

Transgender: Status in India

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Transgender community includes Hijras, Eunuchs, Kothis, Aravanis, Jogappas, Shiv-Shakthis etc., who have been a part of Indian society for centuries. The Vedic and Puranic literatures mention “tritiyaprakriti” meaning the third gender and “napunsaka” meaning someone with the loss of procreative ability. The word *hijra* used in the Indian language appears to be derived from the Persian word *hiz*, i.e., someone who is effeminate and/or ineffective or incompetent. Another commonly used word is *kinnar*, whereas *chhakka* is used in a derogatory context. Though most of the eunuchs seen today are begging at traffic signals or during weddings, they were a respected lot during the Mughal rule in the Medieval India. The word “eunuch” is derived from the Greek word “*Euneukhos*” which literally means bed chamber attendant.” Hence, they were put in charge of harems due to their emasculation. During the British rule, they were denied civil rights and were considered a separate caste or tribe who did kidnapping and castration of children and danced and dressed like women. The LGBTQ group is referred to as the “lesbian, gay, bisexual, transgender, and queer community” which includes those with gender dysphoria and different sexual orientations. The lesbian and gay people have been accepted in many parts of the world and have also got their rights, but the transgender is still without rights.

Prevalence Of Transgender In India: Indian census has never recognized the third gender, i.e., transgender while collecting census data for years. However, in the Census of 2011, data of transgender were collected in the category of “Others” under Gender with details related to their employment, literacy, and caste. The census revealed the total population of transgender to be around 4.88 lakh. The data have been primarily linked to the males section as they are usually counted as men, but on request, they may be counted as women. Due to this, it is impossible to comment on the actual transgender population, though the census has provided an approximate estimate. The 2011 census also reported 55,000 children as transgender identified by their parents.

Current Scenario: The Supreme Court of India passed a unique judgment in April 2014 stating one’s sexual orientation as the integral part of personality, dignity, and freedom and identified transgender as a third gender. In the National Legal Services Authority (NLSA) versus Union of India case, the apex court provided the transgender (Hijras and Eunuchs) a legal identity along with seven other directions. Post the NLSA judgment, various courts passed favorable orders for the transgender community. Based on the NLSA judgment, the Rajya Sabha passed the Rights of Transgender Bill, 2014. However, the government then passed another Bill, Rights for Transgender Persons Bill, 2015, modifying on the 2014 bill by removing the provisions relating to Transgender Rights Court as well as the National and State Commissions. The 2015 Bill underwent further changes, and another bill was introduced in the Lok Sabha in 2016 — the transgender persons (Protection of Rights Bill), which invited criticism from the transgender and activists.^[5]

The Transgender Persons (Protection Of Rights) Bill, 2016

The Lok Sabha on December 17, 2018 passed the Transgender (Protection of Rights) Bill, which seeks to define transgender and prohibit discrimination against them.

Highlights of the Bill-

- 1. Prohibition against discrimination-** It prohibits discrimination in relation to opportunities for education, job, health care services, and access to services, accommodation, transport etc. It directs the central and state govts to provide welfare schemes in these areas.
- 2. Procedure for transgender recognition-** The certificate of identity has to be obtained from the **District Magistrate**, who will issue the certificate based on the recommendations of a **District Screening Committee**, comprising the Chief Medical Officer, District Social Welfare Officer, Psychologist or Psychiatrist, and a representative of transgender community.
- 3. Right of residence-** No transgender person shall be separated from parents or immediate family on the ground of being a transgender.
- 4. Offences like compelling a transgender person to beg,** denial of access to a public place, physical and sexual abuse, etc. would attract up to two years’ imprisonment and a fine.
- 5. The bill Criminalises Begging by Transgender persons** so as to induce them to undertake other sustainable vocations.
- 6. Need for a revised bill/ Concerns of 2016 bill:**

7. **Against self-identified gender expression:** Under this district screening committee's assent was required for getting transgender certificate which undermined **Right of Self Identification** as per NALSA judgement.
8. **No reservation:** The bill was silent on Affirmative actions regarding transgenders and no reservation in jobs or education was proposed.
9. **Criminalization of begging:** It made transgender communities more vulnerable, as they are forced to do begging due to lack of employment opportunities and criminalizing the same was a threat to their livelihood.
10. **Limited protection against sexual abuse:** The bill failed to accord equal protection to transgenders in consonance with women as many offences under the IPC such as rape, stalking, sexual harassment etc are applicable only if the victim is female. For example, definition of rape under Section 376 IPC deals with crime committed against a female but doesn't mention transgender. Further the bill made "sexual abuse" punishable, with a disproportionate punishment of imprisonment only up to 2 years
11. **No civil rights recognized:** The Bill didn't catered to civil rights such as marriage, civil partnership, adoption and property rights.
12. **National Commission not enough:** The bill proposed a transgender commission at the national level which was not enough. The need is to establish a welfare board for transgender, and a helpline number for those in distress at regional and local levels.
13. **Bar on separation from family:** There was a bar on forcible separation of transgender persons from their families, except through court orders. However, it was within the family that many transgender persons faced harassment and abuse, and often felt driven to flee their homes

The Transgender Persons (Protection of Rights) Bill, 2019

The **Transgender Persons (Protection of Rights) Bill, 2019** was passed by the Lok Sabha in August, 2019 and now Rajya Sabha has also passed it.

