

An Introspection of Transgender People's Rights in India

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Abstract: Transgender individuals in India are often stereotypically depicted as men wearing women's clothing, engaging in street-based begging. Commonly used terms to describe them include Hijra, Kinnar, Chakka, Kothi, Shiv-Shakti, and Aravani, among others. Unfortunately, transgender people face significant deprivation of basic rights, which has a detrimental impact on their well-being and the welfare of their community. This has resulted in the transgender population becoming one of the most marginalized and disadvantaged groups in society. This study aims to examine the entitlements of transgender individuals and critically analyse the deficiencies within the existing legal framework that addresses transgender issues in India.

Keywords: Transgender, Gender Identity, Transgender Rights, Constitution, The Transgender Persons (Protection of Rights) Act, 2019.

Introduction:

The transgender community has been an integral part of Indian society since ancient times, with historical documentation affirming the recognition of a 'third gender'—individuals who do not conform to the conventional male or female roles—within early Indian texts and scriptures. The concept of 'tritiyaprakriti' or 'napumsaka' has been deeply ingrained in Hindu Vedic and Puranic literature for centuries.

Illustrations of many memorable transgender characters are found in Indian mythology and epics. Indian mythology is full of stories depicting deities changing their gender and manifesting as opposite sexes. Ardhanarishvara – the androgynous form representing the unity of Shiva and Parvati., i.e., half male and half female, known as 'Ardhanarishvara' (meaning Lord who is half woman in Sanskrit), is still widely revered and worshiped. And the famous avatar of Lord Vishnu as the beautiful and enticing celestial nymph 'Mohini' during the churning of amrit (the elixir of immortality) and distribution of the same among the Devatas and Danavas is known to all.

Epics like the Mahabharata and Ramayana also provide ample references to transgender characters. One of the main protagonists of the Mahabharata tale, Arjuna himself, during the time of their exile, assumed the

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identity of a eunuch named "Brihandala." And who can forget the character of Shikhandi, who found himself in Kurukshetra war in spite of being a transgender.

The conventional perception of transgender individuals as bestowers of blessings is rooted in a mythological belief that these communities possess divine powers of benediction, a notion that can be traced back to the Ramayana. In the epic, when Lord Rama embarked on his 14-year exile, he instructed everyone to leave the city, symbolizing a broader context in which the transgender community is revered for its sacred role in imparting blessings. However, the hijras (transgender people) stayed behind out of devotion. Pleased with their loyalty, he blessed them with the power to give auspicious blessings during events like marriages and childbirths. This is how the tradition of Badhai, where hijras sing, dance, and bless, began.

Transgender people were also highly revered during the Mughal period. They were considered fiercely loyal, intelligent, and trustworthy. They were appointed as political advisors, administrators, and guards of the harem. Transgender people, especially hijras, enjoyed prestigious positions during the medieval period in India. However, the drastic downfall in the status and position of transgender people in India was witnessed during colonial rule. The introduction of the Criminal Tribes Act, 1871, brought drastic changes in the attitude and perception of the masses towards the transgender community. The Act portrayed the Hijra and transgender community as inherently criminal, requiring their registration and surveillance. They were charged with grave offenses such as abduction and forced sterilization, prohibited from wearing women's clothing in public spaces, and subject to arrest without a warrant for performing in public, with potential penalties including jail time or monetary fines. Thus, creating a negative image among the masses about the transgender community, which has peacefully existed in our society since ancient times. This act, when combined with the criminalization of homosexuality (section 377), had a devastating effect on the transgender community in India.

In the last few years, efforts have been made to undo the injustice that was meted out to the transgender community. The judiciary had played a crucial role by giving the right to self-identification and creating the category of third gender to accommodate transgender people in India. The decriminalization of Section 377 was a landmark decision taken by the Judiciary, paving the way for transgender and homosexual people to choose their sexuality openly and without any fear of being prosecuted.



Who is a Transgender?

People often mix up the term's "sex" and "gender," but they actually refer to different things and shouldn't be used interchangeably. According to the World Health Organization (WHO), "sex" is all about the physical and biological traits that distinguish males from females—like chromosomes, hormones, and reproductive anatomy. In contrast, "gender" is about the roles, behaviors, and identities that society associates with being male or female. These social constructs of masculinity and femininity vary across cultures and can change over time.

