

## Transgender in India: New developments and enactments

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### Abstract

Transgender people experience a mismatch between their gender identity or gender expression and their assigned sex. Since the late 20th century, some hijra activists and western non-government organizations (NGOs) have lobbied for official recognition of the hijra as a kind of "third sex" or "third gender," as neither man nor woman. Hijras have successfully gained this recognition in Bangladesh and are eligible for priority in education. In India, the Supreme Court in April 2014 recognised hijra and transgender people as a 'third gender' in law. Nepal, Pakistan, India, and Bangladesh have all legally recognized the existence of a third gender, including on passports and other official documents.

**Keywords:** Transgender, Hijra, Third Gender

### 1. Introduction

A Transsexual is a person who has the internal and an external bodily feature of one sex, but has the irrefutable conviction that he or she belongs to the opposite sex. The term transgender was used in the wider sense. Even gay, lesbian, bisexual were included by the descriptor 'transgender'. Etymologically, the term 'transgender' was derived from two words, namely 'trans' and 'gender'. The former being a latin word meaning 'across' or 'beyond'. The grammatical meaning of 'transgender', therefore, is across or beyond gender<sup>[1]</sup>. This came to be known as the umbrella term which included Gay men, Lesbians, bisexuals, and cross dressers within its scope.

Hijra is a term used in South Asia – in particular, in India – to refer to an individual who is transsexual or transgender. Hijra, found in India, Pakistan and Bangladesh is a term which embraces both hermaphrodites as well as eunuchs. While a eunuch is a castrated male, a hermaphrodite is a person born with both male as well as female sexual characteristics. In the Indian folk gender classification, the term includes both persons born "intersexed" as well as individuals who have undergone emasculation at some stage of their lives. Hijras are not men by virtue of anatomy appearance and psychologically, they are also not women, though they are like women with no female reproduction organ and no menstruation. Since Hijras do not have reproduction capacities as either men or women, they are neither men nor women<sup>[2]</sup>. Our society often ridicules and abuses the transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are side lined and treated as untouchables, forgetting the fact that the moral failure lies in the society's unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change. Transgenders are deprived of social and cultural participation and hence restricted access to education, health care and public places which deprives them of the Constitutional guarantee of equality before law and equal protection of laws. Further, it was also pointed out that the community also faces discrimination to contest election, right

to vote, employment, to get licenses etc. and, in effect, treated as an outcast and untouchable<sup>[3]</sup>.

### Legal history

With the onset of colonial rule from the 18th century onwards, the situation of transgender had changed drastically. During the British rule, legislation was enacted to supervise the deeds of Hijras/Transgender community, called the Criminal Tribes Act, 1871, which deemed the entire community of Hijras persons as innately 'criminal' and 'addicted to the systematic commission of non-bailable offences'. The Act<sup>[4]</sup> provided for the registration, surveillance and control of certain criminal tribes and eunuchs and had penalized eunuchs, who were registered, and appeared to be dressed or ornamented like a woman, in a public street or place, as well as those who danced or played music in a public place. Such persons also could be arrested without warrant and sentenced to imprisonment up to two years or fine or both.

Under the Act<sup>[5]</sup>, the local government had to register the names and residence of all eunuchs residing in that area as well as of their properties, who were reasonably suspected of kidnapping or castrating children, or of committing offences under Section 377 of the IPC, or of abetting the commission of any of the said offences. Under the Act, the act of keeping a boy under 16 years in the charge of a registered eunuch was made an offence punishable with imprisonment up to two years or fine and the Act also denuded the registered eunuchs of their civil rights by prohibiting them from acting as guardians to minors, from making a gift deed or a will, or from adopting a son. Act has, however, been repealed in August 1949.

Section 377 of the IPC found a place in the Indian Penal Code, 1860, prior to the enactment of Criminal Tribes Act, 1871 that criminalized all penile- non-vaginal sexual acts between persons, including anal sex and oral sex, at a time when transgender persons were also typically associated with the prescribed sexual practices.

The Allahabad High Court in *Queen Empress v. Khairati*<sup>[6]</sup> wherein a transgender person was arrested and prosecuted

under Section 377 on the suspicion that he was a 'habitual sodomite'. This case relates to a person named Khairati, over whom the police seem to have exercised some sort of supervision, whether strictly regular or not, as a eunuch. The man is not a eunuch in the literal sense, but he was called for by the police when on a visit to his village, and was found singing dressed as a woman among the women of a certain family. Having been subjected to examination by the Civil Surgeon (and a subordinate medical man), he is shown to have the characteristic mark of a habitual catamite – the distortion of the orifice of the anus into the shape of a trumpet and also to be affected with syphilis in the same region in a manner which distinctly points to unnatural intercourse within the last few months." Even though, he was acquitted on appeal, this case would demonstrate that Section 377, though associated with specific sexual acts, highlighted certain identities, including Hijras and was used as an instrument of harassment and physical abuse against Hijras and transgender persons.

