

The Social and Economic Status of Transgender People in India: A Study about their Identity, Dignity and Legality

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ABSTRACT

The term "transgender" refers to someone whose internal sense of being male, female, or another gender doesn't match the sex they were called when they were born. In contrast, "cisgender" refers to people whose gender identity matches their birth sex. Transgender individuals may seek surgery to change their physical characteristics to match their gender identity. However, transgender people face many challenges, including limited medical facilities, education, prejudice, and job opportunities. A global survey found that over 40% of transgender individuals feel unable to express their gender identity due to fear of professional consequences and societal expectations. Transgender and homosexual individuals often face discrimination and exclusion in employment. Some hide their sexual orientation to avoid discrimination from family and others. This shows the significant prejudice faced by transgender individuals. Transgender social movements and reforms have transformed the LGBTQIA+ community.

KEYWORDS: Transgenders, Socio-Legal status, Identity, Equality, Transgender Persons (Protection of Rights) Bill

INTRODUCTION

Transgender individuals frequently encounter discrimination within educational and societal realms, often resulting in limited access to educational institutions. The accessibility of medical treatments, notably HIV care, is notably deficient in India, disproportionately impacting sexual minority communities, including members of the LGBTQIA+ community. Inadequate technologies for sex reassignment surgeries contribute to suboptimal or unsuccessful procedures for transgender individuals in India. Moreover, LGBTQ individuals may possess a restricted understanding of their legal rights and protections, rendering them susceptible to exploitation by the legal and judicial systems.

Individuals who identify as gay or transgender often encounter coercion and financial hardship as a result of their gender identity. These individuals often struggle to secure suitable employment and frequently experience abandonment by their families. Moreover, transgender individuals may find themselves engaging in risky behavior and are susceptible to exploitation by criminal elements, including extortion and harassment by law enforcement authorities.



It's upsetting to acknowledge that sexual harassment and assault are unfortunately common, with varying levels of prejudice across different communities. The prevalence of these issues also varies across different subgroups of sexual minorities. It's heart-wrenching that LGBT individuals often face rejection from their families and society due to their identity, leading them to keep their sexual orientation a secret. The fear of harassment or discrimination is a major reason why many choose

to keep their gender identity and sexual orientation hidden, even from their biological family. This segregation can lead to substantial financial and emotional strain.¹

HISTORY OF TRANSGENDER SOCIAL MOVEMENTS IN INDIA

Since 2001, the LGBTQ movement in India has actively utilized the judicial system to advance homonormativity. In 2001, the Naz Foundation filed a Public Interest Litigation (PIL) in the Delhi High Court, boldly challenging Part 377 of the Indian Penal Code, with the explicit aim of supporting HIV-positive individuals. The case, *Naz Foundation vs. Government of the National Capital Territory of Delhi*², determined to challenge this system. In 2006, the Naz Foundation a special leave petition was submitted to the Supreme Court of India, to advocate for the legalization of homosexuality by the abolishment of Section 377.³ of the Indian Penal Code.

In 2009, the Delhi High Court issued a ruling deeming specific sections of the Indian Penal Code to violate fundamental rights, thereby prompting numerous appeals to the Supreme Court of India. Despite initial opposition from the Ministry of Home Affairs, the Central Government ultimately reversed its stance and actively backed the decriminalization of homosexuality. However, in December 2013, the Supreme Court rescinded the Delhi High Court's decision, stipulating that the matter should be subject to parliamentary deliberation. This decision was met with criticism from LGBTQ activists, who contended that it infringed upon fundamental rights and constitutional morality. Subsequently, in 2016, the Supreme Court formally indicated its intent to scrutinize the colonial-era statute about homosexuality. Despite all-embracing litigation, Section 377⁴ of the Indian Penal Code has not been rehabilitated.



The LGBT community in India is actively advocating for their rights through legal mechanisms and public events. Parades, and publications such as 'Pink Pages' and 'Bombay Dost', have been organized in various cities to commemorate gay pride. Additionally, LGBT-themed films have been featured at Mumbai Pride festivals, and the inaugural LGBT Queer Rainbow Festival took place in Madurai in 2012. This New Social Movement has piqued the interest of intellectuals and the media. Notably, in 2013, India's highest court sanctioned Pride Parades, garnering backing from significant public figures, the media, and the general populace. The LGBTQ+ community aims to challenge heteronormativity, the prevalent societal norm, by advocating for homonormativity. On September 6, 2018, the Supreme Court of India moderately upturned Section 377⁵ of the Indian Penal Code, leading to the legalization of homosexuality.

