

**Legal Recognition of Third Gender in India : Rights and Challenges of
Transgender People**



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SUPERVISOR CERTIFICATE

This is to certify that Ms. ANGSHU YADAV, pursuing Master of Laws (LL.M) from National Law University and Judicial Academy, Assam has completed her dissertation – “LEGAL RECOGNITION OF THIRD GENDER IN INDIA: RIGHTS AND CHALLENGES OF TRANSGENDER PEOPLE” under my supervision for the partial award of the degree of Master of Laws (LLM) ONE YEAR LLM DEGREE PROGRAMME (2020-2021) Batch. The research work is found to be original and suitable for submission.

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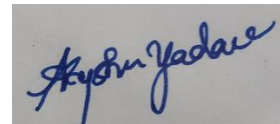


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DECLARATION

I, ANGSU YADAV, pursuing Master of Laws (LL.M) 2020 -2021 batch from National Law University and Judicial Academy, Assam, do hereby declare that the dissertation titled “LEGAL RECOGNITION OF THIRD GENDER IN INDIA: RIGHTS AND CHALLENGES OF TRANSGENDER PEOPLE.” submitted by me for the award of the degree of MASTER OF LAWS/ ONE YEAR LL.M. DEGREE PROGRAMME of National Law University and Judicial Academy, Assam is a bonafide work and has not been submitted, either in part or full anywhere else for any purpose, academic or otherwise.

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7. 1987 - Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
8. 2019 - Transgender Persons (Protection of Rights) Act

TABLE OF ABBREVIATIONS

1. AIR – All India
2. Art - Article
3. Ch - Chapter
4. Etc – Etcetera
5. ECHR - European Court of Human Rights
6. ICCPR - International Covenant on Civil and Political Rights
7. NALSA - National Legal Service Authority
8. p.- Page
9. SCC – Supreme Court Cases
10. Sec – Section
11. SC – Supreme Court
12. TG - Transgender
13. UHRD - Universal Declaration of Human Rights

CHAPTER 1 INTRODUCTION

1.1 BACKGROUND

"I know I am Transgender Because my brain knows its Female, and my body disagrees" -Alan Cohen

Transgenders are no where different than the other human beings as we all are the creations of God. When a baby is born, a doctor, a parent , or birth attendant announces the arrival of a "girl" or a "boy". That very second assignment of gender associated with the sex, dictates several aspects of the life of the new born. It is something most of people never question.

But some people's gender evolve differently. It might not fit the rigid notion of male or female but rather as Third gender and that should have no bearing on whether one can enjoy fundamental rights. Rights have to be protected irrespective of chromosomal sex, genitals, assigned birth sex, or implied gender role. Absent legal recognition in the gender with which they identify every juncture of their daily life, when documents like passport, id card etc, are requested or appearance is scrutinied becomes fraught with potential for violation and humiliation. This is so because they may be suspected of using false documents or may also have to reveal their transgender identity against their will. This also makes them vulnerable to violation of their right to privacy as well as to discrimination and violence.

The framers of the Indian Constitution , while formulating it , envisaged that future India would nurture such a society where there would be no discrimination on the basis of caste, religion, colour, sex,region etc. They envisaged the future of India as a country where there are no caste , religion , gender , regional etc based inequalities and egalitarian society is established. To say that Indian Constitution claims to provide equal opportunity and rights to every citizen. But in the context of Transgender , this does not seem to be reality.

It was the European Court of Human Rights (ECHR) in 1992, that for the first time recognized a state's refusal to allow transgenders to change the gender markers on their official documents,

for example birth certificate who has undergone gender reassignment, and to recognize the “new” gender, constitutes a violation of Article 8 (right to respect for private and family life) of the European Convention of Human Rights.¹

The International Covenant on Civil and Political Rights (ICCPR) provides right to life², prohibition of torture or cruel, inhuman or degrading treatment³, recognition before the law⁴, right to private and family life⁵ to the transgenders.

The Universal Declaration of Human Rights (UDHR) too provides for right to life. They are also protected under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)⁶ and provided with universal enjoyment of human rights, rights to equality and non-discrimination, right to recognition before the law, right to life, right to privacy, right to treatment with humanity while in detention, protection from medical abuses⁷. Vienna Convention on the Law of Treaties⁸ provides for the interpretation of International Conventions.

Transgender⁹ is an umbrella term for persons whose gender identity, gender expression or behaviour do not conform to that typically associated with the sex to which they were assigned at birth. In India, transgender community comprises of Hijras, Eunuch, Kinnar,

Kothis, , Shiv-Shakthis, Aravanis, Jogappas. Hijras, who can be eunuchs, intersex, or transgender, have been part of the Indian society for ages. Eunuchs are celebrated in sacred Hindu texts such as the Mahabharata and the Kama Sutra. They also enjoyed influential positions in Mughal Courts. When the British came to India the community's fortune changed, with the disgusted colonists passing a law in 1897 classing all eunuchs as criminals. Since then many have been ostracised – either for cross dressing or being intersex – and have gone on to form their own communities, around a guru or mother figure to provide emotional and financial security. Neglected and disowned by their own families and ridiculed by the society they have faced serious discriminations and violations.

¹ European Court of Human Rights, Case Nos. B. v. France, No. 13343/87, 1992; Goodwin v. The United Kingdom and I. v. the United Kingdom, Nos. 28957/95 and 25680/94 (2002).

² Article 6

³ Article 7

⁴ Article 16

⁵ Article 17

⁶ Article 2, Yogyakarta Principles

⁷ Yogyakarta Principles 1-7 respectively

⁸ Articles 31 and 32

⁹The major origin point for the word “transgender” is with activist and trans pioneer Virginia Prince, who popularised the term through her advocacy and writing in the 1970s. In 1969, Prince first used the term “transgenderal” to distinguish herself from transsexuals or those who used surgery to transition.

The Supreme Court of India for the first time in *National Legal Services Authority V. Union of India and others* 2014¹⁰ upheld transgender persons' right to self-identify their gender. It recognized hijras, transgender people, eunuchs, and intersex people "Third gender" and declared that the Centre and State governments must grant legal recognition of gender identity as male, female or third gender. A full recognition is to be given even in the absence of any existing statutory regime. Additionally, the Court declared that educational, social and health care issues faced by transgender people must be addressed both at the centre and state government levels.

The golden thread that runs through the equality scheme of the Indian Constitution (Articles 14, 15, 16, 19 and 21) is "enjoyment of life by all citizens and an equal opportunity to grow as human beings irrespective of their race, caste, religion, community, social status and gender". It is debatable how the non conformity of transgenders to the binary notions has always kept them as the neglected section of the society. They are marginalized and even after having their gender recognized as the "Third gender" their difficulties to relate with their identity in day to day activities have not been settled. Being a responsible citizen, we are well aware that the normal gender and transgender people share the same amount of rights as prescribed in the Indian Constitution. Yet they are viewed differently and have to fight to assert their basic rights when it comes to employment, education, health facilities or other civil rights which leads to their social exclusion. They have been subjected to a range of restrictive barriers, which limit their legal recognition of fundamental rights and protections which the researcher shall deal with in the appropriate chapters.

1.2 STATEMENT OF PROBLEM

The Apex court of India has upheld the rights of transgender persons to decide their self identity and has declared the transgender as "Third gender". It directed the central and state government to grant legal recognition to third gender and made several other legal declarations for the upliftment of the neglected community. There has been many a debates on how the transgenders have claimed their space in law but are not protected by it and so it is need of hour that transgender get the respect in the society. The need of the study is to check whether the transgender has got the identity or still struggling for their identity and discriminated by the society on the grounds of sex. The significance of the study is to give directions to the government how a transgender get identity in the society

¹⁰ Writ petition no 400 of 2012 with writ petition no 604 of

and what programs should be run by the government so that transgenders uplift their status and get respect by the member of the society.

1.3 LITERATURE REVIEW

Review of literature is helpful in exploring the previous studies. It enriches and excites the intellect of the investigator. Here are some literature reviews-

Article “A LONG JOURNEY TOWARDS LEGAL RECOGNITION: RIGHTS AND CHALLENGES OF TRANSGENDER PEOPLE” authored by Dr. Diptimoni Baruah. In this article the author studied the Transgender community and its struggle in getting legally recognized by the law. The author focuses on how no full recognition of third gender in documentations results in clear violation of their rights. Even after the National Legal Service Authority (NALSA) v. Union of India case , transgenders face difficulties in getting their legal identity as the Third gender which is why they can't avail the basic rights to themselves just like other citizens of India.

Article “Hijras and their rights: in Mythology and Socio-Cultural practices of India” authored by Aayushi Aggarwal. The author in this paper relates the existence as well as status of Transgender community in Indian history (culturally , mythologically , socially) and in the present day or contemporary India. The author discusses how the transgenders too have the human rights just like any other gender and that gender has nothing to do with availing human rights. It discusses how India can advance itself in uplifting this vulnerable community.

Article “A Study on Socio-Economic Conditions of Transgender” authored by T. Sathya and T. Thasian. In this paper the authors designed a questionnaire that consisted questions related to their struggle in society , financial problems etc. The interview was conducted for 50 transgender people. This paper actually tried to prove a point that the transgenders are left with no other work than sex workers or begging due to the attitude of people in society and unacceptance they go through. It suggests how education is important to bring a change in their life, and uplift this community as a whole. Involving them in vocational training or other workshop activities can also prove to offer them a better way of living.

Editorial (2013), ‘The Third Sex’. This article discussed about the various activities that are done by the welfare boards to uplift the transgender community. It suggested for awareness camps and various other income generating options to socially include them and not leave them as the neglected section of the society.

1.4 AIM

The aim of this paper is to analyse the pressing necessity of protecting the rights of the transgenders in India and make an in depth study on their present status and challenges they face in the Indian society. While doing so the researcher will go into various socio, legal, economic aspects of their lives. It will also study the judicial pronouncements and how far it has been brought into implementation and made changes in the lives of the transgenders . Finally, the paper aims at providing suggestions how this vulnerable transgender community can be brought in equal footing with other citiZens of India to curb the discrimination and violence they experience.

1.5 RESEARCH OBJECTIVES

- To study the historical background to trace the existence of transgenders in india
- To check whether the transgender people have got their identity or still struggling for their identity in India
- To study the socio and legal issues in regards to transgenders in India
- To study the day to day challenges faced by transgenders in regards to their identity in India
- To analyze the stand taken by the Indian Judiciary to protect the identity and rights of transgenders
- Conclusion and Suggestions

1.6 SCOPE LIMITATIONS

The scope of the researcher is to study whether transgenders have got legal gender recognition and what are the challenges faced by them in their day to day life in regards to their identity in India. The researcher studies the NALSA Judgement and other cases and how the existing provisions meant to protect the rights of transgenders just like any other citizens have not been effective as they still are vulnerable to violation of their right to privacy as well as to discrimination and violence.

Due to the ongoing pandemic situation and the unavailability to library to conduct the research , the researcher has been constrained to refer to online sources for the purpose of research which has inherent limitations in the nature of lack of comprehensive material and discourse on the subject matter of research online. Consequently, the researcher has limited her study primarily to the history of transgenders in India, their legal recognition and challenges faced by them in day to day lives, role of judiciary , progressive development and measures to ease their lives in asserting their rights to avoid discrimination and violence.

1.7 RESEARCH QUESTIONS

- What is legal recognition of third gender and why is it important?
- How and under what circumstances rights of transgenders are discriminated and violated?
- What are the challenges faced by the third gender in regards to their gender identity in India?
- Does legal recognition of gender identity require transgenders to undergo medical procedures in India?
- What role has the Indian Judiciary played in legal recognition of Transgenders ?
- What are the progressive development pertaining to the legal recognition of this community?

