

TRANSGENDER PERSONS: A STUDY BASED ON LEGAL PERSPECTIVE

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Received: 16 Oct 2024

Accepted: 20 Oct 2024

Published: 25 Oct 2024

ABSTRACT

A newborn has both male and female sex at birth. In particular, the fact that our Indian society only recognises male and female genders makes it extremely conservative. However, what about those individuals who were unable to categorize them into either of the two groups? There are two categories of transgender people: male-to-female (MTF) and female-to-male (FTM). Transgender people who identify as FTM are born with a feminine body but a predominately masculine gender identity. MTF transgender people identify as female even if they were born with male bodies. Transgender community are sidelined and treated as untouchables and the society is unwilling to contain or embrace different gender identities and expressions. They are constantly abused by everyone as a 'chhakka' and 'hijra' Transgender persons have few avenues to gain their livelihood. Nevertheless, in India transgender persons are legally recognized as the 'third gender' or 'other' gender. Still this third genders are treated as a curse to the society. Thus, it becomes very important to investigate the legal rights that the transgender population has been granted in India. The study focuses on secondary data that was collected from various books, journals, articles, newspapers, bare acts and websites.

KEYWORDS: *Transgender, Gender, Identity, Rights, Legal*

INTRODUCTION

Someone whose gender identity differs from that usually associated with the sex they were assigned at birth is referred to as a transgender person (sometimes abbreviated as trans person) (APA, 2018). Transgender individuals may choose not to identify as heterosexual (straight), homosexual (gay or lesbian), bisexual, asexual, or in any other category. The awareness of transgender individuals is celebrated with a number of cultural activities. One popular sign of transgender pride is the transgender flag (CDC, 2020). The term "transgender" refers to a broad category of identities, including but not limited to intersex, cross-dressing, and transsexual individuals. Individuals of any age who defy conventional notions of what it means to be a man or a woman through their appearance and behaviour are known as transgender people. Ever since the beginning of recorded human history, they have been a part of every culture, race, and social class. The definition of the term "transgender" has changed over time. Virginia Prince initially used a variation of the phrase in the cross-dressing magazine *Transvestia* in 1969. Prince maintained the phrase for those whose gender did not correspond with their sex at the moment, and they did not intend to have sex reassignment surgery performed. In 1992, the word expanded to include all individuals who identified as gender nonconforming. This is the definition that the word currently has. It includes a wide range of groups, such as cross-dressers, transsexuals, androgynies, and gender queers, in addition to people who identify as transgendered. Numerous groups have asserted that the term refers to some form of transgender identification

(Transgender in India, 2020). Transgender-related identities, cultures, and experiences come in a vast variety and are typically categorised as follows: "Hijras: Biological men who eventually reject their "masculine" identity to identify as women, "not-men," "in-between man and woman," or "neither man nor woman" are known as hijras. The terminology used to refer to Hijras varies depending on the locale. Take Kinnars in Delhi and Aravanis in Tamil Nadu, for instance. Hijras might get money by doing traditional tasks like "Badhai," which is clapping hands and requesting alms, blessing newborns, or dancing during celebrations. Due to a lack of other employment options, some Hijras work as prostitutes or as independent contractors for non-governmental organizations (2010 UNDP India Report. 2010). When a child originally assigned to the male sex is found to have ambiguously masculine genitalia at birth, they are classified as intersexed, or Hijras, and are no longer considered eunuch, a term for an emasculated guy. "Thirunangi and the Aravanis" The most well-known of these groups include the Kothi, who identify as male, the Hijras, who are biological men but reject masculine identity, the Aravanis, who are women dressed as men, the Jogappa, who serve the goddess Renukha Devi, and the Shivshaktis, who are men who express themselves as women (Hotchandani, 2017). The 2011 Census shows that 4,87,803 people (or 0.04% of the total population) identify as "other" rather than "male" or "female." Transgender people were included in this "other" category, which was used for people who did not identify as male or female (Population census India, 2011). The term "gender identity" describes how each person experiences gender in a strongly felt, unique way, which may or may not match the sex assigned at birth. Transgender community are sidelined and treated as untouchables and the society is unwilling to contain or embrace different gender identities and expressions. They are constantly abused by everyone as a 'chhakka' and 'hijra' Transgender persons have few avenues to gain their livelihood. Nevertheless, in India transgender persons are legally recognized as the 'third gender' or 'other' gender. Still this third genders are treated as a curse to the society. With this context in mind, the study looks into the legal rights that India's transgender community has been accorded.

