

A Long Road to Justice: Study on Transgenders of India

Arshita Agarwal
(LL.B., B.com)
, India

ABSTRACT:

Gender is an important factor in all aspect of one's life. Biologically gender is divided in to two categories male and female. All persons have gender identity which refers to the person's internal sence of being a male or a female. Transgender or better known as the third gender are people who are different from stereotypes men and women in terms of personality, appearance or behaviour. The term transgender have several meaning the most common is an umbrella term to describe anyone who does not follow the strict rules of society in terms of gender. The transgender community in India highly represented by the Hijras and Kothis. In this research paper the researchers try to show the real picture of the transgender in India and how they get recognition in Indian law.

Keywords: Transgender, third gender, hijras, problems.

I. INTRODUCTION

Many countries have history which marks the presence of transgender or who in the present century popularly known as the third gender. Third gender or transgender is a term which is used for that person who does not look or behave like a typical male or female. Scientifically speaking, they are actually different in their biological construction, and this is the main reason which causes them to face much discrimination. It is not like the discrimination which they faces is years old in fact they were the people who receives eminent respect in older times. If we talk about our own country, India has a 4,000 year history of transgenders, they mark their presence in every period be it the RAMA RAJ (the lord rams' age) or the MAHABHARAT period or even MUGHALS era they were there in every culture, race, class since the evolution of human life.

There are at least 4,90,000 transgenders in India¹. the social acceptance of transgender people in India is not the same as of male or female gender. A study shows that 45% of transgender have a good quality of life².

The main problem with some orthodoax people is the lack of proper awareness and most importantly not understanding of the transgender community and also that too many people did not even accept transgender as human being. But as the time changing the people of the society also changing now society has started to acknowledge their conditions and what they all face in their daily routine, like in 2000, MARCH aunt shabnam became the first hijara to be elected into the parliament also that out of 35 states and union territories 20 states and union territories have groups, organizations and network engaged with the issues of transgender.

Human dignity rested on recognition of physical as well as spritual dignity of the people of the society and it is very sad to know that some individual or group of individuals harm or ignores another individual or group of

individuals. Transgenders are not different from us they are not strangers they are humans only hence society should accept them with full open hearts.

Hypothesis

The feeling of lack of respect and individualism only degrades the transgenders.

Statement of Problem

The main problems that are being faced by the transgender community are of discrimination, unemployment, lack of educational facilities, homelessness, lack of medical facilities and depression.

II. HISTORY OF TRANSGENDER IN INDIA

We all know INDIA is a country with very wide history, it has number of religions which have number of cultures and stories to narrate similar. the concept of transgender in INDIA is not new in INDIA transgender who traditionally known as “*HIJRAS*” can be traced. A nation which goes numb on bold topics like sex, menstruation it is shocking to see that our forefathers or ancient history was more open minded on such topics. We can find their presence in many ancient times/eras and texts of Hindus as well, like in **RAMAYANA**, the epic **MAHABHARATA** and the **MUGHALS ERA**

Ramayana:

Lord Rama, in the epic Ramayana, was leaving in the forest upon being banished from the kingdom for 14 years, turns around to his followers and asks all the ‘men and women’ to return to the city. Among his followers, the hijras alone did feel bound by this direction and decide to stay with him. Impressed with their loyalty, Rama sanctioned them the power to confer blessings on people on auspicious occasions like child birth and marriage, and also at inaugural functions.

Mahabharata:

Aravan 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

Mughal period:

Hijras played a famous role in the royal courts of the Islamic world, particularly in the Ottoman empires and the Mughal rule in the Medieval India. They rose to well-known positions as political advisors, administrators,

generals as well as guardians of the harems. Hijras were considered clever, trustworthy and fiercely loyal and had free access to all spaces and sections of population

The Hijras also occupied high positions in the Islamic religious institutions, especially in guarding the holy places of Mecca and Medina. The person of trust, they were able to influence state decisions and also received large amounts of money to have been closest to kings and queens.

