

CONSTITUTIONAL SAFEGUARDS FOR THE RIGHTS OF TRANSGENDERS IN INDIA: A LEGAL AND SOCIAL ANALYSIS

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Abstract:

In recent years, the recognition and legal protection of the rights of transgender individuals in India have seen considerable progress. This change represents a significant movement towards greater inclusivity and equality for a community that has historically faced discrimination and marginalization. This paper explores the constitutional protections available to transgender persons in India, detailing how their legal rights have evolved over time. It particularly highlights the importance of the landmark judicial case, National Legal Services Authority (NALSA) v. Union of India (2014), which played a pivotal role in shaping the landscape of transgender rights in the country.

The Indian Constitution contains several articles that protect fundamental rights, including Articles 14, 15, 16, 19, and 21. These articles guarantee rights such as equality, freedom from discrimination, freedom of expression, and the right to personal liberty. These constitutional provisions have been crucial in providing a legal foundation for the rights of transgender individuals. The examination of these constitutional articles includes an analysis of how courts interpret them to uphold transgender rights. Additionally, the paper discusses the development of laws aimed specifically at protecting transgender persons, such as the Transgender Persons (Protection of Rights) Act, 2019. This legislation, while providing certain rights, also reflects the ongoing journey toward full legal recognition and protection for transgender individuals. However, even with these legal advancements, challenges remain. Many transgender individuals still experience social discrimination in various aspects of life, including access to education, healthcare, and employment. These barriers hinder their ability to live with dignity and equality.

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The paper argues that although constitutional protections are in place, there is a need for a more comprehensive policy framework that addresses the specific needs of transgender individuals. Social awareness and targeted measures are necessary to bridge the gap between legal rights and actual practices in society. Through an examination of legal frameworks, court decisions, and suggestions for policy improvements, this research aims to showcase both the progress made in securing transgender rights in India and the obstacles that still need to be overcome. It lays out potential future pathways to enhance the protection and realization of these essential rights within the country.

Keywords: Transgender, Gender Identity, Homosexuality, LGBT community, transformation.

Introduction:

Transgender is an umbrella term for persons whose gender identity, gender expression or behaviour does not conform to that typically associated with the sex to which they were assigned at birth. **Gender identity** refers to a person's internal sense of being male, female or something else; gender expression refers to the way a person communicates gender identity to others through behaviour, clothing, hairstyles, voice or body characteristics. "Trans" is sometimes used as shorthand for "transgender." While transgender is generally a good term to use, not everyone whose appearance or behaviour is gender-nonconforming will identify as a transgender person. The ways that transgender people are talked about in popular culture, academia and science are constantly changing, particularly as individuals' awareness, knowledge and openness about transgender people and their experiences grow.⁵ For a long time transgender in India have suffered from rejection and marginalization by society. The marginalization of this community has made them often the victims of hate and discrimination in the society. However, deep changes have been witnessed and significant advancements in the acknowledgment, identity & safeguard of their rights have been made over the past decade. The Indian Constitution including its basic rights of equality, justice, freedom & non-biasness, provides a robust background for safeguarding the rights of third gender. Through judicial interventions and legislative reforms, India has been moving toward ensuring the equality & inclusion of the third gender society in the mainstream of the society.

⁵ American Psychological Association. (2024, July 8). *Understanding transgender people, gender identity and gender expression*. American Psychological Association; American Psychological Association. <https://www.apa.org/topics/lgbtq/transgender-people-gender-identity-gender-expression>

A landmark moment in this journey was the National Legal Service Authority (NALSA) v. Union of India judgment of 2014, where the SC of India recognized transgender people (TP) as the 'third gender' and recognized their fundamental rights under the constitution. The Court held that they were entitled to the same constitutional safeguards against discrimination like other citizen under Articles 14, 15, 16, and 21, which guarantee right to life, liberty & equality respectively. This judgment catalysed further legislative action, leading to the enactment of the (Transgender Persons (Protection of Rights) Act, 2019) (TPA,2019) The law codified protections against discrimination in field of Education, Employment, Healthcare, and in sector of public services, affirming state liability to protect rights of third gender. Despite these legal safeguards the lived reality of third gender in India continues to reflect challenges in terms of social acceptance, implementation of legal provisions, and access to justice. Nonetheless, the constitutional safeguards and evolving legal framework represent a crucial step toward dismantling centuries of systemic discrimination and ensuring that third gender peoples can live with human dignity, equality, and freedom.

