

# “RIGHTS OF TRANSGENDER PERSONS IN INDIA: AN UNPREDICTABLE ROAD TO FREEDOM”

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## INTRODUCTION

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Transgenders have formed a part of the Indian society since time immemorial. The character of Shikhandi in Mahabharata formed an indispensable member of the Pandava army. Arjuna, while in exile, disguised himself as a Transgender named Brihannala in the court of king Virata. Lord Rama in Mahabharata met an army of Transgenders and received blessings from them. All these events perfectly epitomise that Transgenders have been well accepted in the Indian society since ages. But do they find the same acceptability today? It is a very complex question and a very fundamental one. India became an independent sovereign nation in 1947 and provided fundamental rights to both males and females on an equal basis but the rights of the Transgenders remained in the state of limbo.

However, over the years many western countries have come out and spoken against this conservative mindset and formulated progressive policies in order to safeguard their citizens. Countries like New Zealand, the UK, Argentina etc. have formulated a comprehensive policy framework to safeguard the socio-political rights of their Transgender community. Recently, Botswana became the latest country to decriminalized homosexuality. It is important to note that the Supreme Court too, has cited such examples in its judgments. Transgenders form a very small portion of the Indian population and this is one of the reasons that they do not form part of the vote bank and are hence, neglected by the political parties who simply abstain from formulating any Transgender friendly policy. Furthermore, they face tremendous amount of social and economic neglect within the society which results in limited socio-economic growth. It is evident that hardly any Transgender occupies a top position in the socio-political setup. There is a common and a misguided social mindset that a person can only be born as a male or a female and a person born as a transgender is against the order of the nature. However, various reports by international organizations have concluded that it is completely normal for a person to be born as a Transgender. Any social reform in

a society requires not only unanimity but also political will. Over the years, there were allegations that the democratic institutions like the legislature and judiciary sidelined themselves from engaging in this debate to save themselves from the wrath of conservative groups. Political parties, too, refrained from formulating any policy to save their vote bank.

Lack of social and economic protection has had widespread implications on the well-being of the Transgender community. Members of the community have resorted to occupations like prostitution and begging to make ends meet. Many have joined the world of crime in order safeguard their needs and earn income. It is the paramount responsibility of any state to protect the rights of its minorities as no modern democratic state can survive without it. India has a decent number of Transgenders (many of them are yet to formally come out) if absolute numbers are taken into consideration. The entire community has a substantial presence in the South Asia region. A collaborative effort must be undertaken by India along with its neighbors to prevent cross border trafficking of such persons and proliferation of diseases which can be carried by such people.

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## WHO ARE WE?

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### TRANSGENDERS IN INDIA

#### **Who Is a Transgender?**

Transgender Persons (Protection of Rights) Bill, 2016 has defined a Transgender person *as one who is partly female or male; or a combination of female and male; or neither female and male; or neither female nor male. In addition, the person`s gender must not match the gender assigned at birth, and includes trans-men, trans-women, persons with intersex variations and gender-queers.* According to WHO, 'Transgender' is an umbrella term that includes persons whose sense of gender does not match with the gender assigned to them at birth.

#### **Status of Transgenders in India**

In 2018, the National Human Rights Commission (NHRC) conducted a study on the condition of Transgenders in India.<sup>1</sup> As per the study, the total population of the Transgenders according to the 2011 census is around 4.8 lakh out of which only 50,000 are registered as eligible voters with the Election Commission of India.

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<sup>1</sup> <https://www.nhrc.nic.in/research-studies-&-projects/>

However, as per informal estimates there are roughly 50-60 lakh Transgenders in India who, owing to embarrassment or secrecy, refuse to disclose their identity. This paints a grim picture of the true reality of the Indian society's parochial mindset towards Transgenders.