REVIEW OF LITERATURE

In the context of present study, it is important to take cognizance of some of the studies carried out on transgender persons.

Neeraj, M. K., & Sreenath, M, K. (2021) in their study includes that transgender person are victimized into the hazards of discrimination, harassment, verbal abuse, violence, false arrest, rejection, desertion from family, no share in the parental property. The authors highlight the miserable life of transgender persons.

Gleason, H. A., Livingston, N. A., Peters, M. M., Oost, K. M., Reely, E., & Cochran, B. N. (2016) in their study 'Effects of state nondiscrimination laws on transgender and gender-nonconforming individuals' perceived community stigma and mental health on transgender persons. The study made clear the necessity of nondiscriminatory legislation in order to lessen problems like suicide and stigma among transgender people.

Docter, R. F., & Fleming, J. S. (2001) in their study 'Measures of transgender behavior. Archives of Sexual Behavior' found that there is a requirement of clinical attention due to the trauma faced by transgender persons. This trauma is due to the harassment, injury, legitimate issue and monetary problems.

Pradeep M.D.(2021) in his study 'Issues and Concerns of Transgenders – Ways Forward for living Gender of Choice' used secondary data contributing to development of literature based on the futuristic needs found that transgender community is exposed to several problems, deteriorated life with social exclusion, social rejection, stigma, gender crisis, lack of social protection, etc. The identity crises, challenges, and legal system that transgender people face

both nationally and internationally are also major topics of discussion in this article. It advocates for the social, political, economic, and cultural mainstreaming of transgender people via integrated approaches, inclusive growth, freedom to choose one's preferred gender, and other means.

The literature clearly describes the problems of the transgender persons and there is a need to fill the gap in respect of legal protection.

METHODOLOGY

The study is based on secondary data. The secondary data for the purpose of present study was collected from various books, journals, articles, newspapers, bare acts and websites.

RESEARCH QUESTION

- What are the problems transgender people faces?
- What are the Gender specific laws and procedures in India?
- What are the various legal safeguards for improvising the Transgender persons?

OBJECTIVES

The main objectives of the study are:

- To study the problems faced by transgender person.
- To assess the gender specific laws in India.
- To study the legal protection available to transgender person in India.

Transgender in India

Indian Census has never recognized third gender i.e. Transgender while collecting census data for years. But in 2011, data of Transgender's were collected with details related to their employment, Literacy and Caste. In India, total population of transgender is around 4.88 Lakh as per 2011 census.

Table 1: Transgender in India

SI. No.	India	Transgender 487,803	Child (0-6) 54,854	SC 78,811	ST 33,293	LITERACY 56.07%
1	Uttar Pradesh	137,465	18,734	26,404	639	55.80%
2	Andhra Pradesh	43,769	4,082	6,226	3,225	53.33%
3	Maharashtra	40,891	4,101	4,691	3,529	67.57%
4	Bihar	40,827	5,971	6,295	506	44.35%
5	West Bengal	30,349	2,376	6,474	1,474	58.83%
6	Madhya Pradesh	29,597	3,409	4,361	5,260	53.01%
7	Tamil Nadu	22,364	1,289	4,203	180	57.78%
8	Orissa	20,332	2,125	3,236	4,553	54.35%
9	Karnataka	20,266	1,771	3,275	1,324	58.82%
10	Rajasthan	16,517	2,012	2,961	1,805	48.34%
11	Jharkhand	13,463	1,593	1,499	3,735	47.58%
12	Gujarat	11,544	1,028	664	1,238	62.82%

