



# Transgender Roles And The State Of Inequality In India In Terms Of Economic And Social Disparity

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**Abstract:** Safeguarding justice and promoting equality among its people have always been a primary core objective of the State. By virtue of human's birth, they are inherently entitled to fundamental rights and freedoms, which cannot be altered or removed. Everyone in our country has the freedom to exercise all rights without any gender discrimination. Throughout history, we can see transgender individuals are also integral part of our society. They are also humans, entitled to acquire and enjoy rights without any barriers. Judiciary recognized them as third genders in *NALSA v. Union of India*. A legislation was also enacted, the Transgender Persons (Protection of Rights) Act, 2019 for the protection of their rights. But they are always excluded from the society and face problems in several spheres. The existence of social stigma makes this community isolated. This societal exclusion led to face inequality in the field of education, employment, and in attaining medical facilities. Hence, this paper by using doctrinal research methodology, study focuses on the role played by the trans community in our society by tracing the historical aspects, their battle to achieve third gender recognition, pros and cons of the legislation. Gaining acceptance from the society is an in tremendous task, only through the elimination of economic and social disparities it can be erased. A supportive space and an open-minded society combined with initiatives from the State will uplift the trans community by fostering inclusivity, ensuring equal rights and providing necessary welfare measures for their empowerment.

Key Words: Transgenders, social exclusion, constitutional rights, recognition, measure

## INTRODUCTION

Trans individual is an individual whose gender identity, expression or behavioral aspects differs from the sex they were assigned at birth. A person's inner feelings and sense of their own gender; whether male or female or another identity is referred to as gender identity. When a person expresses this gender identity through behavior, clothing, attitude or body style, it can be mentioned as gender expression. Since ancient times, the trans community has played a vital role and has been deeply rooted in the hearts of the society. Yet, societal norms have often excluded them, pushing them to margins. They face challenges due to exclusion. They are treated as marginalized sections and are discriminated in every sphere of life. From childhood they experienced and faced harassments in different ways. But later they identified as 'third gender' through a historical judgment made by the Supreme Court in *NALSA v. Union of India*<sup>1</sup>. However, despite this legal recognition they continued to face social and economic disparities in the society.

<sup>1</sup> AIR 2014 SC 1863.

## RESEARCH METHODOLOGY

The study follows doctrinal research method, analyzed the contentions of the transgenders in India.

## HISTORICAL ASPECTS OF TRANSGENDER LIFE IN THE SOCIETY

Transgenders have been part of the Indian society since ancient times, and their importance in religious and cultural practices is reinforced by both history and mythology. Ancient Indian books and scriptures proved the presence of trans people with distinct identities.

Ancient Indian texts mentioned transpersons in different names such as Trithya Pathi, Trithiya Prakrithi, Hijras, Napumska, Tirunagais. Khoja, Aravanis, Eunuchs. Trans persons participated in all ceremonies in the old days. During those times, there were no such discrimination on the basis of gender. Particularly, hindu mythology offers certain instances of transgender, can see their active participation in various rituals and traditions. Mythological text Ramayana, shows the incidence were the Rama permitted the power to shower blessings on people during some occasions like birth of a child, marriages, inaugurals and such other functions, where Hijras sings and dance<sup>2</sup>. Hijras occupied a special place in Hinduism. Hence, Hijras have been recognised in ancient hindu texts. In 17<sup>th</sup> and 18<sup>th</sup> Century they wore both male and female dress and in 19<sup>th</sup> Century shifted to wore female apparel. They have an attachment to Lord Shiva in his Ardhanarishwara form, mixed version of both man and woman. The Vedic literature states difference between three kinds of Prakriti: Pums prakriti (masculine), Stri prakriti (female), and Tritiya prakriti (third sex) and in Kamasutra, third sex persons are explored.<sup>3</sup>

In medieval India, Hijras played a famous role in the royal courts of mughal empire as administrators, political advisors and guardians. They acted as clever and trustworthy, hence had free access and played a central role in the politics. In the Islamic religious foundations, occupied high stands in guarding the holy places of Mecca and Medina, and were able to impact decisions of the state as well as earned money to have been closest to the kings and queens<sup>4</sup>.

During the British colonial period, Hijras got accepted and gained protections from the Indian governments, it was an entry to form Hijra Community. British didn't accept these persons, but in the mid of 90's Indians were free to accept such persons as respectable characters.