The study by NHRC further pointed out that:

- **99%** of Transgenders in India have faced social exclusion at least once in their lifetime.
- **96%** are forced into low paying or undignified jobs like slavery and prostitution.
- **89%** admitted that there is structural unemployment.
- **50%** have not attended school at all.
- **53%** live under Guru-Chela system.
- **57%** are keen on getting sex-alignment surgery but don't have money for it.
- **Only 2%** own any property.

The study points out the sad state of affairs with respect to the status of Transgenders in India. Transgenders have continued to face disastrous treatment from all corners of the society. Such discrimination and exclusion has curtailed their overall personality development and has had a direct bearing on their social, economic and political rights. Such exclusion has calamitous long term implications.

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## **HOW FAR HAVE WE REACHED?**

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### A HISTORICAL TIMELINE OF EVENTS

#### **Expert Committee Report Under Ministry of Social Justice and Empowerment, 2013**

An expert Panel was set up in October 2013 under the Chairmanship of the Additional Secretary of the Ministry of Social Justice and Empowerment to look into the possibility of declaring Transgender persons as a third gender. The committee recommended that 'Transgender' persons be declared as a separate gender with the right of self-determination and asked the Centre to draft appropriate laws to protect such persons from discrimination and social exclusion. It recommended that the term 'Transgender' be used as an inclusive term to cover

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all gender identities and expressions. It also called for a compilation of all known Transgender socio-cultural groups to be prepared and circulated among all for guidance. It advocated that the terms `gender` and `sex` should be used separately and the former should be used only for official purposes. The Panel took a strict view of the condition of Transgender persons at home. It recommended that stern action must be taken against parents who abandon or physically/mentally harass such persons. It also took a stern view of how such people are provided inhumane treatment at hospitals. The panel also provided recommendations w.r.t. to delinquent public officials like police officers and civil servants who fail to discharge their duties. The panel had submitted its report in the aftermath of the **Suresh Kumar Koushal Case**<sup>2</sup> and recommended making changes in the Indian Penal Code. It advised the government to make changes in gender specific laws like Rape<sup>3</sup>. It further pointed out and remarked that `Constitution is gender blind` and suitable changes must be made to the Citizenship Act, 1955 and comprehensive evaluation of the law must be made to make it gender neutral. It further asked the National Crime Records Bureau to conduct requisite research and investigation into matters related to crimes against Transgender persons and cases registered against them. The Expert Committee was of the view that adequate health facilities must be provided to adolescent Transgenders. As per WHO<sup>4</sup>, Transgender persons are 50 times more likely to be living with HIV than other adults of reproductive age. The committee has recommended a key role for Medical Council of India to undertake such practices to improve health outcomes of Transgender persons.

### **National Legal Services Authority Of India V. Union Of India, 2014**<sup>5</sup>

In a landmark judgment, the Supreme Court for the first time in the history gave legal recognition to the third gender. The Supreme Court comprehensively validated that gender identity and sexual orientation include trans genders and that each person`s self-defined sexual orientation and gender identity is crucial to their personality and forms the bedrock of the act of self-determination. It also held that no person shall be forced to undergo medical procedures.

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<sup>2</sup> *Suresh Kumar Koushal v. Naz Foundation (2014) 1 SCC 1*

<sup>3</sup> Section 375 and 376, Indian Penal Code (1860)

<sup>4</sup> <https://www.who.int/hiv/topics/Transgender/en>

<sup>5</sup> *National Legal Services Authority v. Union of India [(2014) 5 SCC 438]*

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The Court also referred to international practices which had been undertaken across the globe particularly Yogyakarta principles which allows fully enjoyment of human rights to all human beings irrespective of their sexual orientation. The Court also found it pertinent to understand and evaluate the practices which are being undertaken in other countries. Countries like New Zealand, the United States and many European nations have taken progressive measures to enact legislations to protect the rights of Transgender persons. The Court also put forward its disappointment that a country like India lacks a robust legislative framework to protect the rights of such people. The Court also took a broad view of certain provisions of the Indian Constitution. The Court held that the term `any person` also includes a person who is neither male nor female i.e. Transgender and the state must ensure equality before law and equal protection of law to such people. It pointed out that the term `sex` mentioned under Article 15 and Article 16 of the Indian Constitution not only includes biological sex of male or female, but also includes people who consider themselves neither male nor female.

