

Fundamental Rights and Transgenders In India: A Legal Analysis

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Abstract

In 2014, the Supreme Court of India recognized transgender individuals as a third gender, marking a significant milestone in the protection of their constitutional rights. This ruling affirmed their right to equality and non-discrimination under the Indian Constitution. Despite this legal recognition, transgender individuals in India continue to face numerous challenges, including social stigma, legal and bureaucratic hurdles, economic hardship, and limited access to healthcare and education. To address these issues, it is crucial to implement comprehensive legal reforms, enhance public education, and develop targeted support systems. Strengthening the enforcement of constitutional protections and promoting societal acceptance are key to improving the quality of life for transgender individuals and achieving true equality.

Keywords: Transgender Rights, Constitutional Protection, Legal Reforms, Social Stigma, Equality and non-discrimination, Inclusion and equity

Introduction

The Constitution of India is the supreme law of the country. It provides the foundational structure and disciplinary principles for the civilized existence of a person in a larger society like India where "unity in diversity" thrives. Some of these fundamental and disciplinary principles are the fundamental rights which are enshrined in the Constitution. In the arena of human rights and democracy in the country, the Constitution of India is the witness since 26 January 1950. It is the constitutional duty of each and every person living in the territory of India to abide by the provisions of the Constitution. The provisions of the Constitution are a matter of one's legal right which legally binds the State in the matters of governing the State and the administrative matters. When the fundamental rights are concerned, the question which is usually put forth is which category of persons is concerned and with respect to what type of fundamental right the question is concerned. These rights, if not "categorized", will create misunderstanding and disputes resulting in the disharmony in the society at large.

A human being is classified as male or female. However, could a human being be denied his or her categorized rights simply because he or she does not fit into clear categories of male or female? What are the consequences adhering to such a division? These are important questions that need to be answered. India is a unique modern State which, through its acceptance of the existence of a "third gender" - the transgenders, in its social, religious and moral records, has extended constitutional recognition to this metamorphic community whereby Constitutionally speaking, they not only have rights and privileges available to both male and female persons but also certain rights which are available to none other in any other category of citizens. It is settled legal proposition even believed in that the rights relating to transgender also come within the meaning and ambit of "fundamental rights" and are enforceable by the Hon'ble Court.

1.1. Background of Fundamental Rights in the Indian Constitution

The Indian Constitution is a voluminous document containing 395 articles arranged under 25 parts and 12 schedules. In fact, it is the longest written constitution of any sovereign country in the world. Besides others, Part III of the Indian Constitution provides citizens six cherished and scientifically classified rights which amount to enforceable limitations on governmental and sovereign power. In ordinary parlance, these rights are christened as 'fundamental rights'. These fundamental rights are spread over and proclaimed in 24 provisions or articles commencing from Article 12 and ending with Article 35 of the Indian Constitution. While these rights are available to the citizens (as defined in Article 5 of the Constitution), they are also enforceable - subject to some exceptions - by the judicial authorities in India.

The fundamental rights of the Indian citizens, and the right to equality as well as the right against discrimination and disallowance on the basis of sex, are also considered relevant to adjust the legal framework to benefit the transgender community. The state is under an obligation to protect the rights of such discriminated people at every level and even the police is under an obligation to protect the fundamental rights of transgenders.

Research Question

How effectively have the constitutional protections for transgender individuals in India been implemented, and what measures are necessary to overcome the ongoing challenges they face?

Hypothesis

The implementation of constitutional protections for transgender individuals in India has been insufficient in addressing the practical challenges they encounter, including social stigma, discrimination, and limited access to essential services. Comprehensive legal reforms, enhanced public awareness, and targeted support initiatives are necessary to fully realize these constitutional guarantees and improve the quality of life for transgender individuals.

