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# LEX ET MUTATIO

**LAW AND SOCIAL TRANSFORMATION**



**Volume III**



1991



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# LEX ET MUTATIO

LAW AND SOCIAL TRANSFORMATION



Volume III

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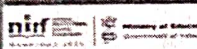
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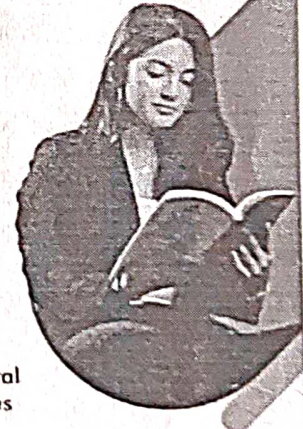
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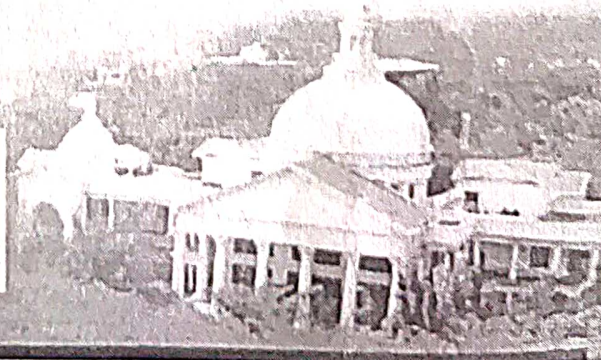
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## TRANSGENDER RIGHTS IN SPOTLIGHT: UNVEILING LEGAL PROGRESS AND SOCIETAL SHIFTS

- Sharika Rai<sup>1</sup>

Dr. Santhosh Prabhu<sup>2</sup>

### INTRODUCTION

The global landscape has seen a tremendous transformation in the discourse around gender identity and transgender rights. The demand for recognition and equality of the marginalized communities has turned the focus towards the often neglected struggles and triumphs of Transgender individuals. This article explores into the legal developments and societal shifts that have been instrumental in shaping the rights and visibility of Transgender People around the world.

From time immemorial the Transgender Community has been subjected to discrimination, stigmatization, and systemic challenges that have denied them the access to fundamental rights and opportunities in India. Ironically the Transgender Persons enjoyed a better status in the ancient Hindu period and even during the Islamic period. References to Transgender Persons and their role can be found in the ancient Hindu texts and scriptures. For example, most pre historical myths relate the descent of the *hijras* from the deity of Shiva, who was also called *Ardhanariswar*, meaning half man and half woman. For many *hijras* the quality of being half man and half woman is a source of infinite strength that endows on them the divine power to give a curse, just like Shiva cursed the earth.

In the famous mythology Mahabharatha, during the war of Kurukshetra, Arjuna dressed as a woman called *Brihannale* and participated in the wedding ceremony of his son *Abhimanyu* with the princess *Uttara*. It is to be noted that Arjuna's cross-dressing is an instance of voluntary emasculation.<sup>3</sup> In Ramayana there is an instance that when Lord Rama was exiled for 14 years to the forest blessed all his followers, men and women to do their duties. Many of his subjects followed him to the forest. Lord Rama asked the men and women to return home. When he

1. Research Scholar, Karnataka State Law University, Hubballi
2. Assistant Professor, SDM Law College, Center for PG Studies and Research in Law, Mangalore, D.K.
3. SANDEEP BAKSHI, *A Comparative Analysis of Hijras and Drag Queens: The Subversive Possibilities And Limits Of Parading Effeminacy And Negotiating Masculinity*, First Ed. 2010, Routledge, p.13.



