

LEGALFOXES LAW TIMES

AN ANALYSIS ON THE IMPORTANCE OF TRANSGENDER IDENTITY IN INDIA

By Jagruthi Rao and Sai Kalyani S

Abstract:

Transgender is a term that characterizes those individuals whose gender identity or expression does not match with the sex they were assigned at birth. Over the years it has been observed that there is a social stigma that exists around the third gender persons due to the reason that they do not conform to the societal expectations based on their assigned sex. In certain countries like India transgender persons are often discriminated and they constitute as a marginal group in the society.

This research is an attempt to assess the grey areas that exist in the society that leads to discrimination in terms of healthcare, employment and poverty of transgender persons. This paper aims to shed light upon Transgender Persons (Protection of Rights) Act, 2019 which was passed by the Indian Parliament to serve as a legal protection to the transgender community. There have been significant changes that have taken place in giving transgender 'identity' in India amongst different sectors of employment.

This paper shall also focus on the recognition that has been in granted to transgender persons through social media and various documentation processes. It further lays emphasis on the real-life experiences and case laws that showcases the injustice that the transgender persons go through. This paper shall also cover the fear that exists in the society towards transgender persons called transphobia and how this affects mental health. A comparative study of India with other developed countries like Malaysia, United States and United Kingdom shall be done with regard to the manner in which these persons are alleviated. Towards the end, a conclusion shall be drawn as to what measures can be taken to uplift this community and isolate them from the stigma.

Keywords:Discrimination, identity, employment, transgender, stigma

Introduction:

Often, the terms "sex" and "gender" are used interchangeably although they have contrasting meanings. **Sex** specifies a set of biological traits in both humans and animals. It is mainly associated with

physiological and physical features including gene expression, reproductive or sexual anatomy, chromosome, hormone levels and its function. Sex is usually classified as male and female. **Gender** refers to socially established roles, expressions, behaviours and identities of boys, girls, men, women and gender diverse people. It determines how people recognize themselves and everyone else, how they respond and interact in the society. Gender identity is not limited to a binary not is it static. It can vary over time.¹ **"Transgender"** is an umbrella term that describes people whose gender identity or expression does not match the sex they were assigned at birth. For example, a transgender person may identify as a woman despite having been born with male genitalia.²

The Transgender community comprises of Hijras, Shiv-Shakthi's, Eunuchs etc., who have been part of the Indian society since ages.³ **Shikhandi** from the historical epic, Mahabharata represents all the queer people. Even though she was looked down upon by many people regarding her sex, it hardly came in between her relationships. While it has taken India, centuries to notice the LGBTQ community, our scriptures were comfortable with the latter and at the end of the day Shikhandi was a human being.⁴ Even during the Delhi Sultanate Period, Eunuchs had an important role in harem management which further continued to the **Mughal Period**. During Akbar's reign, the presence of Eunuchs was relevant and is extensively referred to in most sources. The duty of the Eunuchs was to guard the women's quarters and they possessed symbolic amount of wealth. At present, the transgender community in India has a marginalised existence, often seen begging in the streets or at people's homes on the occasion of marriage, childbirth etc. We rarely acknowledge a life of glory and power that they had once lived in the country centuries ago.⁵

Indian Census has never identified the third gender (Transgender) while collecting census data for years. But in 2011, data of Trans-genders were collected with specifics related to their employment, literacy and caste. In India the total transgender population is around 4.88 Lakh as per the 2011 census.⁶

The Transgender Persons (Protection of Rights) Act, 2019:

¹What is sex? What is Gender?, Canadian Institutes of Health Research (<https://cihr-irsc.gc.ca/e/48642.html>)

²What does transgender mean ,Allina Bradford ,June 17th 2018(<https://www.livescience.com/54949-transgender-definition.html>)

³ Sawant, Neena. (2017). Transgender: Status in India. Annals of Indian Psychiatry. 1. 59. 10.4103/aip.aip_43_17.