In the half of 19<sup>th</sup> century, the British governments criminalized hijra community and denied all civil rights to them. They were considered as separate ones by the colonist managements. Colonial government enacted The Criminal Tribes Act 1871, criminalised all acts done by the transgenders. This act made registration compulsory and treated them as criminals. During this era, they didn't enjoy their normal lives. The act makes a bad impact and created a colonial impression about the transgenders on the Indian society. They deprived all the respects and considerations earned in the previous old days. After the Independence this act was repealed in 1952 but the image created were continued and this made trans community as the marginalised sections of our society<sup>5</sup>. Ignorance from the society forced to do other activities as beggars or sex workers for their resistance. Thus, they deprived of their fundamental and basic rights.

## CONSTITUTIONAL FRAMEWORK AND TRANSGENDER'S RIGHTS

In our Constitution, Preamble is enshrined with certain ideals and principles which dictates to secure every citizen social, economic, political justice and equality of status in all compasses.

Fundamental rights under Part III of the constitution dealt with right to equality in Article 14, states that all are equal before law. Any kind of discrimination on the basis of gender is prohibited in our country. But transgender individuals have consistently faced the denial of their constitutional rights. The reason is that only two genders i.e male and female is only recognised by the society. Non -recognition of identity of transgenders, was one of the reasons for the deprivation of their rights such as their right to education, health, property, and exclusion from the society.

<sup>2</sup> Sribas Goswami & Sushweta Karmakar, Transgender in India: Identified by the Law Discriminated by the Society, 9(2) European Researcher Series A 107, 108-110 (2018).

<sup>3</sup> Monika Rajendra Sawant, Transgenders: Reflection in Indian Society, II GAP BODHI TARU 52, 53-54 (2024).

<sup>4</sup> M Michael Raj, Historical Evolution of Transgender Community in India, 4 ARSS 17, 17-19 (2015).

<sup>5</sup> Soundarya Kumar Deepak, Criminalisation of Transgender Community in India During Colonial Rule, 5 Innovation the Research Concept E32, E32-33 (2020).

## BASIC CONSTITUTIONAL RIGHTS

State should ensure equality before law and equal protection of laws<sup>6</sup> in our country. Through the intelligible reasonable classification and without any arbitrariness<sup>7</sup>, abiding the principles of rule of law, the state should ensure the protection of laws without any discrimination.

In this provision, the word 'any person' here refers to every individual, irrespective of any discrimination such as caste, creed, religion, sex etc. Hence, a transgender is also included in the word 'any person', equal status must be ensured to them. There should not be any kind of discrimination on the ground of religion, race, caste and sex<sup>8</sup>, hence this constitutional fundamental right clearly prohibits the discrimination on the basis of gender.

State should ensure equality of opportunity in the matters of public employment<sup>9</sup>. As citizens of the country, trans individuals are also deserved to enjoy the opportunities in the employment field without any barriers on the basis of sex identity.

In these provisions discrimination on the ground of 'sex' incepts discrimination on the ground of gender identity. The term 'sex' is not only limited to biological factor, but also intends to consider who are neither male or female. The provisions under Article 15(2) and 16(4) empowers the state to make any special provision for the upliftment of socially and educationally backward classes, thus it provides equality in the matters of public employment.

The Directive Principles of State Policy should be read along with these articles and the other international framework which covers the social equalitarian ideas, if these provisions are extended to the transgenders exhaustively, then they can enjoy their life with dignity and status of equality with other genders and social equality can be achieved.

The rights enunciated under Article 19 are integral to the freedom of expression and identity, it includes their behaviour and personality without any type of fear and discrimination, free to express their own views in different ways, behaviourism and style. Actually, the state is under an obligation to protect and recognize these rights which ensures that the trans individuals can live with dignity and to uphold the right to enjoy the status of equality in the society. There are no criteria in our constitution with regard to the acquisition of Indian Citizenship based on gender identity or expression<sup>10</sup>. Hence, as an Indian citizen, they have the right to express their own feelings and behaviour, nobody can't restrict this expression it includes as part of the fundamental right.

Article 21 states that "No person shall be deprived of their life and personal liberty except according to the procedure established by law". Only through the process of law which means only in a just, reasonable and fair manner, a person's life or liberty can be curtailed. This fundamental right ensures an individual right to live and enjoy their life in a dignified as well as peaceful manner, as they wish. Acknowledgment of gender identity is one of inherent right to dignity, and also the right to reputation ensures their protection<sup>11</sup>, if these rights are violated will lead to the non-recognition of expression and their right to live with dignity. We can see that trans people in society are often denied of respect, subjected to humiliation and faced mistreatment by the society. This results to diminishing of importance of their community and suffered societal reputation.