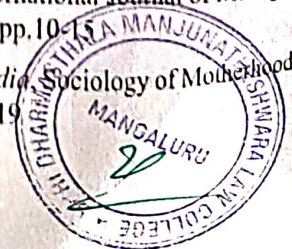
came back from exile he saw the Transgender Persons who did not belong to the male or female gender, waiting for his order. Moved by their action Rama blessed them. In another instance Lord Krishna took women avatar as 'Mohini' to destroy the demon. In Tamil Nadu lot of people worship in number of places, Lord Shiva as 'Arthananareeshwarar'. In this form Lord Shiva and Parvathi resides in a single body which serves as a powerful god for blessings and devotion. Further, another myth in Hinduism is that of Lord Ayyappa who was born to Shiva and Vishnu. These are some references in the Hindu mythologies which witnesses the extension of respect to transgender community.<sup>4</sup>

In the Islamic era the Transgender People were given high ranking and considered to be loyal and confidante of the Muslim rulers. They were also given the responsibility of guarding the *zenanas*.

However, the tyranny against the Transgender Community can be traced back to the British period which witnessed the passing of the Criminal Tribes Act, 1871. The Act branded the Transgender community as criminal and shunned them from the mainstream society. In the Criminal Tribes Act of 1871, the *hijras* were classified as a criminal tribe, inherently immoral and corrupt. The British colonial administration vehemently sought to criminalize the *hijra* community and to deny them the civil rights. The Act included all *hijras* dressed like women dancing in public places as suspects to be involved in kidnapping and castrating children. The punishment for such activities was up to two years imprisonment and a fine or both. This reflects the prejudice of the colonial administrators and policy makers to reject third gender persons as something biologically unnatural. Such a denial reflects British cultural perceptions on the third gender as something non-existent.<sup>5</sup>

Gender identity plays a pivotal role in accessing rights to live a dignified life guaranteed by the fundamental law of the state. To gain access to the welfare measures, policies, and gain protection under the statutes the gender identity becomes very crucial. Even after attaining independence there has not been much progress in the status of Transgender Persons in India. The Transgender Persons had been non-citizens until recently. Since their gender was lacking in legal and gender recognition, they were inhabitants of a zone where official identification is absent. They cannot participate in any political or socio-economic process which requires an officially endorsed identity. The government's response to the community's needs have been indifferent. The breakthrough in the struggle of the Transgender Community came from the land

4. Subramania, *Transgender as Disabled in the Modern Society*, International Journal of Management and Social Sciences, Annamalai University, February 2018, pp.10-15
5. Banshikha Ghosh, *A Diachronic Perspective of Hijra Identity in India*, Sociology of Motherhood and Beyond, University of Zurich, Levant Books, 2018, pp.107-119



mark judgement in *National Legal Services Authority of India v. Union of India*<sup>6</sup>, which paved a path for the recognition and empowerment of the Transgender community. Since then an increasing advocacy, awareness and activism on these issues have led to significant headways in the battle for transgender rights in India.

The article explores key legal developments and transformative social attitudes, showcases the progression and setbacks experienced by transgender communities on their path of empowerment. Despite the obstacles, there have been efforts on the part of various countries to protect the rights of Transgender Persons by way of policies and measures to overcome the prejudice. This article will throw light on the transformation of societal perceptions and attitudes towards gender diversity population. As conversations surrounding gender identity continue to expand and evolve, so does the understanding and acceptance of transgender experiences.

### INTERNATIONAL PERSPECTIVES

International conventions and agreements have tremendously contributed towards promoting and protecting the rights of the Transgender Persons around the world. These conventions have been effective in bringing around a change in lives of Transgender community. The Universal Declaration of Human Rights (UDHR) lays the foundation for international human rights and therefore strives to recognise the inherent dignity and equal rights of all individuals regardless of their gender identity. The benefits of principles of non-discrimination, equality before law and right to life, liberty and security are extended to the Transgender Persons. The Provisions of the International Covenant on Civil and Political Rights (ICCPR) adopted in 1966 can be invoked to protect the Transgender Persons from violence and discrimination based on gender identity. The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), though not explicitly focused on Transgender rights can however be interpreted to include gender identity as part of its nondiscriminatory provisions, especially to challenge the discrimination and violence against Transgender women and matters of education, employment and health.