⁴The Unknown Tale of Shikhandi in Mahabharata, Pallavi Thakur, June 8th 2020(<https://www.speakingtree.in/allslides/shikhandi-and-other-tales-that-no-one-told-you/160030>)

⁵When eunuchs were the mid-run of power in the Mughal Empire, Adrija Roychowdhary, July 19th 2018(<https://indianexpress.com/article/research/eunuch-security-guards-bihar-mughal-empire-history-5266102/>)

⁶Transgender in India(<https://www.census2011.co.in/transgender.php>)

The Transgender Persons (Protection of Rights) Act, 2019 was introduced in the Lok Sabha on July 19th 2019 to protect the rights of Transgender individuals and provide equal opportunity to them in various sectors of health, employment and protection against discrimination. In 2014, the Supreme Court passed a landmark judgement in National Legal Services Authority (NALSA) v. Union of India, where it recognized “transgender individuals as third gender persons and also held that they were entitled to same fundamental rights as ordinary citizens of the country”.

The court in the decision recognized that transgender persons have been subject to discrimination in India since the 18th century and have been subject to discrimination in areas of healthcare, education and employment which has resulted in social exclusion and hence they were considered as socially and educationally disadvantaged groups. Court stated that “gender identity is an integral part of the personality and one of the most basic aspects of self-determination, dignity and freedom. The rights have to be protected irrespective of chromosomal sex, genitals, assigned birth sex, or implied gender role⁷”. Through this act the government has tried to address the lacunas that exist in the judgement and has laid down several provisions to curb the discrimination that they are facing:

- **Prohibition against Discrimination:** The bill prohibits any form of discrimination against a transgender person which might include denial of service or unfair treatment in sectors like (i) education; (ii) employment; (iii) healthcare; (iv) access to, or enjoyment of goods, facilities, opportunities available to the public; (v) right to movement; (vi) right to reside, rent, or otherwise occupy property; (vii) opportunity to hold public or private office; and (viii) access to a government or private establishment in whose care or custody a transgender person is⁸.
- **Right of Residence:** Every transgender person shall have the right to reside in their particular households however if the immediate family cannot take care of the transgender person, then, they may be placed in a rehabilitation centre.
- **Employment:** No government or private entity shall discriminate against a transgender person in matters of recruitment, employment and promotion matters.

⁷NLSA v. Union of India (2012) WP No.400

(<https://www.equalrightstrust.org/ertdocumentbank/NLSA%20v%20Union%20of%20India.pdf>)

⁸The Transgender Persons (Protection of Rights) Bill, 2019 (<https://www.prsindia.org/billtrack/transgender-persons-protection-rights-bill-2019>)

- **Health Care:** The government shall take important steps to ensure that health facilities are provided to transgender persons including separate HIV surveillance centres and sex reassignment surgeries.
- **Certificate of identity for the transgender person:** A transgender person may make an application to the District Magistrate for a certificate of identity, indicating the gender as 'transgender'. A revised certificate may be obtained only if the individual undergoes surgery to change their gender either as a male or a female.
- **Offences and Penalties:** The bill recognizes the following offences against transgender persons (i) forced or bonded labour (excluding compulsory government service for public purposes), (ii) denial of use of public places, (iii) removal from household, and village, (iv) physical, sexual, verbal, emotional or economic abuse. Penalties for these offences vary between six months and two years, and a fine⁹.

Criticisms by the community against the Bill:

- One of the main loopholes in the bill is that it needs to protect the rights of the transgender community for which the people from the community need to be approached or seek their opinions on their needs and requirements, but before passing the bill none of the members in the community were aware about the bill and it was suddenly passed on mere assumptions.
- Another provision in the bill that was highly rejected by the community was that it requires transgender persons to approach the District Court in order to obtain a certificate stating that they are a transgender and its only after this that they will be able to change their gender to Male and Female from government issued identity cards. In order to attain the certificate the transgender persons must show proof through a sex reassignment surgery which the persons in the community strongly oppose as it is a very expensive procedure and also it is a direct violation of their right to privacy as well.

Hence the community hopes that this bill does not obtain the President's assent and does not become an act as it has a number of errors in it.

