

Transgender Rights and Social Justice Through a Constitutional Lens

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ABSTRACT

The pursuit of transgender rights and social justice has emerged as a global movement which is aimed towards challenging the grounds and reasons of discrimination and focuses upon promoting inclusivity for individuals who identify as lesbian, gay, bisexual, transgender, queer, and other diverse sexual orientations and gender identities. This paper examines the facets of transgenders rights, the historical context, the challenges, and strategies for fostering inclusivity. Transgender rights demonstrates the pervasive history of violence, stigma, and marginalisation experienced by those who don't fit into the binary notions of gender. This community has constantly faced discrimination and oppression. They have a long history behind the movements as the world witnesses today. Transgender groups have consistently fought back against structural oppression and demanded acknowledgment of their fundamental human rights, from the Stonewall Riots to the campaign for marriage equality. Nevertheless, many transgender individuals still endure violence, harassment, and discrimination because of their gender identity or sexual orientation, even in places where there has been tremendous progress. The idea of social justice, which places an emphasis on equality, justice, and dignity for all members of society, should be used to assimilate transgenders in the mainstream society.

The paper, through doctrinal approach seeks to address the question as to what are the obstacles in ensuring the inclusivity of transgender individuals in the main stream society. In addition to this, it also aims to critically analyse the legislative framework in India with respect to transgender community on the touchstone of the provisions of the Constitution of India. The paper also focuses upon the notion that for overcoming discrimination and promoting inclusivity for transgender community members, a collective action across diverse communities is required. The societies can move closer toward realizing the full spectrum of human rights by ensuring that transgender individuals are able to live authentically and with dignity.

Keywords: Transgender, Gender Identity, Discrimination, Legal Rights, Social Justice

INTRODUCTION

The history of mankind has witnessed that every individual is identified by their gender, which are popularly categorised into two: Males and Females. Human beings are characterised by the terms like he or she and his or her, thus giving an impression that humans fit perfectly well into the categories of either male or female. The impression ensures the existence of the binary notions of the gender

and outrightly ignores the existence of the third gender in the world. This not only makes this group of the society, vulnerable, but also denies them the basic rights available to those who do not fit in the category of the binary notions of the genders. The World has also witnessed that a range of rights are recognised and guaranteed to every human being, by the virtue of their being a human. These are termed as human rights and are inherent to all the humans. These rights are available to every individual born as a human being, irrespective of their gender or sex [1]. Human Rights are the rights which are fundamental in nature and are available to human beings by the very fact of them being humans. These rights are inherent and therefore these cannot be denied by the State [2]. Kant stated that the purpose of any state is to recognise the human worth and therefore it becomes important that these rights are not violated [3]. Human rights are the basic rights and freedoms that belong to every person in the world, from birth until death. They apply regardless of where you are from, what you believe or how you choose to live your life. They can never be taken away, although they can sometimes be restricted, for example if a person breaks the law, or in the interests of national security. These basic rights are based on values like dignity, fairness, equality, respect and independence [4].

According to United Nations Human Rights Office of High commissioner, Human rights are universally available to all human beings, irrespective of nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible[5]. Thus human rights are those rights which are essential for the protection and maintenance of dignity of individuals and create conditions in which every human being can develop his personality to the fullest extent. Human Rights are the very essence of a meaningful life. Many International treaties, International Conventions and other documents pertaining to human rights focus on the binary aspects of gender and therefore neglect the non-binary notions of gender.

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TRANSGENDER

Section 2(k) of Transgender Persons (Protection of Rights) Act, 2019 defines "transgender person" as an individual whose gender does not correspond with the gender assigned to them at birth. This includes transgender individuals (whether or not they have undergone hormone therapy, laser therapy, or other forms of therapy), gender queer individuals, people with intersex variations, and people with socio-cultural identities such as kinner, hijra, aravani, and jogta (Transgender Persons (Protection of Rights) Act, 2019[6]. In recent years, the topic of transgender individuals have gained significant attention in various social, political, and cultural spheres. While transgender people have always been a part of human society, their visibility and rights have become more prominent due to increased advocacy and awareness. However, misconceptions and stereotypes still abound, making it crucial to foster understanding and support for this diverse community. Transgender is an umbrella term to include those who do not conform to the binary notions of the gender. A person who identifies as a gender different from the one they were assigned at birth. They do not fit into themselves into the

categories of masculine or feminine personalities, rather identify themselves as non-binary notions of the gender.