The Yogyakarta Principles, 2016<sup>7</sup> containing a set of principles drafted by a group of human rights experts, outlines the application of international human rights law to issues of sexual orientation and gender identity. They provide a comprehensive international legal framework for the protection of Transgender Persons' rights ranging from protection against discrimination, violence, freedom of expression, equal access to healthcare, education employment and all concerned areas to live a life of dignity. The Yogyakarta Principles Plus Ten, 2017 further bridges the gap and extends protection based on the recent developments.

6. *National Legal Services Authority of India v. Union of India* (2014) SCC
7. YOGYAKARTA, <http://yogyakarthaprinciples.org>. (Last visited on August 5, 2023 13:00)





The Convention on the Rights of Persons with Disabilities (CRPD) primarily focused on disability rights can be interpreted to be extended to intersect disability and gender identity. The benefits of the Convention can be availed by the disabled Transgender Persons. The Regional agreements such as the European Convention on Human Rights and the Inter American Convention on Human Rights which reinforce the principles of non-discrimination, privacy, and equality, have largely addressed various human rights issues within their respective regions. The International Human Rights Bodies like the United Nations Human Rights Council and various Treaty Bodies continuously monitor and periodically examine issues relating to violations of the rights of Transgender Persons. They also make recommendations to member states for protection of rights effectively.<sup>8</sup>

These conventions and agreements along with the collective efforts of the activists, organisations have raised humongous awareness about the rights of Transgender Persons and prompted the governments of member states to take steps for the overall protection of transgender rights. However, the journey is half way and there still lie huge challenges and disparities to be tackled in different parts of the world given the beliefs, culture and traditions of various nations. There is a need for proper implementation of these policies to overcome the hurdles and bring about a comprehensive change in the attitude and acceptance of Transgender Persons globally.<sup>9</sup>

### LEGAL MILESTONES

In India, the path breaking judgment in *NALSA case*<sup>10</sup> set a new milestone in the journey of the Transgender Person's battle for recognition and equality. The Court in its judgment for the first time recognized the Transgender community as Third Gender. It acknowledged the deprivation of the rights of the transgender Community. The court declared the rights of self-identification to the Transgender Persons. It recognised and guaranteed all the rights of the citizens of India to be extended to the Transgender Persons. It directed the government to make legislations and policies on par with the Yogyakarta Principles<sup>11</sup> to ensure a life of dignity equal to all citizens. It directed the state to take measure to ensure recognition, and protection to Transgender Persons. Accordingly, the Transgender Persons (Protection of Rights) Bill was introduced in the year 2016 which was the watershed version of the *NALSA Judgment*<sup>12</sup>. The

8. *Born Free and Equal- Sexual Orientation and Gender Identity in International Human Rights*, United Nations' Human Rights office of High Commission, New York, Geneva, 2012, pp.39-44

9. *Ibid.*

10. *NALSA V Union of India*, (2014) SCC 438

11. *YOGYAKARTHA*, <http://yogyakarthaprinciples.org>. ( Last visited on August 16, 2023 at 13:00)

12. *NALSA V Union of India* (2014) SCC 438



Act was a total disappointment to the Transgender Community who came together to protest and reject the Bill. This prompted the Government to reconsider the Bill and finally the legislature passed the Transgender Persons (Protection of Rights) Act, 2019. The Act attempted to provide an inclusive definition of Transgender Person. The Act defines a Transgender Person as someone whose gender does not match the gender assigned at birth. It includes trans-men and trans-women, persons with intersex variations, gender-queers, and those who identify as a part of the transgender community. This definition marks the beneficiaries of the legislation.<sup>13</sup>

The Act for the first time allowed the right of self-identification as to gender for the Transgender Persons and prohibited discrimination of all forms based on gender identity. Now they have a right to identify themselves as man, woman, or transgender in accordance with their self-perceived identity. The District Administration was assigned with the task of issuing certificate of identity to Transgender Persons, based on the gender identified by them. The Act guaranteed the right of residence to the Transgender Persons with their family or in a rehabilitation center as per their choice and extends protection against their eviction based on gender identity.

