



TRANSGENDER STATUS OF 21ST CENTURY WITH SPECIAL REFERENCE TO THEIR RIGHTS

SHANKHA SHEKHAR RAKSHIT ¹ | SUJOY KUNDU ² | TAPASI BISWAS ³

¹ MASTER OF EDUCATION (M.ED.) STUDENT, DEPARTMENT OF EDUCATION, VINAY BHAVANA, VISVA-BHARATI, CENTRAL UNIVERSITY, BOLPUR, WEST BENGAL, INDIA.

² MASTER OF EDUCATION (M.ED.) STUDENT, DEPARTMENT OF EDUCATION, VINAY BHAVANA, VISVA-BHARATI, CENTRAL UNIVERSITY, BOLPUR, WEST BENGAL, INDIA.

³ MASTER OF EDUCATION (M.ED.) STUDENT, DEPARTMENT OF EDUCATION, VINAY BHAVANA, VISVA-BHARATI, CENTRAL UNIVERSITY, BOLPUR, WEST BENGAL, INDIA.

ABSTRACT:

A society cannot build up only taking male and female people except Transgender. So, male, Female and also Transgender are integrated to develop a society in local, national and international levels. The researchers conducted this study using content analyzing as methodology to aware different stakeholders about different legal act or bills of transgender. Transgender persons are given different legal provisions or rights to alive as human being with proper dignity in the society from 21 centuries. Different Act or Bills e.g. The right of Transgender person Bill, 2014; Transgender persons (Protection of Rights) Act, 2019 etc. not only protection also to live independently. Universal Declaration of Human Right, it is mentioned that – “All human beings are born free and equal in dignity and rights”. But the transgender community did not live freely and equally as compared to other two genders so it shows a clear violation of their human right.

KEYWORDS:

TRANSGENDER, 21ST CENTURY, RIGHTS

INTRODUCTION:

"It is the right of every human being to choose their gender," it said in granting rights to those who identify themselves as neither male nor female. It ordered the government to provide transgender people with quotas in jobs and education in line with other minorities, as well as key amenities. According to one estimate, India has about two million transgender people. The contemporary term 'transgender' arose in the mid-1990s from the grassroots community of gender-different people. In contemporary usage, transgender has become an 'umbrella' term that is used to describe a wide range of identities and experiences, including but not limited to transsexual people. Transgender people are individuals of any age or sex whose appearance, personal characteristics, or behaviors differ from stereotypes about how men and women are 'supposed' to be. Transgender people have existed in every culture, race, and class since the story of human life has been recorded. Transgender persons face various forms of gendered violence, harassment and discrimination both at home and in public spaces. Transgender people come from all walks of life. They are not new to the society. They exist from the beginning episodes of the human race. To trace the origin of the community we shall at least have to travel back to the period of Mahabharata and Ramayana. In one of the versions of Ramayana, when Lord Rama left Ayodhya for exile, a huge crowd of subjects who had immense devotion towards him followed him to the forest. Having concern on

them, Lord Ram asked "All the men and women" to return to their houses. After the completion of the exile period and having all the adventures, Ram returned to his Kingdom. He later came to know that all the citizens who were neither men nor women were staying still in the place of his speech. Overwhelmed by their devotion, he granted them a boon. Similarly, in Mahabharata when the period of exile was nearing the end, the sons of Pandu, to avoid getting caught had changed their identity. Mighty Arjun portrayed himself as a transgender under the name "Brihannala". The transgender community is incredibly diverse.

