



## LEGISLATIVE AND JUDICIAL APPROACH ON PROTECTION OF RIGHTS OF TRANSGENDER IN INDIA: AN ANALYSIS

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### **Introduction**

*A nation's development and prosperity rests on the upliftment of society in general and individual in particular. A society can have the socio-economic upliftment if all the sections of the society are part of the upliftment in the society. In Indian context, since independence, the nation has been on the path of development and improving the socio-economic status of common citizen of India, however, it's a fact that the Indian society is a highly stratified society. With increasing issues in India, one of the major issues concerning within the country is the rights of transgender. The issues of transgender people are a more relevant topic in recent period towards making an egalitarian society. Transgender people incorporate those whose identity and behavior do not adhere to the conventional gender norm. Since the beginning of time and the presence of humanity, transgender people have been a great aspect of society. Transgender people in India are included in the LGBT (lesbian, gay, bisexual and transgender) groups. They set the underrated position in society and have a desperate existence. The absence of aid from the government, in particular, makes the life of these communities desperate and faces economic, political and legal challenges as well as societal challenges. They struggle for their existence due to some obstacles in the path of their development. The constitution of India guarantees equal rights, opportunities and benefits to all sections of the society regardless of gender and other factors. Yet, it took such a long time to recognize their legal rights. In India, there is huge number of transgender people but still their rights are not properly given and the society did not accept them as it accepted other sections of people. They experienced social, economic, health and human rights related disadvantaged, constitute the marginalized section and are leading a miserable life in the society. But leading a life as a transgender it is far from easy because such people can be neither categorized as male or female. They struggle for their existence due to several disadvantages.*

### **Meaning and Concept**

The terms third gender and third sex describe individuals who are categorized as neither man nor woman as well as the social category present in those societies who recognize three or more genders. Disowned by their families in their childhood and ridiculed and abused by everyone as eunuchs earn their livelihood by dancing at the beat of drums and often resort to obscene postures but their pain and agony is not generally noticed and this demand is just a reminder of how helpless and neglected this section of society is. Thousands of welfare schemes have been launched by the government but these are only for men and women and third sex do not figure anywhere and this demand only showed mirror to society. The Constitution gives rights on the basis of citizenship and on the grounds of gender but the gross discrimination on the part of our legislature is evident. The constitution, while it contains certain prohibited grounds of discrimination such as race, caste, creed, sex, etc., does not specifically include sexual orientation.

The inequality among sections of the society is all pervasive and stark. Inequality and lack of equal opportunities in the Indian society has led to formulation of targeted welfare measures for those sections of the society which have been neglected and are not in the mainstream social construct. Formulation of treated welfare measures is an indication of acknowledgement by the society of



existence of neglected and discriminated sections of the society which cannot uplift without these measures owing to lack of natural ecosystem for their progression. Scheduled castes, Scheduled Tribes, Other backward class are some of the society sections or community which have been identified by the government and targeted welfare measures approach has been implemented for the elimination of discrimination and wellbeing of these sections of the society. Transgender is one such community of the society which has always lived on the fringes of the society despite being the presence of the community being visible to a significant extent in the society.

The transgender have not been given the proper identity till today. However, the legislature passed the bill in 2016, still they are in quest of their own identity in the society. Each and every individual has their own identity and dignity to pursue the respectable life. So, the main objective of this topic to bring the acknowledgment of the rights of the third gender provided to them and to bring them in the society to live a happy and prestigious life in the society by spreading the different ideas such as the biological disorder and others.

### **Review of Literature**

As far as review of literature is concerned, the author while writing this paper found out some past studies, literatures and article based on transgender which is discussed here.

**Jeyaseelan. M (2015):** Jeyaseelan said that the role of the government and the community is to bring awareness among Transgender group of people on their rights. Government and NGO's can work together for the rehabilitation of the transgender involved in prostitution and provide education to the interested people for public awareness campaign to erase social stigma. Then, every transgender will have the right to know about their Rights.

**Prof. Shilpa Khatri Babbar (2016):** The road to the legal recognition of the transgenders as a third gender has been a long and difficult history of reverence but a reality of discrimination is almost unimaginable how it is taking the state and the society so long to legally recognize them as dignified alternate sexualities, so that they no longer have to resign to a life that forces them to identify themselves either as a male or female. There are cloud of ignorant stereotypes, who see transgenders merely as beggars, hecklers and sex workers. Unfortunately, it is this mass rejection of their individuality that render so many of them unfit for any kind of employment, turning them to a life of abuse.