LITERATURE REVIEW

Numerous studies on the rights of third gender peoples in India have been conducted. These pieces were created in multiple dimensions. Here, the researcher's task is to review a chosen body of work.

Law like Love: Queer Perspectives on Law.⁶ Is a book formatted as a compilation of research papers? This book includes a variety of pieces by different authors that emphasize the LGBT issue in relation to the 2009 Delhi High Court judgment. This distinctive collection of works, some light-hearted, some critical, and others thoughtful and irreverent, breathes vitality and relevance into the institutions and lives of the law in the modern era.

Ardhanarishvara the Androgyne: Probing the Gender Within⁷ The book aims to find out that whereas the West Countries have traditionally categorized people as male or female, India's belief in the hermaphrodite nature of humans originates from the wonderful concept of Ardhanarishvara, who literally consists of half man and half woman. This ideology's divine aspect gave it early appeal, even if it was more of a philosophical construct than a social or cultural personification. This book dares to push intellectual boundaries in order to examine

⁶ Narain, A., & Gupta, A. (2020). *Law like love: Queer perspectives on law*. Yoda Press

⁷ Pande, A. (2004). *Ardhanarishvara the androgyne: Probing the gender within*. Rupa Publications India Pvt. Ltd.

the harsh realities of gender equality through questioning, challenging, musing, analysing, and stretching.

Sexual and Gender Diversity⁸ Thailand provides excellent transgender medical care and allows a wide range of LGBTQ establishments, associations, and activities. The nation is promoted by the government at a large level regarding LGBT-welcoming travel destinations. Transgender people have limited acceptability by families and the workplace. Act forbids discrimination based on sex, gender identity (GI), and gender appearance, discernment based on sexual orientation. Gay characters appear frequently in Thai cinema; they frequently feature Tran's humorous stereotypes. Tran's people are unable to change the "sex" title on official documents. To enable this transformation, a gender identity law is being discussed in the country. Cabinet approved a draft law in December 2018 that will enable same-sex couples to register their relationships and get limited legal freedoms.

Crystallising Queer Politics - the Naz Foundation Case (NFC) and its implications for India's transgender communities⁹ It has been discussed in this article that the NFC ruling of the SC goes beyond simply interpreting Section 377 of the IPC to establish grounds for the abolition of any kinds of discrimination against people, including those based on gender identity (GI), sex identity, & sexual orientation (SO). The author in this article discussed Naz Foundation Case on the legal standing of transgender people in Indian society.

LGBT and IPC, Sec-377: An Important Human Rights (HR) Issue for India¹⁰ In light of various International Human Rights (IHR) legislative regulations, the author of this essay examines same-sex sexual behaviour unlawful under Sec. 377 of the IPC. The author also focuses on how LGBT laws have been developed internationally. The comparatively new concepts of "SO" & "GI" are covered in the paper, along with the proper reasons why India views the criminalization of Homo- sexual activity under IPC Sec. 377 as a serious violation of Human Rights in Indian society. The origins of Christian religious law and the repeal of the English criminal code's equivalent of Sec. 377. Of IPC.

⁸ Douglas, S. (2019). Sexual and gender diversity. In *Routledge handbook of contemporary Thailand*. Routledge.

⁹ Narrain, S. (2009). Crystallising queer politics: The Naz Foundation case and its implications for India's transgender communities. *NUJS Law Review*, 2(3), 255-270.

¹⁰ Wintemute, R. (2011). Same sex love and Indian Penal Code Sec-377: An important human rights issue for India. *NUJS Law Review*, 4(1), 31-65.