The LGBTQ community in India recently succeeded in overturning a longstanding law that criminalized same-sex partnerships dating back to the era of British colonial rule. Justice Indu Malhotra underscored the pivotal nature of the decision, asserting that history owed an apology to the community and their families for the enduring shame and exclusion they had borne. This legal development marks the initiation of a new phase in the pursuit of transgender rights, amidst

¹ Nishul, Rao, Anindita Chatterjee (2023), A study on adjustability adaptability and sustainability of lesbian gay bisexual transgender employees in the workplaces, <http://hdl.handle.net>

² *Naz Foundation v. Government of NCT of New Delhi and Others*, WP(C) No. 7455/2001

³ The Indian Penal Code, 1860, s.377.

⁴ *ibid*

⁵ *ibid*

various challenges, including the imperative to rescind the colonial statute, indicating more intricate hurdles that lie ahead. Notwithstanding the decriminalization of homosexuality, India's legal framework continues to evince animosity and bias against the LGBT population, such as National Legal Services Authority v. Union of India⁶, Navtej Singh Johar v. UOI⁷, and Justice K.S. Puttaswamy v. Union of India⁸.

JUDICIAL APPROACH TOWARDS TRANSGENDER RIGHTS IN INDIA

The judiciary, a vital arm of government, is tasked with adjudicating conflicts and issuing legal rulings to safeguard the well-being of the populace. It stands as the guardian and enforcer of the Constitution and essential rights, guaranteeing individuals the liberty to seek legal redress in the event of rights violations. Moreover, the judiciary fulfills the role of legal interpreter, taking into account the evolving needs of society⁹.

In nations with a written constitution, the judiciary encounters increased challenges¹⁰. The Supreme Court, as the highest judicial authority, actively engages in interpreting the Indian Constitution to safeguard fundamental rights and uphold democratic principles. Its role is essential in giving life and significance to the abstract words of the Constitution, ensuring the protection of constitutional and legislative requirements. In the case of Maneka Gandhi v. Union of India¹¹, the Supreme Court reversed its previous pronouncement in AK Gopalan v. State of Madras¹², stating that Articles 14¹³, 19¹⁴, and 21¹⁵ of the Indian Constitution is a profound embodiment of human rights, natural justice, and the rule of law. Within Article 21, lie the fundamental rights to a speedy trial, access to medical assistance, and privacy¹⁶.

The Supreme Court has embraced the concept of rationalism to interpret the law more effectively, addressing the limitations of the traditional approach. In India, the principle of the rule of law ensures that all individuals are treated equally within the legal system. Despite enduring significant challenges, the transgender community continues to confront oppression, discrimination, and harassment from various sectors of society. As transgender individuals become increasingly aware of their rights, they are courageously seeking legal recourse for resolution. Recognizing the need for protection, the judiciary, as the ultimate guarantor of rights, has begun to intervene to support and safeguard the community.

LANDMARK JUDICIAL DECISION ON TRANSGENDER RIGHTS

Throughout its inception in the early 1990s, the LGBTQ rights movement has attained substantial progress, predominantly through pivotal judicial rulings and their ramifications.

NATIONAL LEGAL SERVICES AUTHORITY V. UNION OF INDIA¹⁷

Background: Transgender individuals in India have confronted substantial economic and social exploitation due to their marginalized status within society. They have been subject to physical assaults, defamation, and involvement in sex work, thereby facing heightened vulnerability to sexually transmitted infections, prejudice, and human trafficking. Nonetheless, the pivotal moment arrived in 2014 when the Supreme Court of India formally recognized transgender individuals as a distinct gender, bestowing upon them a revitalized sense of optimism and well-being. This historic legal pronouncement has engendered a profound and enduring impact on the LGBT+ community across India.

