

## **STATUS OF TRANSGENDER: INDIAN PERSPECTIVE**

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### **Introduction:**

While greatest epics find mention of Trans genders, India is still in its infancy period. Though India has made considerable progress on Rights of Transgender people in recent years, most remain socially marginalized and deprived of basic Rights. Members of the third gender have played a prominent role in Indian Culture and were once treated with great respect. They find mention in the ancient Hindu scriptures and were written about in the greatest epics Ramayana and Mahabharata. Transgender is a broad term used to describe those whose gender identity or gender expression is in some sense different from or transgresses social norms for their assigned birth sex. Transgender may include those who identify as being Transsexual, Cross dress, Androgy, Bi-gender, No-gender or Multi-gender, Gender queer, and a growing number of people who do not identify as belonging to any gender category at all. Gender is a human social system of differentiation by sex for roles, behavior characteristics, appearance and identities (e.g., man or woman) which maps cultural meanings and norms about both sex and gender onto human bodies. Everyone has an internal sense of their gender and this sense is called “gender identity”. Most people’s gender identity is congruent with their assigned sex, but many people experience their gender identity to be discordant with their natal sex.

### **Meaning**

- (narrowly) Having a gender which is different from one’s natal sex being assigned male at birth but having a female gender or vice versa.
- (broadly) Not identifying with culturally conventional gender roles and categories of male or female; having changed genders identify from male to female or female to male, or identifying with elements of both, or having sense other gender identity.

Transgender people are colloquially known as Eunuchs, Hijras, Kinnar, Jogtas, Jogappas, Khusras, Aravani, Kothis, Shiv-Shakthis. In Tamil Nadu Hijras are known as Aravani means ‘person who

worship lord Aravani'. The story of lord Aravan is mentioned in the great epic Mahabharata. The difference between Hijra and Aravani people observed is that of cultural difference.

## **Biological Status**

### **i. Biological Reason**

Transsexuals or Transgender people who live or wish to live full time as members of the gender opposite to their birth sex. Biological females who wish to live and be recognized as men are called Female-to-Male (FTM) transsexuals or transsexual men. Biological males who wish to live and be recognized as women are called Male-to-Female (MTF). Transsexuals usually seek medical interventions such as hormones and surgery to make their bodies as congruent as possible with their preferred gender. The process of transition from one gender to the other is called SEX REASSINGMENT or GENDER REASSIGNMENT. Biologist tells us that sex is a complicated matter, much more complex than what we may have been taught in school. A person has XX chromosomes is generally considered female, while a person with XY chromosomes is generally considered male. However, there are also people who have XXY, XYY and other variations of chromosomes. These genetic differences may or may not be visibly apparent or known to the person. Some people are born with XY chromosomes but are unable to respond to testosterone and therefore develop bodies with a vagina and breast rather than a penis and testes. A variation in gender may just be part of the natural order and there are more varieties than we generally realize. People with biological difference in gender may be considered intersex; they may or may not identify as Transgender. There are medical theories about why people are transgender. Some speculate that fluctuations or imbalances in hormones or the use of certain medications during pregnancy may cause intersex or transgender conditions. Then there are people who feel that everyone has a right to choose whatever gender presentation feels best to that individual. People should have freedom t6o express themselves in whatever way is right for them. Sex and gender are complex issues. A huge variety of factors are at work in making each individual the person that they are and there is no one reason that causes people to be transgender. Trans people are part of the variety that makes up the human community. The doctors usually prescribe a SEXUAL REASSIGNMENT SURGERY (SRS) which currently resorts the hormone therapy and surgical reconstruction and may include electrolysis; speech therapy and counselling. Surgical construction

could include the removal of male sex organs and the construction of female ones. Due to alleged legal ambiguity of the procedure Indian transgender do not have access to save medical facilities for SRS.

## ii. Health Problems

This explored the impact of discrimination and stigma on health care access for rural and urban transgender individuals. Maximum respondents do suffer from various illnesses such as blood pressure, diabetic, headache, joint pain etc. Some of them have AIDS and STD (sexually transmitted disease). They generally suffer illnesses like knee pain (mainly caused due to strenuous walking and climbing during begging whether in trains or shops), cold, flu, typhoid, malaria, skin allergy, stomach pain, acidity, piles, herpes and Sexually Transmitted Infections (STI). Those who suffered herpes and STI infections also did not reveal their HIV status. There is need for social acceptance of transgender group. Many Hijras do not like to go to Government hospitals or any other health care sectors. For instances, there is no space available for them, say in hospital wards. The authorities do not admit them in women's ward because women do not feel comfortable or free in their presence and in men's ward they face sexual abuse. Some special issues are following:

- Hijras feel that health care provider's attitudes and behavior towards them belie a lack of personal respect and believe that their health care is compromised as a result;
- Transition health care is impeded by physicians and health insurance companies who do not recognize gender transition as medically necessary;
- Anti-Trans discrimination in both rural and urban communities leads Trans individuals to expect similar treatment from health care providers;
- They prioritized the need to increase the number of health care professionals who are well educated on Transgender people's health concerns, and the importance of advocacy and social support in facilitating health care access.

