

Problems of Transgender in India – An Analysis

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Abstract

This paper attempts to study the **difficulties** faced by **transgender** persons in various forms of gendered violence, harassment and discrimination both at home and in public spaces and the legal protection against such criminalization. Hijras and other transgender (TG) people in India face a variety of issues. So far, Hijra/TG communities have been excluded from effectively participating in social and cultural life; economy; and politics and decision-making processes. A primary reason (and consequence) of the exclusion is the lack of (or ambiguity in) legal recognition of the gender status of hijras and other transgender people. It is a key barrier that often prevents them in exercising their civil rights in their desired gender. So far, there is no single comprehensive source on the basis of which an evidence-based advocacy action plan can be prepared by transgender activists or possible legal solutions can be arrived at by policymakers. This hopefully will lead to further consultations with trans communities and other stakeholders, could be an essential first step towards achieving the legal rights of hijras/transgender people in India.

While the identity documents for a specific purpose (such as passport and social entitlement identity card) can provide a range of options such as man, woman, transgender, male-to-female (MtF) transgender, female-to-male (FtM) transgender, and third sex/gender, there are complexities when it comes to the arena of civil rights. In particular, in a country like India where there are strong affirmative action policies for women, there are serious questions as to under what conditions a male-to-female transgender person is entitled to be recognized as a woman as per the law. The dilemma for the law is whether to recognise transgender persons as a third category through the entire gamut of civil and criminal laws by radically amending all laws or whether to include them within the existing binary gender framework? Is there a Via Media where people are given the choice to either become the gender of their choice when a certain medical threshold is reached (e.g., medical certificate based on sex reassignment surgery or hormone therapy) or to be recognized as a third gender on self certification. A primary reason (and consequence) of the exclusion is the lack of (or ambiguity in) legal recognition of the gender status of hijras and other transgender people. It is a key barrier that often prevent them in exercising their rights related to marriage with a person of their desired gender, child adoption, inheritance, wills and trusts, employment, and access to public and private health services, and access to and use of social welfare and health insurance schemes. Legal recognition of the gender status of TG people is also critical for the right to contest and right to vote in the elections.

Key words: Transgender, problems, human rights, present situation, prevalence, economic status

Introduction

India has a well-established framework of fundamental rights embedded in the Constitution. With the recent Naz decision there is a new precedent to discern transgender rights being recognised by the Constitution. The four important provisions from the point of LGBT rights are: Article 14. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Article 15. The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them Article 19 All citizens shall have the right: (a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations or unions; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India; and (g) to practise any profession, or to carry on any occupation, trade or business. Article 21. No person shall be deprived of his life or personal liberty except according to procedure established by law. In terms of criminal law, until the decision of the Delhi High Court in Naz Foundation vs. NCT Delhi in 200926, all non-penovaginal sexual relationships among consensual adults were a criminal offence under Section 377 of the Indian Penal Code meriting a maximum punishment of life imprisonment. The said provision violated Article 17 and Article 2(1) of the ICCPR27.

The Naz decision has now brought Indian jurisprudence into conformity with international law by decriminalising all consensual same sex activity between adults. As the Court noted: “In our view, Indian Constitutional law does not permit the statutory criminal law to be held captive by the popular misconceptions of who the LGBTs are. 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”. 28 The importance of the Naz decision was that it gave a new interpretation to the existing framework of Constitutional Rights. These four provisions included above are the heart of the Fundamental Rights Chapter. Prior to the Naz decision, it was never seen fit to apply these provisions to LGBT persons. What the Naz decision did was to apply the understanding of Constitutional rights to a minority which had never been deemed worthy of rights protection or judicial consideration.

As the Delhi High Court observed, invoking Jawaharlal Nehru: ‘If there is one constitutional tenet that can be said to be underlying theme of the Indian Constitution, it is that of ‘inclusiveness’. This Court believes that Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as “deviants” or “different” are not on that score excluded or ostracised’.29 The Naz decision interpreted Article 21 to include protection for both zonal and decisional privacy of individuals as well as the dignity of LGBT individuals. As the Court noted, ‘In the Indian Constitution, the right to live with dignity and the right of privacy both are recognised as dimensions of Article 21. Section 377 IPC denies a person’s dignity and criminalises his or her core identity solely on account of his or her sexuality and thus violates Article 21 of the Constitution.

