs transgender in the country out of which only 46 percent is literate as compared to the general literacy rate of the country which is 74 percent. Indian constitution gives right to education to every child up to the age of 14 year and the same is provided to trans people also. Trans people hardly get admission in school where they face harassment and are bullied every day and are asked to leave the school or they drop out on their own. Non sensitization of school authorities, teachers and fellow mates are responsible for this poor literacy rate of transgender.

**Discrimination in Workplace:** Trans people are also discriminated in workplace. The low literacy rate and social exclusion limits the employment opportunity to them. Further lack of knowledge, training in vocational skill, lack of confidence, social stigma is the other reason which such people face at their workplaces and are also reasons of their poor performance.

**Deprivation of Other Basic Rights:** This community is also deprived of many social, cultural, and political rights guaranteed under Indian Constitution to its citizen. They have restricted access to health care, employment in defense services, to get licenses, and are not given the right to contest election. They are treated as outcast and untouchable.

**Legislative Framework for Transgender Community in India:** In India though there are no specific law protecting the rights of transgender however, Indian Constitution and the apex court of the country has always been favorable to this vulnerable group.

**Constitutional Rights of Transgender:** The preamble to the constitution mandates every citizen Justice: – social, economic, political equality of status. The Constitution says that everyone is equal before law. However, the transgender has always been deprived of their constitutional rights. The reason being that the Indian State policies that earlier made only recognized two genders i.e. male and female. Due to non-recognition of their identity, they were deprived of many rights which include right to vote, the right to marry, the right to own property, the right to claim a formal identity through a passport etc. and many other rights like right to education, employment, health so on. The basic fundamental rights which are given to the all citizen including transgender under India Constitution are:

Art. 14: This article gives equality before law and equal protection of law to every person living in India. Therefore, Transgender people also come within its ambit and are entitled to equal protection in all spheres of State activities.

Art. 15: This article talks about prohibition of discrimination on the ground of religion, race, caste and sex and includes the third gender also under its domain as being the citizens they have the right to not to be discriminated on this ground.

Art. 16: Article 16 deals with equality of opportunity in the matters of public employment. The transgender community being the citizen of the country should not be discriminated on the basis of their sexual orientation.

Art. 21: This article states that no person shall be deprived of his life and personal liberty except according to the procedure of law. But this is a matter of sorrow that since time immemorial transgender have been deprived of their life and personal liberty.

**Section 377 of Indian Penal Code:** Recently in case of *Navtej Singh Johar v. the Union of India* constitutional validity of sec 377 of IPC was challenged. This section states that “voluntarily carnal intercourse against the order of nature with any man, woman or animal shall be with punished with imprisonment for life, or with imprisonment which may extend to ten years with a fine.” Through writ petition the petitioner sought the recognition of right to sexuality, right to sexual autonomy and right to choose a sexual partner to be a part of Art 21 of the Constitution of India. The Hon'ble Supreme Court decriminalized Sec377 stating that discrimination on the basis of sexual orientation is violative of right to equality and right to privacy as sexual orientation forms an inherent part of self identity and denying the following rights is violative of right to life and fundamental right cannot be denied.

**Immoral Traffic Prevention Act, 1956:** This Act was amended in the year 1986. The new amended Act makes it gender neutral. Under the ambit of this Act along with male and female sex worker those whose identity is not known is also included. Now male and hijra sex worker is also the criminal subject of this Act and it gives police officers legal basis for arrest and intimidation of the trans sex workers.

**Right of Transgender Bill 2014:** The Bill was introduced in Rajya Sabha on 12<sup>th</sup> December 2014, and it was unanimously passed with opposition party support on 24<sup>th</sup> April. This day (24<sup>th</sup> April) is also celebrated as Transgender day after passing of the Bill in the Rajya Sabha. 2015 The bill was introduced by the, Tiruchi Siva, MP from Tamil Nadu. The Bill if implemented will definitely reduce the suffering of transgender. There are various chapters under the bill dealing separately with different problems faced by this vulnerable group.

➤ The Chapter on education makes it mandatory for the government to provide inclusive education for transgender students and also to provide adult education to them.