Furthermore, the Court held that right to freedom of speech and expression enshrined under Article 19(1)(a) is inclusive of one`s right to self-determination and notwithstanding legitimate exceptions provided under 19(2) of the Constitution. Moreover, the Court interpreted that no person (including Transgenders) shall be deprived of his life or personal liberty except according to procedure established by law under Article 21 of the Constitution. Finally, the Court gave directions to the State Governments to grant legal recognition of their gender identity to the Transgenders.

### **The Transgender Persons (Protection Of Rights) Bill, 2016**

The Bill was introduced in the Lok Sabha in 2016 by the Ministry of Social Justice and Empowerment. Subsequently, the Bill was referred to the Parliamentary Standing Committee. The Bill was finally passed by Lok Sabha in December 2018 after it accepted around 27 recommendations of the Standing Committee.

#### **The Key features of the Bill are<sup>6</sup>:**

a) The Bill provides a comprehensive definition of a Transgender person as a person who is (i) neither wholly female nor male; or (ii) a combination of female

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<sup>6</sup><https://www.prsindia.org/billtrack/Transgender-persons-protection-rights-bill-2016>

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and male; or (iii) neither female nor male. Also, a Transgender person's gender should match his/her gender at birth. The Bill also includes trans-men, trans-women, persons with intersex variations and gender queers.

b) A Transgender person has a right to self-determine his/her gender identity.

c) A Transgender person has to file an application before the District Magistrate to procure a Certificate of Identity which shall act as a proof of identity.

d) A District Screening Committee will be setup under the Chairmanship of the District Magistrate which shall issue a certificate of identity and the Certificate granted by the Committee will record the gender of the person on all the official documents.

e) A Transgender person may re-apply for the Certificate if there is any change in the gender.

f) No public or private establishment is allowed to discriminate against Transgender persons in the matters of recruitment and promotion. If such an establishment contains over 100 employees, then a designated officer must be appointed to look into such matters.

g) The Bill has stringent provisions against any form discrimination against Transgender persons on the basis of (i) Employment; (ii) Education; (iii) Access to public places; (iv) Health facilities; (v) Access to government establishments; (vi) Right to own or rent a property.

h) Educational institutes are required to provide inclusive education, training and opportunities in the field of culture and sports. Policies are aimed at providing recreational exposure.

i) The Centre and State Government are required to provide adequate welfare support to the Transgender persons. This was also put forward by the Supreme Court in the NALSA judgment.

j) Centre and State Governments are mandated to provide adequate health facilities to such people specially to counter diseases like HIV. It is extremely crucial that proper awareness must be created to counter the proliferation of such diseases through Transgenders.

k) A National Council for Transgender (NCT) persons is to be setup to look into the policy initiatives to monitor the situation of such people.

l) The Bill provides criminal punishment between six months and two years for offenses committed against Transgenders. Such offenses include (i) Forced Labour; (ii) Forced begging; (iii) Denying use of public place; (iv) Sexual and/or physical violence committed against Transgenders (v) Denying use of shared household.

#### ISSUES REGARDING THE BILL:

A Bill received widespread condemnation not only from Transgender groups but also academicians and legal fraternity.