Issue: The Supreme Court grappled with the pivotal decision in the case of National Legal Services Authority v. Union of India, as it deliberated on the question of recognizing the hijra and transgender community as a third gender. This

⁶ AIR 2014 SC 1863

⁷ 2018 INSC 79

⁸ Writ Petition (Civil) No 494 of 2012; (2017) 10 SCC 1; AIR 2017 SC 4161

⁹ K.K. Ghai, "Judiciary: Functions, Importance and an Essential Quality of Judiciary", retrieved from <http://www.yourarticlelibrary.com>

¹⁰ Payal Rai Chaudhury, "Judicial Activism and Human Rights in India: A Critical Appraisal" International Journal of HR, Vol. 15, Issue 7(2011), retrieved from <http://www.tandfonline.com>

¹¹ AIR 1978 SC 597.

¹² AIR 1950 SC 49.

¹³ Article 14 of the Constitution of India

¹⁴ Article 19 of the Constitution of India

¹⁵ Article 21 of the Constitution of India

¹⁶ CBP Srivastava, "Balancing activism and restraint in judiciary", retrieved from <http://discoveryias.in>

¹⁷ 2014 INSC 275

recognition would have far-reaching implications for their inclusion in public health, education, employment, and welfare programs.

Judgment: The Supreme Court unequivocally established the 'third gender' status for hijras or transgender people, granting them the freedom to identify as transgender. This landmark ruling has paved the way for the transgender community to assert their fundamental human rights, including the freedom to choose between male and female pronouns, among other important rights.

1. The court ruled that it violated Article 14¹⁸, 15¹⁹, 16²⁰, and 21²¹. The Indian Constitution was violated due to the lack of acknowledgment of their identities.

2. The Indian Supreme Court has mandated the government to designate the "Third Gender" as a socially and economically disadvantaged demographic. This entails the development and implementation of policies aimed at ensuring equitable access to education and employment opportunities.

3. The court ruling states that conflicting gender identification and biological gender are not indicative of a pathological condition. It emphasizes the prioritization of resolving distress related to a gender mismatch over treating any perceived abnormality. Furthermore, the court defines a person's self-image as encompassing gender attributes, while biological characteristics are delineated to include genitalia, secondary sexual features, and chromosomes.

Aftermath: The judicial decision nullified the requirement for sex reassignment surgery for transgender individuals, asserting their entitlement to self-identify as a non-binary gender. State administrations revised health and housing regulations to offer greater accommodation. but the Transgender Persons Bill, 2018²² has significantly influenced this judgment. Additional intricacies will be addressed in the forthcoming article.

RIGHTS OF TRANSGENDER UNDER THE CONSTITUTION OF INDIA



Right to Equality:

The right to equality in India is protected by Article 14²³ of the Indian Constitution advocates for the rule of law, encompassing a comprehensive approach to addressing various forms of discrimination in Part III, notably under Article 15²⁴ the legislation prohibits discrimination based on gender, color, religion, national origin, or place of birth. These collective provisions ensure equal treatment and protection from prejudice and bias.

¹⁸ ibid

¹⁹ ibid

²⁰ The Constitution of India, Article 16

²¹ ibid

²² Transgender Persons (Protection of Rights) Bill, 2016

²³ Article 14 of the Constitution of India

²⁴ Article 15 in Constitution of India

In the Naz Foundation case²⁵, the Supreme Court of India overturned a challenge about whether Article 15 encompasses protection against discrimination based on sexual orientation. The Declaration of Principles of Equality, drafted by specialists and published by the Equal Rights Trust, elucidates various bases for discrimination, including race, color, ethnic or social origin, nationality, religion, belief, political or other opinions, sex, sexual orientation, gender identity, age, disability, health, and related factors.

The Supreme Court determined that the term "sex" in Article 15 encompasses protection against discrimination based on sexual orientation and gender identity. The fundamental right to equality and non-discrimination based on sex or sexual orientation seeks to preclude unfair treatment or bias stemming from societal norms or expectations concerning sexuality and gender roles. While legal experts contend that discrimination rooted in sexuality and transgenderism infringes upon Article 15, such forms of discrimination are considered akin to other grounds of discrimination.

Section 377 of the Indian Penal Code regulates sexual activities by penalizing them regardless of an individual's sexual orientation or gender identity. The Supreme Court of the United States referenced the *Re: Special Courts Bill* case, asserting that equality does not necessitate treating every individual uniformly, but rather advocating for the equal treatment of individuals in similar circumstances about privileges and obligations.

