

## IN THE WAKE OF EQUALITY- EVOLUTION OF THIRD GENDER'S RIGHTS IN THE EYE OF LAW IN INDIA

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### **ABSTRACT**

This research paper analyses the condition of the Transgender community in India, who are actually Considered as *Hijras* and their Historical Background, social problems faced by Transgender on day-to-day basis. Further, this paper will focus upon the new Act introduced in 2019 that provides for reformation and upliftment of this group of society.

Despite having a long history of acceptance in our culture, transgender people are still struggling daily to be accepted by our society.<sup>1213</sup> Families and other social groups reject the members of this community. Due to the lack of possibilities for adequate education, job, and access to health care, they are sometimes driven into ritual begging since they have no other means of support. In modern culture, transgender people come in all racial, cultural, religious, and social backgrounds. Moreover, due to the rigid, forced compliance to sexual dimorphism, they are subjected to bewilderment and agony. They have contended with injustices brought on by societal shame, discrimination, and rejection of their civil and human rights. They experience widespread prejudice in the domains of their own families, social lives, housing, education, health, and other areas.

**Keywords.** *Transgender, Third Gender, Hijra, Sexual Dimorphism, Social Shame.*



GRASP - EDUCATE - EVOLVE

## I. INTRODUCTION

Despite being acknowledged or recognized as a third gender, the community of transgender population is still regarded as a group that has significant challenges in leading a regular life as a binary gender, and they frequently become targets of violence and prejudice. The prevalence of hate crimes and various forms of harassment against this particular community is source of tremendous disappointment, as these transgender communities are facing these days. Transgender people have long been a significant part of the globe and have a unique historical importance. According to the historical records of ancient books, the Hijra tribe has contributed to the essential but frequently disregarded sexual variety in indigenous culture for over 4000 years.<sup>1214</sup> While Hijras and other transgendered individuals are recognized as a third gender under Indian law, other South Asian countries like Bangladesh and Pakistan only do so for Hijras. But even having a long history, the administration pillar of India is failing to provide the community like Transgenders, including other members of the LGBTQIA+ community, the respect they need, even if the greater LGBTQIA+ population faces major legal obstacles.

Transgender having a long history of acceptance in our culture, transgender people are still struggling daily to be accepted by our society. Their families and other social groups reject the members of this community and sadly due to the lack of possibilities for adequate education, job, and access to health care, they are sometimes driven into ritual begging since they have no other means of support. In modern culture, transgender people come in all racial, cultural, religious, and social backgrounds. However, because of **"what they are"** and **"how they are"**, they have never led high-quality lives. Moreover, due to the rigid, forced compliance to sexual dimorphism, they

are subjected to bewilderment and agony. They have contended with injustices brought on by societal shame, discrimination, and rejection of their civil and human rights. They experience widespread prejudice in the domains of their own families, social lives, housing, education, health, and other areas.

## II. HISTORICAL BACKGROUND AND POSITION OF TRANSGENDER PEOPLE- 'FROM A HINDU MYTHOLOGY PERSPECTIVE'

India is considered to be a most religious and traditional based country across the globe, having almost 79.8% of the population of India practices Hinduism, 14.2% adheres to Islam, 2.3% adheres to Christianity, 1.7% adheres to Sikhism, 0.7% adheres to Buddhism and 0.4% adheres to Jainism. The Vedas refer to a "third sex," roughly defined as people for whom sex is not procreative, either through impotence or a lack of desire for the opposite sex.<sup>1215</sup> In other words, according to the Vedas, there is a "third sex", which is often understood to be those for whom procreation is not possible due to impotence or a lack of desire for the other sex. However, third-sex individuals are not shunned and are occasionally acknowledged for their mystical abilities or wisdom. Hinduism's Kama Sutra, which describes the delights of sexuality, says that having sex is "to be engaged in and enjoyed for its own sake as one of the arts." The concept of or term Transgender is not new here, moreover, as per the historical records, the Hijra tribe has contributed to the essential culture and tradition of India for over 4000 years.

Three genders are recognized in Sanskrit, one of the world's oldest languages: male gender, female gender and gender-neutral (Third gender). The term of "tritiyaprakriti" or "napumsaka" was an essential component of early Vedic and Puranic literatures, folklore, and Hindu mythology.<sup>1216</sup>

<sup>1214</sup> Available at <https://theculturetrip.com/asia/india/articles/a-brief-history-of-hijra-indias-third-gender>, Accessed on 07.11.2023

<sup>1215</sup> Available at <https://www.hrc.org/resources/stances-of-faiths-on-lgbt-issues-hinduism>, Accessed on 09.11.2023.