➤ Under the employment chapter there are two clauses

a. Dealing with the formation of schemes for vocational training, and Self-employment of transgender persons by the government.

b. Non -discrimination against transgender persons in any establishment whether it be public or private.

➤ In the social security and health chapter, it is incumbent upon the government to propagate social security and health care facilities which are to be provided in the form of HIV clinics and free SRS. There is also provision for right to leisure, culture, and recreation. They should also have basic rights like access to safe drinking water and sanitation etc.

➤ The Bill also provides for the setting up a number of authorities and forums like National and State Commissions for transgender person. Such commissions work will be mainly in the nature of inquiry and recommendations in the inconsistencies in the implementation of the law or violations of right of transgender.

However, the bill could be passed by Lok Sabha and ultimately lapsed. After two years, a new bill was introduced in Lok Sabha i.e. Transgender Persons (Protection of Rights) Bill, 2016. In contrast to the 2014 Bill, the bill of 2016 was substantially different from NALSA judgement. The Parliamentary Standing Committee on Social Justice also highlighted several instances where the 2016 Bill conflicted with NALSA, in its 43rd Report. The Lok Sabha however, passed the Bill without incorporating the recommendations of the Standing Committee and it became the Transgender Persons (Protection of Rights) Act, 2019. Many transgender people challenged the bill contending that few provisions of the bill being unconstitutional. The Petitioners seek for the Court to strike down Sections 4, 5, 6, 7, 12(3), 18(a) and 18(d) of the Act as unconstitutional. In addition, they pray for the Court to issue a Writ of Mandamus that directs Centre and State Governments to provide reservations for transgender persons in public employment and education, as directed by the Court in NALSA.

**Countries that Support Transgender's Human Right:** Transgender community is not only deprived of their basic human right in India but all throughout the world. However, now civil society is raising its voice in support of this community and accordingly we see some changes in the status of this community at international level as well. Few countries allow them to lead their life according to their own choice and gives them right to sexual orientation.

**Argentina:** Argentina is the first country in the world that made laws on transgender rights. In 2012, Argentina's Senate unanimously approved the Gender Identity Law making sex-change surgery a legal right. The procedure is included in both public and private health care plans.

**Denmark:** In 2010 the Council of Europe adopted a resolution calling on member states to guarantee the rights of transgender people to obtain official documents with their chosen status without requiring other procedures such as sterilization, surgery or hormone thereby. Four years later Denmark became the first European country to allow people to apply for a legal gender change and obtain a new gender status on their identification card with a simple declaration.

**USA:** In the USA, under Section 1557 of the Affordable Care Act, May 13, 2016, discrimination based on gender identity has been banned. The rule applies to discrimination in health settings that receive federal financial assistance, every health program administered by the Department of Health and Human Services, and every health program administered by Title I of the Affordable Care Act. The rule states - it is unlawful for an insurance carrier to "have or implement a categorical coverage exclusion or limitation for all health services related to gender transition"

**Germany:** In Germany, the Federal Social Court ruled in 1987 that gender reassignment measures in the case of transsexuality are subject to payment". The costs for gender-modifying or gender-adjusting treatments are only covered by the health insurances once the medical necessity of the respective treatment has been determined in each individual case.

**Sweden:** Sweden Government provides gender-affirming health care for transgender and gender-nonconforming people. They have multidisciplinary care teams to offer personalized, patient-centered care that addresses each individual's unique health care needs. Also, the national health insurance covers all costs for medical care and pharmacological treatment, except facial surgery.

**South Asian Countries:** Recently many south Asian countries has also given legal status to transgender recognizing them as the third gender and allowed all the rights which is given to the other citizens of the country. Some of them are:

- **Pakistan:** Pakistan in 2009 became one of the first ever to legally recognize a third sex.
- **Nepal:** Nepal in 2013 added a transgender category on citizenship certificates, which act as a national identity card.
- **India:** In 2014 India's Supreme Court recognized the existence of a third gender.
- **Bangladesh:** From 2018 transgender people have been able to register to vote as a third gender in neighboring Bangladesh.