Red Lipstick: The Men in My Life¹¹ This book is based on the life of Mumbai-born activist and classical dancer Laxmi Narayan Tripathi, also simply known as Laxmi. Despite being born as a boy, she accepts her hijra identity. In the Indian subcontinent, it is the general term for eunuchs, intersex, and transgender individuals. In the nations in this region, they are officially acknowledged as members of the "third gender" by their constitutions. Laxmi, who is transgender, is the first representative of Asia-Pacific at the UN. She has also appeared on Bigg Boss, the Big Brother equivalent in India. Together with Pooja Pandey, Laxmi wrote the 2016 book *Red Lipstick*, which is a candid portrayal of her extraordinary life's highs and lows. It is the breath-taking tale of her sexual awakening and self-acceptance, following her transformation from an impoverished youngster to a living legend.

The Legal Status of Transsexual and Transgender Persons¹² This book explores issues that have received little attention up to this point, such as what the full legal ramifications of a legal change of sex or gender should be. Examples of these include changes to pre-existing legal relationships, like marriage and registered partnerships, as well as issues pertaining to children and parenthood. The outcome of an international research project, *The Legal Status of LGBT & Third Gender*, includes national reports from fourteen (14) European and non-European jurisdictions as well as two chapters that examine legal sex/gender changes from a Christian perspective and one chapter from the standpoint of medical psychology that sets a proper procedure for enactments of laws for the safeguard of rights of LGBTQ.

CONSTITUTIONAL AND LEGAL DIMENSIONS OF TRANSGENDER RIGHTS

a) Right to Equality

Every person in India has protection under the law equally and equal standing in eye of law according to the constitutional law. On Indian Territory, the State shall not deprive any person from life, liberty & equality except procedure established by law.¹³ Here, "person" refers to any human being without any discrimination on the basis of sex, gender & place of birth. In India, a transgender person is considered "person" and is accorded the same status as people of all other genders. The transgender population cannot be divided on any discretionary grounds like sex, gender, religions, etc.

¹¹ Tripathi, L. N., & Pande, P. (2016). *Red lipstick: The men in my life*. Penguin Random House India.

¹² Scherpe, J. M. (2015). *The legal status of transsexual and transgender persons* (p. 167). Intersentia.

¹³ *Constitution of India* art. 14 (1950).

In *Naz Foundation (NFC) v. N.C.T Delhi*¹⁴ in this case Delhi High court held that the sec.377 of IPC is unconstitutional. Honourable Court also ruled that art. 14, 15, and 21 are violating sec. 377 of IPC; it makes such act illegal for an adult people who engaged in consensual sex activity privately. By interpreting article 14 honourable courts held that any classification or distinction must be based of “intangible differentia” which set a goal to achieve object for which law has been made by legislature.

Delhi high court’s judgment could not sustain for a long time & finally overruled by honourable Supreme Court in *Suresh Kumar Koushal v. Naaz Foundation*¹⁵ According to the ruling given by the Supreme Court, Art. 14, 15, and 21 are not a violation of Sec. 377 of the IPC. According to SC Sec. 377, it is not violating a provision of the constitution. Sexual behaviour is regulated by such laws with proper restrictions irrespective of gender identity and orientation. The soul of the Constitution is violated by this ruling of the honourable high court. the preamble of our constitution guarantees justice social, economic & political as well as equality for all, despite the existence of specific provisions, individuals continues to face discrimination and exploitation on the ground of orientation.

In *NLSA v. Union of India*¹⁶ honourable court expanded the definition of "person" to encompass more than just males and females. According to the interpretation, the definition of "person" in the court encompasses hijras or transgender individuals who don't recognize as male & female under the law. They will be recognized & protect under law in all field likes education, health, political, economic etc. they will be treated as citizen of the country & peruse all civil & political rights under the different laws in India.

In reality, the uncertainty surrounding the much-lauded National Legal Service Authority (NALSA) ruling has led to significant criticism. Many transgender experts were highlighting the judgment's defects and discrepancies, even as the mainstream media and civil society were applauding the ruling. Not explicitly stated in the ruling is the fact that third person is a catch-all term for peoples whose gender identity & expression differs from the gender allocated to them at the time of birth. In India, this term includes a diverse range of individualities such as kothi, Tran's man, Tran's woman, transgender, aravani, and gender queer, among others.

¹⁴ 2010 Criminal Law Journal 94 (Delhi).

¹⁵ (2014) 1 Supreme Court Cases 1.

