

# RIGHTS OF TRANSGENDER IN INDIA

Divya Kaswa\*  
Jitendra Singh Rathore\*\*

## INTRODUCTION

The word transgender is a recent addition to English. In conversational use as early as the 1960s, “transgender” entered the dictionary in the early 1990s. Trans- is a Latin prefix meaning “across or beyond.” Gender shares the same Latin root as genus. As a classifier for male and female, “gender” replaced “sex” in the 20th century. This was a trend started by feminist writers who wanted to highlight the biological attributes of males and females separate from their social characteristics<sup>1</sup>. Different types of individuals come under this list. The way they act and act differs from the 'normative' gender role of men and women. Leading a life as a transgender is not very easy because such people can be neither categorized as male nor female and this deviation is "unacceptable" to society's majority. Trying to eke out a stately living is even shoddier. According to oxford dictionary the term transgender means “denoting or relating to a person whose self-identity does not conform unambiguously to conventional notions of male or female gender<sup>2</sup>.”

"Recognition of transgenders as a third gender is not a social or medical issue but a human rights issue," Justice KS Radhakrishnan, who headed the two-judge Supreme Court bench<sup>3</sup>

In India, the hijra community has existed for more than four thousand years and is currently believed to number half a million<sup>4</sup>. The word "hijra" denominate an alter-native gender to the ale female binary; the term translates as eunuch or hermaphrodite. Another story was from the Ramayana. Rama, upon being banished from the kingdom for 14 years, when his subjects follow him to the forest, Rama turns around and asks all 'men and women' to return to the city. Amongst his followers, hijars alone do not feel bound by this direction and decide to stay with him<sup>5</sup> Rama rewarded the hijras for their loyalty by giving them the power to bless auspicious occasions such as marriage and childbirth through customary singing and dancing. lopsided male sex organs are central to the group's definition. The hijras include both ceremonially emasculated males and intersexed people whose genitals are "ambiguously male- like at birth." All hijras have female gender characteristics. There are no ambiguous females who identify as males in the group. In its place, all hijras dress and act as women despite the fact that they are not natural women.

<sup>1</sup><http://blog.dictionary.com/transgender/>

<sup>2</sup><http://www.oxforddictionaries.com/definition/english/transgender>

<sup>3</sup><http://www.bbc.com/news/world-asia-india-27031180>

<sup>4</sup>[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=982609](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=982609)

<sup>5</sup><http://www.thehindu.com/todays-paper/tp-features/tp-metroplus/the-queer-tale/article5376979.ece>

As we see transgender are now third gender by the virtue of the judgment<sup>6</sup> of Hon'ble Supreme Court, some of the Act or statues are needed to be amended. Few of them are 'Personal Laws; Marriage, Adoption, Partition and succession. Similar is the case if they are free to opt occupation of their choice there must be provisions under labour laws exclusively for transgender, which are right now only for male and female.

### **Hypothesis:**

The researcher believes that the rights given to transgender in India are not sufficient to secure their life and that too with dignity. Rights allotted to them are unable to maintain the sanctity of their human rights.

### **Research Methodology:**

The method of research adopted by researcher is purely doctrinal in nature & he will take the help of bare act, books, digests, journal, dictionary encyclopedia and websites etc.

### **Research Objective:**

Objective of researcher is to inquire into the prevailing laws in India related to rights of transgender. Second objective is to frame such suggestions as they may serve equal footing to transgender as male and female in terms of human rights.

## **RIGHTS (NOT) GIVEN TO TRANSGENDER**

JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity -: Preamble to the Constitution of India

The very basic fundamental rights from which transgender are deprived of are

1) Right To equality under article 14 of Constitution of India. This article states "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth"<sup>7</sup>.

2) Where Article 15 of Indian Constitution states"Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them

<sup>6</sup>ILR2014(2)Kerala306, 2014(2)KLT378, (2014)3MLJ595, 2014(5)SCALE1

<sup>7</sup><http://indiankanon.org/doc/367586/>

(2) 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 palaces of public entertainment; or

(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

(3) Nothing in this article shall prevent the State from making any special provision for women and children.<sup>8</sup>

3) Article 17 which deals with prohibition of untouchability states that “Abolition of Untouchability Untouchability is abolished and its practice in any form is forbidden The enforcement of any disability arising out of Untouchability shall be an offence punishable in accordance with law”<sup>9</sup>

4) In the same way Article 21 of Indian constitution grants Right to life, this includes right to life with dignity. This article states “Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law”<sup>10</sup>

5) Article 23 states” Prohibition of traffic in human beings and forced labour

(1) Traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law

(2) Nothing in this article shall prevent the State from imposing compulsory service for public purpose, and in imposing such service the State shall not make any discrimination on grounds only prohibits trafficking In human beings as beggars and other similar forms of forced labor and any contravention of these provisions shall be an offence punishable in accordance with law”<sup>11</sup>.