Key Provisions:

1. **Definition of a transgender person:** The Bill defines a transgender person as one whose gender does not match the gender assigned at birth. It includes trans-men and trans-women, persons with intersex variations, gender-queers, and persons with socio-cultural identities, such as kinnar and hijra.
2. **Prohibition against discrimination:** The Bill prohibits the discrimination against a transgender person, including denial of service or unfair treatment.
3. **Right of residence:** Every transgender person shall have a right to reside and be included in his household. If the immediate family is unable to care for the transgender person, the person may be placed in a rehabilitation centre, on the orders of a competent court.
4. **Employment:** No government or private entity can discriminate against a transgender person in employment matters, including recruitment, and promotion. Every establishment is required to designate a person to be a complaint officer to deal with complaints in relation to the Act.
5. **Education:** Educational institutions funded or recognised by the relevant government shall provide inclusive education, sports and recreational facilities for transgender persons, without discrimination.
6. **Health care:** The government must take steps to provide health facilities to transgender persons including separate HIV surveillance centres, and sex reassignment surgeries.
7. **Certificate of identity for a transgender person:** A transgender person may make an application to the District Magistrate for a certificate of identity, indicating the gender as 'transgender'. A revised certificate may be obtained only if the individual undergoes surgery to change their gender either as a male or a female.
8. **Welfare measures by the government:** The Bill states that the relevant government will take measures to ensure the full inclusion and participation of transgender persons in society.
9. It must also take steps for their rescue and rehabilitation, vocational training and self-employment, create schemes that are transgender sensitive, and promote their participation in cultural activities.

Key issues and analysis: The Supreme Court has held that the right to self-identification of gender is part of the right to dignity and autonomy under Article 21 of the Constitution. However, objective criteria may be required to determine one's gender to be eligible for entitlements.

The Bill states that a person recognized as "transgender" would have the right to "self-perceived" gender identity. However, it does not provide for the enforcement of such a right. A District Screening Committee would issue a certificate of identity to recognize transgender persons. The definition of "transgender persons" in the Bill is at variance with the definitions recognized by international bodies and experts in India. The Bill includes terms such as "trans-men," "trans-women," persons with "intersex variations," and "gender-queers" in its definition of transgender persons. However, these terms have not been defined.^[6]

There are several other areas which need clarifications such as certain criminal and personal laws which are currently in existence and only recognize the genders of “man” and “woman.” It is unclear how such laws would apply to transgender persons who may not identify with either of the two genders. Hence, these laws would need amendments.

Lacunae addressed from Previous Bill:

1. **Decriminalised Begging:** Transgenders are forced to beg owing to lack of employment opportunities and criminalising the same was grave injustice for them due to this the new bill decriminalised begging by transgenders.
2. **No District Screening Committee:** In earlier bill screening committee was to give its assent to District Magistrate for issuing certificate of identity which undermined right of self-determination, now certificate will be issued after self-declaration by a person in front of district magistrate.
3. **Remaining Bottlenecks:**
4. **Problem of Nomenclature:** A more comprehensive term like LGBTQ (Lesbian, Gay, Bisexual, Transgender, Queer) would have been more appropriate rather than focusing on rights of transgenders only.
5. **Against the Spirit of Self Perceived Identity:** The Bill states that a person will be recognised as ‘transgender’ on the basis of a Certificate of Identity issued by a District Magistrate. In such a case, it is **unclear what the term ‘self-perceived’ gender identity** entails and how it will be enforced.
6. **No Review Mechanism:** If a transgender person is denied a Certificate of Identity, the Bill does not provide a mechanism for appeal or review of such decision of the District Magistrate.
7. **No role of Chief Medical Officer:** The Standing Committee, emphasised on the importance of the role of the Chief Medical Officer to check any potential misuse of the certificate. However, the 2019 Bill removes the provisions for a District Screening Committee and leaves the power to issue the Certificate with the District Magistrate, based on procedure notified through rules.
8. **Ambiguity on other rights:** Currently several criminal and civil laws recognise two categories of gender i.e. man and woman. The Bill recognises a third gender i.e. ‘transgender’. However, the Bill does not clarify how the existing laws will apply to transgender persons.
9. **Compartmentalization of Discrimination:** Bill expressly prohibits discrimination against a transgender person, **only on nine types** of discriminatory acts. Discrimination is a multidimensional concept and to name just nine types is a travesty of justice.
10. **No Reservation:** In the **NALSA judgement**, the state and central govts were asked to extend backward class reservation to transgenders in education and public employment. But the bill fails to address that issue.
11. **Lighter Sentences:** There are lighter punishments for several criminal offences, such as “sexual abuse” and “physical abuse” if they are committed against transgender people in comparison to females.
12. **National Commission not enough:** A transgender commission at the national level is not enough. There is need for a welfare board for transgender, and a helpline number for those in distress at regional and local levels.
13. **Sex Selective Reassignment Surgeries:** Some activists are criticising this provision as according to him it is defying the order of nature and encouraging forceful or non consensual sex reassignment surgeries.