¹⁶ AIR 2014 Supreme Court 1863 at 1890.

In *Navtej Singh Johar v. UOI*¹⁷ honourable Supreme Court held by majority that sec.377 of IPC violating fundamental rights of the citizens regarding intimacy, autonomy, identity etc. With a majority decision, the Court declared that Section 377 violated the fundamental rights to autonomy, intimacy, and identity, thereby legalize homosexuality is valid & protected under existing law.

The Court explicitly reversed its previous judgment in *Suresh Kumar Koushal case* that held

- 1) The sec.377 is unconstitutional insofar as it criminalizes consenting same sex between two adults.
- 2) LGBTQ society has same rights & liberties like other citizens of this country.
- 3) Some rights are existing under constitutional law like selection of life partner, fulfilment of sexual desires & rights not be subjected of any discriminations.
- 4) The LGBTQ section of society has the right to equal protection and rights without discrimination.

LEGISLATIVE ENACTMENTS VIS-A-VIS THIRD GENDER RIGHTS

The legislature has enacted several pieces of legislation as a result of constitutional provisions that establish the right in favour of this class and ensure legal sanctity. We cover the pertinent acts that define this class's identity below, without going into detail.

1) *GC Act, 1897*

The Act defines a "person" broadly to include any organization, group of people, or firm, regardless of its incorporation status. Section 13 of the aforementioned Act mandates the inclusion of women when discussing the masculine gender. Unless there is something conflicting in the topic or context, this stipulation is subject to statutory direction. The aforementioned rules should be interpreted harmoniously, as they explicitly indicate that transgender individuals are encompassed by the concept of "person."

2) *H M Act, 1955*

Sec.5 of the Marriage Act, 1955¹⁸ Sec.5 of this act specified essentials of Hindu valid marriage. According to these section two adults Hindu can solemnize their marriage if

¹⁷ (2018) 10 Supreme Court Cases 1.

¹⁸ *Hindu Marriage Act*, No. 25 of 1955, India Code (1955).

they fulfilled competency under sec.5 of this act. Unless prohibited under particular section. Therefore, peoples whose name mentioned all official documents can legally recognized as female or male & also secure legal identity for their marriage, preventing future challenges from third parties. Under this act only the parties to marriage can bring a petition for nullity of marriage.

3) **The Citizenship Act, 1955**

This act outlines the requirements for obtaining and determining Indian citizenship, but it does not contain any explicit or implicit provisions that specify a individual's GI or SO as a prerequisite for obtaining freedom of the city. The Election Commission of India has implemented special procedures to register transsexual voters.¹⁹

4) **The Hindu Adoptions and Maintenance Act, (HAMA) 1956**

Persons have fundamental rights to form family include adoption as one of the recognized forms of relationships. Before the juvenile justice act only Hindu parents had the right to adopt a child but after commencement of JJAct, 2015 every person is enabled to adopt child irrespective of any religion. JJ, Act & HAM Act, 1956 are Crucial for understanding the perspective of transgender individuals.

Adopted child can be legitimising under JJ, Act if they fulfilled all requirements of sec.7 & 8 for male & female both.²⁰ No formal scrutiny required under JJ Act. Homosexuals can adopt validly children's from their parents. However, in the case of adoption under HAMA transsexuals have to prove that they are eligible under sec.7 & 8.

5) **Muslim Law**

Mohammedan Law only requires that parties to a civil contract of marriage be of opposite sexes, not men and women. So parties having different Saxes could marry under Mohammedan law. Likewise, a third-gender individual has the right to marry a chis-gender individual, provided that they are an opposite couple.²¹

6) **JJ Act,2015**

Sec.41 (6) of JJ Act²² provides that every person either male or female have right to adopt child & also confers same rights on the transgender couple.

¹⁹ Community demands voter ID cards referring to them as transgender. (2018, August 26). *The Times of India*. <https://timesofindia.indiatimes.com/city/jaipur/community-demands-voter-idcards-referring-to-them-as-transgender/articleshow/65555350.cms> (Accessed August 12, 2021, at 06:10 PM).

²⁰ *The Hindu Adoptions and Maintenance Act*, No. 78 of 1956, India Code (1956).