1.8 RESEARCH METHODOLOGY

Legal research methodology adopted is confined to doctrinal legal research , descriptive method, analytical legal research , case study and narratives.

1.9 RESEARCH DESIGN

Chapter 1- Introduction

This chapter is the introductory chapter and an attempt is made therein to give a broad outline to the study. This chapter includes the research objective, research questions, aim, literature review, statement of problem and research design.

Chapter 2- Historical Background of Transgender people in India

This chapter deals with the history of existence and status of transgender persons in India. It gives a background knowledge of their presence in the ancient india , medieval india and during the legacy of the British in India. It throws light on their status in Indian society back then in a chronological order. It also encompasses privileges they had, struggles they faced and laws that pose a threat to their gender. This is the second Chapter and is named as “Historical Background of Transgender people in India”.

Chapter 3- Legal Gender Recognition of Transgender

This chapter deals with the concept of legal gender recognition of the third genders and its significance. It discusses the renowned NALSA Case and the journey of transgender community in achieving their right to self identify their gender. It also deals with

fundamental rights that are enjoyable by the third gender under the Indian constitution. This is the Third Chapter and is entitled as “Legal Gender Recognition of Transgender”

Chapter 4- Challenges Faced by Transgender

This chapter explains the struggles of transgenders in day to day life in regards to their gender identity. It focuses on how the transgenders are not given full recognition of their gender identity despite the verdict and directions of the landmark NALSA judgement of 2014. It deals with the economic , social and legal challenges. It also discusse data collected on transgenders in regards to their official documentations and crimes. It also dicussesthe challenges This is the Fourth Chapter is named as “The Challenges by Trangender”

Chapter 5- Progressive developments of transgender in india

This chapter deals with the measures that the government have taken to ensure the upliftment of the transgender community in India through schemes. It also deals with some of the judgements of the judiciary. This chapter is entitled as “Progressive developments of transgender in India”

Chapter 6- Findings and suggestions

This chapter discusses the findings and give some recommendations or suggestions

Chapter 7- Conclusion

This chapter is the conclusion.

Chapter 2 Historical Background of Transgender people in India

India one amongst the oldest civilizations “in the world”¹¹ and has undergone many conquests throughout millennia¹². The “subcontinent has had a rich cultural and religious” heritage for millennia, which has shaped their everyday lives. With each Mughal conquest and subsequent British colonialism, the subcontinent's culture has evolved. Today's socio-cultural practises are a synthesis of the numerous forces that shaped the region's history.

A lengthy mythological and historical background surrounds the transgender community in India and the Indian subcontinent. There are references to homosexuality and gender fluidity throughout the Kamasutra, Ramayana, Mahabharata, as well as in the religious writings of Jainism and Buddhism¹³. “Devdutt Pattanaik, an Indian mythologist and author” wrote in his book, “Shikhandi: And Other Tales They Don't Tell You”:

“Hindu mythology makes constant references to queerness, the idea that questions notions of maleness and femaleness. There are stories of men who become women, and women who become men, of men who create children without women, and women who create children without men, and of creatures who are neither this, nor that, but a little bit of both, like the makara (a combination of fish and elephant) or the yali (a combination of lion and elephant). There are also many words in Sanskrit, Prakrit and Tamil such as kliba, napumsaka, mukhabhaga, mukhabhaga, sanda, panda, pandaka, pedi that suggest a long familiarity with queer thought and behavior. It is common to either deny the existence of such fluidity in our stories, or simply locate them in the realm of the supernatural or point to law books that, besides endorsing patriarchy and casteism, also frown upon queer behavior. Yet the stories are repeatedly told and shown, Gentle attempts, perhaps, of wise sages to open up stubborn finite minds and lead them towards infinity.”¹⁴

The community of transgender consists of “Hijras, eunuchs, Kothis, Aravanis, Jogappas, Shiv-Shakthis” etc. The eunuchs lived from the “9th century BC”. The phrase comes from Greek and implies castrated males, “Keeper of the bed” who are popularly asked to protect ladies in the royal homes.

Ancient India

¹¹ SERENA NANDA NEITHER MAN NOR WOMAN : THE HIJRAS OF INDIA (Wadsworth Pub Co 1999)

¹² SERENA NANDA NEITHER MAN NOR WOMAN : THE HIJRAS OF INDIA (Wadsworth Pub Co 1999)

¹³ SERENA NANDA NEITHER MAN NOR WOMAN : THE HIJRAS OF INDIA (Wadsworth Pub Co 1999)

¹⁴ DEVDUTT PATTANAİK, SHIKHANDI: AND OTHER TALES THEY DON'T TELL YOU (Penguin Books Ltd 2014).

Jain, Brahmanical and Buddhist literature from approximately 1500 BCE tell stories concerning the third sex and the Hijras¹⁵. Three thousand years ago, the concept of a third gender was introduced in India¹⁶. "Kilba"¹⁷, "pandaka"¹⁸ and "napumsaka"¹⁹ are terms used in Buddhist and Sanskrit writings to describe categories. '.

There are many transposed genders, same-sex reproductive scenarios²⁰, changing forms, sexual masked balls, as well as gender and sexual fluidity, in Hindu mythology²¹. However, "the Jains, a minority religion in India have specific literature and postulations about gender and sex ambiguities, constituting the single richest source for knowledge of the third sex, as well as for speculations on sex and gender, to be found in India from the ancient to medieval periods"²²

Vedic culture acknowledged three genders, as may be deduced. The essential features of a person were categorized into three clear views by which one of the three genders would be assigned to the person; those of stri, "purusa" and "napumsaka".

'Stri', the woman, 'Purusa' the man, and 'napumsaka', means neither woman, nor man. "The first view, the Brahmanical one characterized gender by the presence or absence of certain primary and secondary characteristics, mainly physiological, a doctrine that was also endorsed by the Buddhists. The second, the Buddhist position²³ assigned gender by the presence or absence of procreative ability, with impotence signifying membership in the third, or napumsaka, category."

The Vedas²⁴ define people in one of three distinct types, by nature or practise. These are also described as pumspraktistri-prakrti (female-nature) and tritiya-prakrti in the Kama Sutra²⁵ and elsewhere (third nature). Different sources imply that in pre-modern India third sex persons were extensively known and comprised both males, females, and intersexuals, who were commonly identified as having been from childhood. Linguistics, old Hindu law, astrology medicine and also discusses a third sex

¹⁵ Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007)

¹⁶ zilling.L, and M.L Sweet, "Like A City Ablaze":The Third Sex and The Creation of Sexuality in Jain Religious Literature, *Journal of the History of Sexuality* P 362 (1996)

¹⁷ Kilba means someone who is sterile

¹⁸ Pandaka means someone who is an eunuch

¹⁹ Napunsaka can be literally translated to mean someone who is neither male nor female

²⁰ Devdutt Pattanaik, *Shikhandi and Other Tales They Don't Tell You*(penguin books ltd 2014)

²¹ Devdutt Pattanaik, *Shikhandi and Other Tales They Don't Tell You*(penguin books ltd 2014)

²² Zwillig and sweet 1996 p 363 quoted in Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007)

²³ (which was also Brahmanical belief elaborated most clearly in Indian Medieval Literature)

²⁴ 1500 BCE to 500 BC

²⁵ A Hindu Text on human sexual behavior written between 400BCE- 200 CE

The “foundational work of Hindu law”, the “Manu Smriti”²⁶ discusses the “biological” genesis of the three genders: "A male child is produced by a greater quantity of male seed, a female child by the prevalence of the female; if both are equal, a third-sex child or boy and girl twins are produced; if either are weak or deficient in quantity, a failure of conception results.”

The Sanskrit grammar study of Indian linguist Patanjali is stated by the Mahabharata²⁷ that the three grammatical sexes in Sanskrit come from three natural genres. Tolkappiyam²⁸ is also a third "neuter" gender in hermaphrodites (“in addition to a feminine category of unmasculine males”). In astrology based on Vedic texts, each of the “nine planets” is allocated to a gender of three. Mercury, Saturn and (specifically) Ketu are linked with the third gender, tritiya-prakrti. Three types of devas of music and dancing are also mentioned in Puranas: apsaras (female), gandharvas, and kinsmen (neuter).

For hundreds of years transgender people were a part of Indian society. There have been historical indications that "third sex" has been recognised or that people in almost the beginning of ancient India do not affirm male or female sex. In “Hindu mythology”, folklore, epic, Puranic and “Early Vedic” and literature the idea "tritiyaprakriti" or "napumsaka" has been an essential component. The word "napumsaka" was used to indicate the absence of procreative capacity, which was shown to represent a difference between males and females. So some of the early literature addressed sexuality concerns and the idea of third sex, which was a “well-established” concept.

Some of Hinduism's most major books, including the Mahabharata and the Ramayana²⁹, feature Hijra figures. Ardhanari, an androgynous form of Shiva, is revered by many in the Hijra culture as a result of Shiva combining with his wife Parvati.

In the Epic Ramayana, when he was 14 years expelled from the kingdom, Lord Rama was departing in the wilderness, turning to his supporters and asking all 'men and women' to come to town. The hijras alone felt bound by this path and chose to stay with him amongst his followers. Rama was so moved by their dedication that he handed them the ability to bless auspicious occurrences such as children's children and marriage and during opening events which were meant to set up the scene for Badhai's habit of singing, dancing and bestowing blessings on others.

²⁶ 200BC-200AD

²⁷ 200BC

²⁸ The earliest Tamil Grammar (3RD century BC)

²⁹ Sridevi Nambiar, A brief History of Hijra, India's Third Gender Jan.1, 2017

<https://the culturetrip.com/asia/india/articles/a-brief-history-of-hijras-india's-third-gender/> last visited on June 28, 2021

When Aravan, Arjuna's son from Nagakanya, offered himself over to Goddess Kali in the Mahabharata, his sole condition was that he spend his final night married. Seeing that no lady wanted to marry a man who was condemned to die, Krishna took the shape of "Mohini" and married him.

Mughal Period

The Mughal invasion and subsequent blending of Indian and Mughal civilizations characterised the mediaeval period in Indian history. In the eleventh and twelfth centuries, the entrance of the Mughals is credited with a major increase in allusions to eunuchs³⁰.

During the Middle Ages, it is clear that eunuchs were common in most Islamic dynasties. The Eunuchs were formally recognised their place and function at imperial and royal courts³¹ the female sphere. The Eunuchs played significant role in the Haren as bodyguards and they were also part of the royal secret service³². They were "powerful figures in charge of collecting taxes and duties in the Sultanate and Mughal Courts"³³.

They played notable "role in the royal courts of the Islamic world", notably in the "Ottoman empires" and the "Mughal rule" in the Medieval India" and held well recognised respectable roles as political advisers, generals, administrators, as well as guards of the harems. Hijras were considered intelligent, fiercely, trustworthy and loyal and had "unrestricted access to all areas and sectors of people, therefore playing a vital part in the politics of empire building in the Mughal Empire".

In Islamic religious organisations, the hijras also held important posts, notably in keeping the people of trust with the holy locations of Medina and Mecca. They could influence governmental choices and moneyed up to get near to the royals. The Eunuchs were frequently chamberlains and guards of the domain of the inner feminine as they both appeared manly and effeminate. They did not represent a sexual threat yet were male enough to be thought of as gaurdians.