**Sakshi Parashar (2016):** Transgender person are continuously facing multiple forms of social discrimination and oppression like health care, employment, educationally backwardness challenges, social participation etc. The major challenges in inclusion of transgender within the ambit of the OBCs reservation in education and appointment. So for the social inclusion of awareness program and sensitization for transgender is a necessary step. This process definitely going to be a gradual process for state, society and individual.

According to Akanksha Mishra (2016): Social and legal position of the Transgender community and judicial treatment are of the same, home is necessary not only to pen down laws but also bring them to action for the upbringing of transgender community.



**Prem Kumar Agarwal(2016):** The Supreme Court recommended the Government to implement the findings of this judgment, further directed to include transgender community as backward class and to take appropriate measures for affirmative action in favour of transgender. The Court also recommended for establishment of a commission to find out the actual status of the transgender population and the Supreme Court strongly argued for the rights of transgender community but the ground reality is different. The problem of the transgender people is deep rooted in the event of social exclusion and until and unless the guidelines of the Supreme Court are implemented and the transgender community is provided with the opportunity of social inclusion, their problem cannot be solved.

**Dipayan Choudhury &AtmajaTripathy (2016) :** There is lack of clarity under Hindu personal law. In addition, there is absence of legislation recognizing marriage and inheritance rights of third-sex people. Supreme Court has recognized right of equality under Article 14 of the Indian Constitution. The duty of Indian legislators should be to amend the current legislation governing Hindu personal law so as to bring it into consonance with India's international obligations as well as with its duty to protect the fundamental rights of the third gender community.

In order to protect the LGBTI community, it is also looked at the laws pertaining to homosexuality, particularly those included in the Indian Constitution's Articles 14, 15, '19, and 21 as well as the Human Right Act and international human rights treaties. In order to clarify how to govern how their necessity for safety and lawful recognition, the present book also analyzed the jurisprudence of the Supreme Court of India on homosexuality and concerns surrounding same-sex families. The Author stated that in order to do this, sexual orientation and gender identity-related issues should be covered under civil rights laws. This book's author sheds light on the legal precedent for discrimination against the LGBTI population around the world. The Indian Hijra community is also covered by the author. The best example of a non-biological family and kinship structure, which eliminates blood and marriage links, is the Hijra (transgender) society of India. There are seven separate houses inside the Hijra community.

The author also cited the widespread legal prejudice and violence against LGBTI Indians. It examines specific instances of discrimination that have an impact on homosexuals' day-to-day lives in India, such as police abuse of gay men, laws against same-sex unions and partnerships, the influence of negative media portrayals, and more. It is believed that in addition to domestic legal reform in India, LGBTI rights education and sexual orientation education in general must be fostered and encouraged. There is a significant incidence of legal discrimination and violence against LGBTI Indians notwithstanding India's State obligations to international accords. In order to demonstrate the degree of agreement between the Indian Constitution and international human rights conventions in the context of the promotion and protection of LGBTI persons, pertinent articles (Articles 14, 15, 19 and 21) of the Indian Constitution are highlighted along with their scope in defending human rights. In a leading case, the Delhi High Court ruled that Section 377 of the Indian Penal Code, which criminalizes sex between adult homosexual men, was unconstitutional. This decision was based on an analysis of the previous judgments of the Supreme Court of India regarding Section 377 of the IPC.

Considering the complex network of people and the sizeable number of eunuchs in the world, it is not possible to close our eyes and ignore their existence. It must be noted that the third gender in India is not adequately provided for, though their existence is evident in our country. A vertical intervention of rights is necessary in recognizing eunuchs as equal citizens of India.



The distinction between sex and gender is social construction. Sex /gender diversity varies from both among and within cultures. Social attitude toward sex/gender diversity are often built on stereotypes, and are somewhat different than attitudes sex/gender variant individuals have about themselves, especially when social attitudes are negative, while cultural images of sex/gender diversity do influence how individual differences in sex/gender identity-how one experiences oneself as a sexed and gendered person. This individual variation is based on differences in personality, life circumstances, social class and other factors.