These gender norms are not static; they fluctuate across cultures and historical periods and are subject to transformation over time. Thus, while sex is a biological construct, gender is shaped by social, psychological, and cultural influences. Societies establish gender expectations, which manifest in concepts of masculinity and femininity. Through the process of socialization, individuals internalize these norms and ultimately form their own sense of gender identity. Importantly, gender identity does not necessarily align with one's biological sex.

According to the Yogyakarta Principles, gender identity is a person's deep and innate sense of gender, which may or may not correspond with the sex they were assigned at birth. This identity may encompass a personal perception of one's body, which could involve a desire to modify its appearance or functionality through medical or other interventions. Gender expression can take many forms, including how someone dresses, speaks, and behaves. Not everyone identifies with the gender they were labeled with at birth, and this is particularly relevant for transgender individuals. Transgender people are those whose sense of their own gender or how they express it differs from the conventional expectations linked to the sex they were assigned at birth. They often push back against rigid definitions of 'male' and 'female,' challenging established gender roles. It's important to understand that being transgender is related to one's internal sense of gender and outward expression—not necessarily to their sexual orientation.

In the Indian context, transgender individuals are often referred to as the "third gender," representing an identity beyond the male-female binary. This group includes people who may present with traditionally feminine appearance and behaviours, often seen in public spaces such as traffic intersections, railway stations, or ceremonial events like weddings and births. Their presence is often marked by distinctive clapping, colourful attire, and ritualistic blessings. Common terms used in India to refer to transgender individuals include hijra, kinnar, kothi, shiv-shakti, and aravani, among others.



In India, "transgender" is a broad legal term. According to the Transgender Persons (Protection of Rights) Act, 2019, it refers to anyone whose gender identity differs from the sex assigned at birth. This includes trans men, trans women, intersex individuals, genderqueer people, and members of traditional communities like hijras, aravanis, and jogtas, whether or not they have undergone medical changes.

Broadly, transgender people in India can be grouped as:

1. Male-to-Female (MTF): Those assigned male at birth but identify as female.
2. Female-to-Male (FTM): Those assigned female at birth but identify as male.
3. Intersex: Individuals born with both male and female sexual characteristics, or with ambiguous genitalia.
4. Third Gender: Persons who do not identify strictly as male or female but as a separate gender altogether.

Rights of transgender in India:

Everyone is born with basic rights like freedom, equality, and dignity. These rights shouldn't be denied to anyone because of their gender identity or sexual orientation. Sadly, these personal traits are often misused as reasons to exclude or mistreat individuals—even by governments or institutions. But every person deserves to enjoy their full human rights, without discrimination.

Transgender individuals across the globe are particularly vulnerable to stigma and systemic discrimination. In India, due to deeply rooted societal mistrust and prejudice, transgender people are frequently denied equal participation in social and cultural life. This exclusion severely limits their access to essential services and opportunities, including education, employment, healthcare, public welfare schemes, and political representation. Such barriers have resulted in widespread marginalization, relegating many members of the transgender community to the periphery of society.

Moreover, transgender persons in India often face harassment not only from the general public but also from law enforcement authorities. Despite being citizens of the country, their lived realities are frequently more distressing than those of refugees.



Right to Self-Determination of Gender Identity:

In the past, transgender people in India weren't allowed to choose their own gender identity. Instead, they were forced to live according to the gender assigned to them at birth, which often didn't reflect who they truly were. This absence of legal acknowledgment of a self-determined gender identity hindered many transgender individuals from obtaining formal government-issued identification documents.

Since the Government of India only recognized male and female genders, those who fell beyond the gender binary were virtually left without any identity of their own. Due to the lack of legal identification documents, most welfare schemes, health care schemes, banking, and even the right to contest elections were denied to transgender people. As a matter of fact, they were not even included in the census of the country; it was only in 2011 that, for the first time, transgender people were included in the census and accepted as a part of the general public of India.

In 2014, the Supreme Court of India made a landmark decision in the NALSA v. Union of India case. It expanded the meaning of "sex" in the Constitution to include "gender," affirming that every person has the right to identify as male, female, or transgender. This right, protected under Article 21, reflects an individual's personal sense of identity. The Court also ruled that transgender and intersex people are entitled to all fundamental rights, including equality and non-discrimination under Articles 15 and 16. This judgment marked the first legal recognition of a "third gender" in Indian law.