It is important to note that the Supreme Court in the NALSA judgment recognized the right of self-determination. It held that self-determination of gender forms a fundamental part of the right to dignity of the Transgender persons under Article 21 of the Indian Constitution. But the Bill passed by the Lok Sabha diluted the Supreme Court directive of self-determination by setting up a District Screening Committee<sup>7</sup> which will ascertain the gender of the person and grant the Certificate of Identity on the basis of that. Moreover, it only allows for an identity certificate as `transgender` and not as a male or a female which goes against the judgment. It crucial to note that countries like UK, Denmark, Argentina etc have passed legislations to provide right to self-determination to their Transgender citizens.<sup>8</sup> The Court also directed the Centre and the State Governments to provide reservation in jobs and educational institutions for Transgender persons. However, no such provision has been included in the 2016 Bill. A Private Member`s Bill was introduced in the Parliament in 2014 which mandated 2% reservation for such people but its significance was defeated when the government decided to introduce its own Bill in 2016. The Bill mandates that equal opportunity will be provided to all persons under this Bill but it would defeat the purpose of the Bill if such people

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<sup>7</sup> Section 6, Transgender Persons (Protection of Rights) Bill, 2016

<sup>8</sup> <https://www.thehindu.com/opinion/op-ed/a-law-that-defeats-its-purpose/article25854190.ece>

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are not given a head start. Reservation will result in social and economic emancipation of such people.<sup>9</sup>

Another controversial provision under this Bill is the criminalization of the act of begging.<sup>10</sup> It is evident that due to lack of employment and social exclusion such people have no other option but to resort to begging. In 2018, the Delhi High Court declared Bombay Prevention of Begging Act, 1959 as unconstitutional since it is the duty of the State to provide livelihood to beggars. It further said that the State cannot fail in its duty to provide adequate facilities and add insult to injury by arresting or detaining such people.<sup>11</sup> The Bill contains various terms like `trans-men`, `trans-women`, `gender queers` etc but no proper definition of these terms have been provided and these terms are open to multiple interpretations. Moreover, there is visible difference if one compares the definition of Transgender persons provided by the Supreme Court, The Expert Committee and the 2016 Bill.<sup>12</sup> It must also be noted that certain gender specific provisions under Indian Penal Code, Indecent Representation of Women Act, Domestic Violence Act, Hindu Marriage Act etc. are open to widespread interpretation when it comes to the third gender. The Bill is unclear if these provisions would apply to the Transgender persons. There is also a mismatch regarding the penalties provided under this Bill and other legislations like IPC. No grievance redressal mechanism has been explicitly provided under this Bill which is another cause for concern. There was no mention of grievance redressal by the Supreme Court and the Expert Committee as well.

### **Justice K.S. Puttaswamy V. Union of India, 2017<sup>13</sup>**

The Supreme Court in the KS Puttaswamy upheld the individual right to privacy under Article 21 of the Indian Constitution. Supreme Court also went onto say that right to privacy also includes right to sexual privacy and it also covers Transgender persons. The Court went one step ahead and invariably ruled against the **Suresh Kumar Koushal judgment** of 2013 which curtailed the sexual

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<sup>9</sup> <https://m.economictimes.com/news/politics-and-nation/cabinet-passes-reworked-transgender-bill/articleshow/65247339>

<sup>10</sup> Section 19, Transgender Persons (Protection of Rights) Bill, 2016

<sup>11</sup> <https://www.thehindu.com/news/cities/Delhi/delhi-hc-decriminalises-begging-in-national-capital/article24631922.ece/amp/>

<sup>12</sup> Transgender Persons (Protection of Rights) Bill, 2016

<sup>13</sup> *Justice K.S. Puttaswamy v. Union of India, 2017 10 SCC 1*

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freedom of Transgenders. The Court believed that the right to sexual privacy is crucial for the protection of the Transgender community.