Every area of a person's life is influenced by their gender. Gender is pre-determined into two categories: Male or Female, both socially and biologically. Specific human features are described by the gender categorization. The most significant aspect of gender is that it has a socially constructed meaning, and people are expected to behave and express themselves in ways that are compatible with the sex-specific gender role that is assigned to them. A group of individuals who are regarded as neither men nor women, such as transgender and intersex people. The term Hijra, Kinar, Third Gender, etc. is also known to transgender people. The fact that people are automatically split into the two biological sexes of male and female as well as the two genders of masculine and feminine seems to us to be the most natural, unchanging, and desirable thing. The concept of sex and gender as a system of two opposite and immutable categories—male and female; masculine and feminine—is so pervasive in both common sense and most social science. This division of humans into two sexes occurs at birth, and when sex assignment is male or female, such sex assignment is assumed to be permanent. For the majority of us, it is challenging to even consider any alternatives to this perspective on sex and gender. Transgender people are perceived as "neither male nor female" but rather as having traits from both. By and large, society views trans people as intersexed, impotent men who undergo emasculation, in which all or some of their genitalia are removed. They behave in a female manner. Transgender people typically make a living by soliciting alms and getting paid to perform at births, marriages, and festivals. Because of their alleged inability and lack of desire to engage in sexual activity as man with woman as a result of their alleged biological intersexuality and their subsequent castration, transgender people are most obviously "not men.". As a result, transgender people are unable to have children, especially boys, who are crucial to our society's conception of the traditional masculine role for men.

However, if transgender people are "not men," they are also "not women," while having some traits of femininity associated with the role. These actions include dressing as women, wearing their hair long, shaving their faces, adopting feminine mannerisms, employing female kinship terminology and a particular feminized lexicon, and taking on women's names. Transgender people, however, are not regarded as women since they are unable to bear children, and their actions, such as their sexual aggression, are seen as scandalous and strongly at odds with the anticipated demure behavior of regular women in their duties as spouses, mothers, and daughters. Transgender performances are essentially burlesques of women, and the entertainment value comes from difference between themselves, acting as women, and the real women they imitate. The Transgenders are outsider community in our society though they born in our society. They are outsiders because in our society, people are classified as male or female in every field. However, they do not fit into any of those groups. They are disadvantaged in society. They are unable to routinely interact with members of society. They are localized inside their own towns. Despite lacking a typical sexual organ, individuals nonetheless have sexual cravings. They each find different ways to satisfy their yearning.



## **Legislative measures**

The presence of the third gender is slowly but painstakingly moving towards official acknowledgement. In a historic case, the Apex Court of India recognized transgender people's legal rights by citing article 14 of the Indian Constitution's right to equality, which utilizes the term "person" rather than a binary term. According to Article 15, governments are prohibited from discriminating against any citizen on the basis of sex when it comes to access to public restaurants, hotels, and entertainment venues. According to Article 16, every citizen shall have access to quality opportunities in areas connected to employment for any office. One's personal identity is centered on their gender identity. As a result, Article 19 must be used to defend it. The Supreme Court continued by stating that gender self-determination is a crucial component of personal liberty and self-expression lying within Article 21 of the Indian Constitution.

It is pertinent to mention here that there are numerous international instruments, documents and covenants where it is clearly mentioned that the rights of third gender is recognised as human rights. The Universal Declaration of Human Rights, (UDHR) is one of them. It was adopted in 1948, the International Covenant on Economic, Social, and Cultural Rights, which was adopted in 1966, and the International Covenant on Civil and Political Rights, which was adopted in 1966. Additionally, legislation governing the rights of members of the transgender community has been passed in other nations.

## **Rights of Transgender**

The National Council for Transgender Persons was established under section 17.

- Article 14&21: Right of equality before law and equal protection of is in under article 14 & 21 of the constitution.
- Article 21: Right of choose one gender's identity is an essential part to lead a life with dignity which again falls under the ambit of Article-21.
- Article 14, 15 & 16: Transgender cannot be discriminated against on the ground of gender as it is violation of Article 14, 15, 16. Article 19 (1) & 19 (2) provides right to every individual regarding gender expression and there is no restriction on one's personal appearance or choice of dressing.