However, once the 1871 Act was repealed and replaced by a more inclusive and reformative law, that was eventually renamed the Habitual Offenders Act 1952 with the tribes being now called the "De-notified Tribes". Even though no Central legislation in India openly recognised the third gender, gender-sensitivity within the Indian bureaucracy took a small step, with "eunuchs" being given the option to enter their sex as 'E' instead of either 'M' or 'F' in passport application forms on the internet, in 2005. Later in 2009, India's Election Commission gave those recognising themselves as 'transsexuals' an independent identity by letting them choose their gender as "other" on ballot forms [7].

Until the National Legal Service Authority [8] decision, there was no other express acknowledgement of their legal status as a third gender except in a few states. State of Tamil Nadu is one such state that has taken several positive steps for their welfare. Few States like Kerala, Tripura and Bihar have referred to trans-genders as "third gender or sex". Certain other States recognize them as "third category"

A Division Bench of this Court in *Suresh Kumar Koushal and Another v Naz Foundation and Others* [9] in reviewing the reading down of the Section 377 by the High Court, the Supreme Court stated that the High Court had overlooked the fact that "a miniscule fraction of the country's population constitute lesbians, gays, bisexuals or transgenders" and that over the last 150 years, fewer than 200 persons had been prosecuted under Section 377, concluding from this that "this cannot be made sound basis for declaring that section ultra vires the provisions of Articles 14, 15 and 21 of the Constitution." The court also regarded the discriminatory treatment complained of by the Naz Foundation as a result of Section 377 as being neither mandated nor condoned by the provision itself and the fact that the police authorities and others misuse Section 377 was not a reflection of the vires of the provision but instead may simply be a relevant factor for Parliament to consider whilst judging whether to amend Section 377. The court found that Section 377 was not unconstitutional; the legislature was still free to consider the desirability and propriety of deleting or amending the provision.

### Indian Constitution

The role of the Court is to understand the central purpose and theme of the Constitution for the welfare of the society. Our Constitution, like the law of the society, is a living organism. It

is based on a factual and social reality that is constantly changing. Sometimes a change in the law precedes societal change and is even intended to stimulate it. Article 14 of the Constitution provides that, the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Article 15 (1) of the Indian Constitution states that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to- (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public. Article 16 (2) of the Constitution provides that, No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State. Article 21 of the Constitution states that, no person shall be deprived of his life or personal liberty except according to procedure established by law.

Article 253 of the Constitution of India provides that the Parliament has the power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention. Courts in India would apply the rules of International law according to the principles of comity of Nations, unless they are overridden by clear rules of domestic law. Article 51 [10], has to be read along with Article 253 of the Constitution. If the parliament has made any legislation which is in conflict with the international law, then Indian Courts are bound to give effect to the Indian Law, rather than the international law. However, in the absence of a contrary legislation, municipal courts in India would respect the rules of international law. In *KesavaNanda Bharati Sripadavalvaru v State of Kerala* [11] it was stated that in view of Article 51 of the Constitution, the Court must interpret language of the Constitution, if not intractable, in the light of United Nations Charter and the solemn declaration subscribed to it by India. Any International convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into those provisions, e.g., Articles 14, 15, 19 and 21 of the Constitution to enlarge the meaning and content thereof and to promote the object of constitutional guarantee.

In the case of *Jolly George Varghese v Bank of Cochin* [12], the Court applied the above principle in respect of the International Covenant on Civil and Political Rights, 1966 as well as in connection with the Universal Declaration of Human Rights. India has ratified the above mentioned Covenants, hence, those covenants can be used by the municipal courts as an aid to the Interpretation of Statutes by applying the Doctrine of Harmonization. But, certainly, if the Indian law is not in conflict with the International covenants, particularly pertaining to human rights, to which India is a party, the court can apply those principles in the Indian conditions.

"Recognition of transgenders as a third gender is not a social or medical issue but a human rights issue," Justice K.S. Radhakrishnan told the Supreme Court while handing down the ruling [13]. It was fitting that Supreme Court verdict of India chose April 15 specifically to rule favourably in the *National Legal Services Authority v Union of India*. It was on April 15, 2008, that the Aravani (Transgender) Welfare Board was

constituted by the Tamil Nadu state government, as the first of its kind in the country. Trans\* and queer communities in the state celebrate April 15 as Transgender Day. Many welfare measures enacted by the TN Transgender Welfare Board have been taken up as country-wide recommendations by the Report of the Expert Committee of the National Ministry for Social Justice and Empowerment <sup>[14]</sup>. As per Justice Sikri, these recommendations are to be implemented in six months (i.e. by October 15, 2014) after re-examining them in light of the legal declaration made in the judgement. Supreme Court held that, determination of gender to which a person belonged to, was left to the decision of the person concerned. In other words, gender identity was found to be integral to the dignity of an individual and at the core of personal autonomy and self-determination. The protection offered by Article 21 of the Constitution was that of the right to self-determination of the gender to which a person belongs. Thus the Hijras/Eunuchs, were considered as the third gender, over and above binary genders under the Constitution and the laws. Articles 14, 15, 16, 19 and 21 of the Constitution of India, did not exclude Hijras/Transgenders from its ambit, but Indian law as a whole recognized the paradigm of binary genders of male and female, based on one's biological sex. The binary notion of gender had for instance been reflected in the Indian Penal Code, and also in the laws related to marriage, adoption, divorce, inheritance, succession and other welfare legislations. Non-recognition of the identity of Hijras/Transgender in the various legislations denied them equal protection of law and they as a result faced wide-spread discrimination. The Constitution of India under Article 14 used the expression "person" and Article 15 used the expression "citizen" and "sex" same to Article 16. Article 19 also used the expression "citizen". Article 21 used the expression "person". All these expressions were held to be "gender neutral" which evidently referred to human-beings. This covered Hijras/Transgenders who are not limited to male or female gender <sup>[15]</sup>.