Discrimination against Transgender Persons is prohibited in all specters under the provisions of the Act, such as education, employment, healthcare, access to public places and public services. The Act ensures the right of employment of Transgender Persons while promoting self-employment and ensuring that they are not discriminated in recruitment process.

The Act urges the government to take measures to provide easy access to healthcare services inclusive of sex re-assignment surgery and hormone therapy. Act directs the government to facilitate easy access to the various welfare schemes and programs. Accordingly, many State Governments like Tamil Nadu, Karnataka, Kerala, and Maharashtra have initiated to set up Transgender Welfare Boards to extend the welfare benefits to the Transgender Persons. The National Council of Transgender Persons is established under the Act to delve into the grievances of the Transgender Persons. The Act also criminalizes and penalizes provisions for acts of violence and discrimination against Transgender Persons.

### LEGAL SCENARIO

However, the Transgender Persons (Protection of Rights) Act, 2019 received a mixed reaction from the stake holders. Concerns were voiced against certain provisions of the Act regarding intervention of the District Administration as certifying authorities resulting in dilution of the rights of self-identification of Transgender Persons. It is even debated that the Act is deliberately silent on many core issues touching upon the right to marry, adoption,

13. PRSIndia, <https://prsindia.org/billtrack/the-transgender-persons-protection-of-rights-bill-2018>  
( Last visited on August 2,2023 14.35)



and inheritance, hence failed to comprehensively cover and protect the rights of Transgender Persons in India.

The Transgender Persons (Protection of Rights) Act, 2019 was enacted in India with the intention of providing legal recognition and protection for Transgender Persons. Although the Act was brought in to force to effectively address the key issues of the Transgender Community, it has been subject to severe criticism by the stake holders for its serious shortcomings.<sup>14</sup>

The Definition of 'Transgender' is not just narrow but also vague and gives rise to confusion. According to the Act 'Transgender Person' means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as *kinner, hijra, aravani and jogta*.<sup>15</sup> The definition includes the term gender queer which is abstract and creates confusion as to the inclusive beneficiaries under the Act.

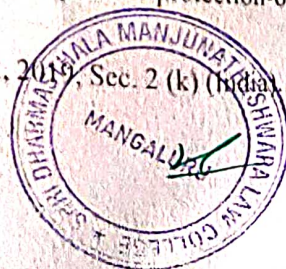
The Act guarantees the right of self-determination to the Transgender Persons; however the right comes with the rider where the Transgender Person has to obtain a certificate of identity from the District Magistrate, based on the recommendation of the screening committee. This procedure clearly intervenes and restricts the right of self-identification of the Transgender Persons, as the determination of identity rests in the hands of the government authorities.

The requirement of surgery and proof of surgery or medical treatment for purpose of gender recognition is invasive and violative of right to privacy. The criminalization of begging rather than regulating it, results in deprivation of survival means to many Transgender Persons whose primary source of income is begging. The Act fails to effectively address health care needs of the Transgender Persons including gender affirmation treatments and surgeries. There are no provisions to educate the Transgender Persons in making right choices about gender affirmation methods, the outcome, the damage, and other ill effects.