²¹ Fayzee, A. A. A. (2009). *Outlines of Mohammedan law* (5th ed.). Oxford University Press.

²² *Act No. 2 of 2016, India Code*.

7) The Transgender Persons Act, 2019 (TP Act 2019)

The aim of the TP Act, 2019 is to protect the rights, liberty & freedom of transgender individuals as well as address relevant issues. The TP Act aims to acknowledge & protect the identity of transgender peoples. It also forbids biasness in a number of areas, likes healthcare, social sectors, private sectors, property, ownership etc., We have discussed the ineffective sections of this Act in previous debates.

GOVERNMENT POLICIES VIS-A-VIS THIRD GENDER RIGHTS

The 66-page National Education Policy (NEP) 2020 mentions gender exactly 16 times. NEP 2020 claims to treat gender as a "cross-cutting priority," yet it only mentions the term in passing. The formation of a Gender Inclusion Fund (GIF), purportedly to support the provision of fair and high-quality education for all girls without any discrimination with collaboration of state & local civic organizations, represents the government's one concrete commitment to implementing this goal. The policy excludes transgender students from the "Gender-Inclusion Fund's" purview. Although the section mentions teaching transgender pupils a unique curriculum, it fails to provide the necessary resources and approaches. It completely ignores gender equality and the struggles transgender students face against toxic masculinity. It does not directly address how to secure the transgender pupils' attendance in school. The largest disparity is the lack of discussion on gender-equal, sensitive mind-sets as well as the lack of acknowledgment of the necessity of reversing the on-going socialization of young boys and girls to acquire the gender-stereotypical features of strength and masculinity.

Conclusion:

Everyone should treat transgender individuals with the same respect and decency. After collecting various data from different surveys, government reports, articles, and censuses conducted in 2011 together with their castes, gender, employment, and literacy, we found there is no correct data for determining the transgender population. In 2011, we gathered information about the genders of transgender individuals along with their caste, employment, and literacy. As per 2011 census around 4.88 lakh third genders peoples are living in this country. The Census Department's primary data groups transgender people under "Males." We have extracted a distinct set of transgender data for educational purposes. The term *transgender* refers to those peoples whose identity, quality, behaviour, & expression differ from common peoples.

Transgender people identify differently from the gender society assumed them to be at birth. At birth, doctors believed that a person's identity, whether male or female, was determined by their physical appearance. However, the gender identity of some individuals differs from the initial expectations at birth. Most of these individuals describe themselves as transgender, meaning they are neither male nor female.

Harassment of third gender peoples in India is a big issue for human rights presently. Problems of third genders leading loss of resources, cyclical & exclusion from social benefits as well as acceptance. The stigma surrounding the transgender community leads to a loss of resources and cyclical exclusion from benefits and acceptance. The consequences include inadequate school education and abuse. This situation often results in individuals resorting to begging & sex work for surviving own life. Due to that transgender peoples are taking risk of various diseases, infections, physical & mental health issues. Third genders peoples continue to be marginalized and oppressed within society. Social recognition is the biggest problems in present time of third genders in India. Social recognition will empowered them in field of employment, education, services & appointment.

Transgender groups face a variety of social security challenges. In the long period, the majority of transgender people flee or face eviction from their homes without anticipation of help from natural families. As a result, third gender faces numerous difficulties; particularly health issues, job opportunities, or advanced age. Businesses typically turn down jobs for even competent and skilled transgender individuals. In certain states, there are subjective accounts of prosperous Hijras who work for themselves and manage grocery stores or cultural events. One of the main reasons a large percentage of transgender persons choose to work in the sex industry, which has hazards related to HIV and other health issues. Through Articles 14, 15, and 21, respectively ensures the fundamental right to equality & prohibits discernment on the grounds of sex, gender, biological structure. The framers of the Constitution believed that no one should have their rights violated on Indian soil. Article 14 discusses both the advantages and disadvantages of equality. Such discrimination reveals that both transgender individuals and others have rights to equality, equal opportunities, fundamental freedoms, life, including the right to live with human dignity & liberty, and freedom from exploitation. The denial of these fundamental and unalienable rights leads to the exclusion of hijras from the basic amenities of civil society. With an optimistic outlook, India is moving toward a brighter future as it has begun to acknowledge the rights of the

venerable peoples by judiciary timely. Third genders are becoming more visible in society due to that they face continues degrade, inhumanity & discriminations in the society.