Gender identity according to the court formed the core of one's personal self, based on self-identification, not on surgical or medical procedure. Gender identity was thus held as an integral part of sex and that no citizen could be discriminated on the ground of gender identity, including those who identified as third gender. It further held that discrimination on the basis of sexual orientation or gender identity included any discrimination, exclusion, restriction or preference, which had the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under the Constitution, and hence the court was inclined to give various directions to safeguard the constitutional rights of the members of the transgender community <sup>[16]</sup>. If a person changed his/her sex in tune with his/her gender characteristics and perception, a procedure that became possible due advancement in medical science, and if that was permitted in medical ethics with no legal embargo, the court posed no impediment, legal or otherwise, in giving due recognition to the gender identity based on the reassign sex after undergoing SRS. It was for this reason that even in the absence of a statutory regime in the country, a person had a constitutional right to get the recognition as male or female after SRS, which was not only his/her gender characteristic but became his/her physical form as well. Transgenders thus had a right to be identified and categorized as "third gender". The term rule of law did not merely mean public order. It also connoted social justice based

on public order. The law existed to ensure proper social life. Social life means to allow an individual the right to life in dignity and development. The Court had duty to protect this concept of the rule of law. By recognizing transgender as third gender; the Court not only upheld the rule of law but also advanced justice to the class, so far deprived of their legitimate natural and constitutional rights. This was the only solution that ensured justice not only to transgenders but to the society as well.

### **Conclusion**

Indian Law, on the whole, only recognizes the paradigm of binary genders of male and female, based on a person's sex assigned by birth, which permits gender system, including the law relating to marriage, adoption, inheritance, succession and taxation and welfare legislations. Unfortunately we have no legislation in this country dealing with the rights of transgender community. Due to the absence of suitable legislation protecting the rights of the members of the transgender community, they are facing discrimination in various areas and hence the necessity to follow the International Conventions to which India is a party and to give due respect to other non-binding International Conventions and principles. Constitution makers could not have envisaged that each and every human activity be guided, controlled, recognized or safeguarded by laws made by the legislature. Article 21 of the Constitution has been incorporated to safeguard those rights and a constitutional Court cannot be a mute spectator when those rights are violated, but is expected to safeguard those rights knowing the pulse and feeling of that community, though a minority, especially when their rights have gained universal recognition and acceptance. Though there may not be any statutory regime recognizing 'third gender' for these Transgenders. Further, such a justification can be traced to the various provisions contained in Part III of the Constitution relating to 'Fundamental Rights'. Such a democracy is not based solely on the rule of people through their representatives' namely formal democracy. There is recognition to the hard reality that without protection for human rights there can be no democracy and no justification for democracy. In this scenario, while working within the realm of separation of powers (which is also fundamental to the substantive democracy), the judicial role is not only to decide the dispute before the Court, but to uphold the rule of law and ensure access to justice to the marginalized section of the society. It cannot be denied that Transgenders belong to the unprivileged class which is a marginalized section.

### **Recommendations**

Multiple problems are faced by Hijras/Transgenders, which necessitate a variety of solutions and actions. While some actions require immediate implementation such as introducing Hijra/Transgender specific social welfare schemes, some actions need to be taken on a long-term basis changing the negative attitude of the general public and increasing accurate knowledge about Hijra/Transgenders communities. The required changes need to be reflected in policies and laws; attitude of the government, general public and health care providers; and health care systems and practice. Some recommendations include the following:

- To provide them education and employment etc., Government should make institutions, schools for them.

- Train health care providers to be competent and sensitive in providing health care services to Hijras/ Transgender as well as develop and monitor implementation of guidelines related to gender transition and sex reassignment surgery (SRS).
- Clarify the ambiguous legal status of sex reassignment surgery and provide gender transition and SRS services (with proper pre-and post-operation/transition counseling) for free in public hospitals in various parts in India.
- Implement stigma and discrimination reduction measures at various settings through a variety of ways: mass media awareness for the general public to focused training and sensitization for police and health care providers.
- Develop action steps toward taking a position on legal recognition of gender identity of Hijras/Transgenders need to be taken in consultation with Hijras/ Transgenders and other key stakeholders. Getting legal recognition and avoiding ambiguities in the current procedures that issue identity documents to Hijras/Transgenders are required as they are connected to basic civil rights such as access to health and public services, right to vote, right to contest elections, right to education, inheritance rights, and marriage and child adoption.
- Open up the existing Social Welfare Schemes for needy Hijras/ Transgenders and create specific welfare schemes to address the basic needs of Hijras/Transgenders including housing and employment needs.

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