Right to Freedom of Speech and Expression: It is important for every citizen to have the freedom to express their thoughts and opinions, regardless of their gender or sexual orientation, as guaranteed by Article 19 of the Constitution. This includes being able to freely display one's likeness, choose a name, and engage in discussions about human rights, sexual orientation, and gender identity. It's essential that everyone feels empowered to express themselves verbally and in writing.

Protect the Right to Life, Liberty, and Privacy of Transgender Persons:

Article 21²⁶ The provision in Article 21 of the Indian Constitution bestows upon individuals the right to life and independence, encompassing the right to lead a life deserving of respect. A comprehensive interpretation of this right asserts that it includes all necessary elements for individuals to live a dignified life and to find purpose and fulfillment in their existence.²⁷ The state unequivocally cannot infringe upon an individual's right to life and personal liberty except through legally mandated procedures. The Supreme Court has decisively expanded the application of Article 21 by interpreting it as a right to life with "human dignity" and "animal existence." This encompasses unequivocal access to sufficient nutrition, clothing, housing, healthcare, education, means of transportation, social connection opportunities, and the freedom to express oneself. It is an undeniable, fundamental human right to live in dignity, free from any form of cruelty, degradation, or humiliation, including torture, sexism, and other egregious treatment. The state is unequivocally responsible for ensuring that no individual, irrespective of age, is exposed to cruel or degrading treatment, including those who identify as transgender or homosexual.

The right to life and liberty is without question violated if an individual is subjected to torture or other forms of ill-treatment based on their sexual orientation or gender identity, including hate crimes. The Supreme Court of India has definitively ruled that the right to personal privacy is undeniably protected by the Constitution, including respect for private and familial life, intimate relationships, reproductive ability, marital status, and sexual orientation.

In the case of the National Coalition of Gay and Lesbian Equality (NCGLE) v. Minister of Justice²⁸, the Constitutional Court of South Africa noted that a person's gender and sexual orientation are closely connected to their identity. The court ruled that every individual has the right to personal autonomy, which includes the freedom to make decisions about their own lives. This ruling strongly impacts the prohibition of voluntary and private homosexual acts committed by adults.

²⁵ Naz Foundation v. Govt. of NCT of Delhi, 160 Delhi Law Times 277

²⁶ Article 21 of the Constitution of India

²⁷ P.K Majumdar and R.P Kataria (ed.), *Commentary on the Constitution of India 171-172* (Orient Publishing House, Allahabad, 10th ed., 2009).

²⁸ ZACC 15, 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC)

INTRODUCTION OF TRANSGENDER ACT IN INDIA

Following the lapse of the previous Transgender Persons (Protection of Rights) Bill, 2018, the Indian Parliament introduced a new act in the Lok Sabha in July 2019 to preserve the rights and welfare of transgender individuals. The Transgender Persons (Protection of Rights) Act across the nation addresses transgender people's complicated conditions, such as discrimination, violence, and economic exclusion. The Act acknowledges transgender people as a third gender who can self-identify based on their gender identity. It prohibits prejudice in educational establishments, medical facilities, and public places, and it mandates the formation of state welfare boards to boost the utilization of social welfare programs. ‘

TRANSGENDER PERSONS (PROTECTION OF RIGHTS) BILL, 2019²⁹:

1. The 2019 Transgender Persons (Protection of Rights) Bill intends to prevent discrimination against transgender individuals in healthcare, education, work, and private and public settings. Fortunately, law enforcement marginalizes trans people and makes them more vulnerable to institutional persecution.
2. The transgender community in India fiercely opposes the bill, claiming it breaches their fundamental rights and contradicts the National Association of Lesbian and Gay Advocates (NALSA) ruling.
3. The legislation restricts the Bill's guarantee of privacy, including the freedom to choose one's sexual orientation. Transgender people are more vulnerable to harassment and privacy and autonomy violations since changing one's gender identity on official documentation requires an acknowledgment from the District Magistrate. A two-year sentence for sexual assault of transgender victims is also included in the measure, which goes against equal protection guidelines.
4. The Bill also ignores the cruelty and horrors transgender people endure from their families, which violates their right to mobility and association. The law makes no mention of how to ensure safe schools and workplaces or change the curriculum to promote inclusive education and opportunity.
5. The courts are supporting and advancing LGBTQIA+ rights oppositely. LGBTQ individuals will continue to fight for equal rights with heterosexuals if the authorities do not recognize the historic decision and put its provisions into effect.

