

Role of Supreme Court in Recognizing the Rights of Transgender in India

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“Gender identity... lies at the core of one’s personal identity, gender expression and presentation and therefore, it will have to be protected under Article 19(1)(a) of the Constitution. A transgender’s personality could be expressed by the transgender’s behavior and presentation. State cannot prohibit, restrict or interfere with a transgender’s expression of such personality, which reflects that inherent personality.”

Transgender is not a term limited to persons whose genitals are intermixed but it is a blanket term of people whose gender expression, identity or behavior differs from the norms expected from their birth sex. Various transgender identities fall under this category including **transgender male, transgender female, male-to-female (MTF) and female to male (FTM)**. It also includes **cross-dressers** (those who wear clothes of the other), **gender queer people** (they feel they belonged to either both genders or neither gender) and **transsexuals**.

In India, there are a wide range of transgender related identities which includes the **Hijras, Aravanis, Kothis, Jogtas/ Jogappas, Shiv Sakthis**. In the past, they were treated with great respect.

‘Hijra’ is a Persian word translated as eunuch which is used in common parlance for transgender community in India.

‘Aravani’ is a term used for male-to-female transgender who undergo genital modification through SRS (Sex Reassignment Surgery) or perform Nirwaan which is a traditional mode of castration.

Kothi is used for those who adopt a feminine role in same sex relationships, but do not live in communes as Aravanis.

Jogtas/ Jogappas found in Maharashtra and Karnataka are male to female transgender who devote themselves to the service of a particular god.

“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. Shiv Shakthis found in Andhra Pradesh are males who are considered married to gods particularly Lord Shiva. They usually work as spiritual healers or astrologers.

RIGHTS GRANTED UNDER INDIAN LAWS TO TRANSGENDER

The rule of law is supreme and everyone is equal in the eyes of law in India. Yet, the transgender community is in a constant battle as they have to fight oppression, abuse and discrimination from every part of the society, whether it’s their own family and friends or society at large. The life of transgender people is a daily battle as there is no acceptance anywhere and they are ostracized from the society and also ridiculed.

Identifying transgender as a third gender, the Supreme Court passed this unique judgment in April 2014 stating one’s sexual orientation as the integral part of personality, dignity and freedom. In the **National Legal Services Authority (NLSA) vs. Union of India** case, the apex court in 2014 declared Hijras and Eunuchs as third gender, providing them a legal identity along with seven other directions. However, the Supreme Court of India in its pioneering judgment by the division bench of Justices K.S. Radhakrishnan and A.K. Sikri in *National Legal Services Authority v. Union of India & Ors.* [Writ Petition (Civil) No.400 of 2012(NALSA)] **recognized the third gender** along with the male and female. By recognizing diverse gender identities, the Court has busted the dual gender structure of ‘man’ and ‘woman’ which is recognized by the

the right of equality before law and equal protection of law is guaranteed under Article 14 and 21 of the Constitution.

The right to chose one’s gender identity is an essential part to lead a life with dignity which again falls under the ambit of Article 21. Determining the right to personal freedom and self determination, the Court observed that “the gender to which a person belongs is to be determined by the person concerned.” The Court

has given the people of India the right to gender identity. Further, they **cannot be discriminated against on the ground of gender** as it is violative of Articles 14, 15, 16 and 21.

The Court also protects one's gender expression invoked by Article 19 (1) (a) and held that "no restriction can be placed on one's personal appearance or choice of dressing subject to the restrictions contained in article 19(2) of the Constitution".

The Court recognized the right to as to how a person choose to behave in private, personhood and the free thought process of the human being, which are necessary for the fullest development of the personality of the individual. The Court further noted that a person will not realize his dignity if he is forced to mature in a gender to which he does not belong to or he cannot relate to which will again hinder in his development. The Supreme Court has given certain directions for the protection of the rights of the transgender persons by including of a third category in documents like the election card, passport, driving license and ration card, and for admission in educational institutions, hospitals, amongst others.

In the following year, the Kerala government announced a Transgender Policy, along with the Department of Social Justice, covering all transgender categories without limiting itself to woman to man or man to woman sex conversions. The policy aimed to address the discrimination faced by the transgender, spread awareness, and sensitize and counsel parents raising them. The policy suggested various measures like constitution of a State and District Transgender Board, a helpline, setting up educational institutions, counseling centers, and providing employment opportunities, grants and housing schemes. Post the NLSA judgment, various courts passed favorable orders for the transgender community.

Citing the NLSA ruling, K Prathika Yashini, a transgender, was allowed by the Madras High Court to appear for a police recruitment examination in 2015. In 2015, the Delhi High Court allowed an Indian student to return to the US and lead a "normal girl's life", after her parents forcibly restrained her and seized her passport and green card.

In a landmark judgment, the Allahabad High Court on April 15, 2015 ruled that the application forms for the issuance of ration cards should "necessarily" include a transgender category along with other genders. The judgment also stated that transgender can also be included in Section 13 of the National Food Security Act, 2013 as head of the household.

Post Prathika ruling, on February 2016 the Madurai Bench of the Madras High Court directed the Dindigul Municipality to accept the application of a transgender who had applied for the post of a midday meal organizer. Monal was deprived of the opportunity to interview for the role as she had applied as a 'woman' in the gender section.

In 2016 the Indian Railways and Indian Railway Catering and Tourism Corporation (IRCTC) added 'transgender/third gender' to the gender category along with the other categories. Recently the Madras High Court passed another judgment which allowed a transgender — post-sex reassignment surgery — to change her name in school and college records on June 1, 2017. "Merely because the petitioner belongs to the third gender, he or she cannot be made to run from pillar to post on the ground that there are no rules available permitting such changes," observed the court.