III. FALL OF THEIR STATUS/ BRITISH PERIOD

Through the onset of the colonial period from the 18th century onwards, the situation, status and the whole lot of transgender faces a dramatic change. If we talk about Europe, they were repulsed to see that how much respect transgender receive in the royal courts. Further in the second half of 19th century the British colonial sought to criminalise the HIJRA community, they were now to be considered as a different caste. Tribe at that period. The Criminal Tribes Act, 1871 made all the HIJRAS as criminals

IV. TYPES OF TRANSGENDERS

- **EUNUCH:** is a person who is born as a male person but later deprived of his male strength. An eunuch is often referred to an intersex person whose genitals are ambiguously male
- **HIJRA:** unlike eunuch not all hijras deprived of his male strength. Hijras are actually males who reject their masculine identity and identify either as a woman or in between man or woman or neither man nor woman.
- **KINNAR:** they are HIJRA but are referred as kinnars in different parts of India such as Maharashtra.
- **ARAVANI:** They are women trapped in male bodies. They are mostly found in Tamil Nadu.
- **KOTHI:** They are heterogeneous group who are biological males showing varying degree of feminine nature.
- **SHIV SHAKHTHIS:** they are community found in Andhra Pradesh. They are believed to be possessed by or “married to” God, particularly Lord Shiva.
- **JOGTI HIJRAS:** they are male and female servants who dedicate their lives to God in temples. Mostly found in Maharashtra and Karnataka.

V. RELIGIOUS-CULTURAL BACKGROUND

Hijras are linked with the religious-cultural background. Descriptions of *hijras* are in epics like Ramayana and Mahabharata (Nanda 1996; Krishna and Gupta 2002) and references of third gender are in Kamasutra also. Few characters mentioned in the epic Mahabharata include Arjuna as Brihannala (a eunuch teacher), Shikhandi

(reborn as a man) who confronted Bhishma during the Kurukshetra war, and Lord Krishna as a woman marrying Arjuna's son Lord Aravan

Hijras worship Goddess Bahuchara Mata (Barbara 1994; Nanda 1996; Lal 1999; Bakshi2004; Hill and McBride 2007) and the temple is situated in Bahucharaji, Mehsana district, Gujarat, India.

VI. SITUATION OF TRANSGENDERS IN INDEPENDENT INDIA

Not only socio-economic problems, *hijras* also face problems in exercising their citizenship rights. Though *hijras* have contested and have had won local, state and national elections (Mukherjee 2004) and were Mayors and MLAs, in the absence of a national policy, they do not enjoy basic fundamental rights. Moreover those contested in elections in the woman category were turned down on the basis that they were not biological females (UNDP 2010).

Kamla Jaan was elected as the first eunuch mayor of Katni, Madhya Pradesh (Chakravorty 2007). She resumed her position in the year 2000 but gave up in the year 2003. The reason was that the political opposition filed a petition at a lower court, and then later at the Jabalpur High Court stating that Kamla Jaan had lied about her gender. The opposition won the case stating that the election had been illegal.³

Some basic rights denied to *hijras* include ration (family) card, Right to vote (Bhan 2006; UNDP 2010; Kalra 2011), right to marriage, child adoption⁴, opening a bank account and many other fundamental (transgender) rights. UNDP (2010) lists some of the legal issues faced by transgenders in India such as legal recognition of their gender identity (difficulty in getting legal recognition as a woman or a transgender woman), inheritance, wills and trusts, immigration status, employment discrimination, and access to public and private health benefits. The change of name and gender on the credentials is also an issue. The sex assigned at birth mentioned on their birth certificate and other school/ college documents do not match with the gender identity and hence transgenders are denied admission in colleges for higher education.

According to a NACO (2011) survey, 41.2 per cent transgender/ *hijra* were not accepted by their family members due to their gender status, 75.2 per cent of the respondent's family mentioned that the transgender/ *hijras* status was not accepted and as a result they were forced to leave their parents house, because of this 48.8 per cent were drop-outs between 6th-12th standard, and 18.4 per cent remained illiterate.

VII. ILEGAL PROVISIONS

The Citizenship Act, 1955 which provides for the acquisition and determination of Indian Citizenship also does not, expressly or impliedly require a determinate sex or gender identity as a pre-condition for acquiring citizenship.⁵

The definition of “*person*” under the *General Clauses Act, 1897* is couched in even wider terms. The Act defines a person to ‘include any company or association or body of individuals, whether incorporated or not’.⁶

Though *Section 13 of the Act* stipulates that words importing the masculine gender⁷ shall be taken to include females, this stipulation is itself conditioned by the statutory direction that this is so unless there is anything repugnant in the subject or context.

Interestingly, *the Registration of Births and Deaths Act, 1969* doesn’t mention anything about “sex/gender” of a person to be registered in case of birth or death.⁸ The Act is gender neutral.