Fundamental right to equality is given by Constitution of India, and on the grounds of sex, caste, creed or religion no discrimination can be tolerated. It also guarantees to every citizen the political rights and other benefits. But the transgender continues to be detested. The Constitution affirms equal footing in all spheres but the real question is whether it is being applied.

This occurrence can also be observed at much higher level, mainly in the form of performance related to the United Nations-sponsored human rights treaties, as well as under the European Convention on Human

<sup>8</sup><http://www.indiankanoon.org/doc/609295/>

<sup>9</sup><http://indiankanoon.org/doc/1987997/>

<sup>10</sup><http://indiankanoon.org/doc/1199182/>

<sup>11</sup><http://indiankanoon.org/doc/1071750/>

Rights. The development of this sexual orientation and gender identity- related human rights legal principle can be listed as follows:

- a) Protection of Privacy rights b) Non-discrimination and
- c) The ensuring of other basic human rights protection to everyone including transgender, despite of sexual orientation of gender character.

In the radiance of the Constitutional guarantees given to us, there is no reason why Transgender Community should not get their indispensable rights, which include Dignity, Right to Personal Liberty,, Right to Education and Empowerment, Freedom of Expression, Discrimination, Right against Violence and exploitation.

In furtherance section 377 of Indian Penal Code 1860 always played sword on transgender. Section 377 of the colonial Indian Penal Code defined homosexual acts as “carnal intercourse against the order of nature” and made them illegal. Now political, social and religious groups are challenging the 2009 Delhi High Court statement that claims the colonial-era law is discriminatory and gay sex should be not treated as a crime. Today the Supreme Court stated that homosexuality should be seen in the context of changing society, many things that were considered immoral twenty years back, have become acceptable to society now. The Bench added that gay sex was not an offense prior to 1860 and stated that homosexuality should not be seen only in terms of sexual intercourse. Today and into tomorrow the bench is asking anti-gay rights activists, political, social and religious organizations that opposed the Delhi High Court verdict to explain how homosexual acts are against nature. The actions of the Supreme Court among the gay community in India were very welcoming while many anti-gay religious, political and social groups continue advocating to have colonial-era law reinstated.<sup>12</sup>

Some statutes in our personal law deals with laws related to marriage, adoption, guardianship, succession, partition such as Hindu marriage act 1955, Hindu succession act 2005, Hindu adoption and maintenance act 1956, Muslim marriage act 1955 etc only deals with either male or female. None of the act provides any rights to transgender.

## **NALSA VS UNION OF INDIA**

National Legal Services Authority (NALSA) v. Union of India is a landmark decision by the Supreme Court of India, declared transgenders to be the 'third gender', affirmed that the fundamental rights granted under the Constitution of India will be equally applicable on the transgenders and gave them the right to self-

<sup>12</sup><http://travellingclassroom.wordpress.com/2012/02/28/equality-in-india/>; Para two of article

identification of gender as male, female or third-gender.<sup>13</sup> Moreover, the court also held that the transgenders to be treated as socially and economically backward classes and will be granted reservation in admissions in educational institutions and jobs.

The National Legal Services Authority of India (NALSA) was the primary petitioner. It has been constituted with the primary objective to provide free legal aid services to the disadvantaged sections of the society.<sup>14</sup> The other petitioners in the matter were Poojya Mata Nasib Kaur Ji Women Welfare Society, a registered society and NGO, and Laxmi Narayan Tripathy, a renowned Hijra activist.<sup>15</sup>

## Bench

The case was heard before a two-judge bench of the Supreme Court, composed of Justice K.S. Panicker Radhakrishnan, and Justice Arjan Kumar Sikri.<sup>16</sup> Justice Radhakrishnan had functioned as a Standing Counsel for a number of educational and social organizations and held appointments in the High Courts of Kerala, Jammu and Kashmir and Gujarat before his elevation to the Supreme Court.<sup>17</sup> Justice Sikri began legal practice in Delhi, specializing in Constitutional cases, Labour – Service matters and Arbitration Matters. Prior to his elevation to the Supreme Court he held appointments in the Delhi High Court and Punjab and Haryana High Court.<sup>18</sup>

## Judgment

The Court has directed Centre and State Governments to grant legal recognition of gender identity whether it be male, female or third gender:

**Legal Recognition for Third Gender:** In recognizing the third gender category, the Court recognizes that fundamental rights are available to the third gender in the same manner as they are to males and females. Further, non-recognition of third gender in both criminal and civil statutes such as those relating to marriage, adoption, divorce, etc. is discriminatory to the third gender.