As it stands, Section 377 IPC denies a gay person a right to full personhood which is implicit in notion of life under Article 21 of the Constitution.³⁰ With respect to Article 14, the Naz decision held that, The criminalisation of private sexual relations between consenting adults absent any evidence of serious harm deems the provision's objective both arbitrary and unreasonable. The state interest "must be legitimate and relevant" for the legislation to be non-arbitrary and must be proportionate towards achieving the state interest. If the objective is irrational, unjust and unfair, necessarily the classification will have to be held as unreasonable. The nature of the provision of Section 377 IPC and its purpose is to criminalise private conduct of consenting adults which causes no harm to anyone else. In the focus groups conducted with trans people in different cities, trans participants were divided in their opinion on whether they want the law to recognise them as a woman or as a separate "third" gender. Key articulated reasons for wanting to be legally recognised as a separate gender included: high possibility of getting separate social protection schemes, and reservations in jobs and election contests; and not wanting to be subsumed under the 'woman' category as they are not "biologically" female.

Key articulated reasons for wanting to be legally recognised as a woman included: self-identification as a woman, even though they are not born as a female; satisfaction with having equal rights as that of a woman/female; and social protection benefits alone should not be a reason for the need to be recognised as a separate gender. Some significant proportion of participants seemed to have misunderstood that getting social protection benefits as getting legal recognition, while others thought that getting social protection benefits and getting a legal recognition as a woman are mutually exclusive

Objective:

This paper intends to explore and analyze the amplified challenges faced by the weak and marginalised sections of society of **transgenders**. Also legal safeguards of transgender people to be recognized as a third gender and enjoy all fundamental rights

Transgender lives matter

"The true civilization is where every man gives to every other every right he claims for himself".

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. Rights help to make our life easier by avoiding all claims. And it encourages an individual to live independently. In every country, we can find that effortlessly. Because we are social animals and it's our right from birth to live independently, give our clarification on it's their fundamental privileges too which cannot and shouldn't be denied to them. The Election Commission has introduced the option of 'other' in the voter's identity card and indicated that 'hijras' can vote or contest as 'other'⁵ ⁶. However, the legal validity of this executive order on the right to contest is not clear. Hijras had contested elections in the past. It has been documented that the victory of a transgender woman who contested in an election was overturned since that person contested in a seat reserved for women and according

to the judgment of the Madhya Pradesh High Court⁷ the person was not a woman but a “hijra”.⁸ However, there have been other documented cases of transgender persons contesting elections as women. Since none of these candidates had won, there has been no cause for any other court to pronounce on the question of whether hijras are ‘women’ for the purposes of contesting from women-only constituencies.

They should alight ‘severy right to prove themselves. And to make their lives better like us. They must have the right to educate themselves, live according to their wish, right to vote, opt for any kind of profession that they prefer. These things gave them different identities so that they also make their name in the world.

If you take an example of your child and any family members. That, if he/she got any different natural characteristics which an individual does not have. Then what we will do? Of course, we accept that person because he/she belongs to their family. Yeah, differences we can see then also but for a family, it is their child which they can't eradicate.

Similarly, for a country's norms, every person is the same and equal. No matters they belong to homosexual, or bisexual. No matter they able or disabled. Because if we see in our surroundings then there are so many people who are different from each other. So by seeing this, it will take millions of time to make rules for each and individual. And maybe it creates lots of trouble too. That's why everyone is equal in the eye of the constitution. Every individual has all rights no matter what they have.

Indian Law on Transgender Rights

The Indian Supreme Court's declaration that transgender individuals are the Third Gender under the constitution and recent legislation has significantly furthered recognition and rights for transgender individuals. This article looks at these developments and guides employers. The golden thread that runs through the equality scheme of the Indian constitution (Articles 14, 15, 16, 19, and 21) is ‘enjoyment of life by all citizens and an equal opportunity to grow as human beings irrespective of their race, caste, religion, community, social status, and gender.

‘One of the basic tenets of the equality scheme lies in the recognition and acknowledgment of the ‘right of choice and self-determination’.

Determination of the gender to which a person belongs and relates is intrinsic to their right of self-determination and their dignity. Acknowledging that Indian laws are substantially binary, recognizing only male and female genders, the Honorable Supreme Court of India in its order in the case of National Legal Services Authority vs. Union of India (dated 15 April 2012, AIR 2012 SC1863, the ‘Nalsal Judgement’), declared transgender individuals distinct from binary genders, as the ‘Third Gender’ under the Indian constitution and for laws enacted by the parliament and state legislatures. Non-recognition of the Third Gender in the Indian legal framework has resulted in the systematic denial of equal protection of the law and widespread socio-economic discrimination

in society at large as well as in Indian workplaces. In the wake of the Nalsal Judgment, the Indian parliament recently enacted the Transgender Persons (Protection of Rights) Act, 2012 (the 'Act').

Gay Choice

The transgender community has all the rights that citizens of India have. Apart from these their other rights include :

- 1) Clauses 21 and 22 of Chapter V aim to reserve 2% of seats in primary, secondary, and higher education institutions funded by the government, and in government jobs.
- 2) Clause 24 for Chapter V mandates the formation of special employment exchanges for transgender people.
- 3) Chapter VIII details the formation of special transgender rights courts.
- 4) The maximum penalty for hate speech against transgender people in 1-year imprisonment with a fine.

