

# Justice For Transgender People; A Step Towards Equality

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## Introduction

Transgender people are individuals of any age or sex whose appearance, personal characteristics, or behaviours differ from stereotypes about how men and women are 'supposed' to be. Transgender community has remained a part of the Indian society from historic time. The contemporary term 'transgender' arose in the mid-1990s from the grassroots community of gender-different people. The term "transgender" in contemporary usage, has become an umbrella term that is used to describe wide range of identities and experiences, including but not limited to preoperative, post-operative and non-operative transsexual people, who strongly identify with the gender opposite to their biological sex; male and female. As transgender in India, are neither male nor female, treating them as belonging to either of the aforesaid categories, is the denial of their constitutional rights. It is the denial of social justice which in turn has the effect of denying political and economic justice.

According to the Former Secretary General of United Nations: Kofi A. Annan, "Gender equality is more than a goal in itself. It is a pre-condition for meeting the challenge of reducing poverty, promoting sustainable development and building good governance."

Transgender is an umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth.<sup>2</sup> Various transgender identities fall under this category including transgender male, transgender female, male-to-female (MTF) and female to male (FTM). It also includes cross-dressers (those who wear clothes of the other), gender queer people (they feel they belonged to either both genders or neither gender) and transsexuals.

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<sup>2</sup> Gay and Lesbian Alliance Against Defamation, "GLAAD Media reference guide"-GLAAD, U.S.A, MAY 2010 available at <http://www.glaad.org>

The rule of law is supreme and everyone is equal in the eyes of law in India. Yet, the transgender community is in a constant battle as they have to fight oppression, abuse and discrimination from every part of the society, whether it's their own family and friends or society at large. The life of transgender people is a daily battle as there is no acceptance anywhere and they are ostracized from the society and also ridiculed.

In the second century, in the book Kama sutra transgender was regarded as the third sex (tritiyaprakriti). Even in Ramayana, Lord Ram grants the blessings to Hijras (a type of transgender) to confer grace on people during fortunate inaugural ceremonies like child birth and weddings. In contemporary world their presence is meant to be lucky for every occasion. In Hindu mythology, there is a concept called Ardhanarishvara or Ardhanari (the lord who is half women) which is a union of Lord Shiva and his wife Parvathi. The puranas also depict the stories of Ardhanarishwara. Also in Mahabharata Arjun assumes an identity of hijras and performed certain rituals and these are today performed by the same community.

When it comes to taking a progressive approach toward gender recognition reform, Netherlands became the first country to legalise same sex marriage in the year 2001 and later U.K also recognised such marriages. In United Kingdom and Netherlands the transgender people have been given various rights such as gender recognition, anti-discrimination etc.

Many countries in the world are still lagging behind in giving equal rights to transgender people. In 2012, the fight for equality of transgender scored a remarkable victory as the Argentine Senate unanimously passed the Gender Identity Act making sex-change surgery a legal right, which has been described as the most progressive and liberal in the world. Two years later, the Danish Parliament followed Argentina's lead and allowed legal gender recognition for transgender

people over the age of 18, solely based on their self-determination without any medical intervention.<sup>3</sup>

In a landmark vote in April 2014, India's Supreme Court granted the country's "hijra" or transgender people and those classified as third-gender the right to self-identify without sex reassignment surgery.<sup>4</sup> Under the ruling transgender people are allowed equal access to education, health care and employment, and protection from discrimination. This Supreme Court judgement was a right initiative in the direction of ensuring human rights to the transgender.<sup>5</sup>

### **Need Of Specific Legislation For Protection Of Transgender People**

Discrimination can be an everyday experience for many transgender people and can affect every area of their life. Transgender, in our society, encompass all races, ethnicity, religious and social classes, yet, they've never enjoyed a respectable life, because of "what they are" and "how they are". They are subjected to confusions and anguish, resulting from the rigid, forced conformity to sexual dimorphism throughout the recorded history. They are facing disparities linked to societal stigma, discrimination, and denial of their civil and human rights. Discrimination against them have been associated with high rates of substance abuse and suicides, and they are facing rampant discrimination in the areas of family life, social life, housing, education, health etc. which is against the principles embodied in our constitution.

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<sup>3</sup>Transgender Europe, Denmark passes best legal gender recognition law in Europe, European Human Right NGO (Jun. 11, 2014) available at <http://tgeu.org/denmark-goes-argentina>.

