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## TRANSGENDER'S RIGHTS: A CONTROVERSIAL ISSUE

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### ABSTRACT

*“Hari se tu mat het kar, Kar harijan se het,  
Maal mulk hari det hai, Harijan hari hi det”*

*-Kabir*

*“Loving God alone won't suffice, also love the men of God,*

*God may give you materialistic things but God's men will enlighten your way  
to God itself”*

Growing up in a country like India, “**Hijras**” are often seen on auspicious events at home, such as birth of a child or marriages. Despite being harbingers of good luck, they are often labelled as different and treated as a socially outcast community. Hijra is name of a member of transgender community in Western India. The presence of transgender is not new, but could be recognized from a time immemorial as could be seen in India's epic literature and temple sculptures. Even after some recognition and social acceptance, their status has barely improved since India's independence in 1947. Most common livelihoods for transgender community include dancing, begging and engaging in sex work. Multiple data suggest that the transgenders are highly prone to HIV infections, and are brutally harassed by police. The main purpose of this research paper is to understand the socio-economic status of transgenders in India. However, to understand the status of transgenders it is significant to understand the problems they are experiencing and the recommendations that need to be implemented to provide them better standing in the society.

## INTRODUCTION

When a child is born, the doctor tags a child as male or female based on what one's reproductive body parts. Now in a common scenario, who are tagged as male turns to identify themselves as male and who are tagged as females turn to identify themselves as females. However, there exist some exceptions to this common rule, where some person's gender identity i.e., their innate knowledge of who they are is different from what was initially assigned to them when they were born. Such people are called transgenders and may include pre- and post-operative transexual person.<sup>1</sup> The word "**Transgender**" is coined from two words Trans and Gender, Trans meaning *beyond*. Thus, the word simply means *beyond gender*<sup>2</sup>. "Trans" is often used as shorthand for transgenders. On April 15, 2014 the Supreme Court of India gave a historic judgement, declaring transgender people to be the "**Third Gender**" in India<sup>3</sup> Transgenders, transgress social gender norms by identifying their gender opposite to their biological sex and accepting it before the stereotypical society<sup>4</sup>. They are socially underprivileged, economically disadvantaged and politically marginalized.<sup>5</sup>

## OBJECTIVE OF STUDY

- To explore and understand the socio-economic problems, faced by the transgender community.
- To understand the Statutory framework for the transgenders.
- To create awareness among people about the trans community and their social status.
- To provide suggestions and recommendations for the upliftment of transgenders.

## TRANSGENDERS IN INDIA

In India, gender variance has ancient, even prehistoric roots. Hijras, Kothis, Jogappas, Eunuchs, Aravanis etc are all part of the trans community. Hijras trace their origin in the ancient Hindu Scriptures of the Ramayana and Mahabharata. Also, Lord Ram, sanctioned them the power to confer blessings to people on auspicious events like marriages and birth. During *Mughal period*, Hijras played famous roles in the royal courts of the Islamic world, since they were considered as clever, trustworthy and extremely loyal to all. Hijras were also appointed as

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<sup>1</sup> Natvej Singh Johar vs. UOI, 2018

