



# INTERNATIONAL JOURNAL OF CREATIVE RESEARCH THOUGHTS (IJCRT)

An International Open Access, Peer-reviewed, Refereed Journal

## Transgender In India:- Legally Recognised But Socially Marginalized

*"If things go wrong under the new constitution, the reason will not be that we had a bad constitution. What we will have to say is that Man was Vile"*

Dr. Babasaheb Ambedkar, Constituent Assembly, 1948<sup>1</sup>

### Introduction:

Society is made of men and women . Men and women are genders ,we see both the genders in light but transgender is also an important part of Indian society. Transgender persons have existed in every country, culture, race, and class since the story of human life has been recorded. Transgender is third gender. They are creation of God just like men and women. They are called as 'special children of God'. Transgender persons are individual of any age, religion, faith and sex whose appearance ,personal characteristics or behaviour differ from normal or stereotypes about how men and women are supposed to be in society. Third gender persons are such persons in our society whose gender identity, gender expression or behaviour does not match to their biological sex or to which they were assign at birth. The term 'transgender' is an umbrella term that includes transsexuals, transvestites, intersexual people and anybody else who doesn't confirm to the traditional model of sex or gender. In India, transgender is known by different names like Hijra ,kinnar, jogatas, jogappas and Shiv Shakti. Apart from these, there maybe those who do not belong to any of the groups but are transgender persons individually. According to **World health organisation**, "The transgender is an umbrella term for people whose gender identity and expression does not confirm to the norms and expectations traditionally associated with the sex assign to them at birth. It includes people who are transsexual, transgender or otherwise considered gender non - confirming"<sup>2</sup>. **Oxford dictionary** defines transgender as "Transgender is a term denoting or relating to a person whose sense of personal identity and gender does not correspond with their birth sex"<sup>3</sup>. We live in 21<sup>st</sup> century where human rights are assured and preserved for human beings. Transgender are human beings and integral part of society. According to the Indian census of 2011,4,87,803 have been classified as transgender out of which 54,854 is below 6 years. The highest proportion of the third gender population identified in Uttar Pradesh it was about 28%. Then 9% was identified in Andhra Pradesh, 8% in Maharashtra and 8% in Bihar, 4% in Tamil Nadu, Karnataka and Odisha. Rajasthan will over 3% and Punjab accounted for over 2% of the local transgender population<sup>4</sup>. They are considerably in large number in our society.

### Transgenders in India - Constitutional Safeguards

The Preamble to the Constitution of India proclaims to secure to every one Liberty of thought, expression, faith, belief, worship, equality of status and opportunity. It mandates justice social, economic and political. Part III of the Constitution guarantees fundamental rights to every citizen. These include **Article 14** securing equity before the law and equal protection of law. Article 15 and 16 which provided prohibition of discrimination by the state on ground of religion caste, race, sex, decent, place of birth, residence. Now this scope of the term sex in **Article 15, 16** have expanded by judiciary. It was referred only to binary gender of male and female. But now it includes

<sup>1</sup> DHANANJAY KEER ,DR AMBEDKAR :LIFE AND MISSION 410(Mumbai ,popular prakashan.1990)1954

<sup>2</sup> <https://www.who.int>

<sup>3</sup> <https://oxfordlearnersdictionary.com>

<sup>4</sup>Census of india 2011,Avilable at .<https://www.census2011.co.in/transgender.php>

transgender as a 'third gender' also. Under **Article 19 (1)(a)** certain basic freedoms which constitute as human rights are granted as natural rights to all the citizens of India including right to freedom of speech and expression of his self identified gender and the right to choose one's personal appearance. **Article 19(1)(a)** is significant for transgender community as it provides certain basic values such as privacy, self identity, autonomy and personal integrity. **Article 21** of the constitution is the greatest and most inclusive Constitutional Article. It state that, "No person shall be deprived of life or personal liberty except according to procedure established by law. popularly known as 'right to life'. Right to life is notable fundamental right. Article 21 ensures right to privacy and personal dignity to all the citizens means this article gives an opportunity to every person to lead his life as dignified life. It includes within itself determination of gender which is an integral part of personal autonomy. **Article 23** prohibits trafficking in human beings as the beggars and other similar forms of force labour and an contravention of the provision shall be an offence punishable in accordance with law.