There are different forms of exploitation<sup>12</sup> against human beings such as human trafficking and beggar, certain types of exploitation are faced by the transgenders and the state must ensure protection against such inhuman treatments.

The right to choose one's gender identity is covered within the ambit of Art 21<sup>13</sup>, it is an essential part of a persons to lead a good life, as they intend. Which gender he or she should belong, it is to be determined by the person concerned, and the Supreme Court has given the right through a landmark judgment. Hence, no transgenders can be discriminated on the basis of gender, as it infringes the fundamental rights guaranteed under Art. 14, 15,16,19 and 21 of our constitution.

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<sup>6</sup> India Const. Art 14.

<sup>7</sup> E.P Royappa v. State of Tamil Nadu, AIR 1974 SC 555.

<sup>8</sup> India Const. Art.15.

<sup>9</sup> India Const. Art.16.

<sup>10</sup> India Const. Art 5.

<sup>11</sup> State of Maharashtra v. Public Concern for Governance Trust, (2007) 3 SCC 587.

<sup>12</sup> India Const. Art 23 and 24.

<sup>13</sup> NALSA v. Union of India, AIR 2014 SC 1863.

Recently, India has made progress and ensured rights of the transgenders but still remained as socially vulnerable community and their basic rights are deprived.

### **JUDICIAL ACTIVISM IN RECOGNISING GENDER IDENTITY**

The Courts have played a crucial role in gaining significance on the rights of the transgenders in India by shaping the issues of equality and the recognition of individuals gender identity without any discrimination.

NAAZ Foundation v. Govt. of NCT of Delhi<sup>14</sup> NGO NAAZ foundation filed a public interest litigation stating the constitutionality of Sec 377 of IPC- regarding the consent for consensual actions between the same sex adults is illegal, this provision violated the fundamental right which is guaranteed under Art.14,15 and 21 of the constitution. Contention raised by the petitioners was that it hurts the dignity of LGBTQ+ and it is a matter of one's personal choice. Thus, Delhi High Court made a landmark ruling, stated that Sec 377 as unconstitutional and can't discriminate on the basis of sexual orientation. It was reversed in Suresh Kumar Koushal & Anr v. NAZ Foundation & Ors<sup>15</sup>, challenged the constitutionality of Section 377 of IPC. The Court analysed that such sexual acts are against the nature's order. And the court finds that there was no such evidence to prove that there is discrimination against the LGBT groups by the officers. Moreover, the court observed that the LGBT community constitutes only a smallest population in the nation, hence it cannot be considered as a sufficient reason for claiming the Section 377 as unconstitutional under Articles 14,15 and 21 of our Indian Constitution. And there is no violation of substantive due process of law and the right to privacy or life.

The Court ruled that privacy is an essential fact of human dignity<sup>16</sup>. The right to privacy protects an individual's freedom to choose personally and decide significant facets of their life and one's dignity is implicit in the sexual orientation. Thus, the Court in K.S Puttuswamy v. Union of India<sup>17</sup> case discussed the decision in NALSA to communicate that the right to privacy includes the right to equality and dignity, and it expresses a person's autonomy also.

In Navtej Singh v. Union of India<sup>18</sup>, the court struck down Sec. 377 of IPC, decriminalised same-sex relations on the ground that it violates a person's freedom to choose sexual orientation which includes right to privacy and right to personal liberty under Art.21 of the constitution. This case made an outstanding change in the LGBTQ community; it legalises homosexuality and recognised their rights; impacting environment in the status of LGBTQ+ rights and it was a greater acceptance for these individuals. This decision sets out a break for more legal proceedings, including equality in the marriage and ensured protections in an anti-discriminative manner. Decriminalizing consensual same sex relationships acknowledged the dignity of the LGBTQ+ individuals and got recognised the fundamental rights under Articles 14, 15 and 21.

National Legal Service Authority of India v. Union of India<sup>19</sup>, landmark judgment and it turned a remarkable point in the history of transgenders community. National Legal Service Authority argued for the rights of the transgenders and gender identity recognition. Transgenders got recognised as a third gender and acquired the right to self- determine gender identity. This made a facet of right to equality and prohibition of discrimination under Art. 14 and Art.15 of the Constitution.

### **BACKGROUND OF THE CASE**

The trans community people faced and they are the victims of mental traumas in their lives. Physically, sexually and mentally got abused by others, societal exclusion is another reason; in order to shed light upon the concerns and grievances of the community, writ petition was filed by the National Legal Service Authority before the honourable Supreme Court to recognize them as gender and ensure constitutional rights.