Medical education and other professional health care training must be improved to address health care needs of Transgender individuals. Health research is lacking in key areas of Transgender health, including the implementation of a medical curriculum that successfully incorporates Transgender health care and inadequate funding opportunities for Transgender health research.

Finally, Anti-Trans attitudes of health care providers can and should be addressed from within the health care profession through education, community advocacy for Transgender Rights, and the passage of Trans-inclusive Anti-discrimination laws.

## Historical Background

### i. Ancient period<sup>1</sup>

Transgender got a strong historical presence in our country in the Hindu mythology and other religious texts. The concept of Tritiya Prakrti on “napunsaka” has also been an integral part of Vedic and Puranic literatures. The word “napunsaka” has been used to denote absence of procreative capability. Lord Rama in the epic Ramayana, was leaving for the forest upon being banished from the kingdom for 14 years, turns around to his followers and asks all the ‘men and women’ to return to the city. Among his followers the Hijras alone did not feel bound by this direction and decided to stay with him. Impressed with their devotion, Rama sanctioned them power to confer blessings on the people on auspicious occasions like child birth and marriage and also at inaugural functions. It is believed set the stage for the custom of badhai in which Hijras sing, dance and confer blessings. Aravan the son of Arjuna and Nagakanya in Mahabharata offers to be sacrificed to Goddess Kali to ensure the victory of the Pandavs in the Kurukshetra war, the only condition that he made was to spend the last night of his life in matrimony. Since no women was willing to marry one who has doomed to be killed, Krishna assumes that form of a beautiful woman called Mohini and marries him. The Hijras of Tamil Nadu consider Aravan their progenitor and call themselves Aravanis. The Hijra community in India, which has a recorded history of more than 4,000 years, was considered to have special powers because of its third gender status. It was part of a well established ‘Eunuch Culture’ in many societies especially in West Asia and its members held sanctioned positions in Royal Courts.

### ii. Medieval period<sup>2</sup>

Hijras played a famous role in the Royal Courts of the Islamic World particularly in the Ottoman Empires and the Mughal rule in the Medieval India. They rose to well - know positions as political

<sup>1</sup> <http://www.trp.org.in/wp-content/uploads/2015/10/ARSS-Vol.4-No.1-Jan-June-2015-pp.17-19.pdf>

<sup>2</sup> <http://www.trp.org.in/wp-content/uploads/2015/10/ARSS-Vol.4-No.1-Jan-June-2015-pp.17-19.pdf>

advisors, administrator generals as well as guardians of the harems. Hijras were consider clever, trustworthy and friendly, loyal and had free access to all spaces and sections of population thereby playing a crucial role in the politics of empire building in the Mughal Era. The Hijras also occupied high positions in the Islamic religious institutions, especially in guarding the holy places of the Mecca and Madina the person of the trust, they were able to influence state decision and also received large amount of money to have been closest to kings and Queens. Thus Hijras frequently state the role of their status in that period. One such example is the Nizams of Hydrabad who employed and honored Hijras. The sixth Nizam Mahboob Ali Pasha employed Hijras as confidants and advisors, domestic supervisors and menial domestic. Even the Hydrabad state had an inspector for Hijras in the Police department to look after their welfare and assure that they are not harassed. Hijras had claims on the public revenues through grants of cash and land and in some places they possessed an official and codified right to beg in India.

### iii. Colonial Period

The situation of Hijras started deteriorating when British Colonial Rules came with their ideologies of sex/gender binned bodies and heteronormative sexuality perspective. The Hijra body was problematic because of its ambiguity and its difference with the abled procreative/heterosexual body. Gradually various laws against Hijras were introduced due to which the Hijra community were deprived of their privileges provided by the Kings and Mughals. Hijras were classified under the list of criminal caste/tribes during the Colonial Rule. The Criminal Tribes Act (Act 27) of 1871 stated registration surveillance and control of certain tribes and eunuch. This act was applicable in all states of India. This was the Act that was written on the bodies of the so-called Criminal Caste. Thus, the bodies and labor of Hijra were controlled. The lands given to the Hijra during the Kings and Mughal rule were also taken back by the Colonial Rulers. Like the Criminal Tribes Act, section 377 of the Indian Penal Code was also introduced during the Colonial Period since 1860. The section banned same sex sexual relationship and is often referred to as 'Anti Sodomy Law'. Since the British Colonial Rule the Hijra community remained underground and led an isolated life. They primarily resided in the outskirts of the villages and remained a closed group for a long time.