Transgenders encounter a variety of difficulties, including as violence, prejudice, and limited access to quality medical care. Discrimination can take many different forms, including verbal and physical harassment as well as denials of housing, healthcare, and employment opportunities. With high rates of homicide and suicide, transgender people impacted by violence to a greater extent. Globally, there are differences in the legal status of gender identity; some nations provide extensive safeguards, while others are still far behind. To affirm one's identity and gain access to various services, it is necessary to obtain appropriate identity documents, such as driver's licences and birth certificates, that represent one's gender identity.

Historical Analysis of Transgenders in India

For centuries, transgender individuals have been an integral part of Indian society. Their history reflects both significant contributions to culture, religious roles, and societal importance, as well as periods of marginalization, particularly during and after British colonial rule. The transgenders have existed within the society since forever, however their position has varied over the period of time.

Ancient India

In ancient Indian society, transgender individuals, especially those identifying as hijras, were respected. Various ancient texts and traditions acknowledge the presence of transgender people, suggesting that gender diversity was accepted and occasionally celebrated. Hindu epics such as the Mahabharata and the Ramayana contain references to characters that can be interpreted as transgender or gender nonconforming. For instance, Shikhandi, a warrior who was born female and later underwent a gender transformation, plays a crucial role in the Kurukshetra war in the Mahabharata [7].

Medieval India

During the Mughal rule in India, hijras held significant positions in royal courts, serving as military commanders, advisors, and guardians of harems. Their unique status in society allowed them to wield influence in various aspects of life. They were often entrusted with sensitive duties such as guarding royal women in harems or acting as diplomats, roles that required loyalty and discretion[8].

Colonial India

The status of transgender individuals in India underwent a drastic transformation with the onset of British colonial rule. Influenced by the rigid gender norms and moral values of the Victorian era, the British colonial administration introduced laws that significantly restricted the rights and freedoms of transgender individuals[9]. The Criminal Tribes Act of 1871 marked a major setback for transgenders during the colonial period. This law labelled transgender individuals, as "habitual criminals," subjecting them to constant government surveillance and harassment. It effectively criminalized their existence, leading to frequent arrests, forced labour, and widespread social discrimination. The law had a devastating impact on the transgender community, severely stigmatizing them. In addition to losing their traditional roles, they also lost the respect they once enjoyed in the ancient times.

Post Independence India

After India gained independence in 1947, transgender individuals continued to face challenges and discrimination in the society. The first positive step taken in direction to protect transgenders from this ongoing discriminations, the Criminal Tribes Act was repealed. However, the other oppressive

laws, including Section 377[10]. of the Indian Penal Code still remained intact. The said section was declared unconstitutional after a lot of struggles and fights for the recognition of the third gender. It was only in 2018 when the Supreme Court of India declared the said provision as unconstitutional[11]and gave due respect to this community as they deserved.

The position of the transgender community deteriorated overtime in history of India. They faced severe social exclusions. Denied access to healthcare, employment, and education, many were forced to depend on begging or sex work for survival. The lack of social support and legal recognition made it difficult for them to integrate into mainstream society. A little relief came in 2018 by the Supreme Court's judgment in Navtej Singh Johar case. Transgender individuals in India have historically been marginalized, often sidelined from mainstream society, and subjected to continuous discrimination. While India's rich cultural and religious history acknowledges the existence of transgender persons, the contemporary socio-political framework has systematically failed to ensure their dignity and human rights. The legal recognition of transgender people as a "third gender" by the Supreme Court of India in National Legal Services Authority v. Union of India (2014) was a landmark ruling that brought visibility to their struggles. However, the gap between legal recognition and actual equality remains vast, leaving transgender persons vulnerable.