Table 1: Contd.,

13	Assam	11,374	1,348	774	1,223	53.69%
14	Punjab	10,243	813	3,055	0	59.75%
15	Haryana	8,422	1,107	1,456	0	62.11%
16	Chhattisgarh	6,591	706	742	1,963	51.35%
17	Uttarakhand	4,555	512	731	95	62.65%
18	Delhi	4,213	311	490	0	62.99%
19	Jammu and Kashmir	4,137	487	207	385	49.29%
20	Kerala	3,902	295	337	51	84.61%
21	Himachal Pradesh	2,051	154	433	118	62.10%
22	Manipur	1,343	177	40	378	67.50%
23	Tripura	833	66	172	181	71.19%
24	Meghalaya	627	134	3	540	57.40%
25	Arunachal Pradesh	495	64	0	311	52.20%
26	Goa	398	34	9	33	73.90%
27	Nagaland	398	63	0	335	70.75%
28	Puducherry	252	16	40	0	60.59%
29	Mizoram	166	26	1	146	87.14%
30	Chandigarh	142	16	22	0	72.22%
31	Sikkim	126	14	9	37	65.18%
32	Daman and Diu	59	10	1	2	75.51%
33	Andaman and Nicobar Islands	47	5	0	3	73.81%
34	Dadra and Nagar Haveli	43	5	0	22	73.68%
35	Lakshadweep	2	0	0	2	50.00%

Source: <https://www.census2011.co.in/transgender.php>

ISSUES TRANSGENDER PERSONS FACE

Lack of legal protection, housing insecurity and marginalization, harassment and stigma, anti-transgender violence, barriers to healthcare.

GENDER SPECIFIC LAWS IN INDIA

In India many laws are only gender specific and do not specify that how these laws will apply to transgender person. Some gender specific laws and procedure in India:

Table 2: Gender Specific Laws and Procedures in India

Legislation	Gender Specific Provision
Criminal Laws	
The Bharatiya Nyaya Sanhita (BNS) is India's new criminal code that replaced the Indian Penal Code (IPC) on July 1, 2024. The BNS is also known as the Indian Justice Code	Punishment for assault on a woman with intent to outrage her modesty (section 74 of BNS); Punishment for selling female minors for purposes of prostitution (section 98 of BNS) Rape as an act committed by a man on a woman (section 63 of BNS); Word, gesture or act intended to insult the modesty of a woman (section 79 of BNS); Husband or relative of husband of a woman subjecting her to cruelty (Section 85 of BNS); Dowry death, where death of a woman caused due to cruelty by husband or his relative (Section 80 of BNS).
The Code of Criminal Procedure (CrPC) was replaced by the Bharatiya Nagarik Suraksha Sanhita (BNSS) on July 1, 2024.	Service when persons summoned cannot be found. Section 64 of CrPc mentioned that the summons may be served only to adult male member of the family residing with him but now in section 66 of BNSS the word male has been replaced and now the summon can be served to adult member of the family residing with him. A female under arrest can be searched only by another female with strict regard to decency (Section 49 of BNSS); Grants the power to compel restoration of the liberty of unlawfully detained females (Section 101 of BNSS); Requires the medical examination of a victim of rape, who should be a woman (Section 184 of BNSS).
Indecent Representation of Women (Prohibition) Act, 1986	Prohibits the indecent representation of women in various forms of publications.
Protection of Women from Domestic Violence Act, 2005	Grants protection to a woman in a domestic relationship and who alleges domestic violence.
Civil Laws	
The Sexual Harassment of Women At Workplace (Prevention, Prohibition, Redressal) Act, 2013	Provides protection against the sexual harassment of women at the workplace.
Hindu Marriage Act, 1955	Recognises marriage between a man and a woman.
The Special Marriage Act, 1954	Recognises marriage between a man and a woman.
Hindu Adoptions and Maintenance Act, 1956	Provides different criteria for a man and a woman in relation to adoption of a child.
Hindu Succession Act, 1956	'Heir' refers to either a male or a female for the purpose of succession, in the absence of a will.
The Muslim Personal Law (Shariat) Application Act, 1937	Specifies 'special property' of females which includes personal property inherited or obtained by contract, gift, etc.
Other Laws	
The Mines Act, 1952	Prohibits the employment of a woman in areas of a mine below ground level; Permits the employment of a woman in a mine above ground level between the hours of 6 am and 7 pm.
Factories Act, 1948	Permits a woman from working in any factory only between the hours of 6 am and 7 pm.
National Food Security Act, 2013	States that the eldest woman in every eligible household will be head of the household for the purpose of issue of ration cards.
National Rural Employment Guarantee Act, 2005	States that priority will be given to women workers (at least one-third of the beneficiaries are to be women) if they have registered and requested for work under this Act.
The Companies Act, 2013	Requires the Board of Directors of every company to have at least one woman director.