British Period

Hijras used to receive protections and benefits by some Indian states through entry into the hijra community in the beginning of the British period in India. The benefits included the

³⁰ RUTH VANITA & SALEEM KIDWAI, SAME-SEX LOVE IN INDIA: READINGS FROM LITERATURE AND HISTORY (edition 2000 New York: St. Martin's Press)

³¹ Shaun Toughner (2002, 143)

³² <https://www.quora.com/Where-there-any-laws-against-homosexuality-in-the-Mughal-Empire> last visted on Jun.28,2021

³³ Anjali Arondekar (2010)

<https://blogs.lse.ac.uk/gender/2019/06/17/hijras-and-the-legacy-of-british-colonial-rule-in-india/>

land provision, food rights and smaller amount of money from agricultural households in the same area which were ultimately eradicated through British legislation for reasons that the land was not inherited through blood relations.

“In the second half of the 19th century, there was a drastic change in the scenario as the partnership, and sexual behaviours were reinterpreted in the binaries of masculine and feminine or natural and unnatural (collective) propensities³⁴. The British colonial administration ruthlessly sought to criminalize the hijra community and deny them the civil rights. Hijras were central to this colonial misrepresentation as it could be seen³⁵. The British Raj authorities attempted to eradicate transgender person, whom they saw as “a breach of public decency”.

With the formal proclamation of the “Criminal Tribes Act (Act 27) of 1871”³⁶, that provided for the “registration, surveillance and control of certain tribes and eunuchs,” hijras were officially brought under the dangerous outlaws³⁷. They were labeled as a “criminal tribe”. The whole community of Transgender persons were under the Act deemed as innately 'criminal' and “addicted to the systematic commission of non-bailable offences”. They could also be arrested without warrant and sentenced to imprisonment up to two years or fine of both. A law passed in 1871 criminalised all hijras who kidnapped and castrated infants, dressed as women, and danced in public. They were sentenced to jail terms of up to two years, or both.

“Any registered eunuch”, wearing a cloth alike women or adorned like a woman, in public streets or places or at any other location, intending to be seen from a public street or place or to dance or to play music, or participating in any, in a public street or place, public exhibition or for hire in the private House can be arrested and detained with the exception: the Act³⁸ shall specifically target Hijra practise by: The stance of this historical act is been abolished but reflects the 'current view of hijras. Although now repealed, the attitudes in this historical Act are reflected in the “contemporary perception of hijras as thieves as well as the brutal violence which is inflicted against them.”

³⁴ Chatterjee, I. 1999. *Gender, Slavery, and Law in Colonial India*. New Delhi: Oxford University Press 67

³⁵ Vanita, R., and S. Kidwai, eds. 2000. *Same-Sex Love in India: Readings from Literature and History*. New York: St. Martin's Press

³⁶ The Act was repealed in 1952 but its legacy continues and many local laws showed the prejudicial attitudes towards certain tribes, including Hijras. For instance, the Karnataka Police Act was amended in 2012 to “provide for registration and surveillance of Hijras who indulged in kidnapping of children, unnatural offences and offences of this nature” (section 36A), in a similar vein to the Criminal Tribes Act, 1871.

³⁷ Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007).

³⁸ Section 26 of Criminal Tribes Act (Act 27) of 1871.

Initially the “Criminal Tribes Act was applicable in Northwest provinces”, Punjab and Awadh. many sections of the Act were extended to the entirety of British India, by the early 20th century. The term “eunuch” under this Act was “deemed to include all persons of the male sex who admit themselves, or on medical inspection clearly appear to be impotent,” a classification that back then permitted “for the registration, surveillance, and ability to arrest all such individuals. This included individuals who”

(1) “are reasonably suspected of castrating children or kidnapping, or of committing offences under section 377 of the Indian Penal Code, or of abetting the commission of any of the said offences”;

(2) “appear, wear clothes or ornamented like a woman, in a public place or street, or in any other place, with the intention of being seen from a public place or street”; or

(3) “play music or dance, or take part in any public exhibition, in a public place or street or for hire in a private house”³⁹

Individuals categorised in this colonial group were defined by a "body of knowledge" that defined their features, habits, and nature British concepts of vagrancy and criminality were mixed with Indian society's perceptions to create this criminal caste⁴⁰. The construction viewed crime as a deeply ingrained, inborn concept that was passed down from generation to generation through genetic inheritance. Consequently, the criminal class concept was elevated to the same level as castes.

They were "written" on the bodies of the so-called criminal classes through this structure. They were also a focus of colonial activities during that time. This work was either sexual (article 377 of the Penal Code, which outlaws sodomy) or asexual, such as singing, dancing, or even clothes.

As a result, the Indian Constitution enacted the same-named section 377, which outlaws sodomy. Transgender's sexuality was restricted, but the criminal caste concept was not. This was a language of crime, sexual inhibitions and restrictions, not love, adoration, sexual orientation and gender identity. Hijras and other transgender people were consistently misrepresented by the British for nearly two hundred years, leading to an erroneous concept of hijras and their sexuality that was far distant from their native belief system.

³⁹ (Collection of Acts Passed by the Governor-General of India in Council of the Year 1871)

⁴⁰ Tolen, R. 1991. Colonizing and Transforming the Criminal Tribesman: The Salvation Army in British India. *American Ethnologist* 106.

Presently in Modern India, the law that the transgender community were terrorized by are “Section 377 of the Indian Penal Code”, 1860 and the “Immoral Traffic Prevention Act”, 1956 (amended in 1986). Immoral Traffic Prevention Act, 1956 is the “key instrument of the Indian state’s regulation of prostitution which mandates to prevent the traffic of women and children into prostitution”. The title was modified to “Immoral Traffic Prevention Act” through its 1986 amendment and now the Act is to be applied to both female and male sex workers and also to those whose gender identity was indeterminate. It became gender neutral and this made both male and hijra sex workers criminal subjects of the ITPA. It legally provided for arrest and intimidation of the transgender sex workers.

“Section 377 – Offence affecting the Human Body provides for the sanction for the prosecution of sexual acts that are deemed to be unnatural. It is noteworthy that regardless of consent these sexual acts are liable for prosecution as because they are viewed as carnal intercourse against the order of the nature, with woman or man, or animal and, therefore satisfy the requirement of penetration. To be a homosexual or a hijra is to draw the presumption that the hijra or the homosexual is engaging in carnal intercourse against the order of nature”.

Though “Section 377 of IPC” is not directly related to transgender, however it has been used as a tool to harass a transgender, in the name of law. From the various examples of violence and abuse against homosexuals and transgender, “it is evident that Section 377 has been grossly misused”.

For instance, Police arrested transgender Pandian on stealing allegations in “Jayalakshmi v. State of Tamil Nadu”⁴¹. He was sexually molested at the police station, and as a result, he set himself on fire in the building.

On the other hand, in Bangalore, police detained Narayana, a transgender man on theft allegation, without alerting him of his arrest or giving him a chance to defend himself. They took his journal and threatened him with grave repercussions for refusing to help them identify other transgenders that they knew. Police have allegedly extorted money from homosexuals in return for keeping their identities secret⁴².

In Naz Foundation v. Delhi NCT Government⁴³ the movement against the coercive and despotic nature of Section 377 grew tremendously and culminated in “Delhi High Court” recognising and interpreting the anachronism of Section 377 to exclude sexual acts between adults with consent

⁴¹ (2007) 4MLJ849

⁴² People’s Union for Civil Liberties (PUCL) Report on Rampant violation of rights of Sexual Minorities, p.14 (2000).

⁴³ WP(C) No.7455/2001, DELHI HIGH COURT; Decision on 2nd July, 2009

and to decriminalize homosexuality. This was the first time that an Indian court had ruled that oppression on the transgender and homosexual communities in the country “was violative under Article 14” of the “Right to Equality”, Article 15 of the “Right to Discrimination” and Article 21 of the Indian Constitution, and the “Right to Privacy and Personal Dignity”.

Chapter 3 Legal Recognition of Third Gender in India

In India, the society has accepted the third gender or the transgenders for a long time, but there was no initiative or action for legal recognition of this community and therefore , ordinary things like opening a bank account, picking parcel at post office, applying job , lodging a harassment complaint or even the simple act of utilising a customised transportation ticket can be a cause of everyday frustration for a Trans person when the legal gender registered does not match the gender identity on an “ID card”, “passport” or other government-issued identification document. This leads distrust, and even violence. A trans person's gender identification must be recognised in order to close this gap. Legal gender recognition on documents is very important for trans people to be able to live a dignified and respectful life.

It is possible to legally acknowledge a transgender person's gender identification by enabling the change of name and gendered information on official papers and registers. Legal gender recognition is the name given to this process. The law permits transgender people to live with their gender identification. Hijras, sometimes known as third genders or third sexes, have been pushed for by transgender activists and western NGOs since the late 20th century.

In 2005, the Indian passport application form was modified to include three genders — M, F, and E – in response to growing demand and social actions by the hijras population (male, female, and eunuch respectively). It was highlighted that transgenders were typically coerced into identifying themselves as a ‘female’ on their passports and other official documents which is not an identity that most transgenders are happy with. Those filling out an online passport application in 2015 have the option of picking 'transgender' in addition to male or female in the gender category, after the 2014 Supreme Court ruling.

Again in 2009 to bring further third gender recognition , India agreed to bring the eunuchs and transgender people in the category of third gender, who are different from female to male to give votes in id cards. The Government of India has made some efforts to integrate the third gender in Indian society but even then the full third gender did not get full third gender recognition and enjoyment of all other rights just like the other genders in the society.

It is to be noted that 2014 has been a very significant year in the history of transgender in India. The Apex Court legally gave recognition to the transgender person as subjects of citizenship and rights. The “Ministry of Social Justice and Empowerment (hereinafter MSJE)” in January month of 2013, made a report on the topic “issues relating to transgender persons” which was drafted by an “expert committee”. Prior its constitution consultations were made with the leaders from the transgender community⁴⁴.

Followed by this the “Supreme Court of India” proclaimed that “transgender persons have equal rights as guaranteed by Articles 14, 15, 16, 19, and 21 of the Indian Constitution” in the landmark case of on “April 15, 2014”, in “National Legal Service Authority (NALSA) v. Union of India⁴⁵”. Court gave a verdict that the Indian Constitution requires all persons to be treated equally “regardless of their gender identity or expression”. It also gave directions that the “legal recognition of gender identity” as female, male or third gender must be granted by the Centre or State governments.

In addition, the Court ruled that “transgender people should be considered as a third gender category and as a socially and economically behind class entitled to proportionate access to and representation in school and employment”.

An individual who undergoes surgery to alter their gender has the “right to identify” as that gender and cannot be subjected to “discrimination”, the Supreme Court said.

"Transgender" refers to transgender people exclusively. Gay, lesbian, and bisexual people are also included in this category.

Now before coming to the exact definition of third gender given by the court, understanding must be brought to other terms like sex and gender. Sex and gender are correlated yet they are distinct and different from one another. Sex identifies women and men on the sole basis of biology whereas on the other hand side gender is determined by social construction⁴⁶. For better understanding or clearance it can be said that sexuality is universally understood to be stable and unchanging across cultures (but there must be no changes made by medicines or surgical). The fact that gender is flexible and can be “determined” by behavior and clothing (an individual's identifying characteristic) as female or male, within his or her society.

Third gender and third sex are those terms that describe persons who are brought under the category as neither female nor male, either by their own choice or by societal

⁴⁴ Ministry of Social Justice and Empowerment, Report of the Expert Committee on Issues Relating to Transgender Persons, January 27, 2013, available at <<http://socialjustice.nic.in/transgenderpersons>

⁴⁵ (2014) 5 SCC 438

⁴⁶ Julie A. Greenberg, Defining Male and Female: Intersexuality and the Collision between Law and Biology, 41 ARIZ. L. REV. 265, 271 (1999)

agreement. The term “third” is in general means “other; the fourth, fifth, and even some genders have been described by certain anthropologists and sociologists. It can be a state of being both male and female, or a state of neither (neuter), or it can be a category entirely separate from male and female, depending on culture or person.

