

## **ADVANCING TRANSGENDER RIGHTS: - AN ANALYSIS OF LEGAL FRAMEWORKS, PROGRESS, AND PERSISTENT CHALLENGES IN INDIA**

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### **Abstract**

Transgender is a term used to describe individuals whose gender identity differs from the sex assigned to them at birth. The society typically recognises an individual as male or female on the basis of their physical appearance and their sex organs i.e. genitalia. However, sexuality or orientation of an individual may or may not align with the sex assigned to them at birth. Transgender are no stranger and are an indispensable part of our society having all the rights which any other individual enjoys and is conferred by the constitution. Transgender have existed since time immemorial and their existence can be found in history. But, recently only they have been legitimately perceived as the third gender. Historically, in conservative societies, the transgender community has long faced discrimination, oppression, and violence. These individuals, often subjected to societal prejudices and biases, have endured significant challenges throughout history. Suppressed by systemic inequalities, they have been denied basic rights and opportunities, hindering their progress and prosperity. This persistent inequality has perpetuated a cycle of marginalization, further reinforcing the existing power dynamics. It is imperative that society recognizes these injustices and actively works towards dismantling the structures that uphold them. The fight for transgender right is a complex and multifaceted journey intersecting multidimensional aspects of law, society and culture. The present paper is an attempt to study the rights that has been conferred to the transgender by the Indian constitution along with specific acts intending to provide them with special privileges so that the long story of suffering and discrimination can be put to an end or at least be brought to a minimal level.

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## INTRODUCTION

Transgender persons are individuals whose gender identities do not conform to the traditional male or female stereotypes imposed by society. Gender identity is a deeply personal experience, encompassing an individual's internal sense of being male, female, or something entirely different. It goes beyond the physical aspects of one's body and delves into the core of their being. However, gender expression acts as the outward manifestation of this internal sense. It is how individuals communicate their gender identity to the world through various means, such as their behavior, clothing choices, hairstyles, and even their voice or physical characteristics. The etymological origin of the prefix "trans" means "beyond," "over," or "across." However, in the context of the term "transgender," the meaning extends beyond the notion of a gender that merely crosses a certain boundary. It is important to acknowledge that the concept of being transgender is often misunderstood or not fully grasped by many individuals.

In India, the Transgender community is referred to by various names like hijras, aravani, jogtas/jogappas, and shiv-shaktis. In many cultural and religious mythologies they are worshipped and are regarded as auspicious. As per the Census 2011 in India, 4,87,803 persons have been classified as 'others' which includes Transgender persons (pib.gov.in, 2022). While welfare measures have been taken by the government for the upliftment of neglected and discriminated sections like Scheduled castes, Scheduled Tribes, Other backward class of the society, Transgender is one such community whose

welfare is often overlooked upon and are forced to live on the fringes of the society.

## RESEARCH PROBLEM

The research paper delves into the multifaceted issues experienced by the transgender community in a developing nation like India. These challenges span across various sectors of society and include social stigma, discrimination, as well as limited access to healthcare, education, and employment opportunities. Furthermore, this comprehensive analysis of the struggles faced by the transgender community highlights the legal protections provided to them within the framework of India's legislative system. By examining specific laws implemented to ensure their rights are respected and safeguarded, this paper aims to shed light on current advancements as well as identify areas where further improvement is needed.

## HYPOTHESIS

Despite significant progress in recent years, the legal framework for the protection of rights of transgender individuals in India remains insufficient.

## LITERATURE REVIEW

The sources of this research are mainly taken from a variety of reliable sources, including books, journals, news articles, internet sources, and other databases. These sources provide a comprehensive range of information and insights that contribute to the overall quality and credibility of the research.

## HISTORY OF TRANSGENDER IN INDIA

The history of transgender individuals in India is both rich and complex, with a legacy that stretches back centuries. The ancient scriptures like Mahabharata mentions the existence of Shikhandi, who is one of the most remarkable transgender figures found in Hindu mythology. Aravan, also known as Iravan, is a significant Transgender character in Hindu mythology and is primarily associated with the Mahabharata, one of the most important epic texts in Hinduism. Ramayana, another sacred text of Hinduism, also mentions transgender. When Rama was going to exile, he addressed his followers as “men and women” to return to their home city. Among them were a community of transgender’s who did not feel themselves bound by the order and decided to be with their lord. Rama, on seeing their devotion, conferred them the power to bless (Narrain, 2023). In the Mughal reign, Hijras occupied high positions like political advisors, administrators, generals as well as guardians of the harems (Michelraj, 2015). In the Eighteenth century, British came to power in India and it marked the downfall of status of Transgender in India. The transgender community's open visibility was deemed abnormal and was associated with potential risks of moral and sexual corruption for the supposedly orthodox Indian males. The British viewpoint perceived the presence and activities of transgender individuals as an invitation for engaging in sexual services. The Indian Penal code came into force on January 1st, 1860. Section 377 of IPC 1860