## **Transgender persons (Protection of Rights) Act, 2014 has been passed by Rajya Sabha on 24th April 2015 which mentions the rights of transgender under the following sections**

1. Section-2 (t) Transgender person means a person like other human.
2. Section-2 (i) define inclusive education as a system of education where in all students learn together all time.
3. Section-2 (q): clearly referred to attain and maintain maximum independence, full physical, social, sensory intellectual, psychiatric, inclusion and participation in every aspect of life.
4. Section-7 (1), Act 2014 give rights to all transgender have the right live in the community with choice equal to other.
5. Section-11 (1); say that no child who is transgender shall be separate born from his/her parents ground of being a transgender except on a order of competent count.
6. Section-11 (2) define that where the immediate family is not able to care for transgender child, the competent court to place child with in his/her extended family or within community.



7. Section-13 (i) transgender students without discrimination provide equal of opportunity for sport, education, recreation leisure activities and on equal an equal basis. (ii) Provide appropriate conformity of the individual needs. (iii) The legal of inclusion provide necessary support in environment that augments academic and social development & (iv) also provided monitor participation progress in school attainments in education for every transgender students.
8. Section-16 (1) its relating to employment requirement, promotion & other issues.
9. Section-16 (2) they are eligible for any post for any field and shall have selected to selected past.
10. Section-21 says that all Government institution of primary, secondary & higher education shall reserve to 2% of the total seat in each class & course for transgender.
11. Section-22 government shall reserved not less than 20% vacancy meant to filled by direct requirement.
12. Section-26 (1) central government shall which is well known as the National commission for transgender to exercise the powers conferred upon and to perform the function assigned to it. State level section 38% is same with section 26 (1).
13. Section-46 said that purpose of speedy disposal of suit of a civil nature.

### **Judicial Approach**

**In Navtej Singh Johar and Others v Union of India**, The Supreme Court, which is composed of a five-judge bench, recently rendered a decision on September 6, 2018, that read down Section 377 of the Indian Penal Code in order to exclude consensual sexual acts carried out by adults in private from its purview. This decision is historic on many levels. While the verdict has been widely reported and is being celebrated by the transgender community as the Court having “de-criminalized homosexuality,” It should be mentioned that homosexuality or attraction to people who are the same sex or gender has never been illegal. On the surface, the section appeared to criminalize some sexual actions regardless of the participants' age or permission, but that has since been reversed. Despite this, the section has had diverse meanings for various kinds of gay people. Therefore, it is necessary to evaluate the Court's decision in the Navtej Singh Johar case on various grounds..

Those who challenged the passage in this and similar cases have given a second narrative that aims to refute the first. We'll refer to this as N2. It is stated that even if the part was worded neutrally, it nonetheless criminalized anyone who identify as lesbian, gay, bisexual, or transgender. Further, it is claimed that the criminalization of what the section refers to as "unnatural sex" gave rise to negative social identities for the aforementioned people and diminished their value in the eyes of the state. But this one also contains a kernel of truth, much like N1. When judges have applied this clause to situations involving two males, they have frequently portrayed individuals who committed the banned activities as having fundamental moral failings. The judge in a landmark case, wrote, referring to the defendant: “It seems clear to us that he is not only a desperate character but is a man of depraved morality.”

In another case, the Gujarat High Court stated that where sexual practices between two people had no chance of ending in peno-vaginal intercourse, such "deviation is liable to be termed perversion". Two Supreme Court justices noted in the case, that "the offence is one under Section 377 IPC, which involves sexual perversity.”



### **Conclusions and suggestion**

As far as the above mentioned discussion, deliberation, debate and discourse is concerned, transgender individuals face intolerance, discrimination, and various forms of exclusion from society. This isolation varies from place to place and for most incomprehensive reasons. While the judiciary has taken a significant step to remove this stigma of the third gender, it is upon society and the people to recognize the true implications of this judgment and prioritize its enforcement. In a country where there are abundant reasons to grant reservations, the community which is attached to the social backwardness is being ignored. Thus, it becomes important not only to understand the laws but at the same time address them among society and its people for the upliftment of the transgender community. The identity of an individual should be treated with the utmost respect. The fight of the transgender community is to be recognized as human and accepted into society. They wanted to be treated with the same respect and dignity as anyone in society.