

# TRANSGENDER - RIGHT AND GENDER DENIED COMMUNITY

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## INTRODUCTION

The Urdu and Hindi word for transgender is "*Hijra*" and may alternately be used as *hijira*, *hijda*, *hijada*, *hijara* or *hijrah*. This term is generally considered derogatory in Urdu. In India, an older name for hijras is *kinnar*, which is used by some Hijra groups as a more respectable and formal term. These people have a unique sexuality and gender identity which does not conform to the traditional social norms. Transgenders are those who tend to transgress from the social gender norms. Though there have been many sexual revolutions in the recent past but the issue of transgender rights was not addressed due to the bias which the society has against this community. There is a lack of acceptance and understanding for the community whose lives encompass a complexity that goes beyond the normative correlation between biological sexes on the one hand and gender identity and sexual orientation on the other hand. Indian society fears any type of sexual or gender non-conformity and this manifests through discrimination against those who display peculiarities.

A transgender person is one who is biologically male and often takes on the gender identity of a female. In other cases, the transgender person might also want to alter their biological maleness/femaleness through a sex reassignment surgery. This community has been a part of Indian society from ancient times and evidence of this can be found in epics like *The Ramayana* and *The Mahabharata*. The episode in the *Ramayana* involving hijras occurs when Rama is banished for 14 years. When he leaves for the forest, he turns around to see a large number of his people following him. Rama appeals to 'all men and women' that they return to the city but the hijras, who belong to neither category, don't feel bound by his injunction and want to stay with him. Impressed by their devotion, Rama sanctions them the power to confer blessings on auspicious occasions like childbirth, marriage, and inaugural functions – hence the custom of 'celebration', in which hijras sing, dance and confer blessings. Another legend is to be found in the *Mahabharata* involving Aravan, son of Arjuna and Nagakanya, who offered to face Bhishma in battle and be slaughtered since Bhishma had vowed revenge. Aravan had one condition for sacrificing his life: he wanted to spend the last night of his life in a state of matrimony. Since no one offered to marry him, Krishna assumed the female form of Mohini and married

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him. The hijras in Tamil Nadu are feminine homosexuals who take Aravana as their progenitor and call themselves 'Aravanis'.

## **VIOLATION OF THE RIGHTS OF TRANSGENDER COMMUNITY**

But in spite of this they are discriminated against and harassed both physically as well as mentally by various social institutions e.g. the police. However, any evidence of such exploitation goes undocumented. This community is denied an opportunity of livelihood and in most circumstances is forced to take up sex work as a way of livelihood. Since in most cases they can't afford the protection and privacy of independent accommodation, they adopt public spaces like parks or certain streets to find their sexual partners. This makes them vulnerable to harassment by the police. In most cases of arrest of a Hijra by the police, they are let off upon paying a bribe, thereby turning this exercise into a circularly lucrative commercial racket. Also, in many cases they are subjected to extreme physical violence by their clients who deny them payment.

Transgender people are extremely vulnerable to STI/ HIV infections and possible transmission of infection to their wives since they have multiple sex partners and little access to STI treatment services. In many cases they even attempt suicide at some point in their lives because of low self-esteem. Further, they are discriminated against and harassed at the workplace, in educational institutions, and are trapped by low levels of literacy. The hospitals and other medical establishments are also not very supportive towards this community. Though SRS (sex reassignment surgery) has started in India, this procedure is a long and expensive one. Thus, it is not possible for every transgender person to go for SRS. Also the accessibility of SRS is very limited to a person belonging to this community. As a consequence of this a considerable number of persons of this community go to unqualified medical practitioners who perform castration. However, the process of castration is extremely dangerous and can lead to a lot of complications. Many times this process is done in hazardous, unhygienic and unsanitary conditions which can cause severe infection, urine loss and other painful conditions. The process of castration may even lead to death due to neurogenic shock or hypovolemic shock or due to the wound becoming septic. The position of SRS is still undecided in the Indian Legal System. The process of 'emasculating' a person comes under the section 320 of the Indian Penal Code which deals with grievous hurt, which can be punished under section 325 of the Indian Penal Code. Section 325 states that *whoever voluntarily causes grievous hurt shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable for a fine*. Thus even if a person voluntarily wants to be emasculated, the doctor can be punished under section 325 and the person voluntarily wanting to be emasculated will be treated as an abettor. However, section 88 under the Chapter of General Exceptions under the Indian Penal Code provides



for acts not intended to cause death, done with consent in good faith for a person's benefit. It means that nothing *which is not intended to cause death, is an offence by the reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm.* Due to this not many doctors are ready to perform the sex reassignment surgery and also there are no general guidelines for this surgery.

