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## Transgender: Identity and Rights

Shubhanshi Suman<sup>a</sup>

<sup>a</sup>Bharati Vidyapeeth University, Pune, India

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*Transgender is the third gender of human beings. They are different from males and females who are referred to as cisgender. The transgender community faces persecution by the majority of cisgender. They are not welcomed by the overpopulated cis society. They suffer name-calling and other kinds of mocking. They are raped and killed in remote areas with a backward mindset. This article is based on the historical and mythological position of the trans community. The present sociological aspect of the trans community is discussed along with the present laws and amenities provided to them. A critical analysis has been done on the Transgender Person (Protection) Bill, 2019. A brief discussion on whether the trans community should be provided vertical or horizontal reservation has also been done. In this so-called modern world, people are raped. However, it has been highlighted by the apex court that rape laws are gender-specific and are only confined to covering rape against women. An argument has been raised in the article that the rape laws should not be gender-specific and must include the trans people who are forcefully drawn into sex by the cis people.*

**Keywords:** *rights, transgender, identity.*

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## INTRODUCTION

Sex is the biological organization of an individual. Gender can be defined as the assigned identity based on the sexual orientation of an individual at birth. A person may be born a male or a female. However, s/he learns to be a male or female in the due course of time. Irrespective

of the gender assigned at birth, a person may grow in different ways. A person whose gender assigned at birth remains the same throughout life is called a cisgender. Cisgender comprises a majority of the population. However, there are people whose gender identity and sex assigned at birth change after some time. They are referred to as Transgender. The United Nations<sup>1</sup> defines the term transgender as “an umbrella term used to describe a wide range of identities whose appearance and characteristics are perceived as gender-atypical- including transsexual people, cross-dressers (sometimes referred to as “transvestites”), and people who identify as the third gender.”<sup>2</sup> Transgender is an umbrella term used to identify people whose gender assigned at birth do not conform with their inherent characteristic. One may be born as a male, however, with the due course of time learn and adore to be a female. They can call themselves gay. There is a common misconception amongst people that gays are sexually attracted to men. However, they may be attracted to either gender or may be asexual. Due to the oppressive norms of society, some people hide or are not able to express their actual preferences. They can be called gender non-conforming.

## HISTORICAL BACKGROUND

While many societies never identified transgender as the third gender, Hindu Mythology had various references to them. In Shiv Purana, it has been given that Lord Shiva appeared as ‘Ardhanarishvara’, half male and half female. It was highlighted that there could be no male without a female and no female without a male. In Vishnu Purana, it has been given that Lord Vishnu took the female form of ‘Mohini’ during the period of Samudra Manthan (Churning of the sea) and united with Lord Shiva to give birth to Lord Ayappa. In Ramayana, when Lord Rama was leaving for exile, he was followed by many trans women. When they were asked the reason for following him, they said that they could have no proper life without him. Lord Rama blessed them and credited them with a boon.

Ancient texts like Manusmriti, Vedas, and other religious texts also identify transgender as the third gender. They have been called the ‘Tritiya Prakriti or the third form of nature. As we

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<sup>1</sup> ‘Definitions’ (United Nations Human Rights: Office of The High Commissioner)  
<<https://www.unhcr.org/definitions/>> accessed 01 April 2022

<sup>2</sup> *Ibid*

unfurl the ancient history of India, we find that transgenders have always been welcomed before colonialism. There have been queer slaves in the Delhi Sultanate. Trans people have been in notable positions in the Mughal era too. We could find the degradation of dignity of trans people in India after the advent of the oppressive colonial government. The Criminal Tribes Act, of 1871<sup>3</sup>, penalized transgender people to dress opposite from the gender they were assigned at birth. The act deemed the entire community of Hijras as criminals. Being a Hijra was a non-bailable offence. This dreadful law never welcomed the inclusion of transgender people even post-independence.