<sup>2</sup> National Legal Service Authority vs UOI, 2014

<sup>3</sup> *Ibid*

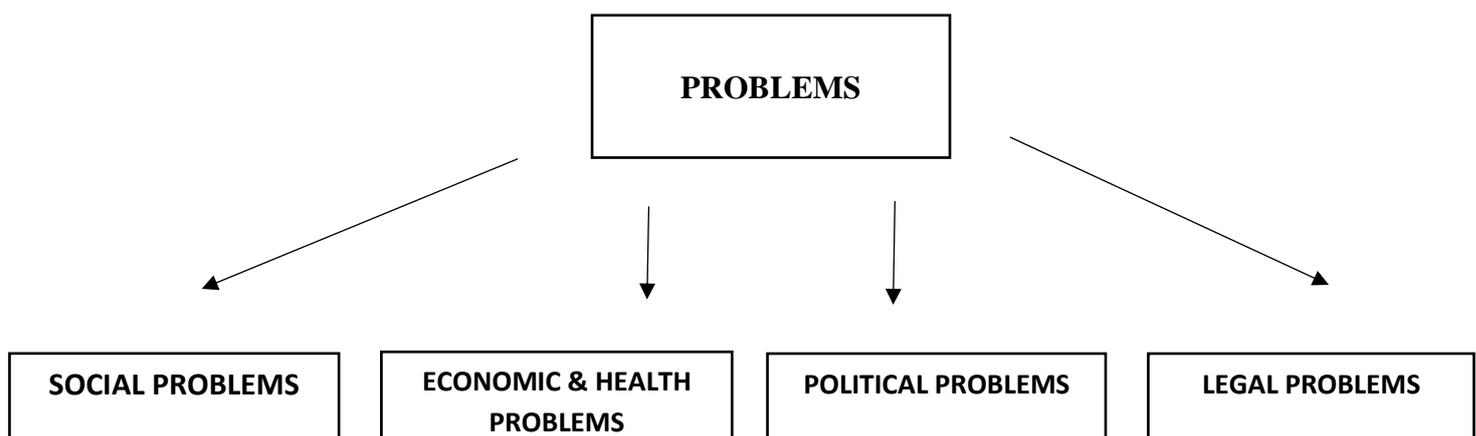
<sup>4</sup> UNDP India Report, 2010

<sup>5</sup> Raju Narayan swamy vs. Beena, 2015

guards in religious institutions especially in Mecca- Medina<sup>6</sup>. In the beginning of **British rule in India**, Indian states not only provided transgenders the right to enter into their community but also provided them with additional benefits like food, land money etc. However, with the start of **Colonial rule** in the 18<sup>th</sup> century, situations changed radically and by the second half of the 19<sup>th</sup> century, transgenders were brutally harassed by the British administration. British administration, denied their civil rights, criminalized the community and was considered as a separate community in various parts of India. The pre-partition scenario resulted in vulnerable conditions of the trans community in the contemporary world which led to the formation of various welfare policies and schemes by the Government of India like issuing citizenship IDs and passports; social and economic development; recognition in society and a lot more.

### PROBLEMS OF TRANSGENDER COMMUNITY

Problems of Trans community can be broadly divided into four sections:



#### 1. SOCIAL PROBLEMS:

**“In time of test, family is best.”** This famous quote proves to be a curse for transgenders, where their families and friends are the first to betray them when their original identity is revealed. Transgenders face a variety of problems including physical and mental abuse; rejections; isolation and denial of basic rights, from their own family. Trans community faces discrimination when it comes to inheritance of property and adoption of child. Further, society often neglects and stigmatises transgenders based on their gender identity. Such behaviour from society ends up making them beggars, dancers, and sex workers.

#### 2. ECONOMIC & HEALTH PROBLEMS

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For a long time, social and local media has been reporting cases of harassment, denial of services and unfair treatment against transgenders in the areas of education, work place, hospitals and housing & public accommodations. Most transgenders are school dropouts. A long chain of problems follows when it comes to transgenders. They are not accepted by families and schools which results into lack of education, and due to lack of education they aren't able to procure good job opportunities, and if at all they get some good job, social stigma and discrimination at workplace forces them to resign their jobs. Likewise, their health needs are also not addressed. Reports suggest, transgenders are most vulnerable to HIV and their sexual and reproductive health needs are often neglected. They do not have separate wards in hospitals and are often mis-treated by health care providers.

### 3. POLITICAL PROBLEMS

Transgenders do not hold a significant role in any State or Central Legislature, although there are many transgenders with enormous political and governance knowledge and interest. However, even after social and economic discrimination, many transgenders are emerging as successful personalities, thereby proving their potential and talent. For example, Kamla Jaan was elected as Mayor of Katni in 2002, Shabnam Mausai became Member of Parliament from Suhagpur (M.P) in 1998<sup>7</sup>. Such odd instances have empowered the community at large.

### 4. LEGAL PROBLEMS

Even after 7 years of famous Supreme Court's Judgement<sup>8</sup>, there are no proper laws as to:

1. Reservations for transgenders in educational institutions and the workplace;
2. Human and civil rights violation;
3. No separate wards for transgenders in Hospitals;
4. Lack of recognition for marriages and adoptions.

### **TRANSGENDER PERSONS (PROTECTION OF RIGHTS) BILL,2019**

The Transgenders Persons (Protection of Rights) Bill, 2019 was introduced by Mr. Thaawarchand Ghelot, Minister of Social Justice & Empowerment in Lok Sabha on July 19, 2019.

### **HIGHLIGHTS OF THE BILL**

#### **1. PROHIBITION AGAINST DISCRIMINATION:**

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<sup>7</sup> <https://www.indiatoday.in/>

<sup>8</sup> *supra*, note.2 (page no.2)

The Bill prohibits the discrimination, unfair treatment and denial of services to the transgenders in context to:

- A. Education;
- B. Employment;
- C. Healthcare;
- D. Access to, or enjoyment and use of any goods, accommodations, service, facilities, benefit, privilege or opportunities available to general public;
- E. Right to movement;
- F. Right to reside, purchase, rent, or otherwise occupy any property;
- G. Opportunity to hold public or private offices;
- H. Access to government or private establishments in whose care or custody a transgender person may be.