<sup>4</sup>Harmeet Shah Singh, Indian Court Recognise Gender Self Identification, CNN, (Apr. 16, 2014) available at [www.cnn.com](http://www.cnn.com).

<sup>5</sup>NLSA v. Union of India, (2014)5SCC 438 (India), [www.supremecourtfindia.nic.in](http://www.supremecourtfindia.nic.in).

The Transgender Persons (Protection of Rights) Bill 2016 aims at ensuring that transgender persons enjoys a life of dignity and equality as an Indian citizen, and guarantees a basic human right that had been denied to them for so long - right to identify as a member of our community and as equals. The Bill also instructs state mechanisms to include all possible provisions to ensure that no transgender person faces discrimination in India because of their gender identity. The fight for trans rights has been long and there is still a way to go.

### Major Issues Faced By Transgender People

The main problems that are being faced by the transgender community are of discrimination, unemployment, lack of educational facilities, homelessness, and lack of medical facilities: like HIV care and hygiene, depression, hormone pill abuse, tobacco and alcohol abuse, penectomy, and problems related to marriage and adoption. In addition, hatred and aggression towards a group of individuals who do not conform to social norms around gender manifest in frequent episodes of extreme violence towards transgender people. This violence often goes unpunished.

The other fields where this community feels neglected are inheritance of property or adoption of a child. They are often pushed to the periphery as a social outcaste and many may end up begging and dancing. This is by all means human trafficking. Sometimes running out of all options to feed themselves, they even engage themselves as sex workers for survival. Several of them were denied identity cards with sexual category of their choice.

Apart from the fact of social discrimination, the low levels of literacy in the community also ensure the social, economic and political powerlessness of the community. Transgender have very limited employment opportunities. They have no access to bathrooms/toilets and public spaces. The lack of access to bathrooms and public spaces access is illustrative of discrimination faced by transgender in

availing each facilities and amenities. They face similar problems in prisons, hospitals and schools.

Most families do not accept if their male child starts behaving in ways that are considered feminine or inappropriate to the expected gender role. Consequently, family members may threaten, scold or even assault their son/sibling from behaving or dressing-up like a girl or woman. Some parents may outright disown and evict their own child for crossing the prescribed gender norms of the society and for not fulfilling the roles expected from a male child.

### Human Rights Violation Faced By Transgender

Human rights are basic rights and freedoms which are guaranteed to a human by virtue of him being a human which can neither be created nor can be abrogated by any government. It includes the right to life, liberty, equality, dignity and freedom of thought and expression.

Transgender people's experience globally is that of extreme social exclusion that translates into increased vulnerability to HIV, other diseases, including mental health conditions, limited access to education and employment, and loss of opportunities for economic and social advancement. They are deprived of social and cultural participation and hence they have restricted access to education, health care and public places which further deprives them of the Constitutional guarantee of equality before law and equal protection of laws. It has also been noticed that the community also faces discrimination as they are not given the right to contest election, right to vote (Article 326), employment, to get licenses, etc. and in effect, they are treated as outcast and untouchable.

Transgender people have low rates of access to health and HIV services due a range of issues including violence, legal barriers, stigma and discrimination.<sup>6</sup> The transgender community faces stigma and discrimination and therefore has fewer opportunities as compared to others. They are hardly educated as they are not accepted by the society and therefore do not receive proper schooling. Even if they are enrolled in an educational institute, they face harassment and are bullied every day and are asked to leave the school or they drop out on their own. It is because of this that they take up begging and sex work.

Seldom does a skilled individual from the transgender community get into formal employment due to the policy of hiring only from either the male or female gender. Even if they do, they are ridiculed and ostracized and hence forced to leave their jobs. They are forced into sex work which puts them at the highest risk of contracting HIV as they agree to unprotected sexual intercourse because they fear rejection or they want to affirm their gender through sex. They are viewed as 'vectors' of HIV in the society. Other sexually transmitted infections such as rectal gonorrhoea, syphilis, etc., add to the risk of HIV.

