

*Review Article***Transgenders: Third Gender Legal Rights in India****M Shamima Parveen****How to cite this article:**

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| <p>Author Affiliation Guest Faculty, Department of Law, Tamil Nadu Dr Ambedkar Law University, Chennai, Tamil Nadu 600028, India.</p> <p>Corresponding Author M Shamima Parveen, Guest Faculty, Department of Law, Tamil Nadu Dr Ambedkar Law University, Chennai, Tamil Nadu 600028, India. E-mail: shamimaparveen1985@gmail.com</p> | <p>Abstract</p> <p>The Indian constitution guarantees to secure all its citizens; the Liberty of belief, Equality of status, and Fraternity assuring the dignity of the individual. It bestows; social, economic and political Justice. The International Bill of Human Rights consisting of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights guarantees all human beings are born free and equal in dignity and rights. This article explores the actuality of fundamental and human rights of Transgenders, made available through various central and state legislations from the eyes and minds, while discussing alongside the ineffable plights of their daily life. The article concludes with its suggestive legal reforms more truly to be implemented to enable Transgenders in India live their life as wished by the framers of our Constitution.</p> <p>Keywords: Third gender legal rights.</p> |
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Introduction

Transgender in India, are widely known as Hijras, Aravanis, Kinner, Jogta, etc.¹, and the word relates to a person whose self-identity does not conform unambiguously to conventional notions of male or female gender. In other words, transgender persons are biologically male but identify as women or “neither man nor woman” or “not man.”

There exists an obnoxious situation of human rights violations meted out by the vulnerable groups, such as lesbians, gays, bisexual and transgender (LGBT) persons in India.² Among them, the Transgenders are majority and as per the 2011 census, there are 4 lakh 90 thousand transgender people in India and about 21 thousand are in Tamil Nadu. From the 2010s, LGBT people in India increasingly gained tolerance and acceptance, especially in large cities. Nonetheless, most LGBT people in India remain closeted, fearing

discrimination from their families, who might see homosexuality as shameful. Transgenders are still lacking a wholesome recognition as the “third gender” in the society which is persisting to be the primary issue. It is widely reported to understand that most of the Transgenders are forced to leave their families due to social stigmatization. There are secluded places in the cities of every state in India that has numerous Transgender households and the problems faced by them are common irrespective of their place. They are not yet accepted as any other humans to find their rental houses anywhere like any others, may be the reason that they are living together in communities.

Transgender people in India have limited rights and face social difficulties not experienced by non-LGBT persons. Transgender persons mainly face various forms of gendered violence, harassment and discrimination in public places. Throughout the country, numerous testimonies are heard about

Transgenders, and their families, who have been killed, tortured, ill-treated, disappeared, threatened, arbitrarily arrested and detained, falsely charged, placed under surveillance, forcibly displaced or had their households raided and thrown out their fundamental freedoms. Their extended list of daily plights are reported to be destitution, social stigma, forced flesh trade or prostitution and forced labor, lack of even a separate bathroom facility, and prejudice shown from many sectors of government in providing them with lack of education, equal opportunity in employment, public health care, and even in issuing them documents like Ration Card, Voter ID, Driving License, Etc. The problem related to their marriage and adoption, and many more are yet to be envisioned for enabling a usual lifestyle on par with other non-LGBT persons.

While a few Transgender specific laws spouts then and there over the past decade and based on that certain institutional frameworks are put in place both at Central and State Levels, widespread deficiencies are immensely felt in their full implementation which have adversely affected the public life and private safety of Transgenders.

International Bill of Rights

India has ratified both UN declaration and human rights and International Covenant on Civil and Political Rights, 1966.³ Both of those treaties provide equal treatment to all- including Transgenders;

- Article 1, of the Universal Declaration of Human Rights (UDHR) inter alia, provides, "All human beings are born free and equal in dignity and rights."
- Article 6, of the Declaration read along with Article 16 of the International Covenant on Civil and Political Rights confer on every individual, a right of recognition as a person before the law.
- Article 17, of the Covenant, inter alia, provides, "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, or correspondence, nor to unlawful attacks on his integrity and reputation."