condemned, all penile-non-vaginal sexual acts between

People. Further The Criminal Tribes Act, 1871, was passed. The act included hijras involved in kidnapping and castrating children and dressed like women to dance in public places. The punishment prescribed for such an act was up to two years imprisonment and a fine or both (Michelraj, 2015). However, in 1952, the act was repealed by the central government led by the then Prime minister Sri Jawahar lal Nehru.

## PROBLEMS FACED BY TRANSGENDERS IN INDIA

Transgender individuals in India face a multitude of challenges and issues that stem from social, cultural, legal, and economic factors. These challenges often result in discrimination, marginalization, and reduced access to essential resources and opportunities. A key problem faced by transgender people in India is the lack of acceptance and understanding from society. Transphobia and stigma create an environment where transgender individuals are met with prejudice and hostility, leading to social exclusion and isolation. The problems faced by Transgenders in India is summed up as follows: -

- i. **Social Stigma and Discrimination:** - Transgender individuals often face stigmatization due to their gender identity, which does not conform to societal norms. Many people hold prejudiced beliefs about gender, considering only binary genders (male and female) as valid. This stigma can lead to social exclusion and alienation.

- ii. **Disrespect, Violence and Harassment:** - Transgender are disrespected almost in every walk of life except during the ceremony of child birth and marriage, where they are called to give blessings. Transgender individuals, especially transgender youth, are more likely to be bullied and harassed in schools and public spaces. This can lead to mental health issues, poor academic performance, and even dropping out of school
- iii. **Family desertion and rejection:** - Majority of transgenders faces the wrath of family desertion and rejection once their identity is revealed. They may be disowned, verbally or physically abused, or forced to leave their homes, contributing to homelessness and vulnerability. Their own family do this due to the fear of societal boycott of the entire family.
- iv. **Prostitution:** - Transgenders often land into the dirty business of prostitution. They are forced into this by their own community, friends, and family, while sometimes this is done voluntarily for the sake of easy money.
- v. **Healthcare Discrimination:** - Transgenders often experience discrimination while accessing health care services. The discrimination ranges from disrespect and harassment to violence and even outright denial of service. The community is exposed to unsafe sex and are perfect contenders of highly vulnerable to sexually transmitted diseases like HIV AIDS. As per the UNAIDS report, In 2021 HIV prevalence among transgender people in India was 3.8%, almost 20 times the national average (UNAIDS, 2023).
- vi. **Access to Public Places and shelter:** - Access to public facilities such as restrooms and changing rooms can be problematic for transgender individuals. They may face harassment and hostility when using facilities that align with their gender identity.
- vii. **Unwanted attention:** - When individuals see a transgender individual in open, they allow them looks and undesirable consideration. In some cases, individuals attempt to form a scene by insulting, manhandling or reviling them, this subjects the transgender to utter discomfort and attention leading to embarrassment and loss of self-confidence.
- viii. **Lack of educational facilities:** - The doors of educational institutions are not opened generously for transgenders. Even if admitted they have to face prejudice.
- ix. **Employment Discrimination:** - Finding and maintaining employment can be extremely challenging for transgender individuals. Discrimination and harassment in the workplace, including misgendering and name-calling, are widespread.
- x. **Legal and Bureaucratic Barriers:** - Obtaining legal recognition of one's gender identity can be an arduous process, involving complex bureaucratic procedures. Many transgender people face difficulties in obtaining accurate identification documents, such as birth certificates, passports, and driver's licenses.
- xi. **Human trafficking:-** Being neglected and deserted section of the society, they are easy targets for the activities like human trafficking.
- xii. **Media Portrayals:-** Media often perpetuates stereotypes and negative portrayals of transgender individuals, contributing to public misconceptions and biases.
- xiii. **Civil Status:** - Transgenders often possess inaccurate and inconsistent documents regarding their identity which frequently land them in trouble

**Legal Frameworks for Transgender Rights in India: -**

The Indian constitution in its preamble provides every citizen social, economic, political equality of status. However up till recently i.e before the 2014 NALSA Judgement, the identity of a transgender was not given any legal recognition. Only two sex- male and female were recognized and the third sex was deprived of even very essential and common rights including voting rights, marrying rights, right to education etc. The NALSA Judgement, 2014, is the first of its kind judgement wherein the supreme court in the case of National Legal Services Authority v. Union of India & Ors<sup>1</sup>, recognized the third gender. The hon'ble court categorically opined that fundamental rights must be available to the third gender, and that the provisions of the article 14,15,16 and 21 are not limited to biological sex. The NALSA judgment unequivocally clarified that all transgenders have the right to education.