However, this discrimination and denial of rights to the transgender community can't be explained solely on the basis of police-behaviour. The root of this discrimination is in the various societal institutions and it starts right from the home. *Home* is considered as a place where a person can live safely and comfortably but, this is not the case with the transgender community. For these people home is the starting point of all the hurdles and problems which they face all through their lives. Article 16 of the Universal Declaration of Human Rights, the document which is the foundation of Human Rights, defines *family* as "the natural and fundamental group unit of society and is entitled to protection by society and the state". However, in the case of transgender people family is not very supportive and they put a lot of mental and at times physical pressure on them to conform to existing sexual and gender norms. Buckling under family pressure to marry and reproduce, many kothis marry and raise families, and have same-sex relationships outside, often under covert circumstances or in shame. At times they are made to leave their hometown by the family in order to save themselves from the shame. Due to this they are neither given a good or proper education nor do they have many job or career options. So they are forced to work as sex workers.

## LAWS WITH ADVERSE IMPACT ON THIS COMMUNITY

The law also adversely affects the position of the transgender community in the society. The link between criminality and sexual non-conformity was made explicit for the first time in the legal framework of India in 1897 by amending the *Criminal Tribes Act, 1871* which was sub-titled as 'An Act for the Registration of Criminal Tribes and Eunuchs'. As per this act eunuchs include every person of male sex who admit themselves, or on medical supervision are found to be impotent. Every such person was required to register themselves and they could be arrested without a warrant and be punished with imprisonment up to 2 years or fine or both. Such a person was considered incapable of acting as a guardian, making a gift, drawing up a will or adopting a son. Thus, being a eunuch was *per se* made a crime. The people of this community were denied the right of personhood. All the backward classes or marginalised classes were represented by one or the other leader but this community never got any representation. Thus, the basis of law for the transgender people was led down in a negative manner.

The *Immoral Trafficking Prevention Act, 1986* includes every person- male, female and Hijra sex workers but this Act is not being used to target the institution of prostitution administered by brothel keepers and clients, instead it is used to target the people in prostitution. The police generally arrest persons only on the mere suspicion that they are prostitutes and without any evidence of solicitation (which a crime under section 8 of ITPA). Due to this a class of people is created which is always targeted and are at any time liable to be assaulted in public, they are wrongfully confined and restrained in the police station, subjected to humiliation and even their earnings are taken away.

The protection of *Fundamental Rights under the Constitution of India* is available to all the persons and only some are limited to the citizen of India. However, sexual or gender identity is a very integral part of the instruments which define civil personhood and India only provides for two sexes i.e. male and female. The transgender are neither recognized as women nor as third sex thus they have neither civil personhood nor any civil rights e.g. right to vote, right to claim a formal identity through a passport and a ration card, a driver's license. Right to education, livelihood, health etc. there have been instances where the people belonging to this community stood up in election and won but these elections are vulnerable to challenge on the ground of sexual identity. In one of the cases the Madhya Pradesh High Court struck down the election of Kamala Jaan as the Mayor of the Municipal Corporation of Katni. The court's logic was that since Kamala Jaan was not a woman, she could not contest for the election because that seat was reserved only for women. Lawyer PratulShandilya who argued Kamala Jaan case contended that he had already filled a Special Leave Petition in the Supreme Court and the court has also granted leave in the petition. The high court verdict came despite a direction from the Election Commission in September 1994 that Hijras can be registered in the electoral roles either as males or females depending upon their statement of enrolment. This direction was given by the Election Commission after Shabnam, a Hijra candidate from Shihagpur constituency in Madhya Pradesh, wrote to the Chief Election Commissioner enquiring about the category under which Hijras were classified.

Though, by a recent amendment to the *Chapter XVI, Section 377 of the Indian Penal Code* which criminalized sexual activity "against the order of nature" was read down to decriminalise same-sex behaviour among consenting adults in a historic judgement by the High Court of Delhi on 2 July 2009. Section 377 continues to be applicable in the case of sex involving minors and coercive sex. This has brought a lot of relief to the transgender homosexual people. But still there is a feeling of apathy towards this community in a society that recognizes only two genders; they are often rendered invisible, ridiculous, horrific or disgusting. They are laughed at, shunned, rejected by their families, denied jobs, ration cards and passports, and exploited by others in the professions they are allowed into (beggary and sex work)



and by the police.

## REMEDIES

Thus, there is a need to promote awareness of the legal rights which the people belonging to this community have against the exploitation and discrimination. All these people have the Fundamental Rights as enshrined in the Constitution of India. The most important fundamental rights are discussed for the transgender community.

- Right to Equality (Article 14) - every person is equal before law and is entitled to equal protection of law. Also, it has been specifically mention under Article 15 that no discrimination shall take place on the ground of sex.
- Right to freedom (Article 19) - Every person has the right to express themselves in any manner in which they deem fit. However, this right can be subject to reasonable restrictions under Article 19(2) on the basis of public order, morality, decency, integrity etc.
- Right to life and personal liberty (Article 21)-it has been held by the Supreme Court that the right to life does not mean a mere animal existence, cruel and degrading treatment but it means to live a life with dignity. The transgender community of India has a *de jure* right to live with dignity.
- Right to constitutional Remedies (Article 32) - If any of these rights are violated by the state then that person can file a writ petition under this article for the enforcement of his fundamental right. Thus, a transgender can approach the Supreme Court for the enforcement of his fundamental right.
- Article 22(1) of the Constitution of India provides that “No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice” thus if any transgender is arrested then the grounds and reason of the arrest must informed as early as possible.
- Under section 51 of the Code of Criminal Procedure, 1973 the search of any person shall be done with dignity. Also, the use of force shall be avoided at all the times while making an arrest.
- Under section 54 of the Code of Criminal Procedure, 1973, a person arrested by the police has a right to be examined by a registered medical practitioner. Also, females should be examined only by female practitioners. Thus, special categorization should be done for the transgender people.
- Under the Section 57 of the Code of Criminal Procedure, 1973 “No police officer

shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's court.