Constitutional Safeguards & Legislations:

Every Transgender law is ought to be endowed with reason and conscience and should act well intertwined with one another in a spirit of Liberty, Equality, and Fraternity assured by the Constitution.

- Article 5, states as to who are entitled to

be citizens of India. But it does not specify anything on sex or gender identity, hence to be assumed .

- Article 14, provides for equality and equal opportunity for all people. It is also enshrined equality on par the gender.
- Article 15, ensures no discrimination and prohibition of discrimination on the ground of religion, race, caste, sex, or place of birth. It also provides access to hotel, public places, temples without discrimination.
- Article 15(2) and Article 16 (4) of the Indian Constitution wherein the States have been given the power to make any special provision regarding the upliftment of these vulnerable minority.
- Article 19, provides freedom of speech and expression, right to residence and profession
- Article 21, right to life also includes dignified life and personal liberty.

The case of K. S. Putt swamy v. Union of India The High Court reiterated that the expression "bride" in the Hindu Marriage Act, 1955 cannot have a static meaning and that a statute must be interpreted according to present-day conditions. The Court also referred to state that the right to marry a person of one's choice is an integral part of Article 21 of our Constitution.

- Article 51, directive principles and state policy states that State need to respect international laws and treaties.

India Changing its View on Transgenders

India has started to understand that binary concept of and general opinion on transgender sex is just a deformity. It started showing by its action that the biological status of a person being of either a male or female sex. Gender, on the other hand, is simply a socially constructed feature. For the first time in India, a transgender library has been opened as part of the transgender resource center in Viswanathapuram, Madurai, to increase awareness about ambisexual people in the country. Most importantly, Indian Courts have started to consider Transgender pains alongside other oppressed communities with its various landmark judgments. This is a good beginning and voices are coming out through its judicial reviews. However, a lot more needs to be done to completely integrate the judgment and actions in reality.

In 2013, the Hon'ble Supreme Court in the Suresh Kumar Koushal Vs NAZ Foundation case,

held that the term 'sex' must be given a broader perspective than the binary norm of biological sex. That "a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders" is not a sustainable basis to deny the right to privacy. The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular. The guarantee of constitutional rights does not depend upon their exercise being favorably regarded by majoritarian opinion.

On April 15, 2014, The Supreme Court gave its historic judgement in *National Legal Service Authority v. Union of India*,⁴ AIR 2014 SC 1863, declaring transgender people to be the "third gender" in India. Even after 6 years of the above case, the country is lacking with being at a stage of trying to define about the term "Transgender". According to the Judgment in the case, transgender people had the right to be treated equally under the Constitution of India, they had the right to self-identification (identifying one's gender as male, female, or third gender), and, most importantly, they were to be recognized as socially and economically backward classes, thereby making them eligible for reservations in jobs and educational institutions. At page 1890 and in para 54, The Hon'ble Supreme Court has observed that the self-identified gender can be either male or female or a third gender. Hijras are identified as persons of third gender and are not identified either as male or female. Gender identity, as already indicated, refers to a person 's internal sense of being male, female or a transgender, for example hijras do not identify as female because of their lack of female genitalia or lack of reproductive capability. This distinction makes them separate from both male and female genders and they consider themselves neither man nor woman, but a - third gender. The discrimination on the ground of sex "under Articles 15 and 16 of the Indian Constitution includes discrimination on the ground of gender identity. The Expression sex" is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male nor female.

Same-sex sexual activity legalization in India commenced in 2018. In *Nave Singh Johar v. Union of India*,⁵ The Hon'ble Supreme Court of India overturned its previous ruling made by in *Suresh Kumar Koushal Vs NAZ Foundation case*,⁶ by decriminalising all consensual sex among adults, including homosexual sex.