### **SOCIOLOGICAL VIEW**

The last census suggested that the trans community comprises 2.5 million of India or 10% of the Indian population. They are smaller in number and, therefore, regarded as different from the 'so-called normal' or cisgender. The Trans community has always been persecuted and harassed by social norms. They have a long history of mockery and disregard. Homophobia or transphobia, which is dislike or prejudice against trans people, has been created in the minds of people. This eventually leads to hatred and various forms of hate crime. Data suggests that gender identity and sexual orientation is the third most common reason for hate crime in the world. There are numerous incidents where transgender people are raped, sexually harassed, and brutally murdered. The deadliest year of violence was 2021 when about 375 transgender people were killed. There are plenty of cases that go unreported.

Every normal day is a crisis for Hijras and other gender non-conforming people. During the COVID-19 pandemic, the normal was a situation of crisis for all. In those times, people raised voices for migrant workers and other poor populations. However, only a few were concerned about the rights of the persecuted trans people. Although there is no strong evidence, it is said that during the plague and other pandemics, the orphaned children were raised by the Hijras. The last census suggested that cisgender people resided in the homes of the Hijras. This time also, orphaned children were sold by their relatives to the Hijras.

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<sup>3</sup> Criminal Tribes Act, 1871

## LANDMARK JUDGEMENTS

Although Indian history recognized transgender as the third gender, after the colonial rule, Indian society failed to give proper recognition to transgender. The Hijras were not even recognized as human beings. In 2014, the Supreme Court in the landmark judgement of the *National Legal Service Authority of India (NALSA) v Union of India*<sup>4</sup> recognized transgender as the third gender. The Supreme Court also held in this judgement that the fundamental rights guaranteed to all the citizens under Articles 14, 15, 16, 19, and 21<sup>5</sup> shall be applied without any exception to transgender people. The Court also highlighted that the core principles of International Human Rights included one and all without any discrimination.

Section 377<sup>6</sup> of the Indian Penal Code, 1860 said, “whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to [a] fine.” This provision was a major flaw in the society that had held back trans people from achieving their sexual autonomy. This provision was first challenged in 2009 in the landmark case of *Naz Foundation v the Govt. of NCT of Delhi*.<sup>7</sup> The two-judge bench of the Delhi High Court ruled that criminalizing consensual sex between two homosexual adults was a serious violation of fundamental rights guaranteed by the Constitution. This judgement was quashed in *Suresh Kaushal and Anr. v Naz Foundation* in 2013 by the two-bench judge of the Supreme Court. It was ruled that Section 377 of the IPC cannot be struck off as unconstitutional.<sup>8</sup> Vague and ambiguous reasons were put forward by the court for the judgement. In June 2016, Navtej Singh Johar who identified themselves as gay, and five other LGBTQ activists filed a writ petition in the Supreme Court to strike off Section 377. Finally, in 2018, the apex court ruled that Section 377 violated the rights of two consenting adults to consensual sex and hence was struck off.

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<sup>4</sup> *National Legal Service Authority of India (NALSA) v Union of India* (2014) Writ Petition (Civil) No. 604/2013

<sup>5</sup> Constitution of India, 1950, art. 14, art. 15, art. 16, art. 19, and art. 21