VIII. THE CALL TO JUDICIARY:

The America is celebrating the decision of the US Supreme Court in *Obergefell v. Hodges*,⁹ on the other hand, India despite being world’s largest constitutional democracy, are still grappling in the heteronormative caves of undermining alternative sexualities.¹⁰

In *Jayalakshmi v. State of Tamil Nadu*,¹¹ Pandian, a transgender, was arrested by the police on charges of theft. He was sexually abused in the police station which ultimately led him to immolate himself in the premises of the police station. Similarly, policemen arrested Narayana, a transgender, in Bangalore on suspicion of theft without informing him of the grounds of arrest or extending any opportunity to him to defend himself. His diary was confiscated by the police and he was threatened with dire consequences if he did not assist in identifying other transgenders he was acquainted with. Homosexuals have also been at the aggrieved end of financial extortion by the police in exchange for not revealing their identities to society.

the laws that cause a great harm to this transgender community is *Section 377 of the Indian Penal Code, 1860* and *the Immoral Traffic Prevention Act, 1956 (amended in 1986)*. *Immoral Traffic Prevention Act (ITPA), 1956 (amended in 1986)* is the principal instrument which prevents the trafficking of women and children into prostitution. With the Amendment of 1986, the scope and ambit of the Act now became applicable to both male and female sex workers and also to those whose gender identity was indeterminable. Thus, both male and hijra sex workers became criminal subjects of the ITPA and it provided the legal basis for arrest of the transgender sex workers population.

Section 377 of the Indian Penal Code, 1860 was drafted by *Lord Macaulay*. This provision provides the punishment for the prosecution of certain kinds of sexual acts deemed to be unnatural. The natural presumption in case of a homosexual or a hijra is drawn that they are engaging in acts against the order of nature. It is clear that this Section has been frequently used to harass and exploit homosexuals and transgender persons.

Surprisingly, the *Indian Council for Medical Research (ICMR)* and *Indian Medical Association (IMA)* have not yet framed any guidelines for *Sex Reassignment Surgery (SRS)*.

From the numerous instances of abuse and violence against homosexuals and transgender, it is evident that *Section 377 of IPC* has been totally misused to cause great harm to such community. Another notable example is *Section 45 of the Army Act, 1950* which penalizes indecent acts which would possibly include the acts of transgender community.¹² It is also to be noted that in India sexual minorities have no freedom to form association or union.

The sexual minority is not a recognized *person* for the purpose of insurance claims, compensation¹³ and nomination for the purpose of gratuity benefits. The reality is that, the transgender community in India lives in a precarious environment dominated by oppression, discrimination and systematic exclusion. It cannot be forgotten that discrimination is antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual.

IX. THE ROAD TO JUDICIARY

The movement against the repressive and oppressive nature of *Section 377* grew exponentially and it was finally on July 2, 2009 that the Delhi High Court passed a judgment in favor of the LGBT's in the landmark judgment of *NAZ Foundation v. Government of N.C.T Delhi*¹⁴ (hereinafter referred to as the *NAZ Foundation case*), declaring *Section 377 of the Indian Penal Code, 1860* which criminalizes homosexuality in India to be unconstitutional and violative of Articles 14, 15 and 21 and read down the section, allowing consensual sexual activity between two homosexuals above 18 years of age.

The matter went to appeal to the Supreme Court of India in *Suresh Kumar Koushal and another v. NAZ Foundation and Others*¹⁵ where the Supreme Court struck down the decision by the High Court in the *NAZ Foundation Case*.

Justice Singhvi said that *Section 377 of the Indian Penal Code* does not suffer from any constitutional infirmity and left the matter to the competent legislature to consider the desirability and legitimacy of deleting the Section from the statute book or altering the same to allow consensual sexual activity between two adults of the same sex in private.

The Court referred to Indian and foreign judgments, *the Yogyakarta Principles*¹⁶ identifying with sexuality as a structure of personality and the worldwide patterns in the assurance of security and nobility privileges of gay people.

The basic rights are implicit in the *Universal Declaration of Human Rights, 1948*. The judgment of the Delhi High Court reflects general conscience towards the sexual minorities. They should be treated with utmost respect

as a citizen of this country, without any discrimination in exercising their right to apply for a employment opportunity, their right to seek justice.

In *April 2014*, the Supreme Court of India declared transgender to be the 'third gender' in Indian laws¹⁷ By recognizing the transgender as a third gender, this Court is not only upheld the rule but also advanced justice to the class, so far deprived of their legitimate natural and constitutional rights. It is, therefore, the only just solution which ensures justice not only to the transgenders but also justice to the society as well. The applicability of the judgment in this case was restricted by the Hon;ble Supreme Court only to transgender and explicitly excluded the Lesbians, Gays and Bisexual, thereby not going in the controversial question of validity of *Section 377 of Indian Penal Code*. The Court on the basis of Human Rights highlighted the importance of gender for applicability of various human rights. The court while deciding this looked at the International Instruments.