THE TRANSGENDER PERSONS BILL, 2014³⁰:

A bill known as the Transgender Persons Bill of 2014 was presented to create programs and protections for transgender people. Though debates were postponed, the Rajya Sabha passed the measure. The "Transgender Persons (Protection of Rights) Bill," which was reintroduced by the Ministry of Social Justice and Empowerment in 2016, compromised the policy in several ways. Transgender people have experienced acts of violence and discrimination, according to the Standing Committee on Social Justice and Empowerment's recommended amendments, which were made under the direction of Sh. Ramesh Bias. The transgender community's collective struggle and the necessity of a profound change in society's social structure were highlighted by the committee.

Many thought the original Bill was a step backward, even if it sought to guarantee transsexual individuals access to fairness and equality in society and economy.³¹ Following the release of the historic NALSA ruling, the public criticized the law and questioned its need. The amended law was met with strong opposition and protests across India as it disregarded the standing committee's and transgender people's suggestions. Like the previous measures, the modified one failed in the end.

A COMPARATIVE ANALYSIS OF PROVISIONS OF THE RIGHTS OF TRANSGENDER BILL, 2014 AND THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019:

A comprehensive central policy, the "The Rights of Transgender Persons Bill, 2014" sought to provide full welfare for transgender people. It did not, however, address the bulk of the shortcomings in the current statute. The 2014 Bill addressed transgender concerns and included a list of services for transgender people, such as job, education, healthcare, and loan programs in addition to employment opportunities. However, it ignored important topics like unions, households, and adoption and disregarded the freedom to express one's subjective gender identity. The Transgender Persons (Protection of

²⁹ Transgender Persons (Protection of Rights) Bill, 2019, Act No. 40 of 2019

³⁰ Retrieved from <https://theleaflet.in/analysis-the-transgender-persons-protection-of-rights-bill-2016-standing-committee-report/>

³¹ *ibid*

Rights) Act, 2019 retains the majority of the 2016 Bill's provisions, except the removal of the District Screening Committee clause and the omission of the prosecution of begging. The laws that are in place do not cover fundamental topics like marriage, familial relationships, and adoption.



CONCLUSION & SUGGESTIONS

For the transgender population, the Transgender Persons (Protection of Rights) Act, of 2019 in India marked a major turning point by acknowledging their right to self-identified gender identity. However, the law is frequently condemned for discriminating against people and for going against the fundamental rights guaranteed by Article 21 of the Indian Constitution. In particular, the Indian Penal Code, 1860's Section 377 does not mention these rights; instead, it concentrates on the capacity to self-identify.

People are still unable to practice several basic rights, including marriage, family, and adoption, even after the Act was passed. The law has to be reevaluated because it is incomplete and has many flaws. Although the government works to advance equality and social justice, these initiatives alone cannot fully accomplish the state's aim.

To address the issues and worries that the transgender community faces, the court has helped provide positive decisions in many areas, such as criminal cases, employment, education, and identity. But despite the judiciary's best efforts, the stigma attached to the transgender population still exists. Through its many decisions, the Indian courts have continuously sought to dispel the unfavorable image attached to the transgender population. But for judicial attempts to be effective, society's entrenched conventional thinking needs to be drastically changed.

SUGGESTIONS

The analysis suggests several recommendations to advance LGBTQ+ rights in India and globally. **Education Awareness:** These include fostering awareness and acceptance of LGBTQ+ individuals and communities through comprehensive educational programs.

Law Reforms: Advocating for legal reforms to protect their rights, promoting political representation.

Community support and Media: Strengthening community support networks, ensuring accurate portrayal of LGBTQ+ individuals in media, cultivating cultural sensitivity, and participating in international collaboration.

Legal Assistance: Providing legal assistance and support to those experiencing discrimination, adopting an intersectional approach to campaigning and policymaking, and continuing advocacy through grassroots mobilization, public campaigns, and strategic partnerships.

These recommendations aim to create a society that is more inclusive, equitable, and just for those who identify as LGBTQ+ in India and around the world. By implementing these suggestions, stakeholders can work towards creating a society that is more inclusive, equitable, and just for those who identify as LGBTQ+.