### **Navtej Singh Johar V. Union of India, 2018<sup>14</sup>**

The Supreme Court in its historic judgment in September 2018 decriminalized Section 377 of the Indian Penal Code 1860 which criminalized sexual intercourse between people of same sex. The Court unanimously held that sexual activity in private between two consenting adults irrespective of their sex cannot be declared illegal and it would be violative of their fundamental right to privacy as held under the Puttaswamy judgment<sup>15</sup>. The case traces its origin back to the **Naz Foundation Case**<sup>16</sup> of 2009 in which the High Court of Delhi declared Section 377 of IPC as unconstitutional and violative of the fundamental rights of the Transgender community. The Court also went onto to cite the **Maneka Gandhi Case**<sup>17</sup> and **Kharak Singh Case**<sup>18</sup> under Article 21 of the Indian Constitution. In 2014, the Supreme Court in its two judge bench decision overruled the Delhi High Court judgment stating that the LGBTQ community (including Transgenders) form a miniscule part of the population and the conviction rate under Section 377 of the Indian Penal Code is extremely low. In the judgement the Supreme Court went a step backward in granting fundamental rights to the members of the Transgender community.

In 2016, a petition was filed before the Supreme Court and the three judge bench decided to refer the matter to a larger bench. The petition challenged the 2014 Supreme Court judgment stating the right to sexual privacy, sexual autonomy and sexual identity of the LGBTQ community forms a part of their right to life and personal liberty under Article 21 of the Indian Constitution, which was curtailed by the Supreme Court in its 2014 judgment. The petition also claimed that there is no reasonable classification under Section 377 of the IPC between natural and unnatural sex as these terms have been vaguely defined and hence, it was violative of Article 14 of the Indian Constitution. Moreover, the Section was also violative

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<sup>14</sup> *Navtej Singh Johar v. Union of India* (2018) 10 SCC 1

<sup>15</sup> *Ibid.*

<sup>16</sup> *Naz Foundation v. Government of NCT of Delhi and Others W/P(C) No. 7455/2001*

<sup>17</sup> *Maneka Gandhi v. Union of India* (1978) 1 SCC 248

<sup>18</sup> *Kharak Singh v. State of U.P.* AIR 1963 SC 1295

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of Article 15 (Right against Discrimination) and Article 19(1)(a) (Freedom of Speech and Expression) of the Constitution.

In September 2018, the five judge bench of the Supreme Court unanimously declared Section 377 of IPC as unconstitutional and violative of Article 14, 15, 19 and 21 of the Indian Constitution. It overturned its decision in the **Suresh Kumar Koushal** Case and decriminalized Section 377.<sup>19</sup> The Court took a cue from the **NALSA** and the **Puttaswamy** judgment and went onto to say that gender identity and gender autonomy is crucial to the personality development of a person and violation of it has a direct impact on the fundamental right to dignity. The Court stated that sexual activity in private is an unreasonable restriction and has no relation with decency and morality under Article 19(2) of the Indian Constitution. The State has no legitimate interest in the intimacy in private of its citizens, the Court said. The Court found that the provision traces its origin from the `Victorian` mindset and has no relevance in the modern society as majority of the democracies have abandoned such archaic practice and have moved towards a progressive era. The Chief Justice of India stated that in a state there must be a `progressive realization of rights` i.e. once a right has been given to a citizen the state has no right to take it back on a later date. The Court said that once a step has been taken in a positive direction there is no going back. Moreover, Constitutional morality must supersede social morality in granting fundamental right to the LGBTQ community, the Court held.

### **Arunkumar And Sreeja V. Inspector General of Registration and Others, 2019<sup>20</sup>**

The Madras High Court in April 2019 held that a marriage solemnized between a Hindu male and a transgender would be held valid under the Hindu Marriage Act, 1955, and the marriage registrar is bound to register such marriage. The Supreme Court in the case of **Shafin Jahan v. Asokan K.M.**<sup>21</sup> in 2018 held that right to choose a partner for marriage is a fundamental right under Article 21 of the Indian Constitution. The Court cited the previous judgments of the Supreme Court and held that the terms `bride` and `groom` under Section 5 of the Hindu Marriage

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<sup>19</sup> <https://www.livclaw.in/tale-of-three-judgments-and-dethronement-sec-377-ipc-when-sc-called-its-own-views-perverse-and-fallacious/>