### Constitutional Rights of Transgender People

A harmonious reading of the Constitutional provisions as well as the provisions of the Citizenship Act, 1955 and the General Clauses Act, 1897 Act would show that in fact there is no conflict or limitation imposed on the concept of 'person' by any of these laws and a Transgender Person would undoubtedly fall within the definition of 'person'. It is evident that the Constitution of India guarantees right to equality and non-discrimination for all including transgender persons.<sup>7</sup>

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<sup>6</sup>World Health Organisation, Transgender people, available at <http://www.who.int/hiv/topics/transgender/links/en/>

<sup>7</sup> Section 5, Chapter III of The Rights of Transgender Persons Bill, 2015

Constitution has fulfilled its duty of providing rights to transgender. Now it's time for us to recognise this and to extend and interpret the constitution in such a manner to ensure dignified life of transgender people. All this can be achieved if the beginning is made with the recognition that transgender as third gender. There is a great need of a statutory regime recognising "third gender" for these transgender. We find enough justification to recognise this right of theirs in natural law spheres. Further, such a justification can be traced to the various provisions contained in Part III of the constitution relating to fundamental rights.

A transgender person doesn't enjoy equality under the law. They have been discriminated on various grounds such as equal rights, liberty, opportunity, work place, medical facility et al.

Preamble to the Indian Constitution mandates Justice - social, economic, and political equality of status to all its citizens. Thus the first and foremost right that they are deserving of is the right to equality under Article 14. Article 14 is a right enjoyed by "any person" (similarly, the reference to "citizen" in Article 15 is gender-neutral) and so applies equally to men, women and transgender people, who do not identify clearly as male or female. Hence, transgender people are entitled to equal legal protection of the law in all spheres, including employment, health care, education and civil rights. Discrimination on the grounds of sexual orientation and gender identity impairs equality before the law and equal protection of the law and violates Article 14.<sup>8</sup>

Articles 15 and 16 prohibit discrimination in certain areas based on a list of grounds, including sex.<sup>9</sup> The reference to "sex" is to be understood as prohibiting all forms of

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<sup>8</sup> Article 14, Indian Constitution states 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India'.

<sup>9</sup> Article 15, Indian Constitution states 'The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them'.

gender bias and gender based discrimination, including discrimination against transgender people. The emphasis put on tackling sex-based discrimination in the Constitution means that people have a “fundamental right to not be treated differently for the reason of not being in conformity with stereotypical generalisations of the binary genders”. The right to choose one’s gender identity is integral to the right to lead a life with dignity and therefore falls within the scope of the right to life (Article 21). Article 21 ensures right to privacy and personal dignity to all the citizens.

Right to education under Article 21 A provides for free and compulsory education to all children of age of six to fourteen years.<sup>10</sup> In respect to education also transgender people are facing discrimination from students, teaching staff and non-teaching staff. This attitude does not permit them to access education in a proper manner. Article 23 prohibits trafficking in human beings as beggars and other similar forms of forced labour and any contravention of these provisions shall be an offence punishable in accordance with law.

Article 41 of the constitution provides the right to work in spite of this provision the transgender people still find it extremely difficult to find a job because of the discriminatory behaviour of the employees. The Constitution provides for the fundamental right to equality, and tolerates no discrimination on the grounds of sex, caste, creed or religion. The Constitution also guarantees political rights and other benefits to every citizen. But the third community (transgender) continues to be ostracized. The Constitution affirms equality in all spheres but the moot question is whether it is being applied.

As per the Constitution most of the protections under the Fundamental Rights Chapter are available to all persons with some rights being restricted to only citizens.

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<sup>10</sup> The Constitution (Eighty Sixth Amendments) Act 2002, 12th Dec., 2002.

Beyond this categorization the Constitution makes no further distinction among rights holders.<sup>11</sup> All they want is to be recognised as persons and treated with dignity and moreover it is their right under Article 21 of constitution.<sup>12</sup>

On the other hand, official identity papers provide civil personhood. Among the instruments by which the Indian state defines civil personhood, sexual (gender) identity is a crucial and unavoidable category. Identification on the basis of sex within male and female is a crucial component of civil identity as required by the Indian state. The Indian state's policy of recognizing only two sexes and refusing to recognize hijras as women, or as a third sex (if a hijra wants it), has deprived them at a stroke of several rights that Indian citizens take for granted. These rights include the right to vote, the right to own property, the right to marry, the right to claim a formal identity through a passport and a ration card, a driver's license, the right to education, employment, health so on. Such deprivation secludes hijras from the very fabric of Indian civil society.