Therefore, third gender is an inclusive term which includes within it various entities with irregular sexual orientation⁴⁷. They are mainly known as hijras, intersex people and transgender people.

The word has been used to denote Hijras of Bangladesh ,Pakistan and India. A key component of the group's definition is the presence of male sex organs that are irregular. Men who have been ritually emasculated as well as intersex persons whose genitals are "ambiguously male-like at birth⁴⁸" are included in the hijras.

In this respect inter-sex must be defined. “Inter-sex people are those born with physical conditions that result in a typical external reproductive anatomies or chromosomal anomaly⁴⁹”.

Transgenderism on the other hand, is a varied collection of people who's gender does not correspond to their biological sexe at birth. Genderqueer is a word that encompasses a wide range of genderqueer groups and individuals.,

Feinberg used Trans-gender to persons who have a gender variant identity. It relates not just to transgender individuals, but to a wide range of groups, including crossdressers, Trans-sexuals, and rogyne, gender-queers and Indian hijras also who themselves proclaim to be third genders⁵⁰.

⁴⁷ According to The Preamble of The Yogyakarta Principles Sexual Orientation “refers to each person’s capacity for profound emotional, affectional and sexual relations with individuals of a different gender or the same gender or more than one gender.” As sighted in National Legal Services Authority V. Union of India and others, CIVIL ORIGINAL JURISDICTION WRIT PETITION (CIVIL) NO.400 OF 2012 WITH WRIT PETITION (CIVIL) NO.604 OF 2013 SC reportable judgment. Available at <http://judis.nic.in/supremecourt>

⁴⁸ Rights of Transgender People – Sensitising Officers to Provide Access to Justice by Hon'ble Justice P. Sathasivam, Judge, Supreme Court of India; Lecture delivered on Refresher Course for Civil Judges (Junior Division)-I Batch at Tamil Nadu State Judicial Academy on 12.02.201, available at [www.trsj.tn.nic.in>article>rightsoftg](http://www.trsj.tn.nic.in/article/rightsoftg)

⁴⁹ Teaching Intersex issues, second Edition, Published by Intersex Initiatives Portland, Transgender Definition, introduction. Transgender Definition, page 1,

<http://www.philosophyreligion.org/handouts/pdfs/Transgender.pdf>

⁵⁰ Transgender Definition, introduction. Transgender Definition, page 1,

<http://www.philosophyreligion.org/handouts/pdfs/Transgender.pdf>

When the directives are concerned, it has been seen that the Apex Court ranges widely and are comprehensive in nature, it can be observed that when it comes to scope, it remains ambitious, particularly in the light of given time scheduled. The implementation of these directions widely depends on the way it will be interpreted by the “Central and State governments”. While practicalities are worked out, execution of the Court's orders may take some time. Despite the court acknowledging the existence of various transgender communities in India, although in its initial direction, it solely refers to eunuchs and hijras. For instance paragraph 46 of the ruling, in which the court recognises the struggle of FTM transsexual people, and separates them from hijras, FTMs and other identifiable groupings may or may not be included in the "third gender" category recognised by the court.

Constitutional framework

The objectives of the Indian Constitution have been enshrined in the “Preamble which mandates Justice - social, economic, and political, equality of status and opportunity”. The goals of the preamble are working as a constant and unending reminder of the achievable standard. Therefore justice and equality must be secured for everyone without “any kind of discrimination on the basis of sexual orientation”.

The objectives of preamble are crystal clear established in “ fundamental rights” chapter in the Indian Constitution. Thus “the first and foremost right that they are entitled of is the right to equality under Article 14. Article 14 provides that the state shall not deny to any person equality before law and equal protection of law”. The interpretation of this right also introduces the “concept of reasonable classification” in favour of non-dominant classes of the country. The “National Legal Service Authority (NALSA) v. Union of India” Judgement in its decision expressly laid down– “Article 14 does not restrict the word ‘person’ and its application only to male or female. Hijras/transgender persons who are neither male/female fall within the expression ‘person’ and, hence, entitled to legal protection of laws in all spheres of State activity, including employment, healthcare, education as well as equal civil and citizenship rights, as enjoyed by any other citizen of this country.⁵¹”

“Discrimination” on the basis of “religion”, ethnicity, class, “gender” or “place of birth” is prohibited under articles 15 and 16. It clearly means that any kind of discrimination made to any individual as a result of the “sexual orientation” would be violative of these provision. People who consider themselves neither female nor male are included in the definition of “sex” under Article 15 & 16. “Article 21” gives all citizens the “right to privacy and dignity”.

⁵¹ The Third Gender and Gender Self-Identification in India: A Review by Aakanksha Kumar; Journal of Politics & Governance, Vol. 3, No. 4, October - December 2014 at p. 34 available at [www.academia.edu>The_Third_Gender](http://www.academia.edu/The_Third_Gender)

When the actual meaning of this article is expanded it needs wide interpretation of the word “life”. Life of a human being cannot be equated to life of “a mere animal but to live with human dignity⁵²”. In this regard the Apex Court held in “National Legal Service Authority (NALSA) v. Union of India” held that –“Recognition of one’s gender identity lies at the heart of the fundamental right to dignity. Gender, as already indicated, constitutes the core of one’s sense of being as well as an integral part of a person’s identity. Legal recognition of gender identity is, therefore, part of right to dignity and freedom guaranteed under our Constitution.⁵³”

Furthermore, Article 19(1) of the Indian Constitution provides certain fundamental rights to freedom to which State-imposed reasonable limitations apply. “Article 19(1) guarantees that the natural rights are inherent in the status of the citizen of a free country. Article 19(1) (a) of the Constitution states that every citizen shall have the right to freedom of speech and expression, which also includes one’s right to express self-identified gender”. As it was observed in the “National Legal Services Authority V. Union of India and others, case” – “Self-identified gender can be expressed through dress, words, action or behavior or any other form. No restriction can be placed on one’s personal appearance or choice of dressing, subject to the restrictions contained in Article 19(2) of the Constitution”

Therefore, the “freedom of expression” as provided under “Article 19(1)(a) the ability to express one's gender identification in a numerous ways. That is it means by way of dressing, mannerism, speech, expression, and many more. It is agreed that many provisions proclaim for equal status of every person, security of dignified living, freedom of expression of one’s gender identity and “non discrimination of the basis of sexual orientation” in the Indian Constitution but this particular section of India ,the third gender, still continues to be deprived of their basic constitutional rights and are ignored and neglected. However , the Indian Constitution still guarantees and provides that it is reasonless and completely baseless why “Transgender Community should not get their basic rights. It includes the right to dignity, personal liberty, freedom of expression, education and empowerment”, and protection from exploitation, violence and discrimination, It also includes the right to empowerment and education⁵⁴.

⁵² Francis Coralie Mullin V. Union of India AIR 1978 SC 597

⁵³ National Legal Services Authority V. Union of India and others, CIVIL ORIGINAL JURISDICTION WRIT PETITION (CIVIL) NO. 400 OF 2012 WITH WRIT PETITION (CIVIL) NO. 604 OF 2013 SC reportable judgment. At page 68, as sighted in The Third Gender and Gender Self-Identification in India: A Review by Aakanksha Kumar; Journal of Politics & Governance

⁵⁴ Rights of Transgender People – Sensitising Officers to Provide Access to Justice by Hon'ble Justice P. Sathasivam, Judge, Supreme Court of India; Lecture delivered on Refresher Course for Civil Judges (Junior Division)-I Batch at Tamil Nadu State Judicial Academy on 12.02.2011

On the other side of the coin, legislations of India have not at any point of time recognized the rights of the third gender. Instead examples can be cited of archaic laws since the time of British rule whereby the transgender community has been subjected to prohibitions and restrictions.

The main example of kinds of laws mentioned above are –

- i. The “Criminal Tribes Act of 1871 (repealed in August 1949)”, and
- ii. Section 377 of the IPC

Both these laws were such that it set the platform for “harassment and surveillance by the police” of the transgender community. The “1871 law”, by the sub-title “An Act for the Registration of Criminal Tribes and Eunuchs,” needed the “local government to keep a register” which maintained the names and residences of all eunuchs who were “reasonably suspected of kidnappings or castrating children or committing offences under Section 377 of the Indian Penal Code.⁵⁵”

The Act⁵⁶ in particular “targeted Hijra practice” by stating that “any eunuch so registered who appears, ornamented like a woman”, or who appears in dresses of women ,”in a public street or place, or in any other place, with the intention of being seen from a public street or place”, or who plays music or performs dances, or takes part in any public exhibition or for hire in a private house arrest without warrant and punishable by imprisonment of any kind for a time that may exceed to two years, or by both.

Furthermore , as per “Section 29 of The Criminal Tribes Act of 1871,it eroded the legal identity of the very group by prohibiting hijras from making a gift or a will” as per their wish. Although now repealed, these weird historical attitudes are reflected in the “contemporary perception of hijras as thieves as well as the brutal violence which is inflicted against them.”

“ Section 377 of the Penal Code, which criminalized non-procreative sexual acts”, which makes “carnal intercourse against the order of nature with any man, woman, or animal”, punishable” with 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”. A general interpretation of this section also brings in the individuals from the transgender community as very much linked with the “prescribed sexual practices” and practically these archaic laws have been used several times to harass this vulnerable section.

⁵⁵ The Third Gender and Gender Self-Identification in India: A Review by Aakanksha Kumar; Journal of Politics & Governance, Vol. 3, No. 4, OctoberDecember 2014 at page 34

⁵⁶ Section 26 of The Criminal Tribes Act of 1871

An example of this is given in the case of “Queen Empress v. Khairati⁵⁷”, in which an officer accused the “victim of being a Eunuch” because he wore women's clothing and was often seen “dancing” and “singing” with women in groups. The policeman arrested him under Section 377 of the United States Code. Because of his anal orifice deformation and his feminine behaviour, the Court concluded that the accused was an avid sodomite. Even though Khairati's gender non-confirming behaviour and identity led to her acquittal, the whole investigation and trial procedure appears to have resulted in the stigmatisation of Khairati through an intrusive process.

Except for these two archaic laws there is no “Central legislation in India” for recognition of the “third gender”. Even so, there existed some administrative actions of the Government that sometimes recognized the third community. In the year 1994, the passport Authority of India proposed to include third gender as a different or say distinct gender identity. For issuing a passport the person must be eligible, regardless of gender. “Bureaucratic gender sensitivities in India, a small step, with “eunuchs” being given the option which was a privilege to enter their sex as 'E' proudly “instead of either 'M' or 'F' in passport application forms on the internet, in 2005⁵⁸”.

Subsequently, the Election Commission of India in 2009 gave transsexuals and eunuchs a distinct identity which was different or separate from Male and Female. Instead of faking themselves as male or female, or forcefully ticking themselves as male or female, they can identify themselves in electoral roles as ‘Others’.

Except this the Govt. for the first time in 2011 took the step to count the third gender people in census. The form for census 2011 has a space specifically given for third gender as it asks the person to mention whether the respondent is a male, female or falls in the ‘Other’ category. Except for a few states, there was no other “legal recognition” of their position as a “third gender” until the “National Legal Service Authority (NALSA) v. Union of India” judgement. Many significant efforts have been done to improve the lives of Tamil Nadu's residents. The term "third gender or sex" has been used in a few states, including Kerala, “Tripura”, and Bihar. Other nations also regard them as belonging to the "third category⁵⁹”

⁵⁷ (1884) ILR 6 All 204

⁵⁸ The Telegraph, 2005 as sighted in The Third Gender and Gender Self-identification in India: A Review by Aakanksha Kumar; Journal of Politics & Governance, Vol. 3, No. 4, October-December 2014 at page 32.