Source: Various Central Laws

Initiatives that the Government has Taken for Transgender Persons

Transgender Persons (Protection of Rights) Rules, 2020:

The Rules have been made under the Transgender Persons (Protection of Rights) Act, 2019.

In addition to outlawing discrimination in the areas of healthcare, education, employment, property ownership and disposal, public or private office holding, and access to and use of public services and benefits, the regulations aim to acknowledge the identity of transgender people.

National Portal for Transgender Persons

Transgender people would benefit from being able to electronically apply for an identity card and certificate from anywhere in the nation, eliminating the need for them to deal with authorities in person. They will be able to monitor the application, denial, grievance resolution, and other process statuses with its assistance, ensuring process transparency. In accordance with the 2020 Transgender Persons (Protection of Rights) Rules, it has been launched.

Garima Greh

The Ministry of Social Justice and Empowerment opened Garima Greh, a transgender refuge home, in November 2020. The "Shelter Home for Transgender Persons" scheme provides a place to stay, food, clothes, recreational opportunities, yoga, physical fitness, library resources, legal assistance, technical advice for gender transition and surgery, employment opportunities, and capacity building for trans-friendly organisations. A minimum of 25 transgender people will be rehabilitated under the program in each of the houses that the Ministry designates.

Recognition in Indian Prisons

The Ministry of Home Affairs advised heads of prisons in the United States and the Union Territories in January 2022 to protect the privacy and dignity of detainees who identify as third gender. In 2020, the National Crime Records Bureau reported that there were seventy transgender inmates housed in prisons throughout the nation. Sexual minorities based on sexual orientation and gender identity (SOGI) are not recognised as a separate class of inmates in India under the Prisons Act 1894 (Ministry of Social Justice and Empowerment, 2020).

LEGAL PROTECTION AVAILABLE TO TRANSGENDER PERSONS

National Legal Services Authority (NALSA) filed a Public Interest Litigation (PIL) on behalf of the transgender community in the matter of NALSA v. Union of India in 2014. They had requested a legal statement of their gender identification in that PIL in addition to "male" and "female." And that has to be administered following the birth. In essence, they desired to be recognised as an independent community. The Supreme Court of the United States has ruled in this case that transgender people are entitled to third gender recognition, stating that this is a human rights issue rather than a social or medical one (NALSA VS Union of India, 2014).

As a resultant of 2014 decision by apex court many significant changes take place in Indian Legal system, especially passing of specific Act to sort out the problems of the LGBT community in legal arena.

The Transgender Persons (Protection of Rights) Act was passed in 5th Dec 2019. The Act has the following main provisions:-