Legal Landscape of Transgender Rights in India

The National Legal Services Authority (NALSA) v. Union of India ruling was a watershed moment for transgender rights in India. The Supreme Court recognized the right of transgender people to self-identify their gender and declared that non-recognition of their identity violated fundamental rights under Articles 14, 15, 16, and 21 of the Constitution of India. The judgment mandated the government to treat transgender individuals as a socially and economically backward class and provide them with reservations in educational institutions and public appointments [12]. In 2018, the Supreme Court of India in its landmark judgment read down Section 377 of the Indian Penal Code, 1860 to the extent it made consensual sexual acts as punishable [13].

In order to give statutory recognition to the judgements of the Supreme Court of India, the Legislature enacted Transgender Persons (Protection of Rights) Act, 2019. The Act aimed to protect transgender individuals from discrimination in education, employment, healthcare, and access to public services. However, it has been widely criticized for failing to adequately address the community's concerns. One of the primary criticisms was the requirement for transgender persons to undergo a certification process to legally recognize their gender identity, a provision that activists argued infringed on the right to self-identification [14].

Constitutional Frameworks and Fundamental Rights

Constitutions are designed to safeguard the rights and liberties of all citizens, yet the interpretation and implementation of these rights can vary greatly. Provisions related to equality, non-discrimination, and human dignity form the bedrock of constitutional protection for transgender individuals. However, realizing these rights in practice often requires an active judicial approach and legislative reforms. Constitutions are pivotal in shaping the social contract between a state and its citizens. For transgender individuals, constitutional protections are essential for securing recognition and equal treatment.

The Right to Equality and Non-Discrimination

Central to the constitutional discourse on transgender rights is the principle of equality. However, the inclusion of gender identity as a protected category remains uneven. The Supreme Court of India in *National Legal Services Authority (NALSA) v. Union of India*, (2014) recognised the gender identity of every person, however, right to be treated equally remains a distant dream for the transgender community.

Right to Dignity and Personal Autonomy

The right to dignity and personal autonomy is another crucial constitutional safeguard. Courts have interpreted this right to mean that individuals have the freedom to express and live according to their gender identity without undue interference. The affirmation of these rights is vital for the social and psychological well-being of transgender individuals. The right to dignity is integral to constitutional frameworks and is closely linked to the principle of personal autonomy. This right allows individuals to live in a way that aligns with their true identity, free from stigma and violence. Judicial interpretations have increasingly emphasized that the right to dignity includes the ability to express and live in one's gender identity.

Prohibition of Discrimination and Equal Opportunity

Articles 15 and 16 prohibit discrimination on grounds of religion, race, caste, sex, or place of birth and ensure equal opportunities in matters of public employment. The Supreme Court, in the *NALSA* judgment, held that these provisions encompass gender identity, thus mandating that transgender individuals should not be discriminated against in access to services and opportunities.

Legislative and Policy Responses

Constitutional mandates often lead to legislative enactments aimed at protecting marginalized groups. The Transgender Persons (Protection of Rights) Act, 2019 recognised statutorily the rights of the transgenders aligning legislative action with constitutional principles of human rights and dignity. This law was designed to prevent discrimination against transgender individuals in areas such as education, employment, and healthcare. Although it represented a step forward, the Act has faced criticism for certain provisions, such as the requirement for a certificate of identity.

Rights of Transgenders

Right to equality and personal liberty

The Constitution of India under Article 14 guarantees the right to equality to everyone, which also ensures that every person shall be treated equally before the law (Constitution of India), irrespective of their gender or sexual orientation. The transgenders, therefore, should ideally be treated equally in terms of application of laws and to receive the advantages or benefits of the legislative mechanisms. Article 21 of the Constitution of India ensures the right to personal liberty (Constitution of India). After years of struggles, the Supreme Court had finally read down Section 377 of the Indian Penal Code, 1860, to an extent which criminalized any sexual intercourse between two consenting adults of the same gender. Such an act was decriminalized and was not considered as an offence in India any longer (*Navtej Singh Johar v. Union of India*). The judgment came as a big relief to the LGBTQ community. Their rights before the law was recognised and their personal liberty was respected through this judgment.