Literature review

Ancient Indian scriptures, such as the Vedas, acknowledge a spectrum of gender identities, with the concept of 'Tritiya Prakriti' (third nature) serving as a foundational recognition of non-binary gender identities. This notion reflects the inclusive and complex understanding of gender in ancient India. Additionally, Hindu texts like the Manusmriti reference individuals who do not conform to traditional male or female gender roles, further illustrating the nuanced approach to gender in ancient Indian thought. The ethnographic study by Serena Nanda delves into the lives of Hijras, a community that embodies the 'third gender,' offering a contemporary perspective on the historical and cultural continuities of gender diversity in India. (Nanda, 1999).¹

Pattanaik, D. (2002) in his work 'The Man Who Was a Woman and Other Queer Tales of Hindu Lore'. explores various narratives from Hindu mythology and folklore that highlight the existence of diverse gender identities and roles, further emphasizing the cultural recognition of non-binary identities in ancient India.² Vanita, R., & Kidwai, S. (2000) in their anthology presents historical texts and literature that discuss same-sex relationships and gender diversity, providing a broader context for understanding the ancient and medieval perspectives on gender in India.³ Dasgupta, Rohit. (2011). 'Queer sexuality: A cultural narrative of India's historical archive' examines how gender and sexuality are depicted in the Mahabharata and Ramayana, offering a deeper understanding of the traditional narratives surrounding gender fluidity in ancient India.⁴ Sax, W. S. (2009) in his book 'God of Justice: Ritual Healing and Social Justice in the Central Himalayas.' Focuses on a specific region, and discusses the rituals and beliefs that recognize and honor non-binary and third-gender identities, connecting ancient practices with contemporary religious traditions.⁵

1.2. Recognition of Transgenders in Indian Society

Ancient India

Transgender persons have been an integral part of Indian society for centuries. Historical records indicate the recognition of a "third sex" in early Indian literature, including Hindu mythology, folklore, epics, and Vedic and Puranic texts. Terms like "tritiyaprakriti" and "napumsaka" were used to describe individuals who did not conform to the male or female genders. The term "napumsaka" specifically indicated the absence of procreative ability, highlighting a distinct identity apart from traditional male and female roles.⁶ Ancient texts explored issues of sexuality and the concept of a third gender, including the notion of "psychological sex" found in Jain literature, which separated psychological identity from physical characteristics.

Significant mythological narratives include:

Ramayana: When Lord Rama was banished to the forest, he instructed his followers to return to the city. However, the hijras (transgender community) chose to stay with him, earning his blessings to bestow good fortune at auspicious events like childbirth and marriage.⁷

Mahabharata: Aravan, son of Arjuna, wished to marry before his sacrificial death. When no woman agreed, Krishna transformed into Mohini, a woman, and married him. The hijras of Tamil Nadu honor Aravan and call themselves Aravanis. Shikhandi is yet another poular character who was instrumental in defeat and death of Bhishma.⁸

Hindu texts like the Bhagavata Purana and Bhagavad Gita touch upon gender fluidity and inclusivity, reflecting varied views on the third gender. In the Bhagavata Purana, Lord Brahma creates beings like kinnars, symbolizing semi-divine

¹ Nanda, S. (1999). *Neither Man nor Woman: The Hijras of India*. Wadsworth Publishing

² Pattanaik Devdutt, *The Man Who Was A Woman and Other Queer Tales from Hindu Lore*. Harrington Park Press, 2002. ISBN 1560231815.

³ <https://archive.org/details/ruth-vanita-saleem-kidwai-eds.-same-sex-love-in-india-readings-from-literature-a/page/n7/mode/2up> last accessed on 23.6.24

⁴ Dasgupta, Rohit. (2011). Queer sexuality: A cultural narrative of India's historical archive. 3. 651-670.

⁵ https://books.google.co.in/books/about/God_of_Justice_Ritual_Healing_and_Social.html?id=OPqvw1rlzkoC&redir_esc=y last accessed on 24.6.24

⁶ Ibid.

⁷ Pattanaik Devdutt, "Vedanta and LBGTIQ" available at <https://devdutt.com/articles/vedanta-and-lgbtiq/> last accessed on 22.6.2024

⁸ Pattanaik Devdutt, "Shikhandi: And Other Tales They Don't Tell You" Penguin Books Ltd. India, (2014) ISBN-13 :978-9383074846

gender diversity. Although the Bhagavad Gita does not explicitly discuss a third gender, Lord Krishna's inclusive approach is evident. Krishna supports all beings and stresses devotion to the Divine, emphasizing unity over differences. The Bhagavata Purana sometimes portrays the third gender as normal, but also subjects them to ridicule, indicating evolving perceptions of identity.⁹

Manusmriti acknowledges the third gender, granting them legal recognition but limiting roles in society, such as barring them from inheriting family property. Similarly, the Arthashastra emphasizes respect for the third gender and punishes insults, though it restricts their social participation. Varshadharas, a third-gender group, served in various roles, including royal servants and spies. The Narada Smriti recognizes homosexual unions and gives women certain rights, including the ability to leave abusive marriages.¹⁰

Medical texts like the Sushruta Samhita recognize the third gender as natural, while Mohini, Vishnu's female form, represents fluid gender identity. Mohini's union with Shiva, leading to Ayyappa's birth, symbolizes gender transcendence.¹¹ The worship of Ayyappa, particularly at Sabarimala, reflects the growing inclusivity of transgender people in religious spaces.