- Under section 154 of the Code of Criminal Procedure, 1973 if a person is complaining of an offence which has taken place; such information shall be recorded in writing and signed by the complainant. The complainant also has a right to get a copy of the First Information Report free of cost under the clause (2) of section 154. Under Clause (3) of this section if the officer in Charge of the Police Station refuses to register the FIR then a copy of the same should be sent to the Superintendent of Police.
- The mandate of NHRC under Section 21(1) of Protection of Human Rights Act includes the power to inquire *suomotointo* "a petition presented to it by a victim or any person on his behalf, into complaint of...violation of human rights or abetment thereof"

## INTERNATIONAL LEGAL DEVELOPMENT IN FAVOUR OF TRANSGENDER PEOPLE

- The international Bill of Gender Rights is particularly useful in conceptualizing the idea of right to a gender identity and the right to freely express one's gender identity.
- The first decision given by U.K. on the grounds of discrimination against transgender people was *Corbett v. Corbett* which the court held that the sex of a person is determined at birth in accordance with stated biological criteria and without any consideration of the person's psychological sex. However this position was challenged in the case of *Christine Goodwin v. the United Kingdom* and it was declared by the European Court of Human Rights that the UK government's failure to alter the birth certificates of transsexual people or to allow them to carry on their new gender role was a breach of the European Convention on Human Rights.
- In New Zealand it was held in the case of *New Zealand Attorney General v. the Family Court at Otahuhu* that for the purpose of marriage, transsexual people should be legally recognized in their re-assigned sex.
- In USA there have been many decisions which have provided support and strength to the transgender community. In the case of *Price Waterhouse v. Hopkins*<sup>1</sup>, it was held that harassment directed at a person because that person does not conform to traditional sex Stereotypes is prohibited. Further, in the

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<sup>1</sup>Price Waterhouse v. Hopkins [1989] 490 U.S. 228



case of *Rosa v. Park West Bank & Trust Co.*<sup>2</sup>, it was held that reinstating Equal Credit Opportunity Act claim on behalf of biologically male plaintiff who alleged that he was denied an opportunity to apply for a loan because he was not dressed in “masculine attire”. Later in *Higgins v. New Balance Athletic Shoe, Inc.*<sup>3</sup>, it was observed by the Circuit Court that “Just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity.”

## Suggested Reforms

- There should be a separate room in jails for people belonging to this community and shall not be sent into male cells with other men to protect them from harassment, abuse and rape. Also, protection and safety should be provided for these people in order to prevent rape in police custody and in jail.
- The Sex Reassignment Surgery (SRS) should be made legal and Medical Council of India shall issue the standard guidelines for this surgery. Also, SRS should be made accessible to the transgender community by providing free services related to this surgery in government hospitals.
- Need for community systems strengthening. Many of the existing Hijra/TG organizations lack basic systems that are essential for effectively running an organization. It is crucial that the capacity of these organisations be enhanced for effective community mobilisation and providing quality services.
- Hijras/TG associations rarely get external financial support. Even those people or organizations who might want to support primarily want to fund for HIV prevention activities. Through the National AIDS Control Programme, only a few Community Based Organisations of Transgender/Hijras have been granted Targeted Intervention projects.
- Various organizations like -NGOs, civil society etc. should come forward in order to create awareness among the transgender community about their Basic Human and Legal rights so that they can be made self-sufficient to fight against the harassment by the society and the state.
- Third sex should be added along with male and female in the gender identity column of the instruments which are used in India to define civil personhood.
- The state shall provide reservation to this (transgender) marginalised class in the educational institutes and in government employment.

<sup>2</sup>Rosa v. Park West Bank & Trust Co [2000] 214 F.3d 213

<sup>3</sup>Higgins v. New Balance Athletic Shoe, Inc. [1999]194 F.3d 252, 261 n.4

The transgender and Hijra people should be given equal respect and identification in the society as everyone else. Sexual violence is a constant, pervasive theme in the lives of these people along with the subjection of physical violence such as beating and threats of disfigurement with acid bulbs, the sexuality of transgender people also becomes a target of prurient curiosity, at the very least and brutal violence as its most extreme manifestation. Their lives are complexly involved with the social structure and power structure of the tradition society. The Transgender community should not be treated as a medical or anthropological issue; it shall rather be treated as a community, culture and movement. The people of this community are extremely-marginalized and must be given recognition, respect in the society by the state.