## **2. RIGHT TO EMPLOYMENT**

No public or private entity can victimize a transgender in employment matters, including recruitments, promotions and events conducted during the course of employment. Also, they are required to appoint a person as complaint officer to deal with complaints in relation to the Bill.

## **3. RIGHT TO RESIDENCE**

No transgender shall be denied of its right to reside and be a part of his household or otherwise rent or occupy any property. Provided, if the family is incapable to take care for the transgender person, then such transgender may be shifted to a rehabilitation centre, on the orders of a competent court.

## **4. RIGHT TO HEALTH CARE**

Transgenders shall have the right to proper health care services, including separate HIV surveillance centres and sex reassignment surgeries. Also, it shall be the government's duty to provide comprehensive medical insurance policies to the trans community and keep a check on medical curriculum to address their health problems.

## **5. RIGHT TO EDUCATION**

All educational institutions, whether public or private, recognised and funded by the relevant government shall provide inclusive education i.e., develop a system in which transgender students learn together with other students without fear of discrimination, harassment, negligence or intimidation and the system should be such that it caters the learning needs of transgender students. Also, institutions along with learning shall also focus on sports and recreational facilities for transgender students.

## 6. IDENTITY CERTIFICATE

Transgenders may obtain an identity certificate, indicating the gender as “transgender” by making an application in the desired form and manner, along with necessary documents, as may be prescribed, to the District Magistrate. And in case of minors such application shall be made by a parent or guardian of the minor.

## 7. WELFARE MEASURES BY THE GOVERNMENT

Government shall take necessary steps to ensure full inclusion and participation of transgenders in social works. Further, government shall also take measures for rescue and rehabilitation; vocational trainings and self-employment; create schemes that are transgender sensitive and promote participation in cultural activities, by transgenders.

## 8. OFFENCES & PENALTIES

Following offences are recognised in the bill against transgenders:

- A. Forced or bonded labour (excluding compulsory government service for public purposes);
- B. Denial of use of public places;
- C. Removal from household and villages;
- D. Physical, sexual, verbal, emotional, or economic abuse;

Penalties for above mentioned offences vary between *six month - two years, and a fine.*

## 9. NATIONAL COUNCIL FOR TRANSENDERS (NCT)

The NCT will consist of:

- i. Union Minister of 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 HRD
- v. One member including representatives of the NITI Aayog and NHRC
- vi. State government will also be represented
- vii. Five members from transgender community and
- viii. Five experts from NGOs

The NCT will be responsible for advising the central government and monitoring the impacts of policies, legislations and projects introduced for the benefits of transgender community. It shall also be responsible for addressing the grievances and issues of transgender persons.

## CRITICAL ANALYSIS OF THE BILL

Since 2014, the sexual minority community is continuously fighting against, the various Bills namely *Rights of Transgender Bill, 2014; Transgender Persons (Protection of Rights) Bill, 2016; Transgender Persons (Protection of Rights) Bill, 2018*, citing various defaults and gaps in it. Even after multiple amendments and suggestions, neither of the bill is closed to satisfactory including *Transgender Persons (Protection of Rights) Bill, 2019*.

### 1. DEFINITION OF TRANSGENDER

According to the Bill, “*transgender person*” means a person whose gender does not match with the gender assigned to that person at birth and includes trans-men or trans-women (whether such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such therapy), *person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta.*”<sup>9</sup>

The Bill, confuses transgender people and intersex people, giving the idea that it was made with inadequate knowledge since every intersex person cannot be identified as transgender, nor every transgender person can be identified as intersex.

### 2. CERTIFICATE FROM DISTRICT MAGISTRATE

The Bill, mandatorily requires transgender persons to get themselves registered with the government, if they want to be officially recognized as “transgenders” i.e., the transgender person shall approach a District Magistrate to obtain the certificate of transgender. And only after obtaining such a certificate they will be allowed to change their gender to male or female on government issued ID cards. Further this process to obtain the certificate requires proof of Sex Reassignment Surgery, which is:

- i. Very expensive procedure, thus not affordable by all transgender persons.
- ii. Violation of Right to Privacy<sup>10</sup>.
- iii. Against the will of many transgender persons.
- iv. Not clearly mentions the actual procedure the District Magistrate will follow while examining the person and their documents.
- v. Not clearly indicates the type of Sex Reassignment Surgery, transgender persons are expected to undergo, as there are different types of Sex Reassignment surgery.