Development of Transgender Identity in Employment Sector :

The Trans persons have been marginalized and subject to a lot of discrimination in India over centuries right now and now they also would want to lead their lives like normal citizens of the country. It becomes

⁹Ibid

necessary to create equal opportunities to them in sectors of education and employment so that they can fund their livelihood. In terms of creating employment many IT based companies like Infosys, Accenture, KPMG, and Nestaway and Sodexo have introduced policies as well as hiring plans to ease the transition of the marginalized community into the formal workplace¹⁰. Many growing start-up companies are as well considering this aspect of employment and are making sure it is effectively implemented in their companies. The main objective behind introducing these opportunities is in order to make sur that this community does not face more discrimination in terms of education, access to housing and ignorance of the society which gives rise to Gender dysphoria.

In the Judiciary as well there are certain developments taking place as in the year 2017 there was appointment of a first Transgender Judge in the Lok Adalat of West Bengal named Joyita Mondal and her journey was not really easy. She is also trying to reduce the discrimination that community faces by making people aware of gender identity and also is trying to reduce the stigma that exists around the community by conducting counselling sessions and showing movies that depict the discrimination the community undergoes so that there is awareness of gender sensitivity amongst the citizens of the country.

Transgender Identity through Social Media:

The emergence and extensive use of Social Media these days introduce a completely new method of expression where verbal abuse and cyber bullying are recurrent. Social Media has the scope to reach a large number of people in different places, thus providing for a potentially strong base for advocacy. Social media provide a constant stream of information, introducing adolescents to concepts and social support they may not encounter in their offline lives. Little is known about transgender adolescents' use of social media, yet this technology may represent a venue for addressing disparities in their health care.¹¹ The transgender community develops on social media as an asset and a trail to reliability, for permitting anonymity when required. Online forums like Facebook, Instagram, Snapchat, YouTube and Twitter help individuals in various ways such as,

- I. **The process of self-disclosure** – Self-disclosure has been found to improve mental and physical health conditions, self-esteem and is highly necessary to receive social support. It can also put the individual in a difficult state due to the uncertain responses one may receive which also greatly impacts the association between disclosure and mental health of that person.

¹⁰India Inc opens doors for Transgender employees, Anjali Venugopalan ,January 14th 2020, (<https://economictimes.indiatimes.com/news/company/corporate-trends/india-inc-opens-doors-to-transgender-employees/articleshow/73237262.cms>)

¹¹Engaging Transgender Patients :Using Social Media to inform Medical Practice and Research in Transgender Health, Charlie Botner and Micah Rajunov, December 26th 2018 (<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6308274/>)

- II. **Computational Text Analysis Methods** – methods like sentiment analysis can act as an instrument to derive the explanation and concepts behind large bodies of texts. People who undergo psychological discomfort tend to post depressive content. There can be a link established between mental health and the social media content. The present study uses these methods to detect sentiment patterns over time during gender transition.
- III. **Tumblr Blogs** – Transition blogs are a category of Tumblr blogs in which people record their gender transition. Usually, these blogs consist of diary entries which focus on the social, legal and medical aspects of transition discussing their mode and conditions of disclosure, social support or rejection, physical and mental changes, medical procedures, name and document related changes.
- IV. **YouTube Vlogging** – YouTube is the most advantageous website for vlogging, video uploading and gives free access to users. It can act as a significant platform for transgender communities to share their stories and for the society to inculcate a level of sensitivity towards their kind¹².

Comparison of Transgender Laws between India and other countries:

United Kingdom:

The United Kingdom from the very beginning did not recognize the rights of transgender persons and the community in the UK as well was subject to a lot of discrimination. In 1996 there was a landmark judgement **P v. S and Cornwall Country Council**, a woman named P was dismissed in the court proceedings because she claimed to her fellow employees that she had undergone a gender reassignment surgery. The court held that the woman had been unlawfully dismissed and this case became the first piece of case law to prevent discrimination in employment or vocational education on the basis of someone being trans. There were slow beginnings of legislative codification of trans-rights under successive labour governments in the early 2000s.¹³ Major change arose with the case of **Goodwin v. United Kingdom (2002)**, in which Christine Goodwin suffered sexual harassment at her workplace during and subsequent to her gender reassignment. She claimed in court that, because of her male legal status, she had to pay National Insurance contributions until the age of 65 rather than 60. She also stated that because her NI number must remain the same under the UK law, her employer was able to find out that she had