<sup>1216</sup> M. Michelraj, Asian Review of Social Sciences ISSN: 2249-6319 Vol. 4 No. 1, 2015, pp. 17-19.

Status of Transgender during Ramayana and Mahabharata period:

- **The tale of Valmiki's Ramayana.** A fourteen-year exile of Lord Rama is described in Valmiki's Ramayana. A large number of people in Lord Rama's dominion followed him out of respect and affection. Upon realizing this, Lord Rama requested all the men and women present there to return to their respective home. Lord Rama noticed that the Hijras had occupied a permanent place in the forest for fourteen years upon returning from exile. The reason behind Hijra community's permanent forest residence was that Lord Ram while leaving for 14 years exile from Aayodhya saw that huge number of people started following him out of respect and attachment, so Lord Ram requested all the men and women to stop following him and go back to their respective home, but Hijras don't fall in any of the category neither men nor women, so they stayed back, and for 14 years they resided in the forest till the Lord Ram came back. While returning to Aayodhya, Lord Ram saw that transgender people are residing in the forest and waiting for him to return to Aayodhya. Lord Ram after knowing the reason of transgender stay in forest for 14 long years, Lord Ram got emotional and satisfied by the Hijras' devotion; also Lord Rama bestowed upon them a blessing and foretold that they would benefit humanity on several auspicious occasions, including marriage and childbirth.<sup>1217</sup>

- **The tale of Mahabharata:**  
**Story of Arjuna as Brihannala**<sup>1218</sup>: When Arjuna refused Urvashi's marriage proposal, saying that she is like his mother, she cursed him, saying he would no longer be a man. Indra minimized the curse to one year. This worked out well for Arjuna, as he spent the final year of the Pandavas' exile hiding as a dance instructor named *Brihannala*. He instructed King Virat's

daughter and her companions in music and dancing. When King Virata discovered Arjuna's true identity, he extended an invitation to marry her by offering Arjuna his daughter. Since he had been her teacher and saw her as his daughter, King Arjuna turned down this offer.

**Story of Shikhandi:** In the Mahabharata, Princess Amba committed herself and vowed to get revenge against Bhishma for kidnapping her for his stepbrother and rejecting her proposal of marriage. Amba took up the name Shikhandini upon her rebirth as King Drupada. She underwent austerities and changed her sex to become Shikhandi, according to the Mahabharata. He was identified by Bhishma as Shikandini, Amba reincarnated, at the Battle of Kurukshetra, and he refused to engage in combat with a "woman."

On the ninth day of the battle, Shikhandi rode in Arjuna's chariot, forcing Bhishma to down his weapons. Arjuna ambushed Bhishma with his arrows while concealed behind Shikhandi. Shikhandi therefore played a crucial role in both the Pandavas' triumph and Bhishma's demise during the Kurukshetra.<sup>1219</sup>

Despite the fact that transgender people have a rich and diverse history that includes representations of Hindu mythological figures and divinities, but still they nonetheless face numerous types of discrimination till now. They have just recently been granted the required social security and the opportunity to become part of the society but that too not in a proper form. These people are also vulnerable to prejudice and stigma, which increases their risk of mental and physical health problems. These include having unfavorable working circumstances and alternatives, as well as legal and substance-related issues.

### III. WHO ARE TRANSGENDERS? HOW DO THEY DIFFER FROM TRANSSEXUALS.

The word "transgender" refers to a broad category of persons whose internal sense of self—whether male, female, or something else—does not correlate to the sex they were given at

<sup>1217</sup> Available at India's third gender: A journey of Hijra community from mythology to harsh reality, available at: <https://myvoice.opindia.com/2020/06/indias-third-gender-a-journey-of-hijra-community-from-mythology-toharsh-reality/>, Accessed on 08.11.2023.