### **Judiciary on Transgender Issues**

As far as protection of these people is concerned, various organisations have come up in India to protect their rights and treat them at par with the general public. One of them is voice against 377, Delhi based, a coalition of 12 non-governmental organisations, working on human rights, sexual rights, lesbian, gay, bisexual and transgender issues. It has organised various events so as to create an ambience of recognising people with alternative sexual orientation.

In Naz foundation v. NCT of Delhi, (2011) the high court of Delhi struck down section 377 of Indian penal code 1860 as being unconstitutional.<sup>13</sup> The judgement

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<sup>11</sup> Indian Constitution, chapter III, art.14 -21

<sup>12</sup> Article 21, Indian Constitution states 'No person shall be deprived of his life or personal liberty except according to procedure established by law'.

was pronounced keeping in mind that this section violated individual's fundamental rights to equality before law, freedom from discrimination, life and personal liberty under article 14, 15 and 21 of the Indian constitution respectively. But the decision was overturned in 2013 by the Supreme Court. On a positive note, in the month of April 2014 a landmark decision was given by Supreme Court in *National Legal Service Authority v. Union of India*, which granted legal recognition to the transgender people. By this judgement they are to be treated as third gender and socially and educationally backward classes of citizens and reservations are to be given in all educational institutions and for public appointments.

The ruling in *National Legal Services Authority (NLSA) v. Union of India* has far-reaching implications.<sup>14</sup> It is a courageous decision that embeds the rights of transgendered persons primarily within the right to equality in the Indian Constitution. In this sense it is a more dynamic decision than the Delhi High Court ruling regarding Section 377, which was largely based on the right to privacy. The Court held that non-recognition of gender identity violates the rights to equality and life, and that transgendered persons should not be compelled to declare themselves as either male or female. The lack of recognition of their gender identity curtails their access to education, health care and public places, and results in discrimination in the exercise of their right to vote and secure employment, driving licences and other documentation where eligibility is contingent on declaring oneself as either male or female.

The apex court has directed Centre and State Governments to grant legal recognition of gender identity whether it be male or female.

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<sup>13</sup> *Naz Foundation v. Govt. of NCT of Delhi*, 160 Delhi Law Times 277 (Delhi High Court 2009).

<sup>14</sup> *NLSA v. Union of India*, (2014) 5 SCC 438 (India).

Legal Recognition for Third Gender: In recognizing the third gender category, the Apex Court in 2014 ruled that fundamental rights are available to the third gender in the same manner as they are to males and females. Further, non-recognition of third gender in both criminal and civil statutes such as those relating to marriage, adoption, divorce, etc. is discriminatory to the third gender.

Public Health and Sanitation: Centre and State Governments have been directed to take proper measures to provide medical care to Transgender people in the hospitals and also provide those separate public toilets and other facilities. Further, they have been directed to operate separate hiv/ ser-surveillance measures for transgender.

Socio-Economic Rights: Centre and State Governments have been asked to provide the community various social welfare schemes and to treat the community as socially and economically backward classes. They have also been asked to extend reservation in public employment and educational Institutions.

Stigma and Public Awareness: These are the broadest directions - Centre and State Governments are asked to take steps to create public awareness so that Transgender people will feel that they are also part and parcel of the social life and not be treated as untouchables; take measures to regain their respect and place in society; and seriously address the problems such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, and social stigma.

Challenging 377: There seems to be a visible shift in the Indian judicial approach towards the transgender community as seen in the NALSA judgment, in contrast to the *Suresh Koushal* decision<sup>15</sup>.

After passing of NLSA judgement, another initiative took place when 'Rights of Transgender Persons Bill' was introduced in Rajya Sabha by Thiru Tiruchi Siva, Member of Parliament from DMK, Tamilnadu on 12<sup>th</sup> December, 2014 which is passed on 24<sup>th</sup> April, 2015<sup>16</sup>. It was introduced for the protection of rights of

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<sup>15</sup>The Wire, Foundation for Independent Journalism, Delhi

<sup>16</sup>Act No. 49 of 2014.

transgender persons and for complying the guidelines of NLSA judgement. 24<sup>th</sup> April is celebrated as Transgender day following the passage of the Bill in the Rajya Sabha.

The rights guaranteed under the Bill are mostly **substantive rights** such as the right to equality and non-discrimination, life and personal liberty, free speech, to live in a community, integrity, along with protection from torture or cruelty and abuse, violence and exploitation. There is a separate clause for transgender children also. **Education, employment and social security** and health are also covered under the Bill. The chapter on education makes it mandatory for the Government to provide inclusive education for transgender students and provide adult education to them.