In light of the inadequacies of Transgender Persons (Protection of Rights) Bill, 2016 being passed, after the government decided to set up a panel to formulate a policy for the welfare of the transgender persons (Panda, 2018). A wider debate needs to be stimulated on the changes that are required at various levels—legal, social and economic—in order to bring mainstream transgender persons into the mainstream. It may give one a better standpoint to critically analyses the benefits and gaps in the Transgender Persons (Protection of Rights) Bill, 2016. In 2009, the Election Commission of India allowed transgender persons to choose their gender as "other" on the election ballot forms (*Telegraph* 2009) and in the landmark NALSA judgment in 2014, the Supreme Court of India created the third gender status for transgender "for the purpose of safeguarding their rights under the constitution and the laws made by parliament and the State Legislature" (Venkatesan, 2014). The more aware of

them like Laxmi Narayan Tripathi and others had fought hard for their gender identity and won. The heart of the judgment lay in the words of Justice K. S. Radhakrishnan who while handing down the ruling stated that "recognition of transgender as a third gender is not a social or medical issue but a human rights issue" (BBC News, 2014). The judgment guarantees that they are now legally recognized and protected as equals under the Constitution. For some time, transgender persons have been asserting that "I am no 'other'. I am not a tree, I am not a bus, I am not a train, a dog or a cat. I am a person. I want my identity. I am a transgender, a hijra" (*First Post*, 2014). It was this judgment that allowed transgender persons during the 2014 Maharashtra assembly elections to demand to be labelled as "transgender" or "third gender" as opposed to "others" (*First Post*, 2014). On 6 September 2018, the Supreme Court decriminalized Section 377 of the Indian Penal Code, which now gives the Indian transgender community the legal right to live with dignity. The NALSA Judgment, 2014, had called for affirmative action in education and primary healthcare for transgender persons. These directives served as a beacon for various legislations. It is to help fight these battles that the Transgender Persons (Protection of Rights) Bill, 2016 was introduced in the Rajya Sabha, as a private members' bill. It was passed unanimously and introduced in the Lok Sabha in 2016. The provisions of Section 377 and the 2016 Bill had created a contradictory situation: while there was a bid to protect the rights of transgender persons, "unnatural sex" was still illegal. In this regard, it may be worth recounting the Supreme Court statement given by the bench headed by Justice Dipak Misra, who said, "Once the criminality of consensual gay sex goes away, then related issues like social stigma and discrimination against the LGBTQ community will also go."

CONSTITUTIONAL RIGHTS OF TRANSGENDER PEOPLE

Preamble to the Constitution mandates Justice - social, economic, and political equality of status.

Thus the first and foremost right that they are deserving of is the right to equality under Article 14. Article 15 speaks about the prohibition of discrimination on the ground of religion, race, caste, sex or place of birth. Article 21 ensures right to privacy and personal dignity to all the citizens. Article 23 prohibits trafficking in human beings as beggars and other similar forms of forced labor and any contravention of these provisions shall be an offence punishable in accordance with law.

The Constitution provides for the fundamental right to equality, and tolerates no discrimination on the grounds of sex, caste, creed or religion. The Constitution also guarantees political rights and other benefits to every citizen. But the third community (transgender) continues to be ostracized. The Constitution affirms equality in all spheres but the moot question is whether it is being applied.

As per the Constitution most of the protections under the

Fundamental Rights Chapter are available to all persons with some rights being restricted to only citizens. Beyond this categorization the Constitution makes no further distinction among rights holders.

But official identity papers provide civil personhood. Among the instruments by which the Indian state defines civil personhood, sexual (gender) identity is a crucial and unavoidable category. Identification on the basis of sex within male and female is a crucial component of civil identity as required by the Indian state. The Indian state's policy of recognizing only two sexes and refusing to recognize hijras as women, or as a third sex (if a hijra wants it), has deprived them at a stroke of several rights that Indian citizens take for granted. These rights include the right to vote, the right to own property, the right to marry, the right to claim a formal identity through a passport and a ration card, a driver's license, the right to education, employment, health so on. Such deprivation secludes hijras from the very fabric of Indian civil society.

THE SUPREME COURT JUDGEMENT ON TRANSGENDER RIGHTS

This judgement covers persons who want to identify with the third gender as well as persons who want to transition from one identity to another, i.e. to male to female or vice versa. The Court has directed Centre and State Governments to grant legal recognition of gender identity whether it be male, female or third gender.

