

Transgender in India: Problems and Laws

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1. INTRODUCTION:

Transgender is a gender term that describe people whose gender identity or their internal sense of being male, female or something else does not match with the sex they were assigned at birth. Transgender people are individuals of any age or sex whose appearance, personal characteristics or behaviours different from stereotypes about how men and women are supposed to be. In history, these types of people existed in every culture, race, and class. In the mid-1990s, the contemporary form 'transgender' arose from the grass root community. In its broadest sense, transgender means anyone whose identity or behaviour falls outside of normal group of people. Gender non-conforming is an umbrella term and includes people who may identified as 'genderqueer', 'gender fluid' who are neither male or female. 'Trans' is often used as shorthand for transgender. Like when a person is born, a doctor usually says that whether the child is male or female based on what bodies look like. Hence, people who are transgender or non – binary opt to use the gender-neutral title that is 'Mx' which is legally recognized in many countries around the world. Gender identity refers to a person 's internal sense of being male, female, or something else. Gender expression refers to the way a person communicates with others and also through behaviour, clothes, hair style, voice and body characteristic.

2. MEANING:

The term 'transgender' is one of many adjectives that can be applied to a person. Being trans means when one does not identify with the gender with which it was assigned at birth. It means it does not indicate the gender of a person whether male or female. Transgender person has been documented in many indigenous, western and eastern cultures and societies from antiquity until the present day. However, the meaning of gender non conformity may vary from culture to culture. There is difference between sex and gender. Sex is assigned at birth and refers to one's biological status means either male or female. Moreover, it is associated primarily with physical attributes such as chromosomes, hormone prevalence and external and internal anatomy. While gender refers to the socially constructed roles behaviours, activities and attributes that a given society considers appropriate for boys and men or girls or women. All these influences the ways that people act, interact and feel about themselves, in different cultures, biological sex is similar but the aspects of gender may differ.

The opposite of transgender is cisgender which indicates that one does identity with the gender which were assigned at birth. Both prefixes 'cis' and 'trans' have Latin meanings; Trans means across from or the other side of. 'Cis' means 'on the same side' or 'the same as'. However, in the past the word has not been used as it is used in present. But the idea of being 'trans or gender' nonconforming has always existed in indigenous, western and eastern

cultures. The meaning of gender, gender expression and gender roles vary from culture to culture, past and present.

3. TYPES AND NAMES OF TRANSGENDER

Transgender is an umbrella term, meaning that many different gender identities and expressions are included in this community. For example - Nonbinary, genderfluid, genderqueer, agender, transman, transwoman and transsexual.

‘Transsexual’ refers to people whose gender identity is different from their assigned sex. Many times, it is seen that transsexual people alter or many times wish to alter their bodies by surgery and other means to make their bodies similar with their gender identities. This process of transaction by medical surgeries is often referred as gender affirmation.

A person who is actually a female but live and pretend to be a male like chooses to cut their hair short and wear tuxedo at special occasions and wish to alter their body through medical surgery so that she can look like a man, this is known as “trans sexual” men or transmen or also known as female to male or FTM. On the other hand, a person who is actually a male but live and pretend to be female like using nail polish or make up and wish to alter his body parts by medical surgery is known as trans sexual women or transwomen or also known as female to male or MTF.

Generally, the “DRAG QUEENS” refers to men who dress as women for the purpose of entertaining others at bars, clubs or other events. The term “Genderqueer” refers to people who identify their gender as falling outside the binary constructions of “male” and “female”. The pronoun used for them is “zie” instead of “he” or “she” and “his” instead of “her”. There are some other categories also of multigender that includes androgynous, multigendered, gender non-conforming, their gender and two spirit people.