### Social Status

Transgender people are socially excluded from the society. People in Indian society treat them as ‘untouchables’. People make them feel inferior and unwanted in society. They are not allowed to participate in any social events where normal people are participating. It happens that normal people get scared of them though there is nothing that can make them scare.

**i. Social exclusion<sup>3</sup>**

Social exclusion framework is increasingly used in highlighting the issues faced by disadvantaged and disenfranchised groups. Adapting Social Exclusion framework to Hijra/Transgender women one can understand how Transgender communities have been excluded from effectively participating in social and cultural life, economy, and politics and decision making process. This framework to illustrate the multiple forms of oppression faced by transgender community:-

- Exclusion from family and society.
- Lack of protection from violence.
- Restricted access to education, health service and public spaces.
- Exclusion from economy.
- Exclusion from employment and livelihood opportunity.

Social stigma includes being looked down upon, labeling and negative attitude towards such as sex work or sex solicitors. The other fields where this community feels neglected are inheritance of property or adoption of a child. They are often pushed to the periphery as a social out caste and many may land up begging and dance. This is by all means Human Trafficking. They even engage themselves as sex workers for survival.

A great majority of the Hijra stated that they have experienced problems caused by the police whether policemen from respective police stations, railway police or traffic policemen. Many expressed heart rending experiences which were recorded under open ended questions. They collect money from the public forcefully. When not given money they have been seen resorting to profanity and unacceptable behavior- the primary reason why masses never not give them cash when asked for. Due to the stigmatization and consequent banishment from society, the

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<sup>3</sup>[http://www.undp.org/content/dam/india/docs/hijras\\_transgender\\_in\\_india\\_hiv\\_human\\_rights\\_and\\_social\\_exclusion.pdf](http://www.undp.org/content/dam/india/docs/hijras_transgender_in_india_hiv_human_rights_and_social_exclusion.pdf)

Transgenders have a tough life. They do not enjoy the Fundamental Rights that a general male or female does. Due to their neglected existence they have very few employment opportunities. They usually make a living out of performing in ceremonies like weddings, begging and sex work.

## ii. Statistics<sup>4</sup>

- The country has an estimated 4 million Hijras with communities recorded back more than 4,000 years.
- Maximum number of Eunuch found in Uttar Pradesh with around 5% of total percentage of state population.
- Number of them found in Andhra Pradesh, Maharashtra, Gujarat, Bihar, Rajasthan and Delhi are 5%, 11.0%, 6.0%, 6.5%, 4.5% and 2.0% of the total percentage of state population respectively.

## Indian Transgenders Whose Contribution To The Society Is A Big Achievement In Itself

- i. **Manabi Bandopadhyaya**, the world got its first Transgender college principal when she took charge of Krishnagar Women's college in West Bengal on June 9 2015.
- ii. **Padmini Prakesh**, on occasion of the 68<sup>th</sup> Independence Day, India freed itself from another kind of gender bias when she became the first Transgender television news anchor in the country.
- iii. **Kalki Subramaniam**, she is a Journalist, Writer, Actor and Activist. She holds to masters in Journalism and Mass Communication and International Relations. Now, she is the India's first Transgender Entrepreneur.
- iv. **Lakshmi Narayan Tripathi**, she is a Hijra Guru. She is also a Spokesperson for the kinnar community. She is the first Transgender person to represent Asia Pacific in UN. She has served on the boards of several NGOs which conduct LGBT activist work. In 2002, she became President of the NGO DAI welfare societies, the first registered and working organization for Eunuch in South Asia.

## Polotical Status

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<sup>4</sup> <http://www.lawctopus.com/academike/case-studies-statistics-survey-hijras/>

### **i. Political Exclusion**

Sexual minorities do not assume significant role in any state's position or political parties although there are many sexual minorities with adequate political and governance knowledge and interest. Although Transgenders contested local body election with social responsibility, they were not adequately recognized by public. Despite discrimination and marginalization, a Transgender person is emerging as successful personalities, thereby proving their potential. There are instances of Transgender persons occupying positions of Political Power.