The Transgender Persons (protection of Rights) Act, 2019 was enacted to give statutory recognition to the transgender community. Thus, the transgenders in India were given a ray of hope through this law. The said law only recognized the identity if the third gender, however, does not provide them the rights relating to marriage or property.

Right to marriage

The Transgender Persons (protection of Rights) Act, 2019 did not recognize the right to marry for the third gender. Since the enactment of this Law, there has been a rage in their community and they are making an appeal for equal rights, especially the right to get married. The Supreme Court of India in “Supriyo @ Supriya Chakraborty & Anr. v Union of India” did not grant the recognition to the “Same Sex marriage” in India, and left this question to be resolved by the Legislature (2023).

Right to Education

Article 21 A of the Constitution of India recognises the free and compulsory education for every child within the age bracket of 6 to 18 years. However, despite the availability of this fundamental right, Transgender people face discrimination in education institutes and are unable to access equal educational opportunities because of harassment and violence. Most transgender learners are school dropouts, and therefore it becomes rather more difficult to gain employment. Denial of employment to them, often force them to enter into sex industry or make them beg on the roads. Lack of Toilet facilities, denial of civil status and physical and emotional abuse in the domestic setup (PP Atheequ Mohammed and Nishanthi Rajathurai, 2016). With the developments in the world and the changing times a few transgenders have gained recognition in different fields, for example, Shabnam Mausi Bano who was the first transgender to get elected in public service, Laxmi Narayan Tripathi who is known as the Hijras Guru and also spokesperson for the Kinnar community, A. Revathi, the first Transgender to write about Transgender and Hijras in Asia, etc. (Konduru Delliswararao and Chongneikim Hangsing, 2018). These recognitions and changes have brought a ray of hope for this community. But a lot of efforts have to be put in at the grassroot level.

Right of Inheritance

The Inheritance laws in India are based on binary notion of gender and they do not envisage LGBTQ community. This means that individuals must choose between conforming to their assigned gender or not availing their rights (Karan Gulati and Tushar Anand, 2021). The transgender persons are often denied the right to inherit due to two major reasons, first, Inheritance rights are based on binary notions and secondly, that is difficult to identify the successors, because the inheritance rules are different for males and females. A change in the legislative system would be a welcome change in true inclusion of this community in the mainstream society.

Challenges Faced by Transgenders

Despite the legal recognition of transgender persons, societal stigma remains deep. Transgender people are often victims of violence and exploitation. The primary reason for the same is lack of family support. It forces many transgender individuals into begging or sex work as a means of survival. The intersectionality of caste, class, and gender further complicates the experiences of transgender persons in India, especially those from marginalized caste groups who face compounded forms of discrimination.

Healthcare Challenges

One of the critical issues transgender individuals face in India is inadequate access to healthcare. Many healthcare professionals are neither trained nor sensitive to the unique medical needs of transgender persons, particularly with regard to gender-confirming treatments. Furthermore, transgenders also face stigma and discrimination in healthcare access, which discourages them from seeking medical assistance. There is also a lack of

affordable and accessible gender reassignment surgeries and hormone therapy in government hospitals [15].

Employment and Economic Marginalization

The transgender community in India faces significant barriers to employment. Despite provisions in the Transgender Persons Act, 2019, that prohibit discrimination in employment, many employers continue to deny job opportunities to transgender individuals, leading to economic marginalization. The lack of employment opportunities forces many transgender persons into informal sectors, where they are often underpaid and exploited. Economic insecurity further reinforces their vulnerability to social exclusion.

Educational Barriers

Access to education is another critical area where transgender individuals face discrimination. While the NALSA judgment called for reservations in educational institutions, transgender persons continue to experience harassment, bullying, and exclusion in schools and colleges. This often leads to high dropout rates and limits their access to higher education and better job prospects [16].