Reforms needed to improve the situation

Legal Measures

- 1) 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. This includes the demand for hijras to be considered female as well as a third sex.
- 2) There should be special legal protection against this form of discrimination inflicted by both state and civil society which is very akin to the offense of practicing untouchability.
- 3) The Immoral Trafficking Prevention Act, 1956, as has been pointed out earlier, is used less for preventing trafficking than for intimidating those who are the most vulnerable i.e., the individual sex worker as opposed to brothel keepers or pimps. This law needs to be reformed with a clear understanding of how the state is to deal with those engaged in sex work.
- 4) Civil rights under the 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 the change in gender/sex identities.

Police Reforms

- 1) 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 kothis and hijras in public areas and police stations, and the guilty policeman is immediately punished.
- 2) The police administration should adopt transparency in their dealings with hijras and kothis; make available all information relating to procedures and penalties used in detaining kothis and hijras in public places.

3) Protection and safety should be ensured for hijras and kothis to prevent rape in police custody and jail. Hijras should not be sent into male cells with other men to prevent harassment, abuse, and rape.

4) The police at all levels should undergo sensitization workshops by human rights groups/queer groups to break down their social prejudices and to train them to accord hijras and kothis the same courteous and humane treatment as they should towards the general public.

Other Measures

1) A comprehensive sex-education program should be included as part of the school curriculum that alters the heterosexist bias in education and provides judgment-free information and fosters a liberal outlook about matters of sexuality, including orientation, identity, and behavior of all sexualities. Vocational training centers should be established for giving the transgender new occupational opportunities.

2) 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.

Key Features

- **Definition of a transgender person:** The Bill defines a transgender person as one whose gender does not match the gender assigned at birth. It includes transmen and trans-women, persons with intersex variations, gender-queers, and persons with socio-cultural identities, such as *kinnar* and *hijra*.
- **Certificate of identity:** A transgender person may make an application to the District Magistrate for a certificate of identity, indicating the gender as 'transgender'.
- **Prohibition against discrimination:** The Bill prohibits discrimination against a transgender person, including denial of service or unfair treatment in relation to:
 - Education, employment, healthcare.
 - Access to or enjoyment of goods, facilities, opportunities available to the public.
 - Right to movement, right to reside, rent, or otherwise occupy property.
 - Opportunity to hold public or private office.
 - Access to a government or private establishment in whose care or custody a transgender person is.

- **Health care**
 - The Bill also seeks to provide rights of health facilities to transgender persons including separate HIV surveillance centres, and sex reassignment surgeries.
 - It also states that the government shall review medical curriculum to address health issues of transgender persons, and provide comprehensive medical insurance schemes for them.
- It calls for establishing a **National Council for Transgender persons (NCT)**.
- **Punishment:** It states that the offences against transgender persons will attract imprisonment between six months and two years, in addition to a fine.

Concerns

- The Bill does not have any provision for self-determination of gender. The transgender community has questioned the certificate of identity.
- It fails to address the lack of an effective mechanism to enforce the legal prohibition against discrimination on the ground of gender identity.
- It does not make provision for affirmative action in employment or education despite the Supreme Court's mandate in **National Legal Services Authority NALSA v. Union of India (UOI) case (2012)**.
- The Bill sets out lighter sentences for several criminal offences, such as "sexual abuse" and "physical abuse", when they are committed against transgender people.

Conclusion

Transgender (LGBT) rights in India have been evolving rapidly in recent years. However, Indian LGBT citizens still face certain social and legal difficulties not experienced by non-LGBT persons. The country has repealed its colonial-era laws that directly discriminated against homosexual and transgender identities and also explicitly interpreted Article 15 of the Constitution to prohibit discrimination on the basis of sexual orientation and gender identity. But many legal protections have not been provided for, including same-sex marriage.

Transgender people in India are allowed to change their legal gender post-sex reassignment surgery under legislation passed in 2012, and have a constitutional right to register themselves under a third gender. Additionally, some states protect hijras, a traditional third gender population in South Asia through housing programmes, and offer welfare benefits, pension schemes, free operations in government hospitals as well as other programmes designed to assist them. The World Professional Association of Transgender Health released a statement in May 2010 urging the de-psychopathologization of gender nonconformity worldwide. This statement noted that "the expression of gender characteristics, including identities, that are not stereotypically

associated with one's assigned sex at birth is a common and culturally diverse human phenomenon [that] should not be judged as inherently pathological or negative. Keep everyone under one eye. Give every right to every individual of each caste, religion, region, etc. Spread love, humanity and let them live according to their wish.

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