<sup>6</sup> Indian Penal Code, 1860, s 377

<sup>7</sup> *Naz Foundation v Govt. of NCT of Delhi* (2016) 15 SCC 619

<sup>8</sup> *Suresh Kaushal and Anr. v Naz Foundation* (2014) 1 SCC 1

## STEPS THAT WERE TAKEN BY THE GOVERNMENT

The Transgender Person (Protection of Rights) Bill, 2019 was introduced seeing the voices raised by the trans community.<sup>9</sup> Though the bill is an initial step towards the upliftment of the trans community, there are various flies in the ointment. The bill does not differentiate the cisgender and transgender in any sense. However, the cis community wouldn't allow its on-ground implementation. The bill says that a certificate of identity could be received by making an application to the District Magistrate. However, the trans community has questioned this provision as it doesn't promise self-determination of gender. The bill guarantees prohibition of discrimination against trans in any field. There have been numerous cases of rape against the trans community. The activists have time and again raised their voices for criminalising trans rape. The Supreme Court had said in its verdict that Section 377 of the IPC is a gender-neutral law. However, Section 375<sup>10</sup> is gender-specific. This is a huge ground of discrimination that needs to be resolved. Activists have been insisting that transgender people should not undergo sex reassignment surgeries just to fit themselves into society. However, one must not be prohibited from doing so. These surgeries are very expensive for people belonging to low and middle-income families. Therefore, the activists ask for free or low charges for safe sex reassignment surgeries.

Despite numerous flaws, the Transgender Person Bill is a progressive step towards the upliftment of the historically oppressed community. The bill promises effective medical health care to trans people. It promises proper HIV surveillance and sex reassignment surgeries. Apart from the Bill, the government has taken various steps for the upliftment of transgender people. The government has made Garima Greh or Shelter for transgender people in Vadodra, Gujarat. It is managed by Lakshaya Trust which is run by trans people. The Garima Greh also provides basic amenities like food, medical care, and recreational facilities. National Portal for Transgender Persons has been opened so that they do not have to physically travel for identity cards and can apply for identity certificates online. A separate university for transgender

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<sup>9</sup> Transgender Person (Protection of Rights) Bill, 2019

<sup>10</sup> Indian Penal Code, 1860, s 375

people is to be opened in Kushinagar, UP, by Akhil Bharatiya Kinnar Sikhsha Seva Trust which shall be India's first university for transgender people.

## RESERVATION FOR TRANSGENDER COMMUNITY

There has been a lot of debate about whether the trans community should be given reservations or not. Trans people have been socially discarded in the past. They are still not fully welcomed by the abundant cis society. Therefore, reservations must be provided as it is highly required for the trans community. The main area of the debate should be whether transgender people should be provided vertical reservations or horizontal reservations. Vertical reservations are applied separately for the persecuted or minority group like the scheduled Castes and scheduled tribes. Article 16(4)<sup>11</sup> of the Constitution of India deals with vertical reservations. Horizontal reservations are applied to all the minority groups across the vertical reservations. Article 15(3)<sup>12</sup> of the Constitution of India is a type of horizontal reservation. For example, reservation for women is applied horizontally. Therefore, a Dalit woman will be given reservation over a Dalit man.

Similarly, transgender and other cisgender activists have been seeking proper inclusion in society by the way of horizontal reservations. There are Dalit trans women and trans men who are not welcomed in society. They face persecution for being a Dalit in the first place and then they are mocked for being different. There have been numerous cases when families have left their children just because they were brought up differently despite their so-called "strictly male" or "strictly female" upbringing. Horizontal reservations would not certainly change the mindset of the society which comprises the abundant cis people. However, these reservations would give a mouth to the trans people to take the shelter of law to raise their historically muted voices.

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<sup>11</sup> Constitution of India, 1950, art. 16(4)

<sup>12</sup> Constitution of India, 1950, art. 15(3)

## CONCLUSION

There is a massive difference between equality and equity. Equality is providing equal ground to all. Equity is removing the historical backlog. Transgender people have been physically and mentally traumatized by the oppressive thinking of the cis community. They have a historical backlog of oppression. Therefore, they must get reservations for their upliftment. In the present day, trans people have raised their voices against the persisting discrimination. We should welcome them as human beings and not as beings who don't deserve to live as they are different from the so-called 'majority'. A few steps have been taken for their inclusion in society. We, as responsible citizens, need to ensure the effective implementation of the Bill. We must include them with open arms and not mock people by name-calling or other forms of insults. Lastly, every man should have the right to cry and express his emotions, every woman should be praised for being bold and every trans should have the right to dress and make love. Equality shall be achieved when people are viewed from the bare eyes of humanity and not from the thick, and dark lens of distinguished gender.