**Legal Recognition for Persons transitioning within male/female binary :** As for how the actual procedure of recognition will happen, the Court merely states that they prefer to follow the psyche of the person and use the "Psychological Test" as opposed to the "Biological Test". They also declare that insisting on Sex Reassignment Surgery (SRS) as a condition for changing one's gender is illegal.

<sup>13</sup>[India recognises transgender people as third gender](#). *The Guardian*. 15 April 2014. Retrieved 15 April 2014.

<sup>14</sup>McCoy, Terrence (15 April 2014). ["India now recognizes transgender citizens as 'third gender'"](#). *Washington Post*. Retrieved 15 April 2014.

<sup>15</sup>[Supreme Court recognizes transgenders as 'third gender'"](#). *Times of India*. 15 April 2014. Retrieved 15 April 2014.

<sup>16</sup><http://supremecourtfindia.nic.in/outtoday/wc40012.pdf>

<sup>17</sup><http://sci.nic.in/judges/sjud/ksradhakrishnan.htm>

<sup>18</sup><http://supremecourtfindia.nic.in/judges/rcji/13smsikri.htm>

**Public Health and Sanitation:** Centre and State Governments have been directed to take proper measures to provide medical care to Transgender people in the hospitals and also provide them separate public toilets and other facilities. Further, they have been directed to operate separate HIV/ Sero-surveillance measures for Transgenders.

**Socio-Economic Rights:** Centre and State Governments have been asked to provide the community various social welfare schemes and to treat the community as socially and economically backward classes. They have also been asked to extend reservation in educational institutions and for public appointments.

**Stigma and Public Awareness:** These are the broadest directions - Centre and State Governments are asked to take steps to create public awareness so that Transgender people will feel that they are also part and parcel of the social life and not be treated as untouchables; take measures to regain their respect and place in society; and seriously address the problems such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies and social stigma.

The Court notes that these declarations are to be read in light of the Ministry of Social Justice and Empowerment Expert Committee Report on Issues Relating to Transgenders<sup>19</sup>.

## TRANSGENDER RIGHTS IN TAMIL NADU

Transgender people are called as Thirunar, Thirunagai for Male to Female Transgender people and Thirunambi for Female to Male Transgender people. The term Aravaani in Tamil was widely popularized before 1990's which is a substitute term for Hijra in India and visible male to female transgenders i.e. thirunagai are often discriminated against in jobs forcing them to resort to begging and prostitution. Thirunagai's (MTF) meet in Koovagam, a village in the Ulundurpet taluk in Villupuram district, Tamil Nadu in the Tamil month of Chitrai (April/May) for an annual festival which takes place for fifteen days. They also meet in Coimbatore singanallur Koothandavar temple and Madurai reserve line Maariyamman Temple festival where they offer Mullapaari(sacred millets and grains) to mother goddess.<sup>20</sup>

Tamil Nadu has an estimated population of more than 30,000 transgender people.<sup>21</sup> It has made great strides in trying to integrate transgender people into society. This includes welfare schemes initiated by the Government and acceptance of transgender people into the mainstream media and film industry.

### **Welfare schemes**

<sup>19</sup>[Report of the Expert Committee on the Issues relating to Transgender Persons](#)". Ministry of Social Justice and Empowerment, Government of India. Retrieved 21 July 2014.

<sup>20</sup>Winter, Gopi Shankar (2014). *Maraikkappatta Pakkangal*: Srishti Madurai. ISBN 9781500380939. OCLC 703235508.

<sup>21</sup>[Chennai: Move on toilets for transgenders sparks off debate](#)". Express India. 23 June 2009.

The Tamil Nadu state in India was the first state to introduce a transgender (hijra/ aravani) welfare policy. According to the transgender welfare policy transgender people can access free Sex Reassignment Surgery (SRS) in the Government Hospital (only for MTF); free housing program; various citizenship documents; admission in government colleges with full scholarship for higher studies; alternative sources of livelihood through formation of self-help groups (for savings) and initiating income-generation programmes (IGP). Tamil Nadu was also the first state to form a Transgender Welfare Board with representatives from the transgender community.

In a pioneering effort to solve the problems faced by transgender people, the government of Tamil Nadu (a state in South India) established a transgender welfare board in April 2008. Social welfare minister will serve as the president of the board. This effort is touted to be the first in India and even in the world. The government has also started issuing separate food ration cards for transgender people.<sup>22</sup> Even though the transgender welfare board solely started focusing only on the development of Transwomen in recent days the rights of Transmen and gender variants are discussed.