"Gender identity" refers to a person internal sense of their own gender, whether as male, female, or a third gender. It is an innate and deeply felt experience that cannot be determined through medical procedures or surgeries. It is a matter of self-determination. Discriminating against citizens on the basis of gender identity or gender violates their fundamental rights. Such discrimination would contravene

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<sup>14</sup> 160 (2009) DLT 277.

<sup>15</sup> AIR 2014 SC 1138.

<sup>16</sup> K.S.Puttuswamy v. Union of India, (2017) 10 SCC 1.

<sup>17</sup> Ibid

<sup>18</sup> AIR 2018 SC 790.

<sup>19</sup> AIR 2014 SC 1863.

Article 15(1) of the Constitution, which prohibits discrimination on the grounds of "sex". Every individual has the right to determine their gender identity freely.

The Court affirmed that the freedom of expression, which is guaranteed under Art 19(1)(a) encompasses the right to express one's gender identity through dress, speech actions, and behaviour. Additionally, the right to life and personal liberty under Article 21 safeguards person's right to self-determination in matters of gender identity. The ruling, recognizes gender identity as fundamental to human dignity, underscoring its centrality to personal autonomy and self-expression. Besides, trans individual should not be compelled to undergo medical examinations or biological tests which would violate their right to privacy and dignity under Article 21 of the Constitution. Violation of these rights cause severe trauma and hardship, adversely affecting the lives trans individuals.

### **DIRECTIONS LAID DOWN BY THE SUPREME COURT**

In this landmark case the court issued certain guidelines to protect the rights and dignity of trans individuals:

- The right to take decision regarding their identity is vested with the trans individuals and the gender identity should be legally recognised and entitled to fundamental rights under article 14,15, 16 and 21 of the Constitution.
- They should be considered as socially and educationally backward classes and making them eligible for reservation in education and public employment.
- The government was instructed to provide medical care and other facilities including separate public toilets, tailored to the needs of the transgenders.
- The government was directed to form expert committees to study and implement policies for the welfare of transgender persons.
- No trans persons should be forced to undergo medical surgeries or biological test to prove their gender identity.

### **SIGNIFICANCE OF NALSA v. UNION OF INDIA<sup>20</sup>**

Case marked a historic moment in Indian jurisprudence, as it was the first time the Supreme Court explicitly avowed that gender identity is a matter of self-determination, without any medical intervention. By recognizing the legal right of individuals to identify as male, female or transgender, the ruling established an initial framework for trans community in India. Thus, this case laid down the root for recognition of trans rights in the country. It not only validated the dignity and autonomy of gender diversity of trans individuals but also it set as a precedent for future legal and policy developments aimed at protecting their rights and promoting societal inclusion. This judgment mandates gender identity is integral part of a sex and citizen can't be discriminated on the ground of gender identity, including the third gender.

Following the landmark case, the legislature introduced the Rights of Transgender Person's Bill, 2014. Hijra community opposed this bill due to complex gender identity issues. This bill ultimately failed in fetching law. Later, the State introduced another bill The Transgender Persons (Protection of Rights) Bill in 2016. This bill also met with several criticisms and protest from transgenders, with 27 amendments the same was tabled on 17<sup>th</sup> December,2018. After criticism, as per the suggestions offered by the transgenders, some recommendations are made by the standing committee. But due to the dissolution of Lok Sabha, bill lapsed. The bill was reintroduced after the reconstitution of Lok Sabha on 19<sup>th</sup> July,2019. President gives assent on 5<sup>th</sup> December, 2019. After Gazette publication, The Transgender Persons (Protection of Rights) Act, 2019 came into effect on 10<sup>th</sup> January, 2020 with affirmative provisions, to upgrade the status of transgender in the society as well as for the protection and welfare of the transgenders.

Key highlights of the Transgender Persons (Protection of Rights) Act, 2019- which aims to protect the rights and dignity of the individual.

1. Definition of Transgender: If a person's gender is not match with their biological gender and includes trans-man, trans -women, inter-sex variations, gender queer and includes hijras, kinner, aravani and jogta<sup>21</sup>.
2. Prohibition against discrimination- strictly prohibits the discrimination against trans persons at employment, educational, institutions and health care<sup>22</sup>

<sup>20</sup> Id

<sup>21</sup> The Transgender Persons (Protection of Rights) Act, 2019 Sec 2, No 49, Acts of Parliament, 2019.

<sup>22</sup> The Transgender Persons (Protection of Rights) Act, 2019 Sec 3, No 49, Acts of Parliament, 2019.