¹²Journal of the American Medical Informatics Association, Volume 26, Issue 8-9, August/September 2019, Pages 749–758, May 23rd 2019(<https://doi.org/10.1093/jamia/ocz056>)

¹³Transgender Laws (<http://www.gendertrust.org.uk/transgender-laws/>)

worked for a company previously under different name and gender which led to more humiliation and harassment.

The citizens opposed the lack of legal recognition of transgender individuals, their gender and their post-operative sex and discrimination they faced in terms of employment, social security and pension as well as their inability to get married either as male or female. The European Court of Human Rights in 2002 held that UK law violated the transgender people's right to privacy and even the right of marrying and starting a family. Judges were of the opinion that the government should help trans-people by issuing more birth certificates that reflect their gender identity and also allow their marriage to an individual of an opposite gender. In the above case¹⁴, the government was held accountable for the lack of protection for the trans-community. After the government's laws in the Goodwin's case, there came about a legislation that was passed, Gender Recognition Act, 2004. This Act provided for full legal gender recognition of trans-people by the government and also permitted the issuing of new birth certificates. This further resulted in passing of Equality Act of 2010 which banned discrimination in workplace and wider society on the basis of gender reassignment.

United States:

The Obama administration issued guidance to protect the rights of transgender people and the guidance mandated fair treatment in employment with federal government and protected the transgender identity in schools. The Trump administration revoked this guidance. According to New York Times, in October 2018, Trump's administration wanted to enact a legal definition of sex as "a biological, immutable condition determined by genitalia at birth. He also rolled back the protection for transgender students (2017) and has been hostile towards transgender people. Under the United States constitution, there is a provision called the Equal Protection Clause which states that no state shall deny to any person "equal protection of the laws"¹⁵. This was bought in by the 14th Amendment to the constitution.

In a Federal Appeals Court, there was a case, **Gloucester County School Board v. G.G (2016)** that protested against the school board's policy requiring students to use the restrooms and locker rooms at their assigned sex at birth, citing the executive guidance issued under Obama and

¹⁴Ibid

¹⁵Transgender Rights Legal Landscape (<http://www.gendertrust.org.uk/transgender-laws/>)

revoked by Trump. The Supreme Court planned to hear the appeal but that was before President Trump revoked the guidelines.¹⁶

In **Obergefell v. Hodges (2015)**, the Supreme Court decided that the Constitution's 14th Amendment guarantees all people (particularly transgender people and same-sex couples) the Fundamental Right to marry. The Judgement means that states cannot issue laws, rules or take any actions to prevent same-sex marriage.¹⁷

Unlike India, US has not specifically passed any legislation that protects the rights of the transgender persons but however the Civil Rights Act of 1964, Title IX says "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to any discrimination under any education programme or activity receiving Federal financial assistance".¹⁸

Malaysia:

Often everyone has a view that there might be protection of Transgender Rights in Malaysia but this view is completely wrong because majority of the population in Malaysia are Muslims and they follow the Shariat Act that almost makes it an offence to be a transgender or even cross dress as the other gender. There came about a case of **The Negeri Sembilan Case** where the transgender persons challenged the constitutionality of Section 66 of the Shariat Act as they were subject to a lot of discrimination and harassment because they were cross-dressing the court held that this particular provision was unconstitutional in nature as it violated five grounds or rights of the constitution like the personal liberty of the person, the entitlement to equal protection under the law, discrimination on the basis of gender, freedom of movement, and freedom of expression and gave the judgement in favour of Transgender persons and this case had a persuasive authority for future cases that call in for the constitutionality of this particular section¹⁹. But the Federal Court was of the view that the Court of Appeals did not follow the particular procedure and it has no authority the court to enact laws. The Federal Court did not contradict the decision completely but just focussed on the procedure followed by the Court of Appeal.