And then finally in 2018 the Supreme Court while hearing the petition on section 377 reconsiders its 2013 decision, where it re-criminalized homosexuality. the chief justice of India Dipak Misra indicates that 150 years old ban on gay sex may soon be gone. On 6 of September, 2018 in the verdict, the SC has said this law shall no longer be invoked to punish sex between consenting adults¹⁸. In the landmark judgement the Supreme Court has struck down 157 years old law which criminalizes homosexual acts between adults. The five judge bench has declared section 377 of IPC unconstitutional.

X. CONCLUSION

God has created human beings as equal without any discrimination as to their skill power, will power, grasping power, intellect, etc. But it is the human beings who discriminate, misuse the abuse other human beings and treat them as objects and the fault lies only on the selfish nature of the human beings. Most transgender people, especially youth, face great challenges in coming to terms with one's own gender identity and/or gender expression which are opposite to that of the gender identity and gender role imposed on them on the basis of their biological sex. They face several issues such as: shame, fear, and internalized trans-phobia; disclosure and coming out; adjusting, adapting, or not adapting to social pressure to conform; fear of relationships or loss of relationships; and self-imposed limitations on expression or aspirations. Transgenders are also part of the society and they have equal right to everything in the world that is available to all other persons. The presence of such transgender is not new, but their presence is there from the time immemorial as could be seen from several scripts, probably because the nature requires such a class to maintain the equilibrium. The most important aspect we have to think is the discrimination. The discrimination based on their class and gender makes the transgender community one of the most dis-empowered group in Indian Society. Transgender and gender non-conforming people face rampant discrimination in health care settings, are regularly denied needed care, and

experience a range of health risks because they are transgender or gender non-conforming, according to a report of more than 6,450 transgender and gender non-conforming people.

The Trans genders were not even recognized as part of the society, not even their own. They do not relate to anyone as friends, family or even acquaintance. They are denied the right to love. They are denied every right and for what – just because of their sex. Problems faced by transgender community are discrimination, employment, education, homelessness, HIV care & hygiene, depression, hormone pill abuse, tobacco & alcohol abuse, marriage, adoption etc.

Although in India they are now been accepted as they are but still there are some who now also don't accept them as a part of the society. Such souls are only required to change their minds because minds like them are the reason why transgender community faces discrimination and other such problems.

XI. REFERENCES

1. <http://timesofindia.indiatimes.com/india/First-count-of-third-gender-in-census-4-9-lakh/articleshow/35741613.cms> Accessed 14 December 2016.
2. George A, Janardhana N, Muralidhar D. Quality Of Life of Transgender Older Adults. *International J of Humanities Social Sci Invention*. 2015;4(6):7-11.
3. Shabnam Mausi too became India's first *hijra* MLA in the year 1999 from the state of Madhya Pradesh (Chettiar 2009)
4. Some *hijras* adopt children and look after their education, marriage etc. However child adoption procedure for *hijras* is not clear. The adopted children address them as mother or aunt or by any other feminine pronoun and not as father.
5. The Citizenship Act, No. 57 of 1955, *available at*: <http://indiacode.nic.in>.
6. The General Clauses Act, No. 10 of 1897, Section 3(39), *available at*: <http://indiacode.nic.in>.
7. The General Clauses Act, No. 10 of 1897, Section 13, *available at*: <http://indiacode.nic.in>.
8. The Registration of Births and Deaths Act, No. 18 of 1969, *available at*: <http://indiacode.nic.in>. An Act to provide for the regulation of registration of births and deaths and for matters connected therewith
9. 135 S Ct 2584 (2015).
10. Shilpa Khatri Babbar, *The Socio-Legal Exploitation of the Third Gender in India*, ISOR-JHSS, Vol. 11. Issue. 5, Ver. 04 (May, 2016).
12. The Army Act, No. 46 of 1950, Section 45, *available at*: <http://indiacode.nic.in>.
13. The Workmen's Compensation Act, No. 8 of 1923, *available at*: <http://indiacode.nic.in>.
14. 2010 Cri LJ 94.
15. Civil Appeal 10972 of 2013.
16. The Yogyakarta Principles are a set of principles on the application of international human rights law in relation to sexual orientation and gender identity. The Principles affirm binding international legal standards with which all States must comply. They promise a different future where all people born free and equal in dignity and rights can fulfill that precious birthright.
17. Supreme Court recognizes transgender as 'third gender'"*Times of India*, Apr. 15, 2014.
18. Navtej singh johar &ors. V. UOI