Constitutional protection to transgender community could be manifested in the fundamental rights. Although the term 'transgender' is not mentioned in the fundamental rights, fundamental rights have clearly express the notion "**Inclusiveness**" through "**Sex**" and "any person". The **golden thread** that runs through the equality scheme of the Indian constitution in **Article 14, 15, 16, 19, 21** is enjoyment of life by all citizens and an equal opportunity to grow as human beings irrespective of their race, caste, religion, community, social status and gender. All these Articles by prohibiting discrimination on the ground of gender identity established the right to equality and equal protection for transgender persons also.

## JUDICIARY ON TRANSGENDER RIGHTS

Human rights are basic rights of human beings regardless of gender, religious identity or nationality. Transgender people are human beings and so their rights are to be protected. An Independent Country - In India, transgender people have been demanding for a LIFE- Life of decency, dignity, respect, and certainty, for over 7 decades now. A turning point happened in the history of transgender rights in India was on **2<sup>nd</sup> July 2009**. In **2001**, Naz foundation (India) Trust, a non-governmental organisation moves in the Delhi High court seeking legalization of homosexuality. In a landmark case **Naz foundation v Government of NCT Delhi** on 2nd July 2009, endeavour is century of discriminatory treatment against transgender people. A landmark Indian case decided by a two judges bench of Delhi High court **Chief Justice Ajit Prakash Shah, Justice S Muralidhar** which held that treating consensual homosexual sex between two adults as a crime is a violation of fundamental rights protected by India's constitution. In this case as the court noted:

"In our view, Indian constitutional law does not permit the statutory criminal law to be held captive by the popular misconceptions of who the LGBTs are. It cannot be forgotten that discrimination is antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual."

The court stated that section 377 of the Indian penal code was violative of Article 14 that is right to equality. Article 15 i.e. prohibition of discrimination and Article 21 protection of life and personal liberty. In this case, the court observed that there is a growing jurisprudence relating to the human rights of person with sexual deviancy. The court categorised human rights legal doctrine under three heads. "Non discrimination, protection of private rights and ensuring of special general human rights. Protection to all, regardless of sexual orientation or gender identity." Accepting the arguments of petitioners in this case, the court held that, "so far as penalizes the consensual sexual act of adults in private is violative of article 21, 14 and 15 of the constitution. The provisions of section 377 IPC will continue to govern non consensual penile non vaginal sex involving minors.<sup>5</sup>

On **11th December 2013**, in **Suresh Kumar Kaushal and others vs Naz Foundation and others**<sup>6</sup>, the decision in Naz Foundation V/s The Government of National Capital Territory Of Delhi has been put in to severe legal scrutiny. Two judges bench of Supreme Court consisting of **G.S. Singhvi** and **S.J. Mukhopadhyay** overturned the Delhi High court case and reinstated section 377 of the Indian Penal Code. Mr Suresh Kaushal, an Astrologer and other appellant in this case founded their argument on the ground that the Honourable High court committed a serious error since the

<sup>5</sup> Naz foundation V Government of NCT of Delhi

<sup>6</sup>Suresh kumar koushal and others v Naz foundation ,civil appeal No -10972 of 2013 )

Writ Petition did not contain any fundamental facts to decide on constitutionality of a statutory provision. It was further submitted that section 377 of the Indian penal code was being used for prosecuting homosexual as a class and not for discriminating against transgender. The basis of their argument was that section 377 of the Indian penal code is a gender neutral provision which is extensively used for penalizing homosexual acts regardless of gender. The court also observed that the deletion of section 377 of Indian penal code was recommended by the law commission of India in its 172<sup>nd</sup> report.