The Act directs the Government to provide vocational training and facilitate employment opportunities, the Act does not elaborate on the measures to be taken to eradicate practices of discrimination in areas of employment and education. The penalties stipulated by the Act for the violence and discrimination against Transgender Persons lacks teeth to deter heinous crimes like sexual assaults and other crimes actuated by hate. The penal provisions relating to sexual assault is also discriminatory when compared to Sec. 376 and other provisions of IPC

14. PRSIndia, <https://prsindia.org/billtrack/the-transgender-persons-protection-of-rights-bill-2019>, last visited on 31.08.2023, 16.20

15. The Transgender Persons (Protection of Rights) Act, 2019, Sec. 2 (k) (India)



which provides for more punishment for sexual assault against women. The social security, housing and other essential welfare needs of the Transgender Persons are also not adequately addressed by the Act.<sup>16</sup> The unique challenges faced by the Transgender Persons belonging to marginalized communities like indigenous background and lower castes makes the situation more complex requiring the government to put in a lot of thought in the provisions of the Act to address these issues. The Act is criticized by the activists and the transgender community for lack of consultation, and not being included in formulation of the Act, resulting in complete failure in understanding their needs and concerns, thereby causing great disappointment to the stakeholders.

**GOVERNMENTAL INITIATIVES**

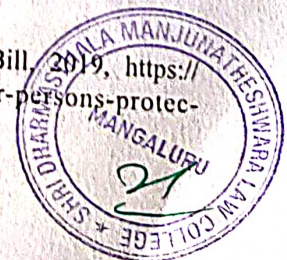
Some states have been dynamic in promoting the Transgender welfare. Ray of hope can be seen where some states like Tamil Nadu constituted the Transgender Welfare Board. The Welfare Board has extended an assortment of social security benefits for the Transgender People, for example, work grants, training grants, free medical coverage, and grants for building houses. In 2015, Kerala also has taken some noteworthy steps to have a progressive and protective approach towards Transgender Persons by curbing acts of discrimination of Transgender People through the Kerala Social Justice Department 2015. The strategy likewise prescribes the setting up of a Transgender Justice Board with state Minister for Social Justice as its director. Kerala additionally made accessible free sex reassignment medical procedures for Transgender People in government clinics in 2016.<sup>17</sup> Even states like Karnataka made provision for 1% reservation in Public Employment for Transgender Persons. These can be seen as slow but steady steps towards a progressive society.<sup>18</sup>

The Transgender Community awaited the legislation with great expectations; the Act intended to bring about a paradigm shift in the society towards recognizing, protecting and reshaping the lives of the Transgender Persons in India. However, there are loud cries of displeasure heard from various quarters about the lacunae's in the Act, which is a cause of concern and requires serious reconsideration. Many of the provisions of the Act are challenged

5. Riyaa Singh, Analysis of Transgender Persons (Protection of Rights) Bill, 2019, <https://www.legalserviceindia.com/legal/article-3199-analysis-of-transgender-persons-protection-of-rights-bill-2019.html>, last visited on 21.07.2023 at 12.00

*Ibid.*

Riyaa Singh, Analysis of Transgender Persons (Protection of Rights) Bill, 2019, <https://www.legalserviceindia.com/legal/article-3199-analysis-of-transgender-persons-protection-of-rights-bill-2019.html>.(Last visited on July 21,2023 12.00)



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as unconstitutional in *Swati Bidhan Baruah v Union of India*<sup>19</sup> and the matter is pending before the Supreme Court. The Act is said to have deviated from the NALSA judgment, thus the Petitioners seek for the Court to strike down Sections 4, 5, 6, 7, 12(3), 18(a) and 18(d) of the Act as unconstitutional. In addition, they filed a Writ of Mandamus that directs Centre and State Governments to provide reservations for Transgender Persons in public employment and education, as directed by the Court in NALSA. They further contended that sec 18(d) sets maximum penalty for sexual assault and abuse of Transgender Person at a very lighter degree than that which is set under section 376 and related provisions of the IPC relating to sexual assault against women. It is further contended that section 12 of the Act restricts the decisional authority of an adult Transgender Persons and even threatens the alternative family structure of the Transgender Community. Sec. 7 which provides for the right of self-identity of Transgender Persons, is violative of article, 19 (1) and 21 of the Indian Constitution as it makes it contingent on medical surgery.<sup>20</sup>