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<sup>9</sup> Section 2(k)

<sup>10</sup> Puttaswamy Judgement, 2017

According to *Navtej Singh Johar vs. UOI, 2018* transgender persons include who do not choose to undergo or do not have access to operation and also include persons who cannot undergo successful operation.

### **3. NO PRIOR SUGGESTIONS FROM TRANSGENDER COMMUNITY**

The Bill, which is solely introduced for the purpose of protection of rights of the transgender community, has been drafted and passed without consulting or approaching the members of the transgender community. The opinions and suggestions of trans persons about their needs and requirements have not been weighed. Thus, the drafting of Bill resulted from stereotype assumption.

### **4. OFFENSES & PENALTIES**

Sexual abuse, has been made as punishable offence under the Bill, however what elements constitute sexual abuse, has not been clearly mentioned in the Bill. Further, if a cisgender woman is raped, then the convicted gets sentenced for a period not less than seven years, which is extendable to life imprisonment<sup>11</sup>. However, when it comes to a transgender person, the minimum sentence is six months and maximum is two years. Such biasness, by the government not only shows unjustified treatment but also suggests that in the eyes of law sexual abuse with transgender persons is not in par with cisgender woman.

### **5. EDUCATION & HEALTHCARE**

The Bill rightly provides government aids in education and healthcare of transgenders; however, it fails to specify the measures or steps by which aids relating to education and health shall be provided. For example, will such aids be free? Or will they be available at lower prices? Thus, there exists no clarity on such aspects.

### **6. RESERVATIONS**

The Bill, fails to provide reservations to transgender persons, who are often neglected and harassed due to their disadvantageous background. Thus, making it difficult for them to have good jobs and quality education.

### **7. REHABILITATION CENTRES**

The Bill, provides that if the transgender person's family is incapable of taking care of the transgender person, then on the order of competent courts the transgender person will

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<sup>11</sup> Section 376 IPC

be shifted to a rehabilitation centre. This denies the right of transgender persons to join other similar communities, like hijra.

## 8. CIVIL RIGHTS

Basic civil rights such as right to marry<sup>12</sup>, social security rights, pension schemes, adoption rights etc have got no mention in the Bill. Thus, depriving transgender community of some fundamental rights.

## 9. PUNISHMENT FOR DISCRIMINATION

The Bill, mentions no provisions to apprehend those persons who discriminate, bully or harass transgender persons at educational institutions, workplace or anywhere otherwise. Transgenders should be protected from violence and discrimination. They have the right to dignity and self-determination<sup>13</sup>.

## LANDMARK JUDGEMENTS

### 1. *NAZ FOUNDATION vs. GOVERNMENT OF NCT DELHI, 2009*

The judgement is popularly known as *Naz Judgement, 2009*. Delhi High Court for the first time, in this judgement declared Section 377, IPC unconstitutional on the basis of Article 15 of the Constitution. Court held that:

*“We hold that sexual orientation is a ground analogous to sex and that discrimination on the basis of sexual orientation is not permitted by Article 15. Further, Article 15(2) incorporates the notion of horizontal application of rights. In other words, it even prohibits discrimination of the citizen by another in matters of access to public spaces. In our view, discrimination on the ground of sexual orientation is impermissible even on the horizontal application of the rights enshrined under Article 15”*<sup>14</sup>

*In sum, the Court declared that Section 377 of IPC, insofar as it criminalises consensual sexual acts of adults in private, violates Article 21, 15 and 15 of the Constitution.*

### 2. *NATIONAL LEAGUE SERVICES AUTHORITY vs. UNION OF INDIA, 2014*

The judgement is popularly known as *NALSA Judgement, 2014*. 2013 was considered as dark year specially for LGBTQIA since Supreme Court re-criminalized homosexuality

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<sup>12</sup> Arun Kumar Judgement, 2019

<sup>13</sup> Shivani Bhat vs. State of Delhi & Others, 2015

<sup>14</sup> indiankanoon.org

in 2013<sup>15</sup>. It was for the first time in Indian legal history, when “**Third Gender**” was recognized. The Court held that:

1. *“Hijras, Eunuchs, apart from binary gender, be treated as "third gender" for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by the Parliament and the State Legislature.*
2. *Transgender persons’ right to decide their self-identified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender.*
3. *We direct the Centre and the State Governments to take steps to treat them as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.*
4. *Centre and State Governments are directed to operate separate HIV Sero-surveillance Centres since Hijras/ Transgenders face several sexual health issues.*
5. *State Governments should seriously address the problems being faced by Hijras/Transgenders such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma, etc. and any insistence for SRS for declaring one’s gender is immoral and illegal.*
6. *Centre and State Governments should take proper measures to provide medical care to TGs in the hospitals and also provide them separate public toilets and other facilities.*
7. *Centre and State Governments should also take steps for framing various social welfare schemes for their betterment.*
8. *Centre and State Governments should take steps to create public awareness so that TGs will feel that they are also part and parcel of the social life and be not treated as untouchables.*
9. *Centre and the State Governments should also take measures to regain their respect and place in the society which once they enjoyed in our cultural and social life.”<sup>16</sup>*