With the employment chapter, there are two separate clauses dealing with formulation of schemes for vocational training and self-employment of transgender persons by the Government. There's a separate clause for non-discrimination against transgender persons in any establishment – public or private.

In the social security and health chapter, the Government is asked to propagate social security and health care facilities which are to be provided in the form of separate HIV clinics and free SRS. They should be given the right to leisure, culture and recreation. Basic rights like access to safe drinking water and sanitation must be provided by the government.

The Bill envisages setting up a number of authorities and forums – National and State Commissions for Transgender Persons. The Commissions work will be mostly in the nature of inquiry or recommendations in the inconsistencies in the application of the law or violations of right of transgender persons. The Commissions can issue summons to witnesses, receive evidence, etc. There is penalty by way of imprisonment for up to a year for hate speech against transgender people.

## Governmental Initiatives

Transgender activists and government together fought their way through the lack of acceptance of the third gender, despite knowing that majority of our population isn't open to the idea of welcoming the LGBTQ community into their lives as normal human beings, and proved equality rises above all.

Over the past few years, the changes in laws for the transgender community proved that slowly but steadily, the transgender community is on the path of acceptance and being treated as equal citizens. By recognising the rights of the transgender community, the state is not doling out largesse; it is only performing its duty under the Constitution.

Here are the significant changes in society that made life easier for the transgender community:

Tamil Nadu and Kerala were the first two states to introduce transgender welfare policy which gave free access to sex reassignment surgery (SRS), free housing programs, admission in government with full scholarship for higher studies, income generation programs etc.

In 2009, India's Election Commission took a first step by allowing transgender to choose their gender as "other" on ballot forms. In 2014, Supreme Court recognised transgender as the third gender.

To help improve their degrading living conditions, Supreme Court of India declared transgender community as economically backward class in April 2014, to entitle them with reservations and welfare benefits like skill development, 2% reservations in government jobs, legal aid, pension and allowances.

On April 24, 2015, The Rights of Transgender Persons Bill was passed by Rajya Sabha in order to prevent abuse, unemployment, violence and exploitation of the

third gender. The bill was proposed by DMK MP Tiruchi Siva and it was the first time that the house passed a private member's bill in 45 years.

Ministry of Drinking Water and Sanitation allowed the transgender community in April 2017 to use the toilet of their own choice in all states in public. By taking this step, the government has broken the 'toilet' stigma attached to the third gender. The city of Mysore became the only city to provide a public toilet for the 'third gender'.

### **Suggestions To Improve The Situation**

After taking into account the discrimination faced by transgender community and issues of law relating to it, this paper suggests the following-

Every person must have the right to decide their gender expression and identity, including transsexuals, transgenders, transvestites, and hijras. They should also have the right to freely express their gender identity.

There should be a special legal protection against this form of discrimination inflicted by both state and civil society which is very akin to the offence of practicing untouchability.

Civil rights under law such as the right to get a passport, ration card, make a will, inherit property and adopt children must be available to all regardless of change in gender / sex identities.

The police administration should appoint a standing committee comprising Station House Officers and human rights and social activists to promptly investigate reports of gross abuses by the police against these people. Protection and safety should be ensured for these transgender people to prevent rape in police custody and in jail.

Vocational training centres should be established for giving the transgender new occupational opportunities.

The Press Council of India and other watchdog institutions of various popular media (including film, video and TV) should issue guidelines to ensure sensitive and respectful treatment of these issues. Supreme Court judgment may bring

transgender on the equal footing with other citizens but more need to be done to change the attitude of people living in the society towards them.

### Conclusion

At last, it may be said that the transgender rights have been recognised by the judiciary and now it is the duty of the legislature to implement the judgement, so that transgender community may get the real benefits as mentioned in the guidelines of NLSA case. After passing the judgement in NLSA case, the Right of Transgender Persons Bill, 2014 is a guiding source. The passing of Bill by the Rajya sabha is the right initiative in the direction of ensuring human rights to the transgender. The transgender rights are also a support for rest of the sexual minorities demanding rights on the basis of equality, dignity and right to life.

The laws alone won't change the discrimination faced by these transgender people. What needs to change is our mentality towards this community and give them respect and space in the society. It is however an important step in the right direction, because legal recognition can underpin greater social acceptance and community integration.