Right to Education:

Education plays a crucial role in driving social change. It forms the bedrock of development and progress in any society, providing individuals with the tools needed to overcome challenges and access better opportunities for a dignified life. As such, education is a central component of government policies worldwide. India has long placed high value on education. It was first formally mentioned in Article 45 of the Directive Principles, calling for early childhood education for all children up to age six. Later, the 86th Constitutional Amendment in 2002 made education a fundamental right by adding Article 21A, which took effect in 2010. Apart from this constitutional protection, the Indian government has also created the National Policy on Education, which acts as a framework for regulating and growing the education industry.

However, the educational status of transgender individuals in India remains dismal. Due to the nature of their gender identity, transgender children often face bullying, harassment, and discrimination, leading many to leave the school and fail to complete their even basic schooling. This mistreatment occurs not only



at the hands of fellow students but also sometimes from teachers. They are subjected to derogatory terms, lack of access to gender-appropriate facilities like restrooms, and insufficient support from school authorities. Moreover, the absence of effective government policies to address these challenges results in lower enrolment rates and higher dropout rates among transgender students. The overall population's literacy rate is 74%, whereas transgender people's is just 46%, according to the 2011 Census.

The 2019 Transgender Persons (Protection of Rights) Act has significantly improved access to education for the transgender community. Any discrimination against transgender people in educational settings, including rejection, cessation, or unfair treatment in schools, is expressly prohibited under Section 3 of the Act. Section 13 mandates that all government-recognized or supported educational institutions must ensure inclusive education for transgender individuals, providing them equal access to sports, leisure, and recreation without any discrimination.

Right to Equal Opportunity in matters of employment:

No individual shall be considered unqualified or face discrimination in employment or public service appointments based on factors such as religion, race, caste, gender, ancestry, birthplace, residence, or any mix of these characteristics. According to Article 16 of the Indian Constitution, which guarantees equal opportunity in public service. Nonetheless, India offers protective discrimination in the form of reservations to aid in the advancement of the socially, economically, and educationally underprivileged segments of society. The Schedule caste, Schedule tribe, and other backward class people in India have reaped the benefits and uplifted their socio-economic position. Transgender people were not included in these categories of educationally, socially, and economically backward classes, and no special policies were formulated for them like those for SCs, STs, and OBCs.

Transgender individuals in India face significant workplace discrimination and barriers to employment. They are often subjected to violations of privacy, denial of job opportunities, and harassment, all of which contribute to higher rates of unemployment and poverty. Prior to the 2014 NALSA judgment, hiring practices in most institutions were strictly based on a binary gender system, which excluded the third gender. Even when transgender individuals were employed, they frequently faced ridicule and ostracism, leading them to eventually leave their positions. Low literacy rates among transgender people also contribute to the problem of unemployment. Lack of steady employment and poverty force the majority of transgender people in India to engage either in begging, sex work, or both. It makes them vulnerable to



sexually transmitted diseases, sexual abuse, physical and mental abuse, and prosecution by law enforcement.

The case of Nangai vs. the Superintendent of Police shows the lack of established employment rules regarding transgender people. Nangai (name change) was directly recruited as a grade II police constable by the Government of Tamil Nadu, and during her training she was asked to go through a medical check-up. After her physical check-up, the medical officer remarked on her as ‘transgender’. She was instructed to undergo an endocrinological evaluation for genetic analysis (sex determination) at the Government Hospital in Chennai. She has to go through a lengthy procedure to determine her gender, and as a result, she missed her training days. Upon examination, she was declared male as her chromosomal examination showed a male pattern and she had ambiguous external genitalia. And because of that, she was terminated from her job. Although she was assigned female at birth and all her documents, including her birth certificate, reflected this, the matter was taken to the High Court of Tamil Nadu. The judiciary determined that the petitioner was entitled to assert her gender identity, affirming her status as female. Consequently, the directive for her dismissal by the superintendent of police was annulled. This case forms part of a broader series of legal actions addressing the rights and identity of intersex individuals within India.

The Transgender Persons (Protection of Rights) Act, 2019 was passed with the intention of resolving the difficulties that the transgender population faces in the workplace. In particular, Section 3 of the Act forbids discrimination on the basis of certain grounds: Section 3(b) forbids discriminatory practices and unfair treatment in the workplace; Section 3(c) forbids unfair termination or denial of job prospects. Section 3(h): Prohibits unfair treatment or denial of opportunity in the run for public or private office.