Deities like Ardhanarishvara and Bahuchara Devi further challenge traditional gender norms, with Ardhanarishvara representing the union of male and female. Additionally, Buddhist texts like the Vinaya Pitaka show early acknowledgment of gender fluidity, promoting compassion for all beings, regardless of their gender identity.¹²

Mughal Period

During the Mughal era, hijras held prominent roles in royal courts, serving as political advisors, administrators, generals, and guardians of harems. Their loyalty, cleverness, and trustworthiness earned them significant influence, including in religious duties such as safeguarding Mecca and Medina. Their trusted positions allowed them to shape state decisions and accumulate wealth, reflecting their high status.

British Colonial Rule

The British colonization drastically altered the status of hijras. Early European accounts expressed repulsion towards hijras and questioned their societal roles. In the 19th century, the British criminalized the hijra community through the Criminal Tribes Act, 1871, branding them as kidnappers and castrators of children. The Act imposed harsh penalties, including imprisonment and fines, exacerbating their marginalization and vulnerability.

Post-Independence Era

Despite the repeal of the Criminal Tribes Act in 1952, prejudices persisted. Local laws, like the amended Karnataka Police Act, 1964, continued to stigmatize hijras, equating them with criminal activity. Section 36A of the Karnataka Police Act, 2012, mirrored colonial attitudes, enforcing surveillance and registration of hijras suspected of crimes such as kidnapping.

2. Legal Framework for Transgenders in India

2.1. Constitutional Provisions and Fundamental Rights

The Yogyakarta Principles affirm the right to equal legal protection for all, regardless of sexual orientation or gender identity, mandating the prohibition of discrimination. Similarly, the Universal Declaration of Human Rights (1948) and the International Convention on Civil and Political Rights (1966) stress the right to privacy, protection from arbitrary interference, and safeguarding one's honor and reputation.¹³ Transgender individuals often face severe marginalization, pushed into low-paying jobs and public performances due to rigid gender norms. Protecting human rights, as enshrined in India's Constitution and the Protection of Human Rights Act, 1993, is critical for ensuring equality and dignity for all.

Article 14 of the Constitution guarantees equal treatment for all individuals under the law, consisting of two key parts: the first part instructs the State not to deny any person "equality before the law," while the second part directs the State not to deny "equal protection of the laws." The Supreme Court in *Sri Srinivasa Theatre v. Govt. of Tamil Nadu*¹⁴ noted that

⁹Wilhem, Das, Amara, Tritiya –Prakriti People of the Third Sex Understanding Homosexuality, Transgender Identity and Intersex Conditions Through Hinduism ,(2004).available at <https://www.xilbris.com/bookstore> last accessed on 23/3/22

¹⁰ Ibid.

¹¹The story of Aravan, The God of Transgender” available at <https://atmanism.wordpress.com/2017/10/11/the-story-of-aravan-the-god-of-the-transgender/> last accessed on 22.2.22

¹²Violet Lhant,” LGBT Rights on the International Stage: An Analysis of Diplomatic Practice,” MAY 22, 2019 available at <https://studentreview.hks.harvard.edu/lgbt-rights-on-the-international-stage-an-analysis-of-diplomatic-practice/> last accessed on 22.6.24

¹³ Violet Lhant,” LGBT Rights on the International Stage: An Analysis of Diplomatic Practice,” MAY 22, 2019 available at <https://studentreview.hks.harvard.edu/lgbt-rights-on-the-international-stage-an-analysis-of-diplomatic-practice/> last accessed on 22.6.24

¹⁴ <https://indiankanoon.org/doc/1660451/> last accessed on 24.6.24

"Equality before law" is a dynamic concept with multiple facets. One facet ensures no privileged person or class exists above the law. Another facet obligates the State to foster a more equal society through the law, meaning equality before law is meaningful only in an equal society. Reasonable classification is permissible if it is fair, logical, and serves societal welfare. Such distinctions must be based on intelligible differentia and have a rational relation to the legislative objective. Access to education and employment is a constitutional right for all citizens, including transgender individuals. The Transgender Persons (Protection of Rights) Act, 2019, prohibits employment discrimination in Section 9, mandates compliance in Section 10, and requires educational institutions to provide inclusive and equal opportunities in Section 13. India's transgender community has long faced a complex history of societal marginalization, legal discrimination, and a lack of recognition of their fundamental rights. Before the landmark NALSA judgment in 2014, transgender individuals in India struggled to access basic services and opportunities, from obtaining legal identification documents to securing employment.