In NLSA v. UOI and Ors²³ In addition to recognizing transgender people as a third gender, the Supreme Court ordered that the state government and the federal governments try to implement various social welfare programs and conduct public awareness programs so that public stigma can be eradicated regarding third genders in society.

Due to a lack of education, they are unable to get jobs in the public sector. Their access to the social, economic, and financial spheres is restricted, leaving them with few possibilities for making a living. For transgender people, discrimination based on class, genders, sex, and place of birth has been a big issue in terms of justice, entertainment, work, and education, among other areas. Transgender people who are outspoken about their gender identity at work run the risk of being harassed by their co-workers and will eventually have to move employment. In every aspect of their lives, transgender people face discrimination. When they are around, people don't act like themselves. They are constantly perceived as undeserving and too low to survive. Frequently, they experience rejection from their own relatives for being a part of the family. Only in rare instances, such as with the birth of a child or for a newlywed couple, are transgender people respected. Every aspect of their lives is greatly impacted by the lack of appropriate identity documents. In essence, one cannot operate in society without identification. Several public services require identity documents in order to be accessed. Identity verification is required in several states for the medical transition. The transgender person cannot afford such medical treatments. 33% of people who have previously transitioned, according to NTDS, were unable to correctly update their identity documents due to a fear of shame. One of the specific issues still exists with the 1954 Special Marriage Act, which among other things stipulates that a marriage must be registered between male & female. Therefore, the Special Marriage Act of 1954 does not allow for the registration of marriages for "third gender."

The "Transgender Persons Act", 2019 is a specific Act pertaining to transgender people that the Indian legislature passed in 2019. This Act was passed with the purpose of protecting transgender people's rights, promoting their welfare, and handling related issues. Nowadays, it is expressly illegal to discriminate against transgender individuals. A transgender person is not entitled to discrimination in the following areas: education, work,

²³ AIR 2014 Supreme Court 1863.

healthcare, access to government or private establishments, right to buy, own, or occupy property, freedom of movement, and the ability to run for public or private office. Even though it may seem obvious that the Indian Constitution already guarantees the same thing, this particular clause will serve as a disincentive to anyone considering discriminating against transgender people.

While the statute grants transgender people the right to identity recognition, it also has major shortcomings. The following are some instances of things the act does not address: The NCTP is to be established under Section 16 of the Transgender Act, 2019, and will be led by the Union Minister of Social Justice and Empowerment of India. Transgender people have right to freedom to identify as male, female, or third gender, according to the Supreme Court's ruling. However, Section 6 of the Act requires individuals to get a Certificate of Identification from the District Magistrate.

*Ms. S. Sushma and Anr. v Commissioner of Police and Ors.*²⁴ *If people fully comprehend the necessity of this shift, judgment significantly alters society. In order to comprehend the difficulties experienced by homosexuals who conceal their identities and biases, Anand Venkatesh undertook counseling. After comprehending the issue, he renders a decision. People from other countries share his understanding of the humility that the transgender community faces. Through this lawsuit, the court has been able to give the transgender community justice while also altering societal norms and morals. The transgender community maintains safety while filing against the offense they are facing with the assistance of the Court's instructions.*

In conclusion, the constitutional protection of the rights of transgender people in India is a crucial aspect of the judiciary's commitment to promoting equality and social justice. The Transgender Persons (Protection of Rights) Act, 2019 has protected their identity and social status. But even after the significant and progressive legal provisions, social stigma and recognition still remain in the minds of people. The apex court is also playing a vital role in the protection of the rights of transgender people, their recognition, and the social status of the third gender. Practically it is not possible to protect equality and dignity of third genders without the social awareness and social recognition by the society. In last, we can say that for such reformation, the contribution of each and every person is required. Only legislation and the judiciary can't change the mind-set of an existing society.

²⁴ *W.P. No. 7284 of 2021.*

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