On **25th March, 2000**, **Chairman B.P. Jeevan Reddy** on its **172nd** report on "**Review of Rape Laws**" submitted to the then Law Minister Ram Jethmalani, the commission had recommended, "In the light of the change effected by us in section 375 IPC, we are of the opinion that section 377 deserves to be deleted."<sup>7</sup> But the government did not act to either modify or delete section 377. It shows that the legislature is a representative of the people and the legislature has thought it improper to delete the section 377. So unless and until a clear violation of the constitution is proved, the court is not empowered to strike down a statutory provision. But observing that mere chance of abuse is insufficient to strike down a statutory provision. A Pitioner Mr Suresh Kaushal, an astrologer argued that homosexuality could even pose danger to National security as the soldiers fighting at the borders could be tempted to take male lovers and India might lose a battle because of that. And In a regressive order, supreme court set aside the 2009 order asserted that section 377 only a miniscule population in India and does not suffer from the constitutional infirmity a and the Delhi High Court judgement is legally unsustainable<sup>8</sup>. This was a huge blow for the transgenders who felt confidence to assert their identities after the 2009 judgement.

On **15th April 2014**, supreme court recognised transgender as a third gender and enjoy all fundamental rights. On 15th April 2014, in **National Legal Services Authority V Union of India**, Supreme Court of India declared that, "transgender people as a third gender". A bench of **Justice K.S. Radhakrishnan** and **Justice A.K. Sikri** passed a judgement holding that transgender persons have the fundamental rights to self identify, their gender as male, female or transgender even without medical reassessment. The court noted that transgender community has faced discrimination since the 18th century in India. Transgenders community was broadly defined by the court to include Hijras, Eunuchs, Kothis, Aravanis and numerous others. The court held that transgender people are facing discrimination in the area of life like health care, employment and education, which often leads to social exclusion. The court declared that in order to comply with rights which are guaranteed under the constitution of India like right to government take necessary steps. The judgement affirms the constitutional rights of transgender persons and promises legal identity recognition and reservation for transgender people and communities in jobs and education. This judgement draws from the philosophy of the Indian constitution by emphasising that the truly liberal and democratic society would only progress when each individual has realised their full potential and "Rule of Law demands protection of individual human rights."<sup>9</sup>

In the **year 2017** another judgement was pronounced by the supreme court in **justice K.S. Puttaswamy (Retd) & Another vs Union of India** and others in which the court held that rights to privacy is protected as a fundamental rights under **Article 14 19** and **21** of the constitution of India. A nine Judges bench unanimously held that, "the right to privacy is protected as an intrinsic part of the right to life and personal liberty under article 21 and as a part of the freedom guaranteed by part III of the constitution. The court has a rightly pointed out that the right to privacy specially includes the right to have intimate relations of one's choice and the right to sexual orientation and gender identity.

"..... Their rights are not "so called" but are real rights founded on sound constitutional doctrine. They inhere in the right to life. They dwell in privacy and dignity. They constitute the essence of liberty and freedom. Sexual orientation is an essential component of Identity. Equal protection demand protection of the Identity of every individual without discrimination."

The judgement mentioned section 377 as a discordant note which directly bears upon the evolution of the constitution jurisprudence. On the right to privacy, "the rationale behind the Suresh

<sup>7</sup> [www.lawcommissionofindia.nic.in/rapelaws.htm](http://www.lawcommissionofindia.nic.in/rapelaws.htm)

<sup>8</sup> Suresh kumar koushal and others v NAZ foundation and others civil appeal no -10972 of 2013

<sup>9</sup> NALSA V Union of India &Ors ,(2014)5SCC 438



Kaushal judgement is incorrect and judges clearly expressed there is disagreement with it. Right to privacy cannot be denied even if there is a miniscule fraction of the population which is affected<sup>10</sup>.

While recognising the right of transgenders of self determination of their sex the court explain the contours of human dignity in the following words.