<sup>1218</sup> Available at Bharti Kalra, Manash P Baruah, et. AL, "The Mahabharata and reproductive endocrinology" vol. 2(3) Indian J Endocrinol Metab 404-407 (2016)

<sup>1219</sup> Available at Shiva Prakash Srinivasan, Sruti Chandrasekaran, "Transsexualism in Hindu Mythology" vol.24(3) Indian J Endocrinol Metab 235-236 (2020)

birth. On the other hand, individuals whose gender identification correlates with the sex they were born at birth are referred to as *Cisgender*. People whose gender identification differs from the gender they were assumed to be at birth might be broadly categorized as transgender. Transgender is commonly abbreviated as "trans." Respect for a transgender person is based on their gender identification, not on their biological sex. Accordingly, a transgender woman is a person who identifies as a woman and should be addressed as "she" or "her." Today's transgender guy should be addressed as "he" or "him," as he lives as a male.<sup>1220</sup>

Transgender identity includes many different kinds of identities. People whose gender identification differs from their assigned sex are referred to as transsexuals. Transsexuals frequently want to change their bodies in order to bring them more in line with their gender identities. In other words, people who had undergone medical treatments, such as gender-affirming surgery, to match their physical appearance and gender identification were referred to as transsexuals. They may do this by using hormones, surgery, or other methods. Gender affirmation is a term that has gained popularity recently and is used to describe this process of transition through medical intervention, which is also known as sex or gender reassignment. Transsexual men, or transmen, are people who were assigned as female but who identify and live as male and who want to change or modify their bodies by medical intervention to more closely reflect their gender identity (also known as female-to-male or FTM). Other categories of transgender people include *androgynous, multigendered, gender nonconforming, third gender, and two-spirit people*. Exact definitions of these terms vary from person to person and may change over time, but often include a sense of blending or

alternating genders.<sup>1221</sup> The word "transsexual," which has been around for a while, was first used in the medical and psychological fields. A person who identifies as transgender may nevertheless be referred to by some as transsexual if their gender identification differs from the sex that was given to them at birth. The more recent definition of transgender, however, does not entail that a person has had medical treatments that change their gender.

The phrase has become widely used to refer to all transgender persons, even though medical practitioners originally used it to classify those who have undergone medical or surgical intervention to match their bodies to their real gender identification. But the name "transsexual" offends a lot of people, even individuals who don't need or desire to have these medical operations done.

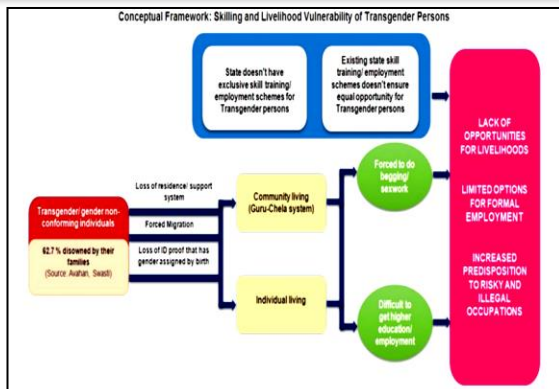
#### IV. CHALLENGES FACED BY TRANSGENDERS IN INDIA

The community of the transgender group includes the *hijras, jogtas, jogappas, Sakhis, and Aradhis*. These individuals face several difficulties on a daily basis. Social isolation, marginalization, a lack of educational and career prospects, verbal and sexual abuse, sexual harassment, mental health concerns, extreme poverty, violence, and being a victim of hate crimes are some of these challenges. In order to safeguard transgender rights, Indian Government has approved "The Transgender Persons (Protection of Rights) Act in 2019, which prohibits discrimination against them in the workplace, in the healthcare system, and in educational institutions. As a responsible citizen of India, it is our duty to treat them with the same dignity and respect as those of any other gender.

<sup>1221</sup> Understanding transgender people, gender identity and gender expression.

Available at: <https://www.apa.org/topics/lgbtq/transgender-people-gender-identity-gender-expression#:~:text=Other%20categories%20of%20transgender%20people,o%20blending%20or%20alternating%20genders>. Accessed on 10.11.2023

<sup>1220</sup> Available at <https://transequality.org/issues/resources/understanding-transgender-people-the-basics>. Accessed on 09.11.2023



This image is taken from <https://www.undp.org/sites/g/files/zskgke326/files/migration/in/Skilling-for-Livelihood.pdf>. Challenges faced by transgenders are as follows:<sup>1222</sup>

1. **Social Stigma:** They frequently come across obstacles while trying to adopt children or inherit property. They are driven into sex work or menial occupations despite having strong credentials since they are socially rejected. Moreover, because the transgender populations lack access to school and career prospects, society views them as inferior, which leads to their detachment from the society. This detachment takes a serious toll on their confidence and sense of self, leading them to accept employment they don't particularly want. They don't have a place to stay or a shelter since they are either thrown out from their home and rejected by their own families or they flee their homes because of violence committed against them by their own family.