Violation of Human Rights

Human rights are basic rights and freedoms which are guaranteed to a human by virtue of him being a human which can neither be created nor can be abrogated by any government. It includes the right to life, liberty, equality, dignity and freedom of thought and expression.

Transgenders are deprived of social and cultural participation and hence they have restricted access to education, health care and public places which further deprives them of the Constitutional guarantee of equality before law and equal protection of laws. It has also been noticed that the community also faces discrimination as they are not given the right to contest election, right to vote (Article 326), employment, to get licenses, etc. and in effect, they are treated as outcast and untouchable.

The transgender community faces stigma and discrimination and therefore has fewer opportunities as compared to others. They are hardly educated as they are nor accepted by the society and therefore do not receive proper schooling. Even if they are enrolled in an educational institute, they face harassment and are bullied every day and are asked to leave the school or they drop out on their own. It is because of this that they take up begging and sex work.

Seldom does a skilled individual from this community get into formal employment due to the policy of hiring only from either the male or female gender. Even if they do, they are ridiculed and ostracized and hence forced to leave their jobs.

They are forced into sex work which puts them at the highest risk of contracting HIV as they agree to unprotected sexual intercourse because they fear rejection or they want to affirm their gender through sex. They are viewed as 'vectors' of HIV in the society. Other sexually transmitted infections such as rectal gonorrhea, syphilis, rectal Chlamydia, etc., add to the risk of HIV.

Immoral Traffic Prevention Act of 1956 which was amended in 1986 has become a gender neutral legislation. The domain of the Act now applies to both male and female sex workers along with those whose gender identity was indeterminate. With the amendment both the male and hijra sex workers became criminal subjects as this gives the police the legal basis for arrest and intimidation of the transgender sex workers.

Section 377 of IPC criminalizes same sex relations among consenting adults. This is a colonial era law which makes the Transgender community vulnerable to police harassment, extortion and abuse. In *Jayalakshmi v. State of Tamil Nadu*, Pandian, a transgender, was arrested on charges of theft by the police. He was sexually assaulted in the police station which ultimately led him to immolate himself.

DIRECTIONS TO THE CENTRAL AND STATE GOVERNMENT

The court as issued certain directions to the central and state government which are:

- Hijras, eunuchs should be treated as third gender for the purpose of safeguarding their fundamental rights,
- Recognize the persons' need to identify his own gender,
- Providing reservations in public education and employment as socially and educationally backward class of citizens,
- Making special provisions regarding HIV sero-surveillance for transgender persons and provide appropriate health facilities,
- Tackle their problems such as fear, gender dysphoria, shame, depression, suicidal tendencies, etc.
- Measures should be taken to provide health care to transgender people in hospitals such as making separate wards and also provide them separate public toilets,
- Frame social welfare schemes for their all round development,
- To create public awareness so that the transgenders feels that they are part of the society and are not to be treated as untouchables.

The judgment has marked a break from otherwise paternalistic and charitable approach of the state towards the transgender community by framing their concerns as a matter of rights.

RIGHT OF TRANSGENDER PERSONS BILL, 2014

The Bill was introduced in Rajya Sabha on 12th December, 2014 which is passed on 24th April, 2015 unanimously, with cross-party support. This was a private member's bill introduced by the MP from Tamil Nadu, Tiruchi Siva. 24th April is celebrated as Transgender day following the passage of the Bill in the Rajya Sabha.

The rights guaranteed under the Bill are mostly **substantive rights** such as the right to equality and non-discrimination, life and personal liberty, free speech, to live in a community, integrity, along with protection from torture or cruelty and abuse, violence and exploitation. There is a separate clause for transgender children.

Education, employment and social security and health are also covered under the Bill. The chapter on education makes it mandatory for the Government to provide inclusive education for transgender students and provide adult education to them.

With the employment chapter, there are two separate clauses dealing with formulation of schemes for vocational training and self-employment of transgender persons by the Government. There's a separate clause for non-discrimination against transgender persons in any establishment – public or private.

In the social security and health chapter, the Government is asked to propagate social security and health care facilities which are to be provided in the form of separate HIV clinics and free SRS. They should be given the right to leisure, culture and recreation. Basic rights like access to safe drinking water and sanitation must be provided by the government.

The Bill envisages setting up a number of authorities and forums – **National and State Commissions for Transgender Persons**. The Commissions work will be mostly in the nature of inquiry or recommendations in the inconsistencies in the application of the law or violations of right of transgender persons. The Commissions can issue summons to witnesses, receive evidence, etc. There is penalty by way of imprisonment for upto a year for hate speech against transgender people.

Based on the *NLSA* judgment, the Rajya Sabha passed the Rights of Transgender Bill, 2014 but not without watering down the bill. The government then passed another Bill, Rights for Transgenders Persons Bill, 2015, modifying on the 2014 bill by removing the provisions relating to Transgender Rights Court as well as the National In September 2014, the Centre expressed doubts whether gays, lesbians and bisexuals too were included under the definition of a transgender. Citing its previous judgment, the apex court ruled out the wide use of the definition under which a transgender was earlier defined. Observing how the transgenders “assumed a distinct and separate class/category” in India, the court detailed the various categories under which they are classified into. Defining each category of transgenders, the court recognized the kind of work they are forced to do and provided with such a restrictive meaning, and State Commissions. The 2015 Bill underwent further

changes and another bill was introduced in the Lok Sabha in 2016 — the Transgender Persons (Protection of Rights Bill), which invited criticism from the transgenders and activists.

In 2016, the Madras High Court ruled in favour of a transgender plea directing the Tamil Nadu government to create a separate class for transgenders and provide them with three per cent reservation in employment and education. Recently the parliamentary panel too mooted the idea of extending reservations for the third gender community in places of employment and education. The 2016 Bill is likely to be passed by the end of this year.

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