⁵⁸ Suresh Kumar Koushal and another v NAZ Foundation and others Supreme Court of India: Civil Appeal No. 10972 of 2013 Link to full court judgement: <http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070>

⁵⁹ Suresh Kumar Koushal and another v NAZ Foundation and others Supreme Court of India: Civil Appeal No. 10972 of 2013 Link to full court judgement: <http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070>

Judicial journey towards NLSA decision

The Indian Judiciary's approach has been traditional and ignorant towards the transgender group and on the basis of the archaic laws of colonial times judiciary passed judgments that were discriminative. It is only recently in two cases that the "Delhi High Court and the Supreme Court" recognized transgender community of India as a as a community with different sexual identity, an identity which is distinct from the binary notions of the society and tried to protect them from the oppressive application of the age old discriminative laws.

But on the other hand, Supreme Court in the controversial judgement in Naz Foundation case⁶⁰ overruled the" judgment given by "Delhi High Court in 2009" and again held that "Section 377" is not ultra virus of Constitution. transgender community is that the "Supreme Court" recently after the decision of the Naz case in another case viz., NLSA case recognized transgender community as distinct sexual minority group and also directed the Government to takes measures to protect their rights. Recently the Government of India has also shown concern on the matter. Following the guidelines of the judgment a private member bill on transgender rights has already been passed But as we discussed earlier, most of the judgments were against the social recognition of Transgender Community rather for the implementation of the discriminative laws of British era. Cases like Queen Empress v. Khairati, or Jayalakshmi v. State of Tamil Nadu, are the examples of age old discriminative view of the Indian judiciary.

However in the Naz foundation case the Delhi High Court for the first time in 2009 had tried to bring some positive aspects in favour of the transgender community of the country. The Court examined the constitutional legality of "Section 377 of the IPC", and its compatibility with "Articles 14, 15, 19 and 21". Considering the matter that preferences for sexuality is covered under the right to privacy and dignity of the person, the court held that Section 377 was infringing the above mentioned right and therefore violated the very essence of Article 21.

Further, while interpreting the term "sex" in Article 15 the Court held that the term not only denotes gender, but to an expanded perimeter that includes 'sexual orientation'. As a result of this impression, the court concluded that Section 377 is presumptively discriminatory towards sexual minorities. . As a result of this impression, the court concluded that "Section 377" is presumptively "discriminatory towards sexual minorities".

⁶⁰ Suresh Kumar Koushal and another v NAZ Foundation and others Supreme Court of India: Civil Appeal No. 10972 of 2013Link to full court judgement: <http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070>

The judgment provided some relief to to the “transgender community” of India. But at the same time we should keep in mind that the neighboring Countries already did a lot to secure the rights of transgender people. We can take note of two landmark judgments. One pronounced by the Nepal “Supreme Court” in the Sunil Babu pant case another of the Supreme Court of Pakistan.

The “Supreme Court” of “Nepal in Sunil Babu Pant & Ors. v. Nepal” Government spoke on “the rights of Transgenders” as below:

“The fundamental rights comprised under Part III of the Constitution are enforceable fundamental human rights guaranteed to the citizens against the State. For this reason, the fundamental rights stipulated in Part III are the rights similarly vested in the third gender people as human beings. The homosexuals and third gender people are also human beings as other men and women are, and they are the citizens of this country as well.... Thus, the people other than ‘men’ and ‘women’, including the people of ‘third gender’ cannot be discriminated. The State should recognize the existence of all natural persons including the people of third gender other than the men and women. And it cannot deprive the people of third gender from enjoying the fundamental rights provided by Part III of the Constitution.”

The eunuchs' rights were considered by the Pakistan Supreme Court in “Dr. Mohammad Aslam Khaki & Anr. Dr. Mohammad Aslam Khaki & Anr. V. Senior Superintendent of Police (Operation) Rawalpindi & Ors.” as here under:

“Needless to observe that eunuchs in their rights are citizens of this country and subject to the Constitution of the Islamic Republic of Pakistan, 1973, their rights, obligations including right to life and dignity are equally protected. Thus no discrimination, for any reason, is possible against them as far as their rights and obligations are concerned. The Government functionaries both at federal and provincial levels are bound to provide them protection of life and property and secure their dignity as well, as is done in case of other citizens.”

However, as discussed earlier the Delhi High Court decision by which “Section 377 of IPC” was said to be unconstitutional gave some fresh air to the transgender community. But the situation did not remain same. The controversial judgment of the “Supreme Court” in the “Suresh Kumar Koushal and another v NAZ Foundation” and others upheld the validity of “Section 377” overruling the Delhi High Court Judgment. This case was decided by a two-judge panel of the “Supreme Court”, which accepted the appeal and reversed the High Court's prior ruling, finding it “legally unsustainable”.

The “Supreme Court ruled that Section 377 of the IPC” does not violate the Constitution and dismissed the writ petition brought by the Respondents as a result of this ruling.

Further, court held that: “Those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes and the people falling in the latter category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification”.

While reviewing the judgment given “by the High Court” in Naz case, the “Supreme Court stated that the High Court had overlooked the fact that a miniscule fraction of the country’s population constitute lesbians, gays, bisexuals or transgenders and that over the last 150 years, fewer than 200 persons had been prosecuted under Section 377, concluding from this that this cannot be made sound basis for declaring that section ultra vires the provisions of Articles 14, 15 and 21 of the Constitution.”

With this decision the situation for the transgender community becomes worse. Protest rose from various sectors against the judgment of the Supreme Court. But ultimately some hope was created by the “recent decision of the Apex Court in NLSA V. Union of India” case. In the case Supreme Court firmly declared “that gender identity is integral to the dignity of an individual and is at the core of personal autonomy and self-determination”.

According to our Constitution and regulations, Hijras/Eunuchs must be treated as a Third Gender. Men and women who desire to transition from one gender identification to another are included in this judgement. Centre and state governments have been ordered to recognise third gender gender identification legally. The Court acknowledges that the third gender has the same fundamental rights as men and women.

Third genders are also discriminated against in civil and criminal arenas such as divorce, adoption, marriage, etc. "Psychological Test" instead of "Biological Test" is preferred by the court, as far as real recognition is concerned.

As a result, Hijras/transgenders are denied equal protection under the law and experience widespread discrimination, according to the court. Article 14 uses the word "person"; Article 15 uses the words "citizen" and "sex"; and Article 16 uses the word "person". The term "citizen" is also used in Article 19. The word "person" is used in Article 21. All of these "gender-neutral" phrases clearly pertain to human beings.

As a result, they include Hijras and transgenders in their scope of work.. The judgment has pointed out other problems of the third gender community and said, “Some of the common and reported problem that transgender most commonly suffer are: harassment by the police in public places, harassment at home, police entrapment, rape, discriminations, abuse in public places et.al. The other major problems that the transgender people face in their daily life are discrimination, lack of educational facilities, lack of medical facilities,

homelessness, unemployment, depression, hormone pill abuse, tobacco and alcohol abuse, and problems related to marriage and adoption”

To cure these problems gender identification becomes very essential as with this recognition various political rights and civil rights can be conferred to this community and they can meaningfully enjoy the the right to own property, “right to employment”, education , health , right to vote, the “right to claim a formal identity through a ration card and passport”t, the right to marry, a driver’s license etc.

Further, it was argued that “there seems to be no reason why a transgender must be denied of basic human rights which includes Right to life and liberty with dignity, Right to Privacy and freedom of expression, Right to Education and Empowerment, Right against violence, Right against Exploitation and Right against Discrimination. Constitution has fulfilled its duty of providing rights to transgenders”.

Finally the Court observed that “now it’s time for us to recognize this and to extend and interpret the Constitution in such a manner as to ensure adignified life of transgender people. All this can be achieved if the beginning is made with the recognition that TG as third gender”

Chapter 4 - Challenges Faced of Transgenders

Above everything, and paramount, is the rule of law. In India, “everyone is equal in the eyes of the law. All human beings are free and equal in dignity⁶¹”, and they should be able to exercise their human rights without regard to “sexual orientation” or “gender identity”. However, it is a continual battle for the third gender group since they must resist oppression, abuse, and prejudice in Indian culture, “whether it is their own family and friends or society” as a whole.

Transgender individuals are regarded and considered as unnatural in Indian society, and are frequently ridiculed and sometimes feared for superstitious reasons. They face severe “mental, physical, and sexual persecution in society”. Transgender people's well-being and health suffer greatly as a result of prejudice and hostility against different gender presentation. Virtually they have no such place in the society which can be considered to be safe for them as most times the discriminations against them results into violence and infringement of the privacy, “right to life and right to live with dignity”.

The most terrible and heartbreaking aspect is that they are discriminated against by the individuals who gave birth to them and in whom they have confided. This vulnerable community's family members frequently do not support them. Transgender people in families suffer a slew of issues, including “verbal and physical abuse, isolation and rejection, and denial of family property”.

Transgender people are frequently stigmatised and discriminated against in society as their “gender identity or sexual orientation”. “Being looked down upon, labelled, and having a negative/generalized attitude about things like sex employment or sex solicitors” are all

⁶¹ Article 1, the Universal Declaration of Human Rights, 1948

examples of social stigma. The extreme stigmatization surrounding transgressions and misdemeanors around make it exceedingly backbreaking for families to accept, understand and acknowledge their children. Instead of taking extra care of the child and providing them with protection from the society, the family out of fear of hurting their pride and spoiling the name of their family, neglects and disowns the child. Also due to unending tortures, beating, humiliation, the only option left for them as hope, consolation and solace is the hijra community. They find their family and its warmth in it⁶². The “life of transgender people” is therefore, a regular battle as they are neglected, ostracized and ridiculed on daily basis. They have no social acceptance be it from their parents who gave them birth, family members or people at large.

This group lacks the basic fundamental rights enjoyed by the other sexes — male and female. They are denied many of the rights and benefits that other citizens of India enjoy. The reason for the exclusion is the absence of full legal acknowledgment of the third gender, as well as its ambiguities. They have “restricted access to health services”, education, and “public spaces, restricted rights” which are “available to” other citizens, such as right to contest elections, right to marry, employment, “right to vote and livelihood opportunities”, obtaining driving license, Identity Card, ration card, Passport etc.

Sexual minorities faced unemployment as a result of a lack of legal protection. According to the “National Transgender Discrimination Survey (NTDS)”, On platforms and at traffic signals, 15 percent of transgender people sang and begged for money. As a result, they lived a very routine existence. Since they were unemployed, they were unable to acquire basic necessities, which led to homelessness and prompted them to commit different unlawful actions so they could survive.

The main issue with this entire procedure is that transgender people are “socially ostracized from society”. They are barred from engaging in any economic, cultural or social activity. They have many difficulties in exercising most fundamental rights. They were granted the “right to vote” in 1994, but were not given voter identification cards and were asked questions about identities. They are not only barred from accessing religious buildings, but they are also barred from using public bathrooms. Some of the hurdles that contribute to exclusion are as follows:-

⁶² Dr. Neelu Mehra & Dr. Shivani Goswami, Third Genders: Their Agonies and the Demand for Legal Recognition, Global Journal of Interdisciplinary Social Sciences, January-February, 2016, pp. 19-20

a) Employment, economic and livelihood prospects b) Limited access to public areas, c) Inadequate medical care d) Exclusion from decision-making e) Citizenship rights f) Inadequate social security, g) Inadequate protection from violence

Furthermore, the ambiguity over whether a “male-to-female transgender person” qualify for recognition as a female prevents them from “exercising their rights related to marriage with a person of their desired gender, child adoption, inheritance, wills and trusts, employment, and access to and use of social welfare and health insurance schemes”.