"The basic principle of dignity and freedom of the individual is common to all nations, particularly those having democratic set up. Democracy requires us to respect and develop the free spirit of human being which is responsible for all progress in human history..... If democracy is based on recognition of the individuality and dignity of man, as a fortion we have to recognise the right of a human being to choose his sex/gender identity which is integral to his/her personality and is one of the most basic aspects of self-determination, dignity and freedom. In fact, there is a growing recognition that the true measure of development of nation is not economic growth, it is human dignity."<sup>11</sup>

Subsequently on **6 September 2018**, in **Navtej Singh Johar and others versus union of India**,<sup>12</sup> the supreme court read down the 158 years old law on homosexuality. The judgement was given by five judges bench comprising the then **chief Justice of India Deepak Mishra, Justice R.F. Nariman, D.Y. Chandrachud A.M. Khanvilkar and Justice Indu Malhotra**. Court ruled unanimously that section 377 of Indian Penal Code was unconstitutional in so far as it criminalises consensual sexual conduct between two adults of the same sex. This section 377 was read down by the constitution bench and will no longer apply to consensual same sex acts between homosexuals, heterosexuals and lesbians but we continue to apply to bestiality and sexual acts without consent by one of them. In this judgement, Justice Indu Malhotra said that-

"History owes an apology to the members of this community and their families for the delay in providing redressal for the ignominy and ostracism that they suffered through the centuries. The member of this community were compelled to live a life full of fear of reprisal and persecution."<sup>13</sup>

### **Legislative Attempt to Protect Transgenders' Rights**

The problems being faced by the transgender community have been brought to the notice of the government in this regard the meeting was organised by **The Ministry of Social Justice And Empowerment** on **23rd August 2013** to discuss the issue relating to the transgender community such as social Sigma, discrimination, lack of education, public health care, employment, opportunities, issues of various government documents. The committee consisting of experts from various fields had studied the problems faced by the transgender community and had recommended several ways to ameliorate the issues affecting transgender community. The **report** of the committee is **submitted** to The Ministry of Social Justice and Empowerment on **27 January 2014**. An expert committee has recommended that "transgender be declared the third gender with the individual having the right to choose the gender and has asked the government to prepare a law to prevent discrimination and atrocities against these people. The committee set up by the ministry of social justice and empowerment chaired by the Additional Secretary of the Ministry, has said, action must be taken against parents who neglect or abuse their gender non-conforming children and doctors practise unethical conversion therapy. Criminal and disciplinary action must be taken against police officer for violation of human rights of transgender persons pointing out that the constitution is "sex blind" - equality before the law irrespective of sex, the report says a harmonious reading of the constitutional provisions as well as provisions of Citizenship Act 1955 and General Clauses Act 1897 any of these laws are not in conflict with the concept of "person" and transgender person fall within the definition of "person".<sup>14</sup> Then in **April 2014** the supreme court of India path breaking judgement **NALSA vs. Union of India**.

In **December 2014**, private member bill i.e. 'the Rights of Transgender People' was introduced in **Rajya Sabha** by **Dravid Munnetra kazhagam M.P. Tiruchi Siva**, Member of Parliament from Tamil Nadu. This Bill was passed by the Rajya Sabha in April 2015 for the first time in 45 years. The Upper House had passed a private members bill. The provisions of the bill was providing

<sup>10</sup> Justice Puttaswamy and Ars V Union of India (2017 )10SCC1

<sup>11</sup> Justice K.S.Puttaswamy and Anr vUnion of India 2017( 10) SSC 1

<sup>12</sup> Navtej Singh Johar &Ors V Union of India 2018

<sup>13</sup> Navtej Singh Johar& Ors V Union of India thr. Secretary Ministry of Law and Justice ,wp (crl)no 76 of 2016suprem court of india

<sup>14</sup> Ministry of Social Justice and Empowerment ,Report of the Expert committee on the Issues relating to transgender persons 27/01/2014 ,<[http://socialjustice.nic.in/transgender\\_persons.php](http://socialjustice.nic.in/transgender_persons.php)>

opportunities and protection for education, job, healthcare, services and access to services, skill development and employment, protection from abuse and torture in education sectors. However, the bill lapsed. on **December 26 2015**, **The Ministry of Social Justice and Empowerment** brought out a draft of the transgender persons protection of rights **bill 2016**<sup>15</sup>. It was referred to the standing committee which recommended intersex person's right, granting reservations for socially and economically backward persons and recognition of civil rights. It was then criticized by transgender groups for many reasons including for getting the definition of transgender wrong.