Transgender people in India are allowed to

change their legal gender post-sex reassignment surgery under legislation passed in 2019, and have a constitutional right to register themselves under a third gender. The Transgender Act,⁷ 2019 as it is popularly called the Transgender Persons (Protection of Rights) Act, 2019, received the assent of the President given on December 5, 2019. The Act, under Section 2(k)⁸ defines transgender person as "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, gender queer and person having such socio-cultural identities as kinner, hijra, aravani and jogta." The Act prohibits discrimination under Section 3; confers right on Transgenders to self-perceived gender identity (Section 4); casts an obligation on appropriate government to formulate welfare measures Section 8), program for welfare and self-employment (Section 14) and health care facilities for Transgenders (Section 15); prohibits discrimination in employment (Section 9); etc., besides establishment of National Council for Transgender.

The Transgender Persons (Protection of Rights) Rules, 2020, has been notified. The Ministry of Social Justice and Empowerment stated that the object. The rules deals with the procedure for issuing certificate of identity as given under section 6 and section 7, provisions and procedure for change of gender, welfare measure, education and social security, medical facilities for the transgender persons by both central and state governments. The rules mandates government to make comprehensive policy for the protection and promotion of transgender persons and ensure human rights for all the people living in the country.

Shortcomings in the Law and Implementation Frameworks

As per the legislation, If one has not undergone sex reassignment surgery, one can only be identified as transgender, not as male or female. Transgender people believe this is coercing them into surgery whereas the demand for free or low-cost sex reassignment surgery has also not been met. Transgender people say certain provisions in the law are unconstitutional, including the formation of district - level, five - member screening committees to certify the gender of a transgender person - a provision that apparently runs against the Supreme Court's 2014 judgement that granted the right to self-

recognition of gender to transgender individuals. Severe criticism abounds because it does not give transgender people the right to self-identify their gender without having had sex reassignment surgery. In addition to that, the provision for punishment for serious crimes committed against transgender people is substantially less severe than for the same crimes committed against cisgendered people. The new bill also denies reservation to transgender, intersex and gender non-conforming people, and requires them to be living with their birth families which are the site of physical and psychological violence in most cases.

The present state of plights of Transgender persons would indicate to all that the cause of the challenges faced by Transgenders is mainly due to the under-implementation of a number of the aforementioned legal reforms, at both central and State levels. Though the major reasons frequently cited include lack of capacity, owing to the sheer size of the country, as well as heavy bureaucracy and political interference. Problems of overlap and coordination within and among the authorities may also explain such deficiencies. Also, Police reform does not seem to be a reality in the whole country, as any reforms implementation at all levels Police institution itself is reportedly quite weak.

Law enforcement authorities

Most of the human rights violations met out on Transgenders, are reportedly attributed to law enforcement authorities, in particular, the Police. Failure to register and/or investigate violations against Transgenders was widely unreported. Transgender's have often seen their complaints not taken up and instead have been charged in false cases. They are often labelled as "History Sheeters" and they have also had their privacy invaded, including by being placed under surveillance. It appears to be deliberate and indicative on such instances, that there is clear lack of proper police training. This is of great concern and their rights to freedom of expression, peaceful assembly, association and movement is on many occasions unlawfully restricted.

Defenders working for the rights of Transgenders:

The organizations working for the rights of Transgender people, face particular oppression and ostracism from the Police and authorities in undertaking legitimate activities. Activists strive for the promotion and realization of Transgender's civil, political, economic, social and cultural rights. The range of human rights violations they suffer is

appalling. Transgender's and activists reportedly face, inter alia, beatings and insults in public places, direct and indirect destruction of their property/belongings; and filing of false cases against them. They are deeply disturbed being victimized by Police and authorities when selflessly striving to achieve the rights of those people.