**Role of Judiciary in protecting Human Rights of Transgender in India:** 21<sup>st</sup> century has witnessed a remarkable change in regard to the recognition and acceptance of the transgender's rights in India. In this process many laws and policies were framed, some legislations were amended and repealed. This changes scenario helped in changing the way we conceive the notion sexual orientation and gender identity. The judiciary played a significant role in according the human rights of transgender community in India.

In *Naz Foundation v. Govt. of NCT of Delhi*<sup>1</sup> a division bench of the Delhi High Court held that treating consensual homosexual sex between adults as a crime was a violation of fundamental rights protected by the Constitution. This, however, was overturned by the Supreme Court in the *Suresh Kumar Koushal case*, and all progressive efforts in this direction were in vain.

In its *National Legal Services Authority (NALSA)* judgment, the Indian Supreme Court officially formed the "third gender" category for transgender people, classifying them as a socio-economic backward classis. This decision guided the government to ensure that they get job quotas, admission in educational institutions and health benefits. The Supreme court taking in view the discrimination and abuse suffered by transgender people provided various anti-discriminatory measures in their favour.

In *K S Puttaswamy vs Union of India* popularly known is an integral judgement as it was held in this case that right to privacy is an integral part of right to privacy. Right to Privacy was also extended to every individual irrespective of their gender and sex. Recognition of privacy for members of the transgender community as an inalienable grant them autonomy and protection from State action while exercising their right to choose their partners.

In *Navtej Singh Johar v. UOI*. the petitioner challenged the constitutional validity of section 377 IPC being violative of right to privacy equality, freedom of expression and protection against discrimination under Article 14, 15, 16 and 19 1 (a) of Constitution of India. The Supreme Court struck down Section 377 to the extent that it criminalized sex between two consenting adults. The court further held that discrimination on the basis of sexual orientation is violative of right to equality and right to privacy as sexual orientation form part of self-identity and denying the following right is violative of right o life and fundamental right cannot be denied.

**Conclusion and Suggestions:** In spiteof several legislative changes and government support, the transgendercommunity continues to face discrimination and violence. The new enactment is hardly making any positive change in the social status of this community.Obviously, few among them who are vigilant and conscious of their rightsis getting benefit of such legislative changes but there is also a large segment of this community who are still being victimized. A full cooperation from all the sections of society plays a crucial role in improving the vulnerability of transgender community in India.

Firstly, we have to understand that being a transgender is not a mental disorder. This fact was also approved by the WHO in 2018 that transgender is mentally fit and can also form a rational judgement. All the medical services should be accessible to trans people and there should also be proper provision for those who wish to undergo gender affirmation surgery.

Secondly, societal attitude towards this community should be changed. This community was forced to indulge themselves in begging and sex work for their livelihood due to which they are subjected to mockery and violence. sensitization of society towards them is required instead of shaming them for their choice of work.

Again, trans community also needs welcoming hands from the employment sector. Most of the transgender to through tough time while searching jobs in formal sector due to lack of required level of education and gender discrimination against them.

It is true that lack of educational qualification is the great impediment in getting decent job for transgender. The basic right to education should also be availed to all trans child. There should not be any

kind of discrimination against them in primary and upper level of education. The government should take strict action against such institutions that denied admission to them on the ground of their sex.

Lastly, the contradiction between two transgender Bill of 2014 and 2018 should be resolved as soon as possible. In pursuance to NALSA judgement, the Transgender Bill 2014, gave them the right to self-identification and also made provision for reservations for transgender people across government and private sectors job. In contrary the Transgender Persons (Protection of Rights) Bill 2018 proposed for the establishment of a board of people to determine whether an individual is transgender or not, based on their genitals and whether they have undergone gender-affirmation surgery or not. This provision of the Bill was protested nationwide by the transgender community and trans rights activists and finally the Bill was lapsed in February 2019, when the Rajya Sabha was adjourned sine die. It is also demanded by this community that if transgender is now recognized as third gender, the entire criminal laws which were solely based on male and female section of society only needs to be revised including this third gender also. Many provisions of the bill seem to be against those for whose shake it was framed, and this was the reason why the bill did not become a law and got the president's assent.

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