Everyone has the “right to equality before the law and equal protection” under the law, free of “discrimination”. Transgender people are “part of society”, and they have the same “rights” as regular male and female residents of the country. However, prejudice based on their class and gender undermines the “transgender community”, making them one of India's most less empowered and disadvantaged communities. Transgender people, despite being human, are not acknowledged as humans “in violation of human rights since they are denied their fundamental rights” and other civil liberties.

According to the Human Rights of U.N. charter report of 2015, it is evidently said that “transgender are ill-treated by many country common people and also by it’s police men who misbehave with ill-words and spit physically abusive words”. In “JayalakshmiVs State of Tamil Nadu”, A transgender individual was detained on theft accusations by police officers. On the grounds of the police station he committed suicide after he was sexually assaulted there. Besides that, “A policemen arrested Narayana, a transgender, in Bangalore on suspicion of theft without providing sufficient information to him”.

Every day, such injustices are committed. As a result of these regulations, transgender persons are subjected to discrimination and harassment. To prevent women and children from being trafficked for prostitution, the “Immoral Traffic Prevention Act of 1956 (ITPA) (as modified in 1986”) was enacted. Its scope and ambit were enlarged by "the 1986 amendment" to cover not just male and female employees, but also persons who identified as neither male nor female. Both male and hijra sex workers were made criminals as a result of the legislation and the arrest of transgender sex workers had a legal basis.

“Workmen's Compensation Act of 1923” does not recognise sexual minorities or transgenders as "Person". As a matter of truth, India's transgender population is threatened by authoritarianism, bigotry, and systematic exclusion from society. Thus, the transsexual individual still has logical failure.

In 2015, the Telangana state had created Hijra Transgender Samiti which report the cruelty done on transgender which are in 40 in number, i.e., 40 attacks within six months. In the year 2015, WHO has issued a guideline, which is meant to be applied throughout the world,

of course in India also. As per this guideline, no medical or otherwise discrimination is to be done to the Transgender. Though these guidelines have come in the year 2015, yet to find full force in India.

In terms of civil rights, the lack of recognition isolates transgender people. Because most official data excludes 'Other,' transgender people are unable to obtain government benefits⁶³. When India was put on lockdown in 2020 because to the “Covid-19” epidemic, “each transgender person” will “receive Rs 1,500” in direct payments and ration supplies, according to the government. “Only 5,711 transgender persons” received bank transfers, and “1,229” obtained food rations, despite a population of 4.8 million. Due to a lack of documentation, 80 percent of transgender people failed to provide bank account information to the authorities⁶⁴.

Even after the landmark “Nalsa Decision”, most government data providers have made no adjustments to include the third gender and continuance of binary data collection and publication with the exclusion of transgender and intersex persons

When reporting a person's gender on the 2011 census, there were three options: "Female," "Male," and "Other." In India, this was the first time that non-binary people were surveyed. 487,803 transgender Indians were counted in the census, despite exclusion and accuracy issues.

Because of harassment and bullying, transgender youngsters are compelled to drop out of school, jeopardising their “chances of employment and society integration. Individuals who identify as transgender” are frequently discriminated against by healthcare personnel, restricting their access to health treatments. They face greater incidences of gender-based violence, particularly from police officers.

"Extreme harassment" and gender-related negative experiences led to the drop-out of nearly six in ten transgender students surveyed in “Kerala in 2015”. This is according to the same research compiled by Sangama, a human rights organisation for persons who are mistreated due of their sexual orientations, which questioned 3,619 transgender people.

The research also revealed high instances of “violence against transgender people”, notably by police officers. “More than half of those polled (52%) claimed they had been harassed by police, and nearly all (96%) stated they had not filed a complaint because of their gender identification”.

⁶³ Shreya Raman | IndiaSpend | Mumbai | Last Updated at June 11 2021 08:53 IST Last year

⁶⁴ Tinesh Chopade, advocacy manager at Humsafar Trust, an organisation working to advance health, advocacy, capacity building and research for the LGBTQIA+ community

“900 transgender persons in four districts of Uttar Pradesh and the National Capital Region” were interviewed in 2017 by the “National Human Rights Commission (NHRC)”.

On average, transgender people in the NCR and Uttar Pradesh never attended school or dropped out before grade X. In the informal sector, 69 percent of respondents were employed in singing, dancing, and 'blessing' [Transgender people are requested to deliver blessings at weddings or after childbirth in some groups. This is an important source of income for many individuals] Thirty-four percent of respondents were unsatisfied with their careers or income-generating activities, and 53 percent earned less than Rs 10,000 per month. The government has neither conducted a survey or conducted a census on transgender problems. No data is available on the number of transgender people who are educated or illiterate, homeless, living with their families, and living on the streets⁶⁵.

When it comes to sex disaggregated data, there is no distinct category for transgender people in key national data sources on health, education, and employment.

Among these datasets are the “National Family Health Survey (NFHS)”, which provides essential health and nutrition data, the “Unified District Information System for Education (UDISE)”, which compiles data from schools on resources and enrollment, and the “Periodic Labour Force Surveys”, which are the primary source of statistics on labour force unemployment and participation.

Officials and other stakeholders ask us on the number of transgender people in order to make a case for a policy change. Sadly, though, “Chopade of the Humsafar Trust” does not have this statistics. Because there are no comprehensive national data, the trust relies on outreach, projects, and research to obtain information.

No surveys have been conducted on transgender or intersex persons or their challenges by the “National Statistical Office”, which is part of the “Ministry of Statistics and Programme Implementation”.

In “2016, the National Crime Records Bureau” began collecting data on transgender persons for its annual Crime In India report, which covers information on all crimes committed in India. A similar study may not completely reflect transgender crime because it only includes offences reported to police and other law enforcement officials.

Transgender people were accorded legal recognition in an “April 2014 Supreme Court decision” that “recognised transgender as a third gender”. The decision, known colloquially as the “NALSA decision”, affirmed transgender people's right to self-identification and

⁶⁵ Kalki Subramaniam, founder and director of Sahodari Foundation

instructed governments in states and central to provide “legal recognition to their gender identity”. It gave transgender people the legal right to alter their gender and name and get id cards in the name and gender they preferred.

Access to any government assistance “scheme or private service system”, that consisted banking, education, housing and health care, requires a valid identity card. Despite legal recognition in 2014, transgender people still face difficulties in obtaining an identification card in their preferred name and gender.

Shaman Gupta, co-chair of "Transgender Welfare Equity and Empowerment Trust (TWEET) Foundation," stated that it took months to obtain a bank account for his group. Occasionally, the information on our board members' identity cards does not match the information on their PAN cards, or our addresses were not changed since we had to present so many documents.

According to a poll by the “Kerala government”, only 2 percent had a PAN card and just one-third of transgender persons had an Aadhaar or voter ID card. Among the responders, three out of four were unable to identify their preferred gender.

Transgender persons in Uttar Pradesh and Delhi have Aadhaar cards or voter identification cards that recognised them as such. One percent had an Aadhaar card, and 2.5 percent had a voter ID card with their prior name and gender on it, according to the data.

An affidavit to the district magistrate and a gazette announcement were required in order to get documents in the desired name and gender.

It is required that applicants be educated or affiliated with an organisation that works in the community in order to be eligible for this prize, according to the 2020 report.

This procedure has been transferred online with the establishment of the National Portal for Transgender People in November 2020. A user must log in, fill out a form, and provide identity documents in order to use the portal based on the Transgender Persons (Protection of Rights Act).

“By March of this year, the Ministry of Social Justice and Empowerment reported to parliament that 1,915 people had applied for the certificate of identification in the four months following its debut. Two hundred of them were rejected owing to inadequate or incorrect documentation. Nearly 85 percent of the legitimate 1,695 applications, or 1,418 applications, are pending. There have only been 227 cards produced. In November 2020, the National Portal for Transgender People will be released. Data are as of March 24, 2021”.

Source: Rajya Sabha

Obtaining the identity certificate also necessitates the use of other current identifying papers. Many transgender persons are unable to complete this process because they have left their home (of birth) without identification documents, according to IDRC study.

"Many transgender people flee their households," Chopade added. They only want to get out of the circumstance or the violence they are in right now, and that's all.

Indian college principal Manobi Bandopadhyay's story is one such terrible "testimony" that illustrates society's stubborn unwillingness to accept what it has long considered foreign. In a "memoir" she released lately, "A Gift of Goddess Lakshmi, Bandopadhyay, born 'Somnath,' recalls her journey from being the beloved only son of her parents, bullied throughout school and college, to earning a PhD in Bengali Literature, working for two decades in an inhospitable college in suburban Bengal, and eventually being appointed principal of another institution in Bengal."

As a college instructor in Jhargram, West Bengal, in the 1980s, Bandopadhyay claims she faced difficulties similar to those faced by the Kochi Metro employees who resigned. She recalls how difficult it was for her to find a permanent home, and how she was forced to move from one temporary accommodation to another until a kind landlord took her in. A part of the students turned against her and her employees excluded her from most choices.

It's a bittersweet ending to the novel, as Bandopadhyay is appointed as the next head of a prestigious college in Bengal's Nadia area. Her decision to leave was based on what she described a "long fight against ignorance" and the lack of collaboration from her colleagues. The fact that she had written several books and articles and served as editor of Bengal's first transgender magazine did not shield her from age-old blind spots.

For the next generation of trans professionals, it would appear as though Bandopadhyay's struggle helped pave the path. It has both and does not have both.

School teacher AtriKar, 27, of Bengal, has undergone two transfers and a sexual reassignment operation (SRS) in order to find her professional niche, but she still has many battles to win. At the time, my co-workers were openly antagonistic to me when I decided to come out at work in 2014. A gathering of 10 individuals would enable 9 people to speak, but not me.

While individuals at her second school seemed to embrace her better, one staff member complained to her presence in the staff room, which led to her current job. 'I've been completely accepted here,' says the English teacher, adding that her family and friends have also adjusted to her new identity. Her auto-rickshaw driver used to call her dada (brother), but now he calls her didi (sister). I'm educated, hold a government position, and am in the

media limelight, so perhaps people are more willing to move on. Our society, after all, is fundamentally elitist.

In terms of elitism, Kar's argument is spot on. People's life can be shaped by their class. School or college you attended, as well as your family's circumstances and attitude, are all factors that might influence your success.

A transgender girl at a Delhi school came out to her classmates at a school assembly. Naina was on the point of committing herself when she arrived. It was she who emerged, a woman who was stronger and ready for higher education and the workforce after SRS and a change of identification in all her documents.

However, many transgender people who want to work in blue-collar or even white-collar jobs face a huge obstacle: insufficient education.

“Neelam Jain of Periferry”, an organization based in Chennai that assists transgender people get work, believes that finding the right candidates is the toughest problem. Our ability to sell them to companies is limited by the fact that many of them lack the necessary credentials.

Orinam, a non-registered, all-volunteer organisation of LGBTI individuals and allies in Chennai, posted Shukla's worries about the bill on their website.

To prove transgender identification, the law requires a district magistrate's certificate. It also does not allow for transgender applicants to work.

“West Bengal Civil Services Examination authorities”, for example, reprimanded Kar when she found the 'third gender' option was absent on their application form. Although the “Railway Recruitment Board”, to which she also applied, had a provision for transgender people, as required by law, it did not make any exceptions for transgender people.

People undergoing “SRS”, even those pursuing an academic degree, must also ask for a name change in their paperwork, which is a bureaucratic ordeal in itself.

Kar says that she had to run from pillar to post in order to get things in order. How am I supposed to do my work at this pace? After Mamata Banerjee intervened through the state education government, Bandopadhyay's degree qualifications became clear.