Recommendations for the consideration of the central and state Governments, and the legislature:

- Repeal or amend any legislation that may hinder the legitimate living of and criminalizing transgender lifestyle. The highest authorities at the central and state levels should publicly acknowledge the fair and equal rights of the Transgenders in the society. Specific attention must be given by all authorities to this category of humans – Transgender's, towards providing their economic, social and cultural rights.
- "Programs for alternate-sex children should be announced in the National Children's Policy and transgender subjects should be included in the school education system," A comprehensive, adequately resourced protection and education programme for human rights of Transgenders to be established at the central and state levels and in conjunction with the National and State Human Rights Commissions should be devised. The process for applying for protective measures provided under such a programme should be cost-free, simple and fast, and immediate protection should be granted while the risk situation of the person is being assessed.
- Strengthen independent national and state level human rights NGOs and provide them with the necessary financial support to carry out effective support to the protection of human rights and the promotion of fundamental and Constitutional rights to the Transgenders.
- Police should be clearly instructed to respect Transgenders and their rights of fundamental freedoms of being a human. Prompt, thorough and impartial investigations on violations committed against Transgender's should be conducted, and perpetrators should be prosecuted, on a systematic basis. Fair and effective remedies should be available to victims, including those for obtaining compensation.

- Ensure that the law enforcement agencies are adequately trained on Transgender rights and monitor them from bringing false criminal charges and rejecting the administrative actions required by them. Sensitization training to Police and State authorities should be significantly strengthened as a matter of equal importance along with other programmes, taking technical advice and assistance from relevant NGOs and other partners.

Recommendations for the consideration of the judiciary

- The judiciary should take proactive measures to ensure the protection of Transgenders. It has to quickly sensitize its justice dispensation system at all levels especially at the subordinate judiciary level, to understand the day-to-day issues of Transgenders being as a citizen, a wife, a mother and as a social victim in all other contexts, to show voluntary inclination in securing their fundamental rights and liberty when curtailed by the Police and other governmental authorities.
- The judiciary should be vigilant and cognizant of the violation of Transgender rights. The judiciary should ensure better utilization of "suo motu" whenever cases of violation against Transgenders arise. It has to be doubly sure in ensuring the full and immediate implementation of the judgements of the international and regional courts as well as other internationally recognised judicial and quasi-judicial bodies on violations of fundamental rights and freedom of Transgenders.

Conclusion

India has a long road ahead to gender justice, and the transgender community wants concerted efforts made to bring about legal reform so that transgender people are as free and empowered in their public and private lives as any other citizen of India. Gender-sensitization should work in parallel with legal reform. The various political and public interest organizations that talk about marginalized people must urgently include transgender persons, as well. The Government should take adequate steps to prohibit discrimination in any government organization or private sectors. Transgenders are to be effectively enabled through dedicated education, proper employment opportunity in government

jobs, housing programmes, and to offer welfare benefits, pension schemes, free operations in government hospitals, as well as other programmes designed to assist them.⁹

There is still a unanimous screaming from Transgenders that every transgender law stays superficial when it comes to answering real questions about the rights and dignity of transgender people. Though India has repealed its colonial-era laws that directly discriminated against gay sex and transgender identification and also explicitly interpreted Article 15 of the constitution to prohibit discrimination on the basis of sexual orientation and gender identity, but many legal protections have not been provided for in the Act.¹⁰

Transgender persons who have undergone a transition from male to female and identifies themselves as a "Transgender", also faces the failures of the law.¹¹ The Act remains silent on how would one be decided on the gender identity when he or she by birth have not undergone a sex reassignment surgery but still transitioned into a Transgender, when many of the transgender persons are reported to get a sex-reassignment surgery after years and decades of living in an alien body. There is no provision in law as to choosing of gender identity of a Transgender without having undergone the said sex reassignment surgery. For someone who has not had a sex reassignment surgery, why is the law different? Are they lesser humans? When in our society, anybody feminine is still misunderstood as a sex-object, there is no clarity in law as to the punishment for committing rape on a Transgender person. Adoption of such an incomplete law, coupled with its muddled implementation, would only contribute to the detriment of their present situation.¹²

Finally, given above the bundle of plights faced by Transgenders,¹³ the author believes that the absence of inclusive laws on the protection and enabling the Transgenders to live a decent and peaceful life including an explicit anti-discrimination law and same w-sex marriage, is a significant lacuna.

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