In India, the term transgender surrounded by a wide range of identities, cultures and experiences which includes **Hijras, Aravanis, kothis, jogtas Jogappas and Shivshaktis**. These people have been part of India’s culture and treated with great respect. Even in the present they are treated with respect. Hijras can be considered as the western equivalent of transgender / trans sexual (male to female) person but hijras have a long tradition and culture in our society. After the performance of marriage and birth of baby boy in a family, it is ritual that Hijras are called by the family to their home for their blessings. When hijras came to give Badhai, they clap with their hands, perform dance and ask for money. People consider it good sign for their prosperity

Kothis, In Indian context, kothis means male individuals at birth but express feminine traits and prefer a feminine kind of role in relationships. They are regarded as feminine men or boys who take a feminine role in sex with men. They don’t live like hijras in communities. Some kothis may identify as hijra, gay or simply as kothis. Kothis have lack of occupational opportunities so they involve in sex work for the sake of survival.

shivshaktis, the term shivshaktis is rooted in Hindu Mythology. Lord shiva and Maa shakti represent the union of masculine and feminine power. This concept of a divine union is often used to understand the transgender community because they are also personifying both male

and female aspects of the divine. Shivshaktis are typically males and considered to be close to the goddess. Their senior gurus taught them all the customs, rituals and norms. One common practice of shiv shaktis is that they are married to a sword which represent the aspect of the divine male and female. Most of them come from lower socio- economic status and they work as astrologers or spiritual holder.

Jogtas, / jogappas, also known as jogappas. They are devoted to a particular God. ‘joga’ refers to make servant of that Goddess and jogi refer to female servant (who is also sometimes referred to as **Devdasi**). In India jogtas are male to female transgender who are found in the temple of Goddess Renukha Devi, present in Maharashtra and Karnataka. They came from distinct sociolect-cultural group who their own specific traditions, beliefs and practices. The Transgender Person (Protection of Rights) Act, 2019 recognizes transgender people which include jogtas also and aim to protect their rights and ensure their inclusion in society.

4. PROBLEMS OF TRANSGENDERS

The transgenders group consists of hijras, jogtas, jogappas, Sakhis and Ardhi’s all of these individuals have to go through a lot of challenges on everyday basis. These problems include verbal abuse, sexual harassments, social exclusion, Lack of education, workplaces opportunities, mental issues, violence and most important victims of hate crimes. They are easily victimized for the crimes that they have not committed. They have to face a violence and become prey of hate crimes. Many times, police even don’t register their complaints and oppressed them, it shows that how much civilized we are. The problems faced by them are as follow –

4.1 Discrimination – Discrimination is the major cause of transgender because the majority of the people in this community are illiterate and having less education. They are not able to get involved much in educated section of the society. According to the Right to Education Act, they are categorised as a disadvantaged group which means that they have 25% reservation as an economically weak section of the society. Lack of education results in unemployment. Moreover, even they get educated after a struggle later on they are not able to respect and value at workplaces.

4.2 social exclusion and homelessness – Transgender are considered as lower class by society which resulted in exclusion. Most of the families do not accept if their male child behaving in ways that are considered famine. Family members scold, threaten or assaulted and even sometimes thrown out of their homes. The reason given by them are disgrace, inability on the part of child to take care of family. Moreover, once their identity is identified, they are forced and pressurize to leave the parental home by the society as they cannot be a party and parcel of normal community and class.

4.3 Prostitution – No one wants to enter the world of sex workers. It is the circumstances only which compelled the person to become prostitution. There are many factors like illiteracy, unemployment, discrimination and social stigma. They are forced by the society, relatives or friends to enter the profession of prostitution. Many times, rejection by the families and lack of social support become the major cause to engage in this work.

4.4 Health care issues- Transgender individuals often face challenges like access to medical health services which are important for addressing the psychological impact of discrimination and stigma. Sometimes they don't get proper treatment due to lack of knowledge. Hence, gender affirming surgeries and other medical treatments are very costly.

4.5 Violence and Harassment – Family rejections and harassed by society leads to violence and sometimes results in isolation. They have to face difficulties in obtaining identity documents also. Lack of awareness and understanding the identities and issues can contribute to discrimination and prejudice.

4.6 Lack of legal protection and victims to hate – Legally, the transgender community is not protected as much as any other community. So, they are easily victimized for the crime which they have not committed. They undergo lot of violence and become victim of crimes. Police also don't want to register their complaints. They are oppressed by the police officers.

5. Constitutional provision of Transgender

Historically, Transgender community has been subjected to discrimination, oppression and violence specially in conservative societies. The Preamble of the Indian constitution concern about social, economic and political equality. Most of the protection are provided in the chapter of fundamental rights which guaranteed to everyone basic rights. All individuals are also guaranteed various benefits and political rights under the constitution.