### **ii. Improvement in status(Political)**

- In 2009, India's Election Commission took a first step by allowing Transgenders to choose their gender as other on ballot forms but India is not the first country to recognize them as third gender.
- Tamil Nadu state in India was the first state to introduce a *Transgender Welfare Policy*.
- They were legally granted voting rights as a third sex in 1994.
- On 24<sup>th</sup> April, 2015, The Rajya Sabha passed the *Rights of Transgender Persons Bill, 2014* guaranteeing Rights and Entitlement, etc.
- The Bill was introduced by the *Tiruchi Siva* who belongs to the *Dravida Munnetra Kazhagam Party* and marked the first time the House had passed a private member's Bill in 45 years.
- The all India Kalyan Sabha fought for over a decade to get Voting Rights which they finally got in 1994.
- Shabnam Mausi is the first Transgender Indian or Hijra to be elected to public office. She was an elected member of the Madhya Pradesh legislative assembly from 1998 to 2003.
- In 2003, Hijras in Madhya Pradesh announced that they are establishing their own political party "*Jeeti jeetayi Politics (JJP)*".
- Kamla Jaan the first woman Transgender Mayor at Katni for two and years since January 2000.

### **Constituional Rights Of Transgender**

*The Fundamental Rights* is defined as the basic human rights of all citizens. These Rights defined in Part III of the Constitution, apply irrespective of race, place of birth, religion, caste, creed or gender. They are enforceable by courts, subject to specific restriction.

i. **Article 14 of the Constitution of India states that**”Equality before law- The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India”. So, article 14 does not restrict the word ‘person’ and its application only to Male or Female. Transgender persons who are neither Male/Female falls with the expression ‘person’ and hence, entitled to legal protection of laws in all spheres of the state activity including employment, health care, education as well as equal civil and citizenship rights as enjoyed by any other citizen of this country.

ii. Transgender have been systematically denied the Rights under **Article 15** which states that *“Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth”*

**Article 15(2)**states that **“No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—**

**(a) Access to shops, public restaurants, hotels and places of public entertainment;**

**(b) The use of wells, tanks, bathing Ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.**

**Article 15(4)** states that **“Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes”**. According to this article Transgender are hence, legally entitled and eligible to get the benefits of socially and educationally backward classes (SEBC).

iii. They have also been denied Rights under **Article 16** which states that *“Equality of opportunity in matters of public employment”*

**Article 16(2)**states that**”No citizen shall, on grounds only of religion, race, caste, sex, descent,**

**Place of birth, residence or any of them; be ineligible for, or discriminated against in respect of any employment or office under the State”.**

**iv. Article 19 of the Constitution of India states that “Protection of certain rights regarding freedom of speech, etc.”**

**Article 19(1) All citizens shall have the right—;**

**Article(19)(a) to freedom of speech and expression;** gender identity, therefore, 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 Trans Gender’s personality could be expressed by this behavior and presentation. State cannot prohibit, restrict or interfere with a Trans Gender’s expression of such personality, which reflect that authorities either due to ignorance or otherwise fail to digest the innate character and identify of such persons. Therefore, the values of privacy, self-identity, autonomy and personal integrity are Fundamental Rights guaranteed to members of Transgender community. According to this Article the Constitution of India and State is bound to protect and recognize those Rights.

**v. Article 21 states that”Protection of life and personal liberty.—No person shall be deprived of his life or personal liberty except according to procedure established by law”.**

Determination of gender to which a person belongs is to be decided by the person concerned. In other words, gender identity is integral to the dignity of an individual and is at the core of ‘personal autonomy’ and ‘self-determination’.

***Hijras/eunuch***, therefore have to considered as Third Gender over and above binary genders under our constitution and the laws.

### **Legislative View**

Section 377 of Indian penal code states that, “Unnatural offences.—whoever voluntarily has carnal inter-course against the order of nature with any man, woman or animal, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section”.

Section 377 of IPC, 1860 code was drafted by LORD Macaulay. It comes under the section titled “offences affecting the human body” and provisions provide the sanction for the prosecution of certain kinds of sexual acts deemed to be unnatural. It is important to note that regardless of consent these sexual acts are liable for prosecution provided they are seen as carnal intercourse against the order of the natural, with man, woman or animal and thus satisfy the requirement of penetration. And to be a Hijra is to draw the presumption that the Hijra is engaging in carnal intercourse against the order of nature.

From the numerous instances of abuse and violence against Trans Genders it is evident that section 377 has been grossly misused. It is equally obvious that a judicial move to address this concern was exigent in the face of a law enforcement framework so hostile that exploitation at the hands of the alleged protectors became a quotidian affair for sexual minorities in India.