¹⁶Ibid.

¹⁷Ibid.

¹⁸Ibid.

¹⁹ Malaysia-APTN_Publication_OnlineViewing.pdf

On November 25th 2013 there was a bill that was passed in Malaysia by the National Unity Constructive Council to protect the rights of all citizens against discrimination. It was known as the National Harmony and Reconciliation Bill, 2014 which under Clause 7 prohibits gender discrimination, including discrimination on the basis of pregnancy, sexual orientation and identity, the denial of access to opportunities, and the systemic inequality of access to opportunities by gender as a result of the sexual division of labour²⁰.

There are many other countries which have recognized the rights of Transgender persons and have tried to reduce the stigma that exists around the community.

Transphobia:

Transphobia is a term used to express extreme aversion of or bias against the transgender community. It even includes dislike towards intersex and transsexual people. Transphobia regularly originates from the conviction that gender is binary and that individuals are born just male or female and ought to accordingly carry on with their lives as one of those two genders. Just as this, there is the desire that people should like certain things, or dress a specific way, or act in an unexpected way. Any individual who doesn't carry on or present in the 'right' way can be liable to verbal abusing or tormenting. There are loads of various genders and there is no exact way for any gender to act or dress. Transphobia involves practices like name-calling, discrimination, violence and mis-gendering of people like calling a trans-man "she" or "it" even though it is known that the trans-person is a man. It could also take a while for the person's family and friends to get adapted to using different pronouns but if the pronoun is deliberately used, then it is transphobia. Not allowing trans women to use women's changing rooms, trans men to use men's washrooms or denying healthcare, housing or jobs only by considering that they are transgender also shows that the person is transphobic.²¹

Some organizations that work in support of LGBT - lesbian, gay, bisexual, transgender like LGBT youth Scotland etc. are trying to make a difference regarding the upliftment of the transgender community.

No individual has the right to hurt or discriminate another individual emotionally or physically. Various steps that the society can take towards abolishing transphobia are:-

²⁰Ibid

²¹What's Transphobia(<https://www.plannedparenthood.org/learn/gender-identity/transgender/whats-transphobia>)

Avoiding the use slurs against transgender people or asking personal questions about their sex life or surgeries. Complimenting such people like “You look just like a real girl!” or “I never would have guessed you were transgender” would also display transphobic behavior.²²

Final Analysis and Conclusion:

Transgender does not only become a legal issue but a social issue as well and it becomes very necessary to reduce the stigma that exists around the community. It is very important to recognize them as individuals and equal citizens of the country with similar rights. The community has faced a lot of discrimination over the years not only in India but all over the world and they do deserve their own identity as they are abandoned by their own family members and often seen begging in traffic signals in order to earn their living. The society’s view towards them must also change as many individuals often fear them or look down upon them.

Every country must consider this and uplift their social status through education and employment so that this community does not face the harassment and discrimination it usually faces. Separate identity must be given to this group as they would not want to be something that they are not and the discrimination there are facing must stop by all means. During the present times there has been a lot of influence on the masses through Social Media and this serves as a tool for reducing the stigma that exists around the community. Therefore, education, employment, social media and improving the social conditions of the groups serves as a great medium to help uplift the status of the transgender persons.

The central government has taken a number of steps already and will continue to improve the societal status of this community which includes:

- The Umbrella Scheme in which there is provision for scholarship to trans-persons for education and vocational training.
- The Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA) scheme that provides for employment.

The state governments have taken steps like:

- Kerala passed a bill in which it seeks to provide reservations for transgender persons in higher education and metro and so on.
- Tamil Nadu started the Transgender Welfare Policy.

²²What is Transphobia(<https://young.scot/get-informed/national/what-is-transphobia>)

- Maharashtra arranged for a board that assesses the discrimination faced by Trans-genders and gives out recommendations for the same.
- The Odisha Government has introduced a SWEEKAR scheme in which it promises monetary support and reservation for jobs.

The government has planned out these measure but these will only be effective if it is implemented in an effective manner.



• LEGAL FOXES •

"OUR MISSION YOUR SUCCESS"