2. **Poverty:** The majority of transgenders as per recent study, i.e. 52 percent are begging for a living, making it the primary source of income for the community in majority of the states in India. Then sex labors cones under the ambit of 14%, bestowing blessings at customary celebrations or the birth of a child comes under the ambit of 14%, and working in social development with neighborhood organizations comes under the ambit of 9%. Last ambit comes roughly around 3 percent of transgender people used sex work to supplement their income.

### 3. **Lack of getting education and be aware about the surroundings:**

Since the vast majority of individuals in this community are either uneducated or illiterate, they are unable to participate much in the activities of the educated segment of society. The 2011 census found that there were 4.9 lakh transgender individuals, and only 46% of them were literate—a much lower percentage than the general population, which has a literacy rate of 74%. They have a 25% reserve as an economically weaker part since they are classified as a "disadvantage group" under the Right to Education Act. They are less educated for a variety of reasons, including mental health concerns, poverty, and alienation from friends and family.

4. **Psychological impact:** Those who have surgeries with regard for their gender reassignment experience a state of shock. They thus find it more difficult to do tasks requiring a lot of manual labor. Jobs requiring labor and daily wages that don't require formal education aren't fit for their bodies.

### 5. **Insufficient legal safeguards and frequently becoming targets of hate crimes:**

The transgender community is not as legally shielded as other communities, which leaves them open to being attacked for offenses they did not even commit. They experience a great deal of violence and fall prey to hate crimes. Many police agencies show little consideration for these neighborhoods and fail to even record the complaints that are brought forth. The fact that the cops oppress them demonstrates how ineffective we are as a society.

## V. POSITION OF TRANSGENDERS IN INDIA

In India, transgender individuals are among the most discriminated against high-risk populations. The Preamble to the Constitution guarantees social, economic, and political equality of position as a matter of justice. Since discrimination on the basis of religion, race, caste, sex, or place of birth is strictly forbidden under Articles 14 which states that *Equality before law.—The State shall not deny to any person equality before the law or the equal*

<sup>1222</sup>Available at <https://www.undp.org/sites/g/files/zskgke326/files/migration/in/Skilling-for-Livelihood.pdf>. Accessed on 09.11.2023

protection of the laws within the territory of India and 15 which states that *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.* (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 places 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., so the first and most important right that people deserve is the right to equality. Every individual is guaranteed the right to privacy and personal dignity under Article 21 of the Indian Constitution which 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.**

Moreover, Article 23 of the Indian Constitution forbids the trafficking of persons as beggars and other like types of forced labor, and any violation of this article will be prosecuted as a crime. The Constitution forbids discrimination based on a person's gender, caste, creed, or religion and guarantees their fundamental right to equality. Every citizen is also entitled to various rights as well as political rights under the Constitution. However, the third community i.e. the transgender people continues to face discrimination.

The question of whether the Constitution's guarantee of equality in all areas is irrelevant is whether it is actually being followed. The majority of the safeguards included in the Fundamental Rights Chapter of the Constitution apply to everyone, although certain rights are exclusive to citizens. The Constitution does not further distinguish between different types of rights holders beyond this classification. One of the most important and inevitable categories that the Indian state uses to determine civil

personhood is sexual identity, or gender identity. As mandated by the Indian state, sex-based identification of males and females is an essential part of civil identity.

How judiciary recognizes the third gender i.e. Transgender? Answer to this question is that in **National Legal Service Authority vs Union of India & Ors**<sup>1223</sup>, the Supreme Court gave transgender people in India legal recognition as the third gender. It was further held that *the applicability of section 377 is irrespective of consent and it doesn't criminalize any particular identity or orientation. Hijras which are not a part of the gender binary i.e., male and female be treated as the 'third gender' thus safeguarding their fundamental rights under Part III of the Constitution as well as other laws made by the Parliament or State Legislature.*

The initial sentences of the aforementioned ruling demonstrated that how the court recognized the extreme pain and suffering endured by the transgender community in India. Justice Radhakrishnan, states that our culture rarely acknowledges or cares to acknowledge the pain, suffering, and grief that transgender people go through. It also doesn't respect the natural feelings that transgender people have, especially those whose body and mind reject their biological sex.