The NALSA v. Union of India case¹⁵, filed by the National Legal Services Authority, was a pivotal moment in the fight for transgender rights in India. The Supreme Court's ruling recognized transgender people as a "third gender" and affirmed their right to self-identify, a decision that upheld the fundamental rights of dignity, equality, and non-discrimination.

However, the implementation of this judgment has faced ongoing challenges, as the transgender community continues to grapple with social stigma, economic marginalization, and inadequate access to healthcare and social services. As the NALSA judgment celebrates its eighth anniversary, it is crucial to examine the progress made, the remaining barriers, and the path forward in ensuring the full realization of transgender rights in India.

In the case of Ram Singh v. Union of India,¹⁶ the Supreme Court discussed the concept of 'homogeneity,' defining a social class as an identifiable segment of society that can be internally homogenous (based on caste or occupation) or heterogeneous (based on disability or gender, such as transgender individuals). The Court noted that backwardness results from multiple independent factors, which can be social, cultural, economic, educational, or political.

In two significant cases, Aslam Pasha Urf. Chandini vs. State of Karnataka¹⁷, and Swapna vs. The Chief Secretary (MHC)¹⁸, the courts directed state governments to implement reservations for transgender persons. These decisions rejected the notion that such actions should be left solely to administrative discretion, emphasizing the judiciary's role in interpreting and intervening where the legislature alone could not.

The word "gender" has fascinating etymological roots. In English, French, and Spanish, it can be traced back to the Latin verb "generare," meaning "to beget," and the Latin stem "gener-," meaning "race" or "kind." In German, "Geschlecht" reflects concepts of sex, sexuality, and generation. In French and Spanish, "genre" and "género" are more related to notions of sort, kind, or class, rather than explicitly referring to sex or sexuality. Across languages, terms akin to "gender" are linked to ideas of kinship, race, biological taxonomy, language, and nationality, reflecting the central role of gender in systems of classification.

Despite constitutional guarantees of equality, Hijras/transgender persons face severe discrimination in all facets of society. The non-recognition of their identity deprives them of equal protection under the law, making them vulnerable to harassment, violence, and sexual assault in public spaces, homes, and even jails, often perpetrated by the police. They endure sexual assault, including molestation, rape, forced anal and oral sex, gang rape, and public stripping, supported by credible statistics and evidence. Non-recognition leads to pervasive discrimination in employment, education, and healthcare. Access to public spaces such as restaurants, cinemas, shops, malls, and public toilets is a significant challenge, and the lack of dedicated facilities compels them to use male toilets, exposing them to higher risks of sexual assault and harassment. Discrimination based on sexual orientation or gender identity undermines equality before the law and equal protection of the law, violating Article 14 of the Constitution of India.

Article 14 guarantees equality and equal protection, allowing reasonable classification and articles 15 and 16 prohibit discrimination, include gender identity under 'sex', and allow special provisions. TGs have been systematically denied rights under Article 15(2), which protects against restrictions on access to public places, and Article 15(4), which allows for special provisions for socially and educationally backward classes (SEBC), to which TGs belong. Affirmative action is necessary to rectify historical injustices. Article 16(2) ensures TGs are free from employment discrimination, and Article 16(4) entitles them to reservations in public services. These articles, along with the Directive Principles of State Policy and international instruments, emphasize the need for social equality, crucial for TGs to live with dignity and equal status.