3. Recognition of Identity- provision which states that a transpersons has the right to be recognised; a right to self- perceived gender identity<sup>23</sup>.
4. Welfare measures – mandates the government to take appropriate measures, to formulate welfare schemes and programs to protect the rights and interest of transpersons and certain measures to participate in cultural and recreational activities<sup>24</sup>.
5. National Council for Transgenders- dictates to constitute a Council to advise the government in formulate and evaluate the policies, to review and co-ordinate the activities, and to focus on the grievances<sup>25</sup>.
6. Education, social security and health- it is an obligation upon the educational institutions to include or provide educational facilities for the transpersons; government formulate schemes for self-employment and support livelihood, and healthcare facilities for sex re-assignment surgery and such other needs<sup>26</sup>.
7. Offences and Penalties- punishment for a term not be less than six months but not exceeding two years and fine can be imposed in case of forced labour, restricts the right of passage to public place, in case of any sexual, mental, physical violences and forcing a transgender person to leave home, village or place of residence. <sup>27</sup>

### PROS AND CONS OF THE LEGISLATIVE FRAMEWORK

There are certain provisions which are framed for the protection and recognition of the transgenders. The Act recognizes transgenders and proscribes discrimination in education, employment, healthcare and access to public services. Transgenders can obtain identity certificate, after the sex reassignment surgery. National Council for Transgenders must constitute to advise on policies and to act for the protection and enhancement of trans communities. There are certain provisions exclusively regarding their health services. But at the same time, on the other side lack of provisions or affirmative action in the reservation policies in employment and education. There is absence of enforcement agencies to prohibit discrimination. Trans individual has the right to be recognised as transgender and right to self-perceived gender identity. In case of obtaining the identity certificate complexities are there because rules require that the person should obtain identity proof report from the psychiatry, if an individual changes gender, as his/her wish to a trans men or trans woman, need to collect revision certificate from the district judge and it violates the right to self- declaration in the NALSA's – landmark ruling. The act fails to mention about their civil rights such as marital rights, property rights and adoption and other benefits which focuses social security. Lacunae in the legislation should be cleared, will enhance the trans community and reduce the violations and harassments against them in the society. Nowadays, they are fronting cyber bullying in the social medias, but there are no stringent provisions in the act for cyber-attack and other heinous violences.

### CONCLUSION

In India, trans individuals historically played a momentous role in religious rituals and cultural traditions. The Hijra communities, acknowledged by the people and applauded in ceremonies such as child birth blessings, weddings and acted as trustworthy. Transgender persons are documented in religious and cultural sculptures in ancient period. Nevertheless, in the colonial period, societal attitudes and criminalisation changed the trans community to marginalized group. Later, after a long way and struggle, the judicial and legislative steps give a path for the protection and recognition of trans rights in modern India. Landmark judgments were some breaking points for the trans movements in India. It was a huge step, from the part of the legislators that they framed an act named, The Transgender Persons (Protection of Rights) Act, 2019 for protecting and legally recognizing the transgenders in the year 2019. Despite, the progressive approaches still experiencing social stigma in the society. Marked as socially and educationally backward people, there are gaps in reservation policies related to employment. The gaps will lead to the economic disparities and effect the development of the trans community socially and educationally. Due to discrimination trans people struggled more to find an employment. It is an

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<sup>23</sup> The Transgender Persons (Protection of Rights) Act, 2019 Sec 4, No 49, Acts of Parliament, 2019.

<sup>24</sup> The Transgender Persons (Protection of Rights) Act, 2019 Sec 8, No 49, Acts of Parliament, 2019.

<sup>25</sup> The Transgender Persons (Protection of Rights) Act, 2019 Sec 16, No 49, Acts of Parliament, 2019.

<sup>26</sup> The Transgender Persons (Protection of Rights) Act, 2019 Sec 13,14 &15, No 49, Acts of Parliament, 2019.

<sup>27</sup> The Transgender Persons (Protection of Rights) Act, 2019 Sec 18 No 49, Acts of Parliament, 2019.

impossible factor to promote equality and dignity for the transgenders without social recognition. Barriers in workplace and educational institutions also guides to economic and social disparities. The legislation also remarks an exclusive commission in the national and state level. Effective reservation policies in an affirmative way should be introduced; particularly horizontal reservation system will give an effect to make a remarkable change in the status of trans community in the society. A safe and supportive environment should be created through different strategies especially providing credit facilities for self-employment lead to financially independent. Hence, possible changes and actions must be taken for the advancement of the rights of the transgenders. Amended legislation, implementation of policies and welfare measures absolutely will create an inclusive society where the trans community can live freely respect, dignity, without any harassment. Only one life in the world, must ensure the facilities to enjoy their life with dignity, as they wish.

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