**Progress Made in Advancing Transgender Rights: -**

The NALSA judgement paved a path for the Indian judiciary for introduction of new laws for the betterment and upliftment of the transgender. The Supreme court in the case of *Navtej Singh Johar v. the Union of India*<sup>2</sup> decriminalized homosexuality by striking down partially the colonial period provisions of Section 377 of the Indian Penal Code

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

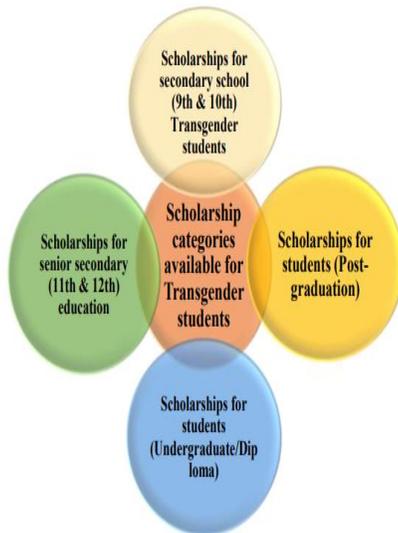
<sup>2</sup> AIR 2018 SC 4321

<sup>3</sup>(2014) 4 MLJ 12

(IPC). In the case of *Nangai vs the Superintendent of Police*<sup>3</sup>, The Madras high court cited that the applicant has freedom to choose a distinctive sexual orientation character as a third sexual gender in future based on medical declaration. The Transgender Persons (Protection of Rights) Act 2019 obligates educational institutes to be comprehensive towards transgenders with such facilities which suits their requirements. The act also prohibits discrimination of transgenders in employment. The act conferred power to central government as a result of which on 21st August 2020 the Central Government constituted a National Council for Transgender Persons. The council shall perform the functions like advising, monitoring, evaluating, reviewing and coordinating all the departments of the governments and other non-governmental organizations which work tirelessly for the well being of the transgender community.

On February 12, 2022, a scheme "SMILE - Support for Marginalized Individuals for Livelihood and Enterprise" was launched by the Ministry of Social Justice and Empowerment. The scheme provides various welfare measures for transgender persons like financial assistance in the form of scholarships to transgender students studying in classes Ninth till post-graduation, skill development training & livelihood, composite medical health for availing gender reaffirmation surgeries, pre and post-operative procedures and other health care facilities, setting up of Garima Grehs in each state for providing shelter facility for abandoned and orphaned transgender

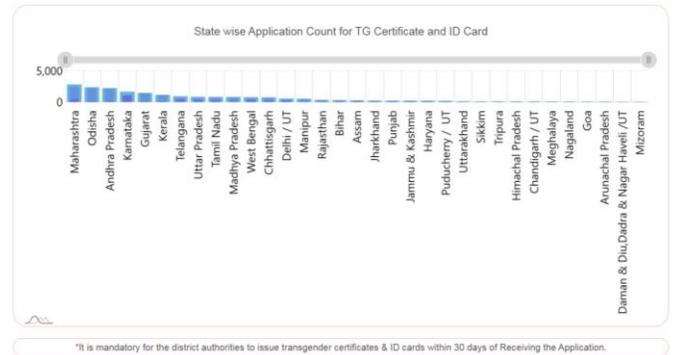
persons, setting up of transgender protection cells in the entire country for providing quick redressal of offences & crimes against transgender persons etc (static.pib.gov.in, 2022).



**Fig 1- Scholarship Schemes under SMILE**

A National portal for Transgender Person is Launched by the Ministry of Social Justice and Empowerment on November 25, 2020.<sup>4</sup> The portal facilitate the hassle free issue of certificate of identity to transgender individual without any physical interface with the authorities.