The NALSA v. Union of India case was a landmark ruling by the Supreme Court recognizing transgender people as a "third gender" and affirming their right to self-identify, upholding their dignity, equality, and non-discrimination. The judgment highlighted that the Constitution is dynamic and must be interpreted to address modern realities. The judiciary, as the Constitution's guardian, ensures that transgender individuals (TGs) receive their legitimate rights, thereby protecting both the Constitution and democracy. Despite this, the transgender community still faces social stigma, economic

¹⁵ Supra .1

¹⁶ (2015) 4 SCC 697

¹⁷ <https://indiankanoon.org/doc/175431560/>. last accessed on 24.6.24

¹⁸ <https://translaw.clpr.org.in/caselaw/586/#:~:text=This%20petition%20directed%20the%20respondents,all%20educatio,n%20and%20employment%20opportunities> last accessed on 24.6.24

marginalization, and inadequate access to healthcare and services. Courts have emphasized the need for their inclusion and protection under all legal frameworks, including reservations and affirmative action. The court emphasized that the concept of 'gender' has evolved from a purely biological understanding to encompass broader notions of identity and expression, highlighting the need to address systemic discrimination and ensure equal opportunities for transgender individuals. This requires judicial activism, legal reforms, and societal changes to fully realize their rights and integrate them into society.

The Immoral Traffic (Prevention) Act, 1956 (ITPA) fails to explicitly address the unique vulnerabilities of transgender individuals, who are often marginalized and pushed into sex work due to socio-economic hardships. This oversight leads to discriminatory enforcement and further victimization. To better protect transgender individuals from trafficking, the ITPA should be amended to include specific provisions for them, alongside improved sensitization and training for law enforcement, robust support systems, and economic empowerment initiatives. Such measures would align with the Transgender Persons (Protection of Rights) Act, 2019, and the Supreme Court's NALSA judgment, ensuring equitable protection and opportunities.

Articles 25-30 of the Indian Constitution play a crucial role in safeguarding the religious, cultural, and educational rights of transgender individuals. These provisions ensure that transgender persons can freely express their identities, practice their religion, and access inclusive education, thus promoting a more equitable and inclusive society.

The right to constitutional remedies, enshrined in Article 32 of the Indian Constitution, is essential for protecting the fundamental rights of all individuals, including transgender persons. This provision allows transgender individuals to approach the Supreme Court or High Courts directly when their rights are violated, ensuring judicial protection and redressal. Landmark judgments, like the NALSA case, have affirmed transgender rights to self-identification and mandated their equal treatment under the law. By empowering transgender individuals to challenge discriminatory actions and policies, Article 32 complements other constitutional provisions, such as Articles 14, 15, and 21, which guarantee equality, non-discrimination, and the right to life and personal liberty. This comprehensive legal framework fosters social justice and inclusivity, transforming constitutional ideals into reality for the transgender community.

The Directive Principles of State Policy (DPSP) guide the Indian government in achieving justice, equality, and welfare. **Article 38** focuses on reducing inequalities and securing justice. **Article 39** ensures fair livelihood, equal pay, and protection against exploitation, which is crucial for transgender individuals. **Article 39A** provides for free legal aid, important for addressing discrimination faced by transgender persons. **Article 41** guarantees the right to work and public assistance during unemployment or disability. **Article 42** promotes humane working conditions and maternity relief, which should extend to fair wages and support for diverse reproductive needs of transgender individuals. **Article 43** ensures decent working conditions and fair wages for all workers, including transgender people. **Article 46** aims to protect marginalized groups, including transgender individuals, from exploitation. **Article 47** focuses on improving public health and nutrition, benefiting transgender individuals as well.

These DPSP principles, along with Fundamental Rights and Duties, create a comprehensive framework to support and integrate transgender individuals into society.

2.2. Laws and Policies Specifically Addressing Transgender Rights

The Transgender Persons (Protection of Rights) Act, 2019, aims to ensure the rights and welfare of transgender individuals in India. The Act provides a comprehensive definition of transgender persons, including those who do not conform to traditional gender identities, such as intersex variations and genderqueer individuals. It explicitly prohibits discrimination in education, employment, healthcare, housing, and public services. The Act guarantees the right to legal recognition based on self-identified gender, requiring a certificate of identity from a district magistrate. This legal framework aims to promote inclusivity and equal opportunities for transgender persons, addressing social stigma and discrimination. Additionally, various states in India, such as Tamil Nadu, Kerala, and Andhra Pradesh, have implemented targeted policies and welfare schemes to support the socio-economic empowerment of transgender individuals. These initiatives include financial assistance, skill development programs, educational scholarships, and healthcare services, reflecting a commitment to fostering a more inclusive and supportive environment for transgender communities. However, ongoing efforts are needed to ensure effective implementation, raise awareness, and address challenges to achieve meaningful progress in transgender rights and inclusion.