- **Legal Recognition for Third Gender:** In recognizing the third gender category, the Court ruled that fundamental rights are available to the third gender in the same manner as they are to males and females. Further, non-recognition of third gender in both criminal and civil statutes such as those relating to marriage, adoption, divorce, etc is discriminatory to the third gender.
- **Legal Recognition for people transitioning within male/female binary:** As for how the actual procedure of recognition will happen, the Court merely states that they prefer to follow the psyche of the person and use the 'Psychological Test' as opposed to the 'Biological Test'. They also declare that insisting on Sex Reassignment Surgery (SRS) as a condition for changing one's gender is illegal.
- **Public Health and Sanitation:** Central and State Governments have been directed to take proper measures to provide medical care to Transgender people in the hospitals and also provide them separate public toilets and other facilities. Further, they have been directed to operate separate HIV/Sero-surveillance measures for Transgender.
- **Socio-Economic Rights:** Centre and State Governments have been asked to provide the community various social welfare schemes and to treat the community as socially and economically backward classes. They have also been asked to

extend reservation in educational institutions and for public appointments.

- **Stigma and Public Awareness:** These are the broadest directions - Centre and State Governments are asked to take steps to create public awareness so that Transgender people will feel that they are also part and parcel of the social life and not be treated as untouchables; take measures to regain their respect and place in society; and seriously address the problems such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, and social stigma.
- **Challenging 377:** The judgment contradicts the findings of the Supreme Court in Suresh Kumar Koushal in various ways. The main points include:
 - The judgement notes that Section 377, though associated with specific sexual acts, highlighted certain identities, including Hijras. It also recognizes that sec 377 has been used as an instrument of harassment and physical abuse against Hijras and transgender persons. The judgment only says that this amounts to a misuse of the Section as opposed to what it actually dictates, thus refusing to meaningfully apply a fundamental rights analysis to it. Now we have a clearly contradictory finding.
 - It argues against Koushal's infamous 'miniscule minority' argument noting that Transgender, even though insignificant in numbers, are still human beings and therefore they have every right to enjoy their human rights.
 - The Court finds that discrimination on grounds of sexual orientation and gender identity violates Article 14, and that transgender are extremely vulnerable to harassment, violence and sexual assault in public spaces, at home and in jail, also by the police. If we are to read this with their finding that 377 is used to harass and physically abuse transgender persons, we can clearly make the link that 377 fails the test of equality under the Constitution.

THE RIGHTS OF TRANSGENDER PERSONS BILL, 2014

The Rajya Sabha passed the Transgender Persons Bill, 2014 on April 24, 2015. The Bill consists of various rights on social, economic and political entitlements, privileges, and immunities for transgender. It also entails several duties on educational and employment providing institutions to provide equal and inclusive opportunities to this unidentified community. In addition to this provisions have been made for enactment and implementation of

necessary schemes in order to provide social security, rehabilitation, and recreation to the transgender. Providing safeguards and promotion of rights of transgender persons for attaining adequate living standards and conditions to enable them to live independently in the community is another peculiar feature of this Bill.

The introducers of the Transgender Persons Bill were of the opinion that the issue of transgender should not be mixed with the lesbian-gay-bisexual issues because of diverging concerns of the two groups. The former suffers from a grave problem of lack of one's identification in various walks of life whereas the latter's problems are concerned with the acceptance of their sexual orientation by the social and legal community.

TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

The Parliament has passed the Transgender Persons (Protection of Rights) Bill, 2019, with the Rajya Sabha approving it by a voice vote. The Lok Sabha had already passed the bill in December 2018. Various provisions of the Bill are:

DEFINING TRANS PERSON

- The Bill defines a transgender person as one whose gender does not match the gender assigned at birth.
- It includes trans-men and trans-women, persons with intersex variations, gender-queers, and persons with socio-cultural identities, such as kinnar and hijra.