Way Forward:

More State level initiatives are needed for augmenting their welfare like:

1. **Tamil Nadu** established a **transgender welfare board** in 2008.
2. **Kerala** brought the ‘**State Policy for Transgenders in Kerala 2015**’ to provide the “right to live with dignity.” It was the first state to have a transgender policy.
3. **Odisha** is the first state to give transgender people social welfare benefits.
4. **Andhra Pradesh** also announced pension scheme for transgender community.
1. **Socio Economic support:** Provide opportunities in social and economic activities by encouraging their incorporation in government initiatives and bringing reservation for them in education and employment. **Ernakulam District Panchayat** helped 6 transgender people to open Kerala’s 1st Transgender run hotel named **Ruchimudra**.
2. **Grassroot Support:** Local governments need to play a positive and proactive role in removal of taboos and discrimination. Moreover, reservation in panchayats can also be done to empower them.
3. **Child Protection laws:** It needs to be strengthened to address issues faced by transgender adolescents. The abandonment of children is a punishable offence under Section 317 of IPC (Indian Penal Code) .The age limit of child for this offence need to be increased to 18 years as abandonment of transgender children usually takes place between 12 and 18 years.

4. **Sensitization:** The Home Department of the Government of India must take initiative and work in coordination with the State Governments for sensitizing the law enforcement agencies and by involving all the stakeholders to identify the measures and to implement the constitutional goal of social justice and the rule of law.

Medical Lexicon

The following definitions help in understanding the various gender-related terminologies:^[7-9]

1. Assigned gender – refers to a person’s initial assignment as male or female at birth. It is based on the child’s genitalia and other visible physical sex characteristics
2. Agendered – “without gender,” individuals identifying as having no gender identity
3. Cisgender – describes individuals whose gender identity or expression aligns with the sex assigned to them at birth
4. Closeted – describes an LGBTQ person who has not disclosed their sexual orientation or gender identity
5. Coming out – The process in which a person first acknowledges, accepts, and appreciates his or her sexual orientation or gender identity and begins to share that with others
6. Gender – denotes the public (and usually legally recognized) lived role as boy or girl, man, or woman. Biological factors combined with social and psychological factors contribute to gender development
7. Gender-atypical – refers to physical features or behaviors that are not typical of individuals
Gender expression – the manner in which a person communicates about gender to others through external means such as clothing, appearance, or mannerisms. This communication may be conscious or subconscious and may or may not reflect their gender identity or sexual orientation
8. Gender-nonconforming – refers to behaviors that are not typical of individuals with the same assigned gender in a given society
9. Gender reassignment - denotes an official (and usually legal) change of gender
10. Gender identity – is a category of social identity and refers to an individual’s identification as male, female or, occasionally, some category other than male or female. It is one’s deeply held core sense of being male, female, some of both or neither and does not always correspond to biological sex
11. Gender dysphonia – as a general descriptive term refers to an individual’s discontent with the assigned gender. It is more specifically defined when used as a diagnosis
12. Gender expansiveness – conveys a wider, more flexible range of gender identity and/or expression than typically associated with the binary gender system
13. Gender fluidity – a person who does not identify with a single fixed gender, of or relating to a person having or expressing a fluid or unfixed gender identity
14. Gender queer – gender queer people typically reject notions of static categories of gender and embrace a fluidity of gender identity and often, though not always, sexual orientation. People who identify as “gender queer” may see themselves as being both male and female, neither male nor female or as falling completely outside these categories
15. Transgender – refers to the broad spectrum of individuals who transiently or persistently identify with a gender different from their gender at birth. (Note: The term transgendered is not generally used)
16. Transsexual – refers to an individual who seeks, or has undergone, a social transition from male-to-female or female to male. In many, but not all, cases this also involves a physical transition through cross-sex hormone treatment and genital surgery (sex reassignment surgery)
17. Transphobia - fear and hatred of, or discomfort with, transgender people.

Conclusion: The Government of India today has taken a stance and introduced several welfare policies and schemes for the transgender which would be a big step forward. These include census, documentation, issuing of the citizenship ID Cards, issuing passports along with social, economic, political transformation, housing, legal measures, police reforms, legal and constitutional safeguards to prevent human rights violations of the transgender community and institutional mechanisms to address specific concerns of transgender people.

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