Despite constitutional protections and anti-discrimination legislation, the workers had to leave Kochi at the end of the day. “Law and Policy Research Center” based in bangaluru Executive Director Jayna Kothari wondered why Kochi Metro has not been punished harshly for failing to protect the rights of its workers.

Neither the law nor social structure, which is far more difficult to change, are at fault for this calamity. Home is where it all begins, usually when a child is a young child.

In order to improve the lives of transgender individuals, Aaron says, we must first reform the family. While advocating for the community, she focuses on the rights of genderless children, whom she feels must be regarded as children with special needs. Because of the way she has turned out, we can't hold her responsible. In this case, we must blame the social system.

“Santa Khurai”, working in Manipur with a grassroots organisation, agrees. Many juvenile trans young people in the state, she adds, are pushed by the parents who are hardest to sensitise in beauty restaurants, some of them using them for their sex job. Young people do not attend school, which makes it much more difficult to advocate with the government, Khurai says.

The path ahead is lengthy and packed with inconvenient realities. In society as a whole, transgender individuals must learn to see each other like “any other human being – and, if not, be held responsible by law.”

Few trans individuals “appeared on a video, which went popular on social media” in order to ask the public soon after starting working in Kochi. “I don't want you to see someone who needs sympathy when you look at me today,” stated one staff member. “Do not glance twice when you see me,” another said.

The “Kerala High Court's transgender identification judgement” may be well known as an LGBTQI victory. In fact, it's not.

The High Court of Kerala declined to accept a habeas corpus request by a transperson's mother noting that all trans persons are entitled to “travel and/or associate with the like and cannot be forced to remain at the house of their parents.” It said that the “Indian constitution - Article 19(1)(a)” – has a particularly particular clause which safeguards freedom of expression, which subsumes “the right to life as a transgender.” It was the case in the Bench that “Justices V Chitambaresch and KP Jyothindranath” had been appointed. The ruling further reaffirms that all trans-persons are guaranteed and protected by the Constitution those principles which are vital to our lives – “privacy, self-identity and autonomy and personal integrity.”

“The fundamental principles of this opinion are that the right of gender identity is at the very centre of one's identity and that the right should not be restricted from State prohibitions, interference and interference, as opposed to the National Legal Services Authority versus Union of India (2014).”

However, some of the judgement is troubling. The petitioner - Arundhati's mother – asked for a medical/psychological assessment immediately and an invasive assessment of the kind that it appeared as though something had happened and therefore violated the “rights of the transperson” concerned.

In addition, the court appears totally unhelpful to analyse or re-visit the historical injustice suffered by the trans community, often referencing the medical report on gender dysphoria in this assessment. Arundhati has been subject to four days of psychological and physiological examination and has been ravaged by the failure to self-identify the bank

Sometimes everything we need is a little reminder Arundhati questioned the verdict of the “High Court” as the principles of NALSA provide for the freedom to self-identification: "I've already disclosed my gender. The court was not persuaded, though. It took my mother's petition seriously and ignored my statement that I was a trans woman."

State intolerance persists in the shape of obvious prejudice, whether the legislative or the judge. Despite NALSA's decision, there was not much environmental change — the environment was not made favorable to the realization and enjoyment of trans people's rights.

There are numerous sexual surveys with a sufficient understanding of politics and governance in any political party or state. No sexual minorities in any State's position or political parties exists. While transsexual contested social responsibility for the elections of the local authority, popular recognition was not enough. A transgender person emerges as successful personality, despite prejudice and marginalisation, and thereby proves his potential. There are cases of transgender people in political leadership positions. For instance, in 2000 KamlaJaan was chosen Mayor of Ketni by ShapnamMousi, a Member of SahogpurParliament in Madhya Pradesh. These peculiar incidents did not empower the wider society much. Such people cannot do what other people do, for example finding mainstream work, voting, etc.

The majority of transgender persons are dropping out of school. Gays and bisexuals also endure a great deal of stigma and prejudice in schools, especially following voluntary or involuntary exposure of their sexuality. They are driven into sex work and begging because they lack appropriate schooling and lack employment prospects.

While some of the transgender people succeed in sustaining their employment despite stigma and discrimination on the job, most of them do not tolerate stigma and discrimination. Numerous factors, such as inadequate education, limited employment opportunities, and a lack of supportive families, put male-born sexual minorities at risk of contracting HIV/AIDS. A lot of times, sexual and reproductive health concerns aren't

addressed properly. Other than in Tamil Nadu, most transgender persons receive little support for sex-transition surgical operations, such as hormone therapy and emasculation.

In the Nalsa ruling, the court recognises and separates from hijras the struggle of females to males transgender people (FTM). It is not apparent whether "FTMs" and other designated groupings are all meant to come under the concept of "third gender," which law recognises.

Unlike the apex court, however, the high courts in transgender matters are more pro-active (revolutionary). Because *Jackuline Mary v* raised the same problem.

It is unclear, however, whether transgender people's self-identification (i.e., the ability to choose one's legal gender identity without having to undergo surgery or hormonal transition) will be sufficient to qualify them for legal protection under the third gender category, or if they will first have to be offended by the third gender category in order to qualify.

The ruling does not make it obvious. Except Tamil Nadu, no state government, either following their gender identification or undergoing gender transition operations, has provided provision for the changing of sex in the official gazette and official identity papers of transgender persons. The Tamil Nadu Government has formed a regional screening committee in each district to certify, after screening, and to give identity cards for "aravanis," through its "Transgender Welfare Board (TGWB)".

Even after the judgment of apex court, there have been several unstained in of transgender persons who is dying with diseases or accident and doctors who are at the hospitals are not able to diagnosis them because of legal forms and conditions of hospitals. It is difficult to define the male or female section of forms not only of hospitals and schools but other administration departments.

"The Transgendered (Protection of Rights) Bill 2016" is a government ignorance exercise that would undo all the achievements gained in the last decades' fight for dignity by the community. Under "section 13(1) of Bill 2016", no individuals with transgenders or immediate families shall be separated. This breaches transgender people's freedom to live autonomously and is faithful to examine the acts of violence in the biological family of transgender people.

The statute does not prevent police brutality, while the police have extensively recorded incidents of physical and sexual assault against transgender (PUCL 2014). The BJP, in its 29 April 2016 debate of the proposal for a transgender system in Tiruchi Siva, stated: 'There

are impoverished youngsters in transgender with them and they are transgendered by the operation.' This is a severe crime and you're calling for reservation, so we would cause enormous damage to society unintentionally (Lok Sabha Synopsis of Debate 2016). According to "The Times of India", transgender figures in India have stood at 4.49 lakhs in 30/05/2014. Transgender is often sexually exploited and sexually harassed because of their position in society that has become a poor picture.

In 2019, a bill was introduced in "Lok Sabha" to defend transgender from all forms of discrimination, the "Transgender Persons (Protection of Rights) bill 2019". Under that law, however, a transgender can only benefit if, "on the basis of a certificate issued by a district officer", a transsexual is recognised as a transgender. This law also criminalizes begging.

Actually, no one opts for begging out of his/her own choice. Instead, of passing such impractical law, the Government should come forward with a more practical measure to improve their condition. For the sake of the name, the government of India has been taking steps to improve their condition. In the Lower House in August 2019 the "Transgender Persons (Protection of Rights) Bill" was adopted. While the legislation abolishes several contentious aspects of the 2018 law, including the criminalization of begging, heavy criticism is widespread since it does not provide transgender individuals the freedom to define their gender without sex reassignment operation.

According to legislation, a "Gender Certificate" will be granted to the District District Magistrate and the screening committee at district level. If you have not had an operation for sexual reattribution, it is not possible to identify you as male or female. transsexual. Transgender persons think that this is forcing them into operation, although there has also been little demand for free or low cost reassignment. There are two types of SRS. One of which is MTF and the other one is FTM. The private hospitals budget to conduct a SRS is Rs 2 lakhs to Rs 5 lakhs for male to female transition (MTF) whereas it costs something around Rs 4 lakhs to 8 lakhs for a female to male (FTM) transition. After the transition process, the person also has to bear extra expenditure of the medication and therapy. One cannot undergo a physical transition without having a minimum one year session of therapy with a psychologist. This session consists of minimum two and maximum four sittings with the psychologists. Per sitting charges around Rs 1000 to Rs 1500 which is not a small amount.

In Karnataka transgender have been put under the Women and Child Department and provided annually an amount of Rs 20,000- Rs 50,000. Firstly, despite they being the third gender they are not being addressed by a exclusive department set up for them and secondly, the amount is insufficient for them to survive in the present day. There are no firm provisions in regards to their house, education, health, employment etc.

The Matri Scheme in Karnataka provides for Rs 500 to transgenders from ages 18 TO 0 as pension.

It is not just that, but also penalty provision is considerably less harsh for major offences committed against transgender persons than the same crimes against transgendered people. The new law also prohibits reserve for non-compliant transgender, intersex and gender and obliges them to live with their relatives who in the majority of cases are a place of physical a

An NALSA vs Union of India Supreme Court panel had called for legislation to protect transgender rights when it announced its judgement in 2014. The bench stated: "Non-recognition of the identity of Hijras/Transgenders in the various legislations denies them equal protection of law and they face wide-spread discrimination."

The "Act of 2019" gives the "District magistrate (DM)" the ability to recognise a person as a trans, but "NALSA" ruling allows gender to be self-identified. In addition, the NALSA ruling said that any SRS (Sex Reconstruction Operation) demand is unethical and unlawful. He underlined that gender self-determination is essential to the identity and dignity of the individual. However, in order to be identified as male or female, the Act of 2019 states that the magistrate must provide evidence of surgery. Activists argue this gives the DM enormous authority which leads to arbitrariness and abuse.

The 2019 Act further institutionalizes legal prejudice by punishing "not less than six months, but up to two years in jail for sexual abuse." The punishment of women rape is significantly less than that of the "Indian Penal Code (IPC)", which is "no less than seven years imprisonment but may exceed to life, or to a period of 10 years or be responsible for fines."

In addition to it, the 2019 Act allegedly enacted by other persons or organisations to eradicate discrimination against transgender people does not even provide for a penalty of discrimination. It says that if a transsexual cannot be looked for by the immediate family, with an order from the competent court the individual can be placed in a rehabilitation clinic. This infringes "Article 21", which ensures the "right to life and dignity". The 2019 Act does not acknowledge the ability of transgender people to make decisions alone.

The Act also breaches the NALSA judgement by failing, via considering transsexual people as "socially and educationally backward" groups, to allow for "reservations in admissions to educational institutions and public" positions. In 2019, on the occasion of the annulment of Article 370, fervent calls were brushed off to send the draught "bill to a select committee". At Trans Act approval, the Rajya Sabha was attended by just half of its MPs.

Their restrictions are outside the scope of the Act, say campaigners. The guidelines authorize the DM to refuse a trans certificate application and also criminalize what the Act terms 'false assertions.'

The 2019 Act breaches NALSA's ruling by granting the DM arbitrary authority to reject the request. There is also a restricted period for the appeals process. A person may request a trans

certificate from the DM and a trans certificate must be submitted or rejected "within 60 days". Accordingly, the DM is to provide the second certificate within 15 days of receiving a trans person's request to be certified as binary male/female, together with a medical superintendent's surgical certification. Our goal is to establish a deadline and a defined time limit for the project.

The guidelines also infringe the ruling of NALSA by making SRS compulsory. There is just one column of the form provided in the Act called "transgender," which means that different gender identities do not recognise culture.

The guidelines state that you require a psychologist's certificate, even for self-identification as a transgender person. This is contrary to the 2019 Act. The ruling of NALSA emphasised that self-identification is sufficient to give rise to rights. This is part of the right to equal opportunities. The regulations of the 2019 Act are mainly about identity and an exclusionary procedure surrounding the Act, in particular from Section 2 through Section 9.