In additional effort to improve the education of transgender people, Tamil Nadu government also issued an order on May 2008 to create a third gender for admissions to government colleges.<sup>23</sup>

The Government has also decided to conduct a census on the transgender population in order to issue identity cards.

Tiruchi Siva DMK moved the popular bill which was supported by all political parties in Rajya Sabha for Transgenders to ensure they get benefits akin reserved communities like SC/STs and is taking steps to see that they get enrolment in schools and jobs in government besides protection from sexual harassment.<sup>24</sup>

## Media

In a monumental push in breaking taboos, the Tamil cable channel STAR Vijay started a talk show hosted by a trans woman named Rose. The programme is called "Ippadikku Rose", translated into Yours Truly, Rose

Karpaga, a transgender person born in Erode, performed a lead role in the Tamil movie Paal; the first transgender in India to achieve such a milestone. Kalki Subramaniam, a transgender person born in Pollachi, Tamil Nadu performs a lead role in a new Tamil movie "Narthagi".

Transgender A. Revathi played a role as Transgender Chief in the 2008 Tamil film Thenavattu.

---

<sup>22</sup>[Welfare board](#)

<sup>23</sup>[Admission to colleges, The Hindu, 5 May 2008](#)

<sup>24</sup><http://www.deccanherald.com/content/465345/govt-bring-policy-transgenders.html>

## Helpline

A telephone helpline called "Manasu" ("Heart" in English) (0091-44-25990505) was set up by Tamil Nadu AIDS Initiative-Voluntary Health Services (TAI-VHS) for members of the transgender community, their families and the public. It functions between 10 a.m. and 6 p.m. and was launched by V. K. Subburaj, Principal Secretary of Health Department of Tamil Nadu. Subburaj launched the services in March 2009 and said it will be helpful in finding employment for transgender people.<sup>25</sup>

Sahodari Foundation is an organization working for the transgender rights. Founded in 2007, Sahodari Foundation is a well known organization in India for its creative and alternative advocacy methods.

Srishti Madurai launched India's first helpline for Genderqueer, LGBTQIA in October 2, 2011 at Madurai. Later in June 2013 the helpline turned to offer service for 24 hours with a tagline "Just having someone understanding to talk to can save a life".

## Transgenders in Tamil Nadu politics

Kalki Subramaniam, a transgender rights activist, writer and an actor, In the 2011 assembly elections, Kalki tried in vain to get a DMK ticket. Again on March 2014 Kalki announced in Puducherry that she would contest in this election from Villupuram constituency in neighbouring Tamil Nadu. She is likely to be among the very few contestants fighting in the national elections from the transgender community that faces discrimination and ridicule.<sup>26</sup>

## Gender issue in TNPSC and UPSC

Transgender Swapna and gender activist Gopi Shankar from Srishti Maduraistaged the protest in Madurai collectorate on 7 October 2013 demanding reservation and to permit alternate genders to appear for examinations conducted by TNPSC, UPSC, SSC and Bank Exams. Swapna, incidentally, had successfully moved the Madras High Court in 2013 seeking permission to write the TNPSC Group II exam as a 'woman' candidate. Swapna is the first trans person to clear TNPSC Group IV exams.<sup>27</sup>

## Third Gender Literature and Studies

"Vaadamalli" by novelist Su.Samuthiram is the first Tamil novel about Aravaani community in Tamil Nadu published in the year 1994. Later Transgender activist A. Revathi is the first Hijra to write about Transgender issues and Gender politics in Tamil, her works have been translated in more than 8 languages and acting as a primary resources on Gender Studies in Asia. Her book is part of research project for more

<sup>25</sup>[Helpline for transgenders launched](#)". The Hindu. 14 March 2009.

<sup>26</sup><http://www.thehindu.com/news/national/tamil-nadu/transgender-kalki-in-poll-race/article5840745.ece>

<sup>27</sup>[http://www.newindianexpress.com/states/tamil\\_nadu/Transgender-Clears-TNPSC-Group-IV-Exam/2014/02/09/article2046310.ece#.Uvc-CPmSycw](http://www.newindianexpress.com/states/tamil_nadu/Transgender-Clears-TNPSC-Group-IV-Exam/2014/02/09/article2046310.ece#.Uvc-CPmSycw)

than 100 universities. She is the author of Unarvum Uruvamum (Feelings of the Entire Body); is the first of its kind in English from a member of the hijra community.<sup>28</sup> She also acted and directed several stage plays on Gender and Sexuality issues in Tamil and Kannada. "The Truth about Me: A Hijra Life Story" by Transgender A. Revathi is part of the syllabus for Final Year students of The American College in Madurai. Later Naan Saravanan Alla" (2007) and Vidya's "I am Vidya" (2008) became first transwoman autobiography.<sup>29</sup>