PROHIBITION AGAINST DISCRIMINATION

- It prohibits the discrimination against a transgender person, including denial of service or unfair treatment in relation to education, employment, healthcare, access to, or enjoyment of goods, facilities, opportunities available to the public.
- Every transgender person shall have a right to reside and be included in his household.
- No government or private entity can discriminate against a transgender person in employment matters, including recruitment, and promotion.

HRD MEASURES

- A transgender person may make an application to the District Magistrate for a certificate of identity, indicating the gender as 'transgender'.
- Educational institutions funded or recognized by the relevant government shall provide inclusive facilities for transgender persons, without discrimination.
- The government must provide health facilities to transgender persons including separate HIV surveillance centers, and sex reassignment surgeries.

GRIEVANCES REDRESSAL

- The National Council for Transgender persons (NCT) chaired by Union Minister for Social Justice, will advise the central government as well as monitor the impact of policies with respect to transgender persons.
- It will also redress the grievances of transgender persons.

LEGAL PROTECTION

The Bill imposes penalties for the offences against transgender persons like bonded labor, denial of use of public places, removal from household & village and physical, sexual, verbal, emotional or economic abuse.

CONCLUSION:

Transgender rights are part of human rights. It is natural right of every person whether that person is of any gender enjoy freedom to learn, love, work and play. We know that gender is not in our hand it depends on genes, hormones or environmental factor but after that we discriminate the transgender community. In recent years the law, policies and attitudes of social change and allow more transgender people to live safer and healthier life. It is the duty of Government to engage with transgender to easily understand their concerns and support then whenever their human right violates.

REFERENCES

1. Chettiar, A. (2015). Problems Faced by Hijras (Male to Female Transgenders) in Mumbai with Reference to Their Health and Harassment by the Police. *International Journal of Social Science and Humanity*, 5(9), 752–759. <https://doi.org/10.7763/ijssh.2015.v5.551>
2. Kumar, S., & Kumar, S. (2018). RPwD ACT, 2016 and School Education: Concerns and Challanges. *International Journal of Research and Analytical Reviews*, 5(1), 382–385.
3. Levitt, H. M., & Ippolito, M. R. (2014). Being Transgender: The Experience of Transgender Identity Development. *Journal of Homosexuality*, 61(12), 1727–1758. <https://doi.org/10.1080/00918369.2014.951262>
4. Mondal, B., Das, S., Ray, D., & Banerjee, D. (2020). "Their Untold Stories...": Lived Experiences of Being a Transgender (Hijra), A Qualitative Study From India. *Journal of Psychosexual Health*, 2(2), 165–173. <https://doi.org/10.1177/2631831820936924>
5. Mueller, S. C., De Cuypere, G., & T'Sjoen, G. (2017). Transgender research in the 21st century: A selective critical review from a neurocognitive perspective. *American Journal of Psychiatry*, 174(12), 1155–1162. <https://doi.org/10.1176/appi.ajp.2017.17060626>
6. Sawant, N. (2017). Transgender: Status in India. *Annals of Indian Psychiatry*, 1(2), 59. https://doi.org/10.4103/aip.aip_43_17
7. Sharma, A. (2018). Identity Crisis for Transgender in India: A Case-study from Madhya Pradesh. *Quest-The Journal of UGC-HRDC Nainital*, 12(2), 157. <https://doi.org/10.5958/2249-0035.2018.00021.9>
8. <https://thediplomat.com/2020/01/what-does-indias-transgender-community-want/>
9. <https://iasscore.in/national-issues/transgender-rights-in-India>
10. <http://lawtimesjournal.in/human-rights-and-transgender/>
11. <https://www.bbc.com/news/world-asia-india-27031180>
12. <https://www.civildaily.com/news/parliament-passes-transgender-persons-protection-of-rights-bill-2019/https://www.epw.in/engage/article/securing-transgender-rights-education-finance>