

## TRANSGENDER RIGHTS PROTECTION IN INDIA- AN ANALYSIS

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**Abstract:** *Everyone knows gender is a problem, yet no one thinks of it as a human rights issue.*

-- Riki Wilchin S

Transgender people are individuals of any age or sex whose appearance, personal characteristics, or behaviors differ from stereotypes about how men and women are 'supposed' to be. The main problem lies in, whether transgender community also can claim rights conferred on the other genders. Though Constitution of India provides for non-discriminatory approach towards everyone, but at times people like transgender are not in a position to enjoy the very same rights. The main problems that are being faced by the transgender community are of discrimination, lack of educational facilities, unemployment, 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. Author will also look in to the various welfare actions taken by each states in India.

**Key Words:** Transgender, Policy, Rights Etc.

**Introduction:** Transgender people are individuals of any age or sex whose appearance, personal characteristics, or behaviors differ from stereotypes about how men and women are 'supposed' to be. Transgender people have existed in every culture, race, and class since the story of human life has been recorded. That includes people who do not self-identify as transgender, but who are seen as such by others and thus are subject to the same social oppressions and physical violence as those who actually identify with any of these categories.

**Definition for the Term Transgender:** As a general meaning given to the term noting or relating to a person whose gender identity does not correspond to that person's biological sex assigned at birth: the transgender movement.[1]

2(i) "transgender person" means a person who is (A) neither wholly female nor wholly male; or (B) a combination of female or male; or (C) neither female nor male; and whose sense of gender does not match with the gender assigned to that person at the time of birth, and includes trans-men and trans-women, persons with intersex variations and gender-queers.[2]

**Rights of Transgender in India:** Preamble to the Constitution mandates Justice social, economic, and political equality of status. Thus the first and foremost right that they are deserving of is the right to equality under Article 14. Article 15 speaks about the prohibition of discrimination on the ground of religion, race, caste, sex or place of birth. Article 21 ensures right to privacy and personal dignity to all the citizens. Article 23 prohibits trafficking in human beings as beggars and other similar forms of forced labor and any contravention of these provisions shall be an offence punishable in accordance with law.

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 (transgenders) 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. Beyond this categorization the Constitution makes no further distinction among rights holders.

But 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 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.

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.

**Problems 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. 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 [3] employment, to get licenses, etc. and in effect, they are treated as outcast and untouchable.

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 admitted to 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 this 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. **Immoral Traffic Prevention Act of 1956** which was amended in 1986 has become a gender neutral legislation. The domain of the Act now applies to both male and female sex workers along with those whose gender identity was indeterminate. With the amendment both the male and hijra sex workers became criminal subjects as this gives the police the legal basis for arrest and intimidation of the transgender sex workers.

Section 377 of IPC criminalizes same sex relations among consenting adults. This is a colonial era law which makes the Transgender community vulnerable to police harassment, extortion and abuse. In *Jayalakshmi v. State of Tamil Nadu, Pandian*, a transgender, was arrested on charges of theft by the police. He was sexually assaulted in the police station which ultimately led him to immolate himself.

The main problems that are being faced by the transgender community are of discrimination, unemployment, lack of educational facilities, homelessness, 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 1994, transgender persons got the voting right but the task of issuing them voter identity cards got caught up in the male or female question. Several of them were denied cards with sexual category of their choice. The other fields where this community feels neglected are inheritance of property or adoption of a child.. Transgenders have very limited employment opportunities. Transgenders 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 transgenders in availing each facilities and amenities. They face similar problems in prisons, hospitals and schools.

One such law, Section 377 of Indian Penal Code, criminalizes same-sex relations among consenting adults, and is used as a justification for discrimination against transgendered and homosexual people. These laws, coupled with the social stigma have proven to be difficult hurdles on the road to equality for this marginalized group in India.

**The Supreme Court Judgment on Transgender Rights:** However, the Supreme Court of India in its pioneering judgment by the division bench of Justices K.S. Radhakrishnan and A.K. Sikri in *National Legal Services Authority v. Union of India & Ors*[4] recognized the third gender along with the male and female. By recognizing diverse gender identities, the Court has busted the dual gender structure of 'man' and 'woman' which is recognized by the society.

"Recognition of Transgenders as a third gender is not a social or medical issue but a human rights issue," Justice K.S. Radhakrishnan told the Supreme Court while handing down the ruling.