### **Role Of Judiciary**

**National Legal Services Authority vs. Union Of India(UOI) and Ors<sup>5</sup>**, Supreme Court held that,

- a) Hijras, Eunuchs apart from binary gender be treated as “Third Gender” for the purpose of safeguarding their Rights under Part III of our Constitution and laws made by the Parliament and the State Legislature.
- b) Transgender persons’ right to decide their self-identified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender.
- c) We direct the Centre and the State Governments to take steps to treat them as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.
- d) Centre and State Governments are directed to operate separate HIV Sero-surveillanceCenters since Hijras/ Trans genders face several sexual health issues.

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<sup>5</sup>(2014) 5 SSC 438

- e) Centre and the State Governments should also take measures to regain their respect and place in the society which once they enjoyed in our cultural and social life.
- i. Shivani Bhatt vs. State of (NCT of Delhi) and others**<sup>6</sup>, it was held that, everyone has Fundamental Rights to be recognized in their chosen gender. There is no gaining fact that Transgender enjoys basic Human Rights including protection from violence and discrimination. Transgender have Right to Dignity and self-determination.
- ii. Ashish Kumar Misra (Advocate) [P. I. L. ] vs. Bharat Sarkar Through Sachiv Khadhya and Prasanskarn Mantralya (Allahabad High Court)**<sup>7</sup> it was held that, Section 13 of National Food Security Act,2013, “A ration card is an important document issued by public authorities to enable the holder and her family to gain access to subsidized food grain. That is why the objective and transparent administration of schemes for the issuance of ration cards are a critical element in enhancing access to food security. Food security means no less to a transgender than to other segments of society. Impoverishment and marginalization have been endemic to the transgender population. Preventing discrimination in all walks of life is one facet of the right of Trans genders to live in dignity, with the confidence that they can lead their lives on their own terms in realization of gender identity. But the law needs to travel beyond nondiscrimination, by recognizing an affirmative obligation of the State to provide access to social security. Food security lies at the foundation of it. Trans genders must have both”.
- iii. T.Thanusu vs. Secretary to Government of Tamil Nadu, Department of Homes, Chennai and others (Madras HC)**<sup>8</sup> it was held that, only reason stated by Respondents to brand Petitioner as Transgender was that there was absence of uterus and ovaries in her body. If absence of uterus and ovaries to be taken as decisive factor for sexual identity as transgender then it would be disastrous because it was only congenital defect such as visual impairment, hearing impairment, clubbed legs etc. Mere in-advertent entry in community certificate as sylvan could not decide sexual identity of Petitioner. Petitioner has freedom to identify herself as female and since she was recognized as female all along, denial of employment by misbranding her as Transgender not sustainable in law and therefore same

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<sup>6</sup>2015 (223) DLT 391

<sup>7</sup> 2015 (4) ADJ 146

<sup>8</sup>2014 (6) MLJ 93

needs interference at hands of Court. Hence, Respondents directed to issue appointment order to Petitioner as Grade II Woman Police Constable and depute her for training.

## **Role of other bodies**

### **i. Tamil Nadu Welfare Board**

In a pioneering effort to address the issues faced by Transgender people, the government of Tamil Nadu established a Transgender Welfare Board in April 2008. It is the first of its kind by any State Government in India. The Board would potentially address a variety of concerns of Transgender people that includes education, income generation and other social security measures. Furthermore, only in the state of Tamil Nadu, in collaboration with the Tamil Nadu Aavanigal Welfare Board free sex reassignment surgery is performed for Transgenders in selected government hospitals.

### **ii. Public union Civil Liberties report(PUCL)<sup>9</sup>**

In September 2003, the people's union for civil liberties, Karnataka published a truly remarkable report on Human Rights Violation against the Transgender Community in India. The report documents efforts by the Kothis and Hijras to organize and protest the violence and discrimination that they face. It also documents much useful recommendation on how to improve the plight of Transgender people in India.

## **Conclusion**

All Trans Genders are human beings and logically all human Rights apply to them. As all human beings have the Right to live with dignity all times, regardless of their legal, social and political status so do Transgenders.

## **Recommendation**

There should have various NGOs who should work for the upliftment of Trans Genders and government should also take sufficient measures to improve their status in the country. Multiple problems are faced by Trans Genders which necessitate a variety of solution and actions. While some action requires immediate implementation such as introducing Trans Genders specific social welfare scheme.

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<sup>9</sup> <http://ai.eecs.umich.edu/people/conway/TS/PUCL/PUCL%20Report.html>



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