Further, a committee was established by the Supreme Court to thoroughly examine the issues facing the transgender community and suggest potential government initiatives to allay those worries. The Court ruled that Hijras should be regarded as "third gender" in addition to binary gender in order to safeguard their rights under Part III of our Constitution and laws enacted by the State Legislature and Parliament. The Center and state governments are required to provide legal recognition of a transgender person's gender identification as either male, female, or third gender. Transgender people's ability to select their self-identified gender is also guaranteed.

<sup>1223</sup> (AIR 2014 SC 1863)

Supreme Court of India also directed the government to provide health services, job opportunities, and other facilities to secure social and economic justice to the transgender community.<sup>1224</sup>

The Transgender Persons (Protection of Rights) Act was introduced in the Lok Sabha and passed unanimously in response to the ruling in *NALSA v. Union of India*, which ordered the Central Government and State Governments to take various measures for the welfare of the transgender community and to treat them as a third gender for the purpose of safeguarding their rights under Part III of the Constitution and other laws made by Parliament and the State Legislature. Consequently, the bill became the Transgender Persons (Protection of Rights) Act, 2019 after passing the Rajya Sabha and obtaining the President's approval. The 2019 Act permits a transgender person to self-perceive their gender identity and to be recognized as such. The laws also address the granting of gender-neutral certificates and certificates of identification. A certificate of identification specifying one's gender as "transgender" may be obtained from the District Magistrate by a transgender person.<sup>1225</sup> Furthermore, the Act permits the establishment of a National Council for Transgender Persons. Also, this act prohibits any type of discrimination against the people belonging to transgenders, right of residence, education, healthcare and employment. Moreover, the following offenses against transgender people are recognized by the Act: (i) forced or bonded labor (apart from mandatory government service for public purposes); (ii) denial of access to public areas; (iii) expulsion from the home and village; and (iv) abuse on any level, including physical, sexual, verbal, emotional, or financial. These offenses include fines in addition to jail terms ranging from six months to two years.

<sup>1224</sup> Akshay Tiwari, and Dr. Kusum Pal, JOURNEY OF GENDER IDENTITY IN INDIA FROM MYTHOLOGY TO THE THIRD GENDER, *PJAE*, 17(16) (2020).

<sup>1225</sup> Available at <https://translaw.clpr.org.in/legislation/transgender-persons-protection-of-rights-act-2019/#:~:text=The%20Act%20recognizes%20the%20following,verbal%2C%20emotional%20or%20economic%20abuse.> Accessed on 17.11.2023.

Now, in the year 2023, a landmark judgment was delivered by the Honorable Supreme Court of India in the matter of *Supriyo @ Supriya Chakraborty & Anr. Vs. Union of India*<sup>1226</sup>, with regard to the transgender people it was stated that the majority opinion of the Bench affirmed that **transgender individuals have the right to marry within the existing legal framework**. The judgment emphasized that gender identity is distinct from sexual orientation, highlighting that transgender individuals can be in heterosexual relationships similar to cisgender individuals. Therefore, **such marriages can be legally registered under marriage laws**. Additionally, the judgment recognized that intersex individuals who identify as either male or female also have this right. Moreover, The Court affirmed the Madras High Court decision in *Arun Kumar v. Inspector General of Registration (2019)*, which declared marriage between a Hindu male and a transwoman a valid union.<sup>1227</sup>

### CONCLUSION

The journey of the transgender's rights movement from 300 BC to the 21st century was full of hurdles. This neglected community faced atrocities, discrimination, humiliation, and whatnot. While some people may consider gender as a modern concept, Hindu literature and mythology have always taught about heroes who defied the binary gender system. Despite the fact that Hinduism, in contrast to most Western religions, has long seen homosexuality as a natural behavior that is documented in both sacred text and folklore, the biological link between a man and a woman is still highly regarded in the religion. Indian mythology contains countless tales on sexuality, gender identity, gender expression, and gender flexibility.

Even after the Supreme Court's decision in the year 2014, the government is not able to provide them the security and support they deserve. We as a system or society owe them a lot. But in

<sup>1226</sup> Writ Petition (Civil) No. 1011 of 2022

<sup>1227</sup> Available at <https://www.drishtiias.com/daily-updates/daily-news-editorials/lgbtq-rights-in-india-the-supreme-court-s-verdict>, accessed on 11.11.2023.



2023 Supreme Court of India by the majority of the bench supported transgender people in heterosexual marriages but rejected adoption for gay couples.

In the end we can conclude that New India can only reach its maximum potential if it acknowledges, accepts, and shows respect for every group that makes up New India—transgender people included, of course.