Discriminations in attaining equality

The Constitution of India, under Article 14, guarantees the right to equality for all individuals, ensuring that every person is treated equally before the law, regardless of their gender or sexual orientation [17]. This means that transgender individuals should, in principle, be afforded equal treatment under the law and have access to the same benefits and protections provided by legislative mechanisms. Additionally, Article 21 of the Constitution guarantees the right to personal liberty [18]. After years of struggle, the Supreme Court partially struck down Section 377 of the Indian Penal Code, which had criminalized consensual sexual relations between adults of the same gender. This landmark ruling decriminalized such acts, providing significant relief to the LGBTQ community by recognizing their rights under the law and respecting their personal liberty [19]. The Transgender Persons (Protection of Rights) Act, 2019, was enacted to provide statutory recognition to the transgender community. This legislation offered a glimmer of hope by officially recognizing the identity of the third gender. However, it fell short in certain areas, as it did not extend rights related to marriage or property to transgender individuals.

Discrimination to exercise right to marry

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Discrimination in Inheritance

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SUGGESTIONS

Strengthening Legal Frameworks

While the The Transgender Persons (protection of Rights) Act, 2019 was a step forward, it requires significant reforms to fully protect transgender rights. First, the certification process for gender recognition should be eliminated, allowing individuals to self-identify their gender without invasive medical procedures. Second, enforcement mechanisms should be strengthened to ensure that anti-discrimination provisions are effectively implemented across sectors such as education, healthcare, and employment.

Public Awareness and Sensitization

Combatting societal discrimination requires widespread public awareness campaigns and sensitization programs. These initiatives should target not only the general public but also specific sectors such as healthcare providers, educators, law enforcement, and employers. The goal should be to reduce the stigma and misconceptions surrounding transgender persons and create a more inclusive society.

Healthcare Reforms

There is an urgent need to make healthcare services more accessible and inclusive for transgender persons. This requires not only affordable access to gender-affirming procedures but also broader reforms in the healthcare system to ensure that transgender persons are treated with dignity and respect. Training healthcare professionals to be sensitive to the needs of transgender patients should be made mandatory. Additionally, government healthcare schemes should include coverage for gender reassignment surgeries and hormone therapy.

Employment Opportunities and Economic Empowerment

To combat economic marginalization, the government and private sector must work together to create employment opportunities for transgender individuals. Companies should adopt inclusive hiring practices and provide workplace sensitization programs to foster an environment of acceptance. The government should also expand social welfare programs for transgender persons, including targeted vocational training programs, to help them transition into formal employment.

Access to Education

Addressing educational barriers is essential to ensuring that transgender persons have the opportunity to achieve economic independence and social mobility. Educational institutions must implement anti-discrimination policies to protect transgender students and create a safe learning environment. In addition, the government should introduce scholarship programs and reservations for transgender students in higher education to encourage their participation.

Political Representation and Participation

Transgender individuals have historically been excluded from political processes in India. Increasing their political representation can be a powerful tool for advancing their rights. Affirmative action policies, such as reserved seats in local and state legislatures, can ensure that transgender voices are heard in decision-making processes. Additionally, political parties should take proactive steps to include transgender individuals in their leadership and candidate lists.

CONCLUSION

The pursuit of transgender rights and social justice through a constitutional lens underscores the profound need for inclusivity and equality in legal frameworks worldwide. Constitutions serve as the bedrock of democratic societies, outlining

the fundamental rights and liberties that should be accessible to all individuals, regardless of gender identity. India has made significant strides in recognizing the rights of transgender individuals, but the fight for true equality is far from over. Legal recognition must be accompanied by substantive social change to combat the deep-rooted discrimination that transgender persons face. Advancing transgender rights requires a multi-faceted approach that addresses legal, social, and economic disparities. By strengthening legal frameworks, increasing public awareness, reforming healthcare and education systems, and promoting economic and political inclusion, India can move closer to achieving justice for transgender individuals. It is only through sustained efforts across all sectors of society that the vision of a more inclusive and equitable India can be realized for transgender persons.

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