On **August 24, 2017**, Supreme Court's ruling has come that the **right to privacy** is fundamental right. This inspired hope among the members of Trans community and among their supporters. Once again, a new and remoulded bill i.e. The Transgender Persons (Protection of Rights) Bill 2017 was drafted and send to sending committees on Social Justice and Empowerment for consultation. In **January 2018**, the Supreme Court agreed to hear petition to revisit the 2013 Naz foundation judgement and on September 2018, the court ruled unanimously in **Navtej Singh Johar vs Union of India**. After this judicial development the Lok Sabha table and passed a new version of Bill on **17 December 2018**. In the light of the Transgender Persons (Protection of Rights) Bill 2018 preceded by a 2016 version where both met protests and criticisms by transgender, persons lawyers and activist in India then following the reconstitution of the Lok Sabha after the 2019 general elections, the bill was **reintroduced** on **19th July 2019** by minister of social justice and empowerment **Thawar Chand Gehlot**. The bill was passed by the **Rajya Sabha** on **26th November 2019** and already passed by the **17th Lok Sabha** on **5th August 2019** as **Transgender Persons (Protection of Rights) Act, 2019** following which the minister of law and justice published it in the Gazette of India as **Act No. 40 of 2019**.<sup>16</sup>

The main highlights of the Act are:

1. Inclusive definition of transgender person is given in Act. It includes trans men and trans women, persons with intersex variations, gender-queers and persons with socio cultural identities such as kinner and Hijra.
2. Non discrimination against a transgender person in educational institution, employment, and healthcare services.
3. Provision for formulation of welfare schemes and programm for education social security and health of transgender persons.
4. Provision of National council for transgender persons to advise, monitor, and evaluate measures for the protection of their rights.
5. Provision of right of residence with parents and immediate family members.
6. Recognition of Identity of transgender persons and to confirm upon them right to self perceived gender identity.
7. Offences such as, compelling a transgender person to beg, denial of access to a public place, physical and sexual abuse etc would attract up to 2 years of imprisonment and penalty.

The Act will benefit a large number of transgender persons to mitigate the stigma, discrimination and abuse against this marginalised section and bring them into the mainstream of society. It will lead to greater inclusiveness and will make transgenders and proactive members of the society.

### **Transgenders in India - Socially Reprobated**

As rightly said by John F Kennedy "if we cannot now end our differences, at least we can help make the word safe for diversity". Identification on the basis of sex within male and female it is a crucial component of civil identity as required by the Indian state. In our society we recognise only two sexes and refuse to recognise the third gender belongs to the marginalised group of the society which faces social, cultural and economic difficulties. The constitution affirms equality in all spheres but the main question is whether it is being applied. The supreme court of India passed a unique judgement in April 2014.

<sup>15</sup> Through Secretary Ministry of Law and Justice (W.P.Crl No 76 of 2016 D.No 14961/2016)

<sup>16</sup> The Transgender Persons (protection of rights )Act 2019

The various legal measures adopted in India for the protection of the trans people with a particular thrust on the (Transgender Persons Protection of Rights) Act, 2019. But transgender community still faces discrimination even after legislature and judicial safeguards. The transgender people face problems like -

1. Discrimination in their own family
2. Discrimination at workplace
3. No proper health care
4. No legal identification documents
5. Not getting proper educational facilities
6. Not getting proper sanitation facilities
7. Physical and verbal abuse
8. Forced prostitution
9. Threat to life
10. Poverty
11. Harassment and stigma

According to a study by National Institute of Epidemiology around 60,000 transgender persons across 17 states including Tamil Nadu found that large population of persons received no support from their biological parents.<sup>17</sup> More than half of 58 percent transgender dropout before completing 10<sup>th</sup> grade there are several reasons for dropout. Major among them are, transgender face negative experiences like mental harassment, physical abuse as well as sexual abuse. Economic reasons, mainly poor financial condition of families. Lack of interest and awareness about higher studies.<sup>18</sup>