- Definition of Transgender person (Section 2):-The Act says that transgender person is a person whose gender identity does not match with the sex assigned at birth and it includes trans-men and trans-women, persons with intersex variations, gender-queers, and persons with socio-cultural identities, such as kinnar and hijra. Intersex variations is defined to mean a person who at birth shows variation in his or her primary sexual characteristics, external genitalia, chromosomes, or hormones from the normative standard of male or female body.
- Prohibition against discrimination (Section 3):-This Act prohibits all kind of discrimination against a transgender person including rejection of service or unfair treatment relating to: ▪ Education ▪ Employment ▪ Healthcare ▪ Access to or enjoyment of goods, facilities, opportunities available to public ▪ Right to movement ▪ Right to reside, rent or occupy property ▪ Opportunities to hold public or private office.
- Certificate of identity for a transgender person (Sections 4-7):-A transgender person may make an application to the District Magistrate for a certificate of identity, indicating the gender as 'transgender'. A revised certificate may be obtained only if the individual undergoes surgery to change their gender either as a male or a female.
- Welfare measures by Government (Section 8):-The Bill states that the relevant government will take measures to ensure the full inclusion and participation of transgender persons in society. It must also take steps for their rescue and rehabilitation, vocational training and self-employment, create schemes that are transgender sensitive and promote their participation in cultural activities.
- Employment (Section 9):-No government or private entity can discriminate against a transgender person in employment matters, including recruitment, and promotion. Every establishment is required to designate a person to be a complaint officer to deal with complaints in relation to the Act.
- Right of residence (Section 12):- Every transgender person shall have a right to reside and be included in his household. If the immediate family is unable to care for the transgender person, the person may be placed in a rehabilitation centre, on the orders of a competent court.
- Education (Section 13):-Educational institutions funded or recognized by the relevant government shall provide education, sports and recreational facilities for transgender persons, without discrimination.
- National Council for Transgender persons (NCT) (Sections 16-17):- The NCT will consist of (i) Union Minister for Social Justice (Chairperson); (ii) Minister of State for Social Justice (Vice- Chairperson); (iii) Secretary of the Ministry of Social Justice; (iv) One representative from ministries including Health, Home Affairs, and Human Resources Development. Other members include representatives of the NITI Aayog, and the Human Rights Commission. State governments will also be represented. The Council will also consist of five members from the transgender community and five experts from nongovernmental organizations (The Transgender Persons (Protection of Rights) Act, 2019).

The Bharat Nyaya Sanhita has also made a Number of Other Changes, Including:

Transgender

A transgender has been included in the definition of ‘Gender’ under Section 2(10) of BNS to have the meaning assigned to it in clause (k) of section 2 of the Transgender Persons (Protection of Rights) Act, 2019 which means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta.

Unnatural Sexual Offences Unclear

The BNS does not retain Section 377 of IPC dealing with unnatural sexual offences. This implies that rape/sodomy of an adult man will not be an offence under the BNS, neither will have intercourse with an animal. However, under Section 38 of BNS, the right of private defence of body extending to causing death includes an assault with intention of gratifying unnatural lust, which means though sodomy is no offence but a person being/apprehended being sodomised can cause death of the perpetrator.

Inclusive Language & Gender Neutrality

Sec2(10) of the BNS includes transgenders which was missing in the erstwhile IPC.

“Gender” – the pronoun he and its derivatives are used of any person whether male, female or transgender (The Bharatiya Nyaya Sanhita, 2023)

“transgender” shall have the meaning assigned to it in clause (k) of section 2 of the Transgender Persons (Protection of Rights) Act, 2019 (40 of 2019);

Rape of trans-women

The Transgender Persons (Protection of Rights) Act, 2019’s definition of a transgender person includes anyone whose assigned gender at birth does not match with their identified gender. This specifically includes trans-men, trans-women, social groups such as *hijras*, and intersex persons. Section 18 of the Act provides only a maximum of two years of imprisonment as punishment for abuse, which is much lower than that provided under Section.

CONCLUSION

Transgender persons are humans irrespective of any other identity. They deserve to be treated equally which is the basic necessity of all human beings. The Constitution of India provides the basic fundamental rights which are applicable to all the citizens of India including transgender and says that it is the duty of the state to protect the fundamental rights of all the citizen of India.

Transgender persons are still fighting for their fundamental freedom. Nonetheless, now the situation of transgender community in India is improving. National Legal Services Authority judgment and the enactment of the Transgender Persons (Protection of Rights) Act in 2019 have made significant strides in the lives of transgender persons. The formal recognition as a third gender is a blessing for everyone. There are laws which protect their rights. Many efforts

have been undertaken by the Indian Government as well. Section 2(10) of the The Bharatiya Nyaya Sanhita includes transgenders which was missing in the erstwhile Indian Penal Code. "Gender" – the pronoun he and its derivatives are used of any person whether male, female or transgender. Hence, inclusion both psychologically and physiologically is essential for the progress of every citizen. There should be an attempt to understand the biological and psychological reasons for their behaviour. The most important thing is that the society is changing their attitude towards them. Any work in this direction would definitely be considered to be a great work of pride. Additionally, there is a need of legal provision to penalise non-consensual unnatural sex between adults akin to the now-altered Section 377 of the Indian Penal Code (IPC) would have to be introduced in the BNS in a new form and the same has to be done with consensus from all parties

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