<sup>20</sup> *Arunkumar and Sreeja v. Inspector General of Registration and Others (2019) W.P. (MD) No. 4125 of 2019*

<sup>21</sup> *Shafin Jahan v. Asokan K.M. & Ors. (2018) SC 343*

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Act, 1955 are vague terms and are open to multiple interpretations and are hence, inclusive of Transgender persons. A legal provision must be read in consonance with the current social scenario, the court held. The Court further went onto to mention Article 16 of the Universal Declaration of Human Rights (UDHR) which guarantees right to freedom of choice. The Court also mentioned that since the marriage has been solemnized according to Hindu tradition, the right to freedom of religion under Article 25 has also been abrogated. The Court directed the respondents to register the marriage solemnized between the petitioners.

The Court opined that it is paramount for the Transgender community to join the mainstream and legitimate access to the social institution of marriage must be allowed. The Constitution, as an enabling document, is allowing them to join the mainstream, the court held.<sup>22</sup> The Court maintained that it is not opening new avenues but simply stating the obvious as held as by the Supreme Court in its previous judgments.

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## HOW FAR DO WE NEED TO GO?

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### THE WAY FORWARD

- Every progressive movement must have a strong foundation. Gender sensitization is of crucial importance in order to protect the rights of Transgenders. School children must be given proper counselling and workshops must be conducted to create awareness amongst the adolescents.
- The Supreme Court judgments along with the Bill are a step in the positive direction but such measures need to be streamlined. Moreover, inter-state and inter-ministerial cooperation is indispensable to achieve requisite success.
- Local governments need to play a dynamic role to ensure eradication of taboos and social discrimination faced by Transgenders in rural areas.
- State Governments need to take initiatives by formulating schemes for the emancipation of the Transgender rights. Main focus areas should be education, housing, employment and most importantly health. Several states like Tamil Nadu and Kerala already have a sophisticated policy framework.

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<sup>22</sup> <https://www.thenewsminute.com/article/madras-hc-shuts-down-tn-govt-s-problematic-argument-upholds-trans-woman-s-marriage-100569>

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- Law enforcement agencies must ensure that no crimes are committed by and against the Transgenders and no form of custodial torture is practiced. Moreover, legal counselling should be provided to the Transgender victims.
- Gender-specific provisions in acts like the Indian Penal Code, Code of Criminal Procedure, Domestic Violence Act, Hindu Marriage Act etc. must be read in a broader sense as to include the Transgenders.
- Special care homes must be set up for adolescent children who have been abandoned by their parents.
- Vocational training must be provided to Transgenders to ensure that they form a part of the mainstream.
- Reservation in employment and education must be provided (as per the recommendation of the Supreme Court in the NALSA judgment) to the Transgenders. They should be provided equal opportunity to join the armed forces and public services.
- Requisite amendments must be made to the Transgender Persons (Protection of Rights) Bill to ensure self-determination of gender, as mandated by Supreme Court in the NALSA judgment.
- A standalone health policy should be formulated to ensure timely health benefits are provided to the Transgender community.
- Civil rights like Right of marriage, Right of inheritance, Right of adoption etc. must be ensured to Transgenders and required amendments should be made to ensure such rights.
- Financial inclusion is pivotal to grant economic rights to such people. The State must ensure credit facilities provided by banks to such people are fulfilling desired norms.

It is critical to note that Transgenders have always been a part of the great Indian civilization and discarding such community would be a massive blot on it. Transgenders might form only a miniscule part of the society but their contribution to the society has been indispensable over the years. *The entire journey from the Naz Foundation case to the Arunkumar and Sreeja has faced a lot of ups and downs from not only the society but also democratic institutions. It is paramount to understand the journey is still far from being complete as such people still end up facing social stigma. A collaborative effort by all the sections of the society is needed to completely eradicate this inhumane practice.*