## CONCLUSION

Supreme Court of India recently on April 14, 2014 took very good step by declaring transgender as third gender. Initially in 1994 transgender got right to vote. This was not enough as they were not given voter ID due to unavailability of gender identity. Further in 2009 they got place voter ID as others. This gender is not a new concept but it was also prevalent in very beginning of civilization. The very first step the legislation should take is to amend section 377 of IPC so that it will not play obstacle to the sexual orientation of transgender. The rights from which this community is deprived is not any ordinary right but a Human Right. Human rights are inherent rights of a human being by the virtue of being human. If we snatch their human right from them it means we are not considering them human. While doing this we should take into consideration that most of them do not choose to be different but natural phenomena which compel them to live in that particular way. All the fundamental right either if it is right to liberty or it may right to life, all of them is frequently infringed by our society and no step are taken specifically for the prohibition and protection from such acts. Further the main problem is they are discarded from society and family and hence they do not have any right in their family in which they are born. They cannot marry; adopt a child, succession and partition of joint family property. They are not considered as coparcener and therefore do not have any right over property of his forefathers. Right to choose occupation of their choice is also not that easy for them and to choose particular occupation they even do not have opportunity to attend school. In order to remove this reservation is helpful tool. Government should grant reservation to transgender so that this minority can compete with so called ordinary society.

## RECOMMENDATIONS AND SUGGESTIONS

Discrimination against the transgender is prevalent in state as well as society. Therefore the violence faced by them is rooted in state as well as society. We recommend some suggestions to chisel out the discrimination against transgender and to enact such laws to put them in equal footing to male and female. Few of these measures are:

### **Legal Measures**

1. Each and every individual have right to choose his sex as well as sexual orientation. Hence transgender are no exception to it. Our constitution also does not put any bar on the selection of gender.

<sup>28</sup><http://www.thehindu.com/books/hope-floats/article802665.ece>

<sup>29</sup><http://www.deccanherald.com/content/89595/doraiswamy-revathi-tamil-writer-activists.html>

2. The constitution needs to be amended so that the third gender could get his basic human rights. This can be done by inculcating the word transgender along with men and women so that they can also get benefit of those human rights.
3. Special clause for transgender also needs to be enacted in constitution so that the hatred and discrimination could be abolished like abolition of untouchability etc.
4. The Immoral Trafficking Prevention Act, 1956 is used as tool to intimidate the transgender sex worker. It needs to have some amendments so that it cannot be used as tool of deterrence.
5. Personal laws of all the religions needs to be amended so that transgender can also avail the benefit of laws related to Marriage, Adoption, Succession and partition.
6. Laws related to labour regulation are in need to be amended. There is not any specific clause for transgender and in absence of such provisions these people might become victim of injustice.

### **Police Reforms**

1. The police administration should appoint transgender to deal with the cases of transgender.
2. Separate cell for transgender is prime need as they might get sexually abused in male cell and it is very difficult to put them in female ward and the cause behind this is very natural that the female of that particular ward get uncomfortable.
3. To prevent the custodial rape of Hijras or transgender stringent laws should be made to create deterrence in the mind of wrongdoer.
4. The police seem to be less sensitizing when it comes to transgender. Workshops should be conducted for the police just for the purpose of their sensitization.

### **Other Measures**

All the discrimination and hatred which is prevailing in society is due to lack of comprehensive sex-education. By giving such kind of education we could play just with third gender. The role of media and non-governmental organizations is very prompt to achieve this goal.

### **Reforming the Medical Establishment**

1. In order to avoid discrimination and misconduct by the medical officers and doctors' appropriate authority should make some regulations so that the eradication of discrimination could be established.

2. Special wards for transgender in hospitals should be made. The main reason behind it is that if they are put in male ward they might get sexually abused. In case if they are put in female ward female of that ward feel uncomfortable.

National Legal Services Authority (NALSA) v. Union of India is a landmark decision by the Supreme Court of India, declared transgenders to be the 'third gender', affirmed that the fundamental rights granted under the Constitution of India will be equally applicable on the transgenders and gave them the right to self-identification of gender as male, female or third-gender. Moreover, the court also held that the transgenders to be treated as socially and economically backward classes and will be granted reservation in admissions in educational institutions and jobs.