***In sum, the Court recognized “Third Gender” and held that transgender persons were entitled to fundamental rights under Article 14, 15, 16, 19(1)(a) and 21 of the Constitution.***

### **3. K S PUTTASWAMY vs. UNION OF INDIA, 2017**

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<sup>15</sup> Suresh Kumar Koushal vs. UOI, 2103

<sup>16</sup> *supra*, note 14 (page no.9)

The judgement is popularly known as *Puttaswamy Judgement, 2017*. The Court held that:

*“Right to privacy is not enumerated as a fundamental right in our Constitution but has been inferred from Article 21 of the Constitution”*<sup>17</sup>

***In sum, Right to Privacy is extended to every individual irrespective of its gender and sex and cannot be denied even if the LGBTQIA forms miniscule fraction of the country.***

#### **4. NAVTEJ SINGH JOHAR vs. UNION OF INDIA, 2018**

The judgement is popularly known as *Navtej Johar Judgement, 2018*. The judgement was the result of various PIL's filed by LGBTQIA community. The Court held that:

*“there seems to be no reason why a transgender must be denied of basic human rights which includes right to life and liberty with dignity, right to privacy and freedom of expression, right to education and empowerment, right against violence, right against exploitation and right against discrimination. The Constitution has fulfilled its duty of providing rights to transgenders. Now it is time for us to recognise this and to extend and interpret the Constitution in such a manner to ensure a dignified life for transgender people. All this can be achieved if the beginning is made with the recognition of TG as third gender. The aforesaid judgment, as is manifest, lays focus on inalienable —gender identity and correctly connects with human rights and the constitutionally guaranteed right to life and liberty with dignity.”*<sup>18</sup>

***In sum, Section 377 was struck down to the extent which criminalizes sex between two consenting adults in private and recognized that every individual irrespective of its gender identity has the right to live with dignity and autonomy.***

#### **5. ARUN KUMAR vs. INSPECTOR GENERAL OF REGISTRATION, TN, 2019**

The judgement is popularly known as *Arun Kumar Judgement, 2019*. The Madras High Court held that:

*“The expression “bride” occurring in Section 5 of the Hindu Marriage Act, 1955 cannot have a static or immutable meaning. It will have to include within its meaning not only a woman but also a transwoman. It would also include an intersex person/transgender person who identifies herself as a woman.”*<sup>19</sup>

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<sup>17</sup> *ibid*

<sup>18</sup> *id*

<sup>19</sup> *id*

*In sum, the Madras High Court held that the term bride to include transwoman and lays the foundation of right to marry of the LGBTQIA community.*

## **RECOMMENDATIONS & CONCLUSION**

1. Awareness among people for transgender community is the need of the hour. Hence cisgender people should be educated and made aware about the transgender community so that cases of harassment and discrimination of the transgender persons could be reduced.
2. To protect transgender youth from hostile school environment is a dire need. Therefore, free or education at lower cost should be provided to transgender persons. Also, special scholarship schemes should be made available to transgender persons for higher education.
3. Cisgender children should be taught to respect transgender persons and should be prohibited from bullying transgenders in any manner. Also, a chapter on transgenders can be introduced in the adolescent education curriculum in the school. This can be an effective step to address discrimination at school level.
4. Doctors and other health care providers should be guided to tack quick responsive actions to meet the needs of transgender persons.
5. Separate wards in hospitals should be made for transgender persons so as protect them from any type of discomfort or discriminations.
6. Trans community should be covered under different types of pension and other beneficial schemes.
7. Sensitizing police and social workers regarding the problems faced by the transgender persons so that they can help trans persons in addressing them.
8. Human rights of transgenders should be highlighted on media and other public forums so as to not only make the general public aware about transgenders and their rights but also to make transgenders aware of their rights as humans.
9. Parents of transgenders should be made aware that having transgender children is not a matter of embarrassment. Also, they should be made aware of the problems being faced by their transgender children and what effective measures they can take to support their transgender children in society.
10. Proper laws should be established to protect and cater the needs and requirements transgenders. Also, their civil rights should be addressed as they form a part of fundamental rights.

11. Transgender community should be seen as a backward community and thus necessary reservations should be made for them so as to uplift them in society.