According to 2011 census of India the literacy amongst transgender persons was 46 percent compared to 74 percent of general population.<sup>19</sup> According to survey conducted by NHRC 89 percent of transgender persons do not get employment opportunities despite having qualification and skill which is required for job, partially being the reason to be compelled to do sex work for livelihood.<sup>20</sup> Transgender community is struggling for their basic rights. The problem faced by transgender community does not limit back to above only, but they exploited and abuse in public places like railway stations, bus stand, schools, work places, malls, theatres. In Kochi 21 transgender people appointed for job in Metro services but in one week out of 21 transgender people eight have quit their job and the reason being nobody is ready and willing to give house and rooms on rent to them.<sup>21</sup> They face large amount of human rights violation. They are even side-line and treated as untouchable. Society deprived this people 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 and the right to claim a formal identity through a passport and ration card. In this way stigma attached toward the third gender ultimately leads to social exclusion and they are used to the fringes of society. The mainstream society has failed to understand their dilemma of sex and gender, culture, lifestyle, social structure and as a result they are living all by themselves facing life as it comes and remaining as an overlooked component of our society.

They face discrimination experience and different treatment receive undue attention in their each and every phase of life. We live in the same society, still transgender are the ones who have a struggling life and are ignored and harassed by the society. Law and order trying very hard to

<sup>17</sup> Police harass transgender most, says study, The Times of India, (accessed on May 2023)

<sup>18</sup> Transgender survey of department of social justice, Kerala 2014-15

<sup>19</sup> Rema Nagarajan, First count of third gender in census: 4.9 lakh, The Times of India (May, 2014) Accessed on February

<sup>20</sup> The National Human Rights Commission, Study on Human Rights of Transgender as Third Gender (2017)

<sup>21</sup> Ramesh Babu, In one week, eight transgender employees quit working for Kochi Metro, Hindustan Times (25 June 2017) (accessed on April 2023)

socially inclusion of third gender in society. But there is an urgent need to transform and include the community as a part and parcel of society. According to NHRC survey 99% transgender persons who participated in the survey accepted that they have social rejections more than one in the past. According to a study conducted by Kerala development society on behalf of National human Rights commission only 2% transgender persons living with their family.

### **Conclusion:**

The judgements of courts and law are all for affirmative action in education. primary health care .employment and equal opportunities. But at the same time, we must remember that court cannot bring changes unless the society is ready to accept trans people as part of mainstream community. The law alone cannot insure trans equality. The stigma of third sex is perceived as an alien in the Indian society. The stigma does not make him and outsider for the member of the society as such but isolates them from their family and society as whole. Therefore, they find no place in their own home and society also and there remains no option for them but to leave home and stay with others are their kind. This inability of acceptance left the third gender filled with anxiety, social discomfort. Due to low social economic status, they are deprived of job opportunities. They lack in social security schemes. With such poverty and distress, they are forced to leave in slums. Forced into occupation like begging and prostitution. Hence legal and law enforcement schemes need to be empowered and sensationalized on problems relating to the third gender group. It is necessary to take strong criminal and disciplinary action against individuals who perform violence against them. These barriers in social inclusion includes barriers in education are employment are further prospect of freedom to lead a happy contended life. **Rigveda** says, "**unnatural** is also **natural**". The saying says that whatever in this universe being called as unnatural is also natural. In the light of this, the society should treat transgenders as natural creation of God like us and not an unnatural or abnormal creation. Since we live in a democracy, democracy does not mean that it is autocracy of majority, but it is the rule of that majority who respects the rights of the minorities. So, it is mandatory that even a single person's right is not to be violated. There is a long road ahead in which the journey has been started, but transgender will definitely enjoy their basic rights when majority accepts them.

*"We must keep in mind that growth must not only be rapid. It must be inclusive and sustainable. The benefits of growth must reach the SCs, STs, minorities and other disadvantaged groups in our society."*

Dr. Man Mohan Singh