Article 14 states that the state shall not deny to any person equality before the law or the equal protection of laws within the territory of India. Here, every person including non-citizens and transgenders have the right to equality before the law or the equal protection of laws. The equal protection of law is a pledge of protection or guarantee of equal laws. The two expressions are simultaneously used in Article 7 of Universal Declaration of Human Rights, 1948. It may have influenced the formulation of Article 14. The basic purpose of the two expressions is to give as wide amplitude to Article 14 as possible.

Article 15 deals with the prohibition of discrimination on the ground of religion, race, caste and sex which includes the third gender also. As citizen they also have a right not to be discriminated on any of these grounds. They also have the right to protect their gender expression which is reflected through their dressing sense.

Article 16 deals with equality of opportunity in the matters of public employment. Transgender being the citizens of India has the right to employment and equal opportunity in the matters of employment and they should not be discriminated on the basis of their sexual orientation.

Article 21 deals with the protection of right to life and liberty. It states that no person shall be deprived of his life and personal liberty except according to the procedure established by law. Hence, transgenders being a citizen of Indian society also have the full right to protect their rights and personal liberty.

Naz Foundation vs. Government of NCT of Delhi, (2009, DLT277), It is the landmark case in the Indian court system. It declared section 377 of IPC unconstitutional as it infringed fundamental rights. The Delhi high court initially ruled in favour of the Naz Foundation holding

that criminalizing consensual homosexual acts violated constitutional rights like the right to privacy and equality.

However, this decision was later overturned by the Supreme Court in a subsequent case, **Suresh Kumar Kaushal vs. Naz Foundation, (2013) 14 SCC1** which reinstated section 377. Ultimately, the Supreme court revisited the issue in **Navtej Singh vs. Union of India**, striking down sec.377 once again and decriminalizing homosexuality.

In **Navtej Singh Johar vs. Union of India, AIR 2018 SC 4321**,

In this case the constitutional validity of sec .377 of the IPC was challenged. As it stated that sec.377 of IPC is the violation of the right to privacy, equality, freedom of expression and protection against discrimination. The petition is filed to seek recognition of right to sexuality and to choose a sexual partner of own choice. The Honourable supreme court held that sec.377 of IPC should be decriminalized and affirmed that homosexuality is not an aberration but a variation of sexuality. The court also held that discrimination on the basis of sexual orientation is violation of fundamental rights.

In **National Legal Service Authority vs. Union of India, (2014, SC)** the Supreme court held that the basic fundamental rights must be available to the third gender in the same way as it is expected to be provided to males and females. The court held that the right to one's gender identity lies guaranteed under Article 14 and 21 and it is essential a part to live life with dignity. While interpreting the applicability of Article 14 the court held that the provision provides protection to 'any person' which will also include transgender as well. Article 15 and 16 are also not limited to the biological sex of male and female but it intended to include even those who consider themselves neither male or female and the third gender.

K.S. Puttaswamy vs. Union of India (2017) 10 SCC, this is the landmark judgment affirmed the right to privacy as a fundamental right under the Indian constitution. This case primarily addressed the constitutional validity of the Aadhaar Scheme and the right to privacy. The Supreme court held that right to privacy is a necessary component. Every person irrespective of gender as male and female must be given the right to privacy.

6. TRANSGENDER AND PERSONAL LAWS

In India, inheritance laws are governed by personal religious laws and these laws have been recognised the inheritance only in reference to male or female. Hence, this issue has raised many times but nothing has happened in this regard. Problem arises when there is lack of the basic identification documents such as 'third gender'. Even though it is recognised by the government but they have to face the violation in respect of the inheritance rights.

Hindu Succession Act, 1956, In this Act sec. 8 outlines the rules of succession for a male and Female Hindu who dies intestate (without a will). It also described about the distribution of property. Sec. 15 of the Act outlines the rules for succession to the property of a female Hindu who dies intestate. It also details the order in which property should pass on to different heirs in the absence of a will. However, just to avoid these inherent matters the transgender categorised themselves as female heir. But there is no ground also which disqualify for the transgender.

Muslim personal law, The Muslim personal laws were drafted according to the Quran- the Holy Book of Islam. Under Shariat Law, there is no specific laws for transgender. But some jurist argue that Islamic principles allow for the recognition of transgender individuals. However, the lack of clarity and the binary nature of gender in traditional Islamic law create challenges for transgender people seeking to exercise their rights.