Directions to the central and state government

- The court as issued certain directions to the central and state government which are:
- Hijras, eunuchs should be treated as third gender for the purpose of safeguarding their fundamental rights,
- Recognize the persons' need to identify his own gender,
- Providing reservations in public education and employment as socially and educationally backward class of citizens,
- Making special provisions regarding HIV sero-surveillance for transgender persons and provide appropriate health facilities,
- Tackle their problems such as fear, gender dysphoria, shame, depression, suicidal tendencies, etc.
- Measures should be taken to provide health care to transgender people in hospitals such as making

separate wards and also provide them separate public toilets,

- Frame social welfare schemes for their all round development,
- To create public awareness so that the transgenders feels that they are part of the society and are not to be treated as untouchables.[5]

The judgment has marked a break from otherwise paternalistic and charitable approach of the state towards the transgender community by framing their concerns as a matter of rights.

**Right of Transgender Persons Bill, 2016:** The Union Cabinet cleared the Transgender Persons (Protection of Rights) Bill, 2016, which will pave the way for the community to be declared as the third gender with an option to identify themselves as male, female or transgender. However, the bill cleared by the cabinet does not explicitly talk about giving reservation to such transgenders who by birth do not belong to Scheduled Castes or Scheduled Tribes.[6]

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. Education, employment and social security and health are also covered under the Bill. The bill envisages at constituting committees. There is penalty by way of imprisonment for up to a year for hate speech against transgender people.[7]

**Initiatives taken by States in India:** The Odisha Government has chalked out a dedicated policy for transgender community which seeks to protect rights of the gender non-conforming child. It says action will be taken against parents who desert such children while support will be provided to those who take care of specific needs of the transgender child.

The draft Odisha Transgender Policy 2017 proposes that the Government will develop capacity of anganwadi workers and staff of frontline child service providers so that they are responsive to the needs of transgender children.

The Odisha Government was the first in the country to announce welfare measures for the third gender..

Odisha is counted as one of the States with a higher transgender population as 5.75 per cent of transgender households of rural India and 1.5 per cent of the urban transgender population in the country is in Odisha.

The policy also seeks to provide them redressal against discrimination and violence through free legal aid.[8]

**State of Kerala:** An initiative offering jobs to a handful of members of Kerala's hijra community aims to tackle prejudice and bring transgender people into

the mainstream. They used to beg on India's train network, but this month, for the first time, transgender women will have proper jobs, serving passengers and selling tickets in the south Indian city of Kochi.

In an effort to integrate trans people into Indian society, Kochi's metro has hired 23 members of the hijra community, who will start working behind ticket counters and on housekeeping teams before the end of this month.

The new jobs are an unprecedented initiative in India, where the trans and third gender community is mocked and isolated. Though trans women have been given jobs in the past, the majority have to resort to sex work or begging to survive.

Rashmi CR, spokeswoman for Kochi Metro Rail, said the new appointments were part of a wider initiative to make the trains more inclusive. "We want the metro to be not just a means of transport, but also a livelihood improvement project," she said.

"People don't interact with trans people. They live separately from society, they are not given jobs, their rights are not respected. We want to bring them into the mainstream by ensuring that people interact with them every day – on their way to work, for example."

The new recruits have already had training in customer care and taken classes in confidence improvement.

"Kochi metro is the first company in India to accept us. It is a huge achievement for us," said Vincy, one of those newly employed by Kochi metro. "I feel very comfortable there. The other workers know how to respect me because Kochi metro is recognising us." [9]

**Residential school** for transgenders in Kochi: proposal to uplift transgenders through education is all set to be implemented in the state.

**Policy by Kerala:** Kerala became the first state to formulate a transgender policy in 2015. The policy aimed at ending the discrimination and bringing the third sex to the mainstream. The state has set up a transgender justice board to deal with their complaints, and a separate column called intersex, was introduced in the birth and death registration form. Also, it was made mandatory for all government buildings to have separate washrooms for the transgender. Last month the state had conducted an exclusive sports meet for the third sex.

The first phase of the metro, completed in record time, will be inaugurated next month after getting a date from Prime Minister Narendra Modi.[10]

**Maharashtra Government Initiatives:** Maharashtra has become the second state in India to set up a welfare board and the first, to set up a cultural institute dedicated to the transgender community. The Welfare Board will provide avenues for formal education, expand employment and self-

employment opportunities, run health programmes and provide legal help to the community for free.

Since 2009, UNDP has supported efforts at greater recognition for the transgender community

Recently, the state government of **Andhra Pradesh** has ordered the Minority Welfare Department to consider 'Hijras' as a minority and develop welfare schemes for them.

**Conclusion:** All individuals are protected from torture and cruel, inhuman or degrading treatment.

In order to respect, protect and fulfill the right to life and security of person guaranteed under

international law, States must effectively investigate, prosecute and punish perpetrators responsible for extrajudicial executions, and enact hate crime laws that protect individuals from violence on the basis of sexual orientation and gender identity. Effective systems should be established for recording and reporting hate-motivated acts of violence. Asylum laws and policies should recognize that persecution on account of one's sexual orientation or gender identity may be a valid basis for an asylum claim.

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