### NAVIGATING REAL LIFE CHALLENGES

Our society has always been reluctant to acknowledge the trauma of the Transgender Community. There is unwillingness in the society to accept different gender identities and expression, which needs to be changed and law alone, cannot be a tool for such change. There are some practical difficulties in the literal implementation of the directions given by the court in the *NALSA judgment*<sup>21</sup> which cannot be overlooked taking into account the unique traditions and culture of India. The right to marry, adoption, inheritance etc. are the major areas that are necessary for the complete citizenship to be enjoyed by the Transgender Persons but are conspicuously left out by the Act. It seems, like the government had a calculated mission in not incorporating these provisions in the Act, with the apprehension that, doing so will disturb the societal balance. The government believes that the conception of marriage is common to all domestic laws and instruments of laws relating to marriage, including the Special Marriage Act, which has enacted a special scheme of provisions based on the same concepts. The opposition on part of the government are based on the ground that the societal concept of marriage is inherently interconnected to religious and cultural norms and are within domain of personal laws that require a to be debated on a social and a national level. The view of the government is that the question of updating a law will arise when it fails to realise its purpose and not to accommodate an alien purpose forced into the scope of law. It is an impractical task according to the government as over 160 provisions across various legislations would have to be changed to

19. Supreme Court Observer, <https://www.scobserver.in/cases/swati-bidhan-baruah-union-of-india-challenges-to-transgender-persons-act-case-background/> (Last visited on July 21, 2023 12.00)

20. *Ibid.*

21. NALSA V Union of Indiat (2014) SCC 438



accommodate the recognition of same-sex marriages. The time is now ripe to acknowledge the existence and reality of diverse gender identities in the society and we cannot live in perpetual denial. However, it is to be noted that the right to marry does not include the right to compel the State to create a new definition of marriage. Only the Parliament is competent to do this and, therefore, the court has also opined that this is a matter best left for the Parliament to decide.<sup>22</sup> Nevertheless, there is a need to find a middle path to protect and extend all rights to the Transgender community yet maintain a balance that would not be turbulent to the societal norms at large.

As regards the right to adoption, The NCPCR and other organizations have opposed allowing adoption by same-sex couples, on grounds of "mental and emotional development of the child. They opine that there may be emotional difficulties for a child, due to not being exposed to a "normal" heterosexual marriage. Regarding the laws related to succession and inheritance it is to be noted that succession and inheritance are governed under personal laws, which poses a practical difficulty to extend to Transgender Persons<sup>23</sup>

## CONCLUSION

There is a pressing need to bring about a dynamic change in the sexual orientation network of India. There is a need to establish a strong support system to ensure that the Transgender Persons can live their lives freely with all dignity. Some of the suggestions for the betterment would be, to effectively implement the provisions of the Act. Stringent action against the people for abandoning children for biological distinction would deter and bring down the case of homelessness among the Transgender Persons. Easy credit offices and extension of financial aid must be guaranteed to fuel entrepreneurship in the community with adequate vocational training. Awareness programs and publicity at a large scale of projects and welfare measures must be composed to reach out to the Transgender Community. Strategies and policies for compulsory literacy program to Transgender Community must be undertaken in the grass root level. Establishment of helpline for profession planning and direction, vocation openings and online placement framework must be engaged. Helplines for psychological help and counseling must be extended.<sup>24</sup> The school curriculum must include content creating awareness of Transgender People, their problems and rights to sensitize the children who will grow up to

22. Anesha Mathur, New Delhi, UPDATED: ISTSame-sex marriage case in Supreme Court - Issues and debates, 2023 <https://www.indiatoday.in/law/story/same-sex-marriage-case-supreme-court-issues-and-debates-2378525>, (Last visited on July 21,2023 12.00)

23. *Ibid.*

24. Riyaa Singh, Analysis of Transgender Persons (Protection of Rights) Bill, 2019 <https://www.legalserviceindia.com/legal/article-3199-analysis-of-transgender-persons-protection-of-rights-bill-2019.html>(Last visited on July 21,2023 12.00)





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