Indian succession Act 1956, This Act governs to all those who are not Hindu, Muslim, Jain, Buddhist or Sikh. It indicates that prima facie, this statute seems gender neutral because it uses terms such as kindred and lineal descendants. However, the legislation still is not truly free of binaries and silence of the statute is not favourable towards the transgender community.

Use of Will, However, succession through will is the safest way of ensuring that transgender persons are given a share in inheritance. A will can override any other mode of intestate succession. It does not dependant on gender. It can include all persons regardless of their characteristics. Under Hindu Law, a person can bequeath as they please because the will can override intestate succession as mentioned in the Indian Succession Act.

Hindu marriage Act, 1955 Inherent rights are often stem from marriage, if marriage of transgenders is not recognised then off course inherent rights will suffer as well. Under the Hindu Marriage Act, the used terms are bride and bridegroom which left no more interpretation in this regard. But in Arun Kumar & Anr. Vs. Inspector General of Registration & Ors. (2019)10 SCC 513, The supreme court held that under sec.5 the word bribe includes transgender person as well. This verdict was passed on the basis of Article 21 of the Constitution, the putt swamy and the NALSA judgment. But there is nothing has been mentioned in the Transgender Persons protection of Rights) Act, 2019. Hence, Indian legislation restricts marriage of transgenders in either letter or in spirit of the law. Thus, lack of marital rights is also one of the causes to hamper inheritance rights.

7. TRANSGENDER PERSON (PROTECTION OF RIGHTS), ACT 2019

The Transgender Person (protection of rights) Act, 2019 is a landmark piece of legislation passed by the Indian Parliament with the object of protecting their rights and other issues faced by them. The Act was passed with the object to combat discrimination and ensure equal access to opportunities in areas like education, employment and healthcare. This Act define a transgender person as someone whose gender identity does not align with their assigned sex at birth.

7.1 SOME FEATURES OF THE ACT

- (1) **Prohibition of discrimination** - The Act prohibit the discrimination against transgender person in several aspects of life like education, employment, healthcare and access to public facilities.
- (2) **Rights of residence** – transgender individuals have the right to reside and be included in their families and household.
- (3) **Employment** – According to the Act, Transgender cannot be discriminated in government and private entity in the matter of employment.

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- (4) **Education** – Transgender must provide inclusive education in educational institutions. They will be provided opportunities for their growth.
- (5) **Health Care** – The Act make it mandatory for the government to provide healthcare facilities to the transgender. It includes sex reassignment, surgery and hormonal therapy. If required they will also be provided counselling and other necessary services.
- (6) **Welfare Measure** – The Act also mandates the government to take appropriate steps for the rescue, protection and rehabilitation of transgender persons.
- (7) **Identity Certificate** – A Certificate that define the gender of a person is called identity certificate. Transgender person can request to the District Magistrate for gender certificate. However, such a certificate will be issued even if the gender is changed via operational surgery.
- (8) **Offences and penalties** – The Act also recognize following offences against transgender people which includes denial of access to public spaces, removal from the home or village, removal from the home or village, removal for forced or bonded labour, physical, sexual, verbal or any kind of financial abuse will be punished by fines and prison sentences that range from six months to two years imprisonment.

8. Conclusion

The Rule of law is supreme and everyone in India is equal in the eyes of law. There has been a notable shift in the 21st century in India in terms of rights of individuals who belong to the Transgender community. Many laws and policies were created throughout this period and some laws were changed or repealed. As a result of these new realities and the way of thinking about subjects like sexual orientation and gender reality has changed a lot. In India, the judiciary has played a vital role in ensuring the transgender community's human rights. Henes, the Transgender are in constant struggle to fight in every part of the society. Their life is a daily battle in which they are not accepted in anywhere. It is the socio-economic responsibility of the federal government and the state government to manage the whole of the society socially as well as economically by implementing a number of social welfare policies. The Courts have to prefer to follow 'Phycological Text' in spite of the 'Biological Test'. In order to follow the human thoughts, they also declare that insisting on sex reassignment surgery as a condition for changing one's gender is legal. Though one reality which can't be changed is that they are part of this civilized society so they should be given a comfortable place for their growth and development.

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