Despite the fact that there is no time limit, the DM is required under the Regulations to inform the applicant if the request is denied. No information is provided in clause 9 on who the appeal authority is or when the appeal must be finished.

Insisting on getting an SRS certificate by the hospital's medical supervisor, however, is not justified. Many trans persons underwent surgeries years ago, and SRS is not a single monolithic operation. Many parts of the laws are unknown, such as the status and rights of transgender persons who have operated in the past but are unable to present documentation at this moment.

But the Indian judiciary has done genuine good by issuing beneficial judgments. Although the Honorable "High Court" and "Supreme Court" have rendered rulings in favour of the eunuchs, are they recognised in society on the same basis as other citizens? The reality is that Transgender are still begging at traffic red

National Legal Service Authority (NALSA) and State and Central governments in India, as well as the Supreme Court of India, have defined their gender identification as male, female, or third gender. A number of further legal declarations have been filed in an effort to raise the status of this neglected area. After receiving a Recommendation from an Expert Committee created by the Ministry of Social Justice and Empowerment, the Supreme Court directed the central and state governments to examine and implement, within six months, the legal declaration on matters involving transgender persons. Unfortunately, it became apparent that the Supreme Court's ruling had not been implemented.

Chapter 5 - Progressive developments of transgender in india

National and international human rights legislation clearly state that states have a “legal duty to protect the basic rights” of transgender persons. UPSC was the first to include a transgender category in its application forms.

As of now, many corporations are actively addressing the issue of workplace inclusiveness. It was found that, as of 2016, 85 percent of respondents to a survey by “Mission for Indian Gay & Lesbian Empowerment (MINGLE)” were open to their coworkers and 69 percent to their families. Although just 48 percent of them are covered by anti-discrimination policies, those who did come out at work reported better acceptance. Evidently, the ability to act and speak freely about oneself at work is important enough to most individuals that they are willing to risk losing their jobs.

There are well-defined pro-LGBTQ policies in place at the Godrej Group. They have transgender team members listed as 'other' in their personnel policy papers. A new term has been added to the dictionary: partner in place of spouse⁶⁶. A gender-neutral primary caregiver is considered in their adoption policy.

“Godrej” is also testing a "unconscious bias training" to educate its employees about all the prejudices that exist in the workplace. Currently, the firm, which has thousands of employees in India, employs one transgender individual.

To redress the past abuse and injustice that the community has suffered, some instances included NALSA principles.

Transgender women and transgender men were included in NALSA's scope and viewpoint after the Madras High Court ruled in *Jakuline Mary v. Superintendent of Police, Karur*. Judge wrote in his ruling that “she is a female in the legal parlance and

⁶⁶ Mahnaz Shaikh, Head of Diversity & Inclusion, Godrej Industries and Associate Companies Limited

thus she is eligible for appointment as a woman police constable” her right to self-identification, which was maintained.

A 19-year-old transman was unjustly held and mistreated by his family in “Shivani Bhat v. State of NCT of Delhi, and the “Delhi High Court” recognised the community's historical disadvantage.

This case marked the first time a transgender person became a sub-inspector for the Dharmapuri Police Department in Tamil Nadu following an extensive legal battle. In this ruling, the court ruled that “transgender” people have a fundamental human right to determine their own gender identity, and that the federal government and state governments must recognise their gender identification, whether it be “male, female, or a third gender”, in legal proceedings.

In “Ganga Kumari v. State & Ors”, the Court recognized “fundamental right of the trans community to be protected against inequality or discrimination”.

Transgender people were recognised as a third gender by the Supreme Court in the case NALSA v Union of India, and the University Grant Commission (UGC) issued a circular to all university vice chancellors on October 29, 2014 recommending that all application forms include a column for transgender people. Students who identify as transgender will also benefit from affirmative action measures made by universities.

There were 3,63,413 candidates for the 2017 MBA Maharashtra Common Entrance Test, and 9000 were of the other gender. This was done expressly to include the column Others in the form.

According to the Supreme Court in “Suresh Kumar Koushal vs NAZ Foundation⁶⁷”, the term'sex' must be given a broader perspective than biological sex. In “Christine Goodwin vs United Kingdom⁶⁸”, the “European Court of Human Rights” concluded that brain sex falls under the definition of'sex'.

As a result of praiseworthy efforts made by the Tamil Nadu government, a board for transgenders has been established under the Social Welfare Department.

The Tamil Nadu Aravanigal Welfare Board was created by the state's Social Welfare Department in May 2008. It is estimated that the state government provides the board with 10 million rupees each year to support its programmes and operations. According

⁶⁷ AIR2014SC563

⁶⁸ (2002) 35 EHRR 447

to the government of Tamil Nadu, it has begun to count the number of transgender people in all districts. In the shelled government, they began utilising ration cards and enrolling pupils in government educational institutions as a third gender group for free SRS enrollment.

The treaty bodies of human rights have stated repeatedly that all countries have the duty to provide protection to all its people from discrimination that is made due to their gender identity. Only because a “person’s gender identity” is not female or male doesnot stop them from availing and enjoying “human rights”. The” right to development” entitles everyone “to engage in, contribute to, and enjoy economic, social, cultural and political upliftment, in which all human rights and fundamental freedoms can be fully realized.”

The Naz Foundation Case is also very significant and a hallmark in development of this community as the verdict given in this case was a relief to this community. The court decriminalized Section 377. It decriminalized all consensual sex between same sex individuals is no more an offence. The court acknowledged the wrong done to this community for so long and apologized to entire transgender community on behalf of India.

“Article 41 of the Constitution of India enjoins the States to make a provision that works for securing the right to education, to work and to public assistance in cases of , sickness unemployment, disablement and old age and in other cases of undeserved want within the limit of its economic capacity and development”.

“Article 14 also guarantees to all persons equality before the law. Article 19(1) ensures for all citizens freedom of speech and expression. Article 21 expresses protection of life and personal liberty to all persons. Article 15 (1), 15(2) and 16 (2) in express terms prohibit discrimination on the ground of sex”.

“The social security and empowerment of persons with disabilities department , government of odisha” acknowledges that “transgender people” are a significant “human resource for society” and aims to establish “an environment that provides them with equal opportunity, protection of their rights, as well as full social involvement”. "SWEKRUTI" is a new umbrella scheme for transgender equality and justice created by the Department of Justice as part of “an integrated transgender equality” and “justice” strategy. Sweekruti focuses on the following broad aims in order to provide transgender people with equal access to justice:

1. Enable transgender people in the state to have equal opportunity, equity, and social justice by creating a supportive atmosphere.

2. Assist transgender people in achieving effective social integration via voluntary effort and engagement from all interested parties
3. Assist transgender people with their rights and entitlements through expanding outreach efforts.
4. To encourage transgender people to seek work, self-employment, and other socio-educational services on an individual and group basis.
5. All transgender people in the state should be covered by state-wide implementation mechanisms.

This program's goal is to provide transgender people with the full spectrum of services essential for their recovery. Priority would be given to the following essential measures for integrating transgender people into mainstream society and realising their potential:

1. All transgender individuals in the state will be surveyed and identified.
2. All transgender students who are enrolled in school are eligible for pre- and post-matriculating scholarships.
3. Self-help Groups are strengthened through skill-upgrading and entrepreneurial development training, as well as the provision of Self Employment Kits.
4. Assistance with “critical health care” and “group insurance for transgender” individuals
5. In addition, transgender people in distress can receive free legal assistance, therapy, and support from a professional counsellor.
6. Awareness, sensitization and campaigning in the community on transgender rights, as well as training for employees and volunteers

Under the leadership of the Union Minister of Social Justice, a National Council for Transgender individuals has been established by the Centre..

Five main functions are outlined in the legislation: providing advice to “central government on the formulation of transgender-related policies, programmes, legislation, and projects; monitoring and evaluating the impact of policies and programmes aimed at achieving equality and full participation for transgender persons; reviewing and coordinating the activities of all transgender-related government agencies”.

Ministers of minority affairs, home, education, health , labor and rural development will be represented by joint secretaries on the council. “National Commission for Women”, “National Human Rights Commission” and Niti Aayog and will also be represented.

On a rotating basis, the commission will be made up of leaders from five states or union territories. Odisha, Andhra Pradesh, and Gujarat, Tripura, Jammu and Kashmir are the first such group.

Representatives of the commission will also include “five members” of the local community and five specialists from “non-governmental organizations”. Members of the community and the expert shall have a three-year term of office.

Chapter 6 Findings and Suggestions

Transgender community though have been in existence for a long time and ages yet it has always been neglected by the people. Some feared them and others ridiculed them. In between all this it is basically forgotten that this community too are as humans as any other person regardless of their gender identity. It was well established in the NALSA Case that one has the right to self identity their gender. However , to include the third gender in society and to make their basic rights available to them is far vision as they still face difficulties to get their documentations done. Full legal recognition is very important to make it easy for the transgenders to enjoy their rights. . The “trans-community” will not benefit from isolated judgments like “Arundhati's or Prithika's or Shivani's” and states should legislate on issues of this community that includes firm provisions in regards to their education , housing , health , etc is essential.

Progressive measures like awareness camps to sensitize the society about third gender describing their rights, creation of separate public toilets for transgenders in public places,

separate wards for them in hospitals as are provided to male and female , reservation of seats in education and elections should be provided to them.

Even if few institutions are intaking transgender students, the number of drop outs on account of bullying or financial burden is high. Education is the primary key to mainstream transgenders. Therefore it is not only important to have seats reserved for the transgender people in schools instutions but it is even more important to consider scholarships for them to become a part of the institutions. Educational packages in addition to thses scholarships should also be availed to them inorder to encourage admissions.

Centre and State Governments should actively take measures to make social welfare schemes which are instrumental in uplifting status in the society and their equal participation in every aspect by appointing officer, granting NGO's with required help in this regard.

For social inclusion of this neglected section of society commissions like the Scheduled Caste / Scheduled Tribe Commission , Women's Commission , Other Backward Caste Commission, Minority Commission , Disability Commission etc should be created. All official documents must mandatorily include a column for transgender.

The 2019 Act must again be reviewed and what transgender actually want and what can make their life a little less difficult must be considered. Provisions like that of the certificate collection from district magistrate, hospitals etc must be removed.

Only government-run hospitals can provide subsidised health care services backed by competent medical surgeons when the legal status of sex-change surgery is decided. So that transgender people may receive proper medical treatment without further discrimination, it is vital that healthcare personnel receive adequate training.

Society must be more tolerant and sympathetic toward transgendered individuals, and they must be treated equally as other citizens, in order for the long-oppressed minority gender to finally be free.

Chapter 7 Conclusion

This case dealt with the legal acknowledgment of transgender people's gender identity. A transgender person's freedom to self-identify their gender was affirmed by the court. Individuals must be treated equally, regardless of their gender identity or presentation, according to the Constitution.

But even in present day transgender people face immense discrimination and violations. A transgender in society is looked backed twice and that's what makes them feel uncomfortable at the very first place. They are abandoned by their own parents out of shame and societal pressure. The stigmatization of this community and their image is very deep rooted. Uprooting of it will have to start from the family itself where the transgender is born , followed by acceptance in society and most importantly full legal recognition of their self identified gender.

Transgenders are not less human than any other person and deserve all the respect , acceptance and most importantly basic rights and stand in the society just like any other individual. The Supreme Court ruled that the federal government and state governments must recognise gender identification as male, female, or third gender on a legal level. Recognized despite in the lack of a legal framework. However , a full recognition of third gender seems a far vision as many from this community still struggle to get their documentations done like opening a bank account or getting a passport. Government has taken several development measures to uplift the community and still a lot has to be done in education , health , employment, etc for them.

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