<sup>4</sup><https://pib.gov.in/PressReleasePage.aspx?PRID=1784245>



**Fig 2. Details of Application received for Transgender certificate State-wise**

On July 29, 2020, The National Education Policy of India 2020 was approved by the union cabinet of india<sup>5</sup>. The policy aims at 100% Gross Enrollment ratio by the year 2030. It also recognizes transgender children as Socio-Economically Disadvantaged group<sup>6</sup> (SEDGs). It provides for special assistance and Gender-Inclusion fund for all girls and transgender childrens

**Future Prospects and Recommendations:**

The transgender community has been sidelined and ignored for a long period of time. It is high time that this community is given the recognition and treatment in the society that is equal among commons. There has been various notable transgenders personalities like Laxmi Narayan Tripathi<sup>7</sup>,

<sup>5</sup> <https://pib.gov.in/PressReleasePage.aspx?PRID=1642061>

<sup>6</sup> <https://pqars.nic.in/annex/255/AU334.pdf>

<sup>7</sup> Laxmi Narayan Tripathi is a transgender/Hijra rights activist, bollywood actress, Bharatanatyam dancer, choreographer and motivational speaker in Mumbai, India. She is also the Acharya Mahamandaleshwar of kinnar akhada.(Source- Wikipedia)

Manabi Bandopadhyay<sup>8</sup>, Joyita Mondal<sup>9</sup> who have defied all odds and brought laurels to the country, They have been continuously working for the rights of the transgender community. However, there are persistent challenges which need to be overcome. An environment in the society is to be developed wherein this section is not looked upon with raised eyebrows, they should not be looked upon as strangers and treated as normal citizens. The government is expected to streamline and improve the mechanism of issuing legal documents to this community so that their identity can be established without doubt. Transgender rights are a global concern, a collective effort is required by international organizations and activists to advocate for gender rights world-wide. One of the important reasons for the non-acceptance of transgender in the society is ignorance or the lack of knowledge about them, continuous educational efforts to raise awareness about transgender issues and rights are expected, with the integration of transgender-related content into school curricula and professional training programs. More legal protections are to be provided to this community by enacting anti-discrimination laws, and ensuring that gender identity and expression are explicitly included in legislation. Improved access to gender-affirming healthcare, including hormonal therapy and surgeries, is anticipated. Health insurance policies may become more inclusive, and healthcare

providers may receive better training in transgender care. The transgender community often suffers from mental trauma due to various reasons, this vulnerable section of the society requires greater emphasis on mental health support, given the higher risk of mental health issues. It is important to acknowledge that while there are challenges, there is also hope for progress in the fight for transgender rights. These challenges constitute a call to action for governments, organizations and individuals to work together to overcome them and create a more equitable and inclusive society for transgender people.

### Conclusion

It is a highly acknowledged fact that individuals who identify as transgender and have diverse sexual orientations are subjected to prejudice, discrimination, and exclusion in society. This isolation spans from personal biases to widespread misconceptions within the broader social fabric. This plight faced by transgender individuals originates from the deeply ingrained societal norms and beliefs that often fail to acknowledge and respect their identity and experience. Consequently, they find themselves marginalized, their voices silenced, and their rights compromised. This systemic discrimination imposes immense emotional, psychological, and social burdens, leaving transgender individuals cut off from mainstream opportunities and support networks. In order to foster a truly inclusive society, it is imperative that we challenge these deep-seated prejudices, work towards dismantling rigid gender binaries, and strive to create a safe and accepting

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<sup>8</sup> Manabi Bandyopadhyay is the first openly transgender Indian college principal.

<sup>9</sup> Joyita Mondal is the first Bengali trans woman who was a member of a judicial panel of a civil court and a social worker from West Bengal, India (Source-wikipedia)

environment for all individuals regardless of their gender identity or sexual orientation. Only then can we begin to bridge the gaps of understanding, educate ourselves and others, and ensure a happier, more equitable future for all.

The Indian Judiciary has made a considerable contribution to eradicate the shame attached to the third gender, but the real essence of these reforms are yet to be realized. From regarding transgender as a powerful medium to get gods blessing, to making mockery and a source sexual stigma and insult, the society has not only perpetuated the transgender community ongoing struggle but also has reinforced the cycle of anger that they have been trapped in for centuries. Presently, there exist numerous reasons for providing exceptional reservations for this community, as it is synonymous with social backwardness that is often overlooked. It is therefore not enough to merely draft laws, but we must also ensure their effective implementation to elevate the transgender community to the fundamental platform of human dignity.