Additionally, Section 9 underscores the principle of non-discrimination in employment, ensuring that no employer may engage in discriminatory practices concerning the transgender community in areas such as recruitment, promotion, and other employment-related matters. The Act also directs the government to design inclusive and non-stigmatizing social welfare schemes aimed at improving the welfare of transgender people in India.

Following the enactment of the law, Article 16—which ensures equal employment opportunities—was meaningfully extended to the transgender community, a right that had been previously denied. Several states have moved toward offering reservations for transgender people in public employment. In 2021, Karnataka became the first state to reserve 1% of positions in all public service sectors for transgender individuals. The state government was ordered by the Rajasthan High Court in February 2022 to abide by



the Supreme Court's directives on the reservation of employment for transgender people. In a groundbreaking move, the Chhattisgarh police department also hired 13 transgender constables in March 2021.

Right to vote and to be elected:

Democracy thrives on the active participation of all its citizens. When certain segments of society are excluded or denied the chance to engage politically, it undermines the very essence of democracy. In India, voting and standing for elections are basic political rights, guaranteed to all citizens under the Constitution. The universal adult franchise, which gives rights to everyone above eighteen years of age to vote and be a part of democracy, is a significant and salient feature of the Indian constitution.

However, a larger section of the transgender community was deprived of the right to vote and be elected for a longer period of time. As the electoral roll had only two genders to choose from, i.e., male and female. And for transgender people, no option was available. And if at all they want to use their franchise right, they have to choose the gender they were assigned at the time of their birth, which does not match the gender identity they perceive. This created genuine confusion. As the person donning female attire and mannerisms comes to vote, and in her voter ID, she is identified as a male, As a result, many turned back and were not allowed to vote. But the process of getting an electoral ID itself was a monumental task, as many transgender people were rejected due to confusion over where to place them in the column where the sex of a person has to be identified. This prevents many transgender people from enrolling themselves in the electoral roll and using their franchise rights.

The 2014 ruling by the National Legal Services Authority (NALSA) represents a pivotal moment for India's transgender community, as it officially recognized them as a distinct third gender. This landmark decision by the Supreme Court dismantled barriers that had long excluded transgender individuals from various societal privileges. Following this decision, the Election Commission of India added a new category, "others," on voter IDs. This allowed individuals who don't identify strictly as male or female to register as voters and run for elections. This judgment not only granted political recognition but also paved the way for the transgender community to actively participate in public life. One notable achievement was the election of Madhu Bai Kinnar, a transgender woman, as the first elected transgender mayor of Raipur, Chhattisgarh, after defeating a BJP candidate. This victory symbolized a new era of political engagement for transgender people, inspiring others to enter politics. In the 2019 Lok Sabha elections, five transgender candidates contested from various states like Tamil Nadu, Uttar Pradesh, Odisha, Maharashtra, and Kerala.



Although none were victorious, their participation sparked greater awareness and encouraged many transgender individuals to assert their political rights.

While many transgender candidates have run as independents due to limited party support, political parties like the Aam Aadmi Party, INC, and BJP are increasingly considering transgender individuals for electoral tickets. Many transgender individuals have contested elections at the panchayat, state assembly, and parliamentary levels, signalling growing acceptance.

Conclusion:

The transgender community in India faces widespread misunderstanding and discrimination. Transgender individuals have been a part of Indian culture for centuries, once being respected and holding prominent positions in society. However, over time, their status has declined. Systemic neglect by mainstream society, compounded by their exclusion from government welfare policies and schemes, has led to their marginalization.

Despite this, recent years have witnessed significant legal and policy reforms that offer hope for improvement. The Indian Supreme Court has made pivotal decisions, such as recognizing gender identity as a part of 'sex' under Articles 15 and 16 of the Constitution, establishing a third gender category, and decriminalizing Section 377, which criminalized same-sex relations. These landmark judicial decisions have ushered in a transformative era of progress for transgender individuals within the nation. The most recent and relevant legislative advancement, the Transgender Persons (Protection of Rights) Act, 2019, has instilled renewed hope for the empowerment of the community and promises a more inclusive and prosperous future.

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