The Transgender Persons (Protection of Rights) Act, 2019, supports the constitutional principles outlined in Articles 39, 39A, 41, 42, 43, 46, and 47. It mandates the implementation of welfare measures, including livelihood support, vocational training, and equal pay for equal work, ensuring fair participation of transgender individuals in economic activities. The Act also guarantees access to comprehensive healthcare, legal aid, and justice, addressing the specific needs of the transgender community. By promoting inclusive health policies, preventing discrimination, and providing financial support, the Act aligns with the constitutional goals of enhancing public health, preventing exploitation, and securing equal opportunities. Together with the Directive Principles of State Policy, the Act aims to create a supportive environment for transgender individuals, ensuring their dignity and equality in all spheres of life. Despite the enactment of the Transgender Persons (Protection of Rights) Act, 2019, aimed at preventing discrimination and promoting inclusion,

activists criticize the Act for not involving the transgender community in its drafting. The judiciary continues to play a crucial role in protecting and expanding the rights of transgender individuals in India.

State governments in India have initiated various policies to support transgender individuals, reflecting a growing commitment to their rights and welfare. For instance, the Garima Greh initiative provides safe housing and support services for transgender persons, offering a refuge from homelessness and social exclusion. Additionally, several states have introduced allowances and financial aid programs to assist transgender individuals with their basic needs and reduce economic hardship. Reservation policies in education and employment have also been implemented to promote greater opportunities and inclusion for transgender people. Furthermore, the establishment of Transgender Welfare Boards in some states aims to coordinate and oversee the implementation of welfare schemes, address grievances, and ensure that transgender individuals receive necessary support and services. These state-level policies collectively contribute to improving the social and economic conditions of transgender individuals, although challenges in implementation and coverage remain.

2.3 Judicial Pronouncements

Over time, the judiciary in India has significantly enhanced and expanded the rights of transgender individuals, aligning with international human rights standards. A pivotal moment was the Supreme Court's 2014 ruling in *NALSA v. Union of India*, recognizing transgender identities as a third gender and affirming the right to self-determination. This ruling mandated the inclusion of transgender individuals in socially and educationally backward classes to alleviate historical injustices. The decriminalization of Section 377 IPC in the *Navtej Singh Johar* case¹⁹ further affirmed the rights of homosexuals, emphasizing the right to choose one's sexuality and the fundamental right to love. The *Naz Foundation* case²⁰ led to the Delhi High Court decriminalizing consensual same-sex acts. However, the Supreme Court later reversed this decision in the *Suresh Kumar Koushal* case²¹, leading to continued legal challenges and a pending curative petition to address discrimination against sexual minorities.

Several landmark cases highlight ongoing judicial activism supporting transgender rights. For instance, *Sushma and Seema v. Commissioner of Police*²² addressed police protection for LGBTQIA+ individuals, while *Kavin Thamizh v. Inspector of Police*²³ upheld the right to live with a partner. The *Ashish Kumar Misra* case²⁴ stressed the need for affirmative action for the socio-economic inclusion of transgender people. Legal recognition challenges post-sex reassignment surgery persists, highlighting the need for clearer norms and guidance.

Right to Property Ownership

In *Chinnasamy's* case²⁵, the court upheld his right to execute a sale deed for his property, dismissing his nephew's claim of mental incompetence based on his transgender identity. The court affirmed that being transgender is not a mental illness and recognized transgender individuals' equal property rights.

Protection Against Sexual Harassment

Pandia,²⁶ an effeminate male, faced sexual harassment by police while reporting to a station, leading him to self-immolate in protest. The court ordered disciplinary action against the responsible police personnel.

Historical Case of Harassment

Khairati,²⁷ a hijra, was accused of dressing as a woman and faced scrutiny under the Criminal Tribes Act. He was initially convicted under Section 377 of the IPC, but the conviction was overturned by the Allahabad High Court due to vague evidence.

¹⁹ <https://translaw.clpr.org.in/case-law/navtej-singh-johar-vs-union-of-india-section-377/> last accessed on 24.6.24

²⁰ <https://indiankanoon.org/doc/100472805/> last accessed on 24.6.24

²¹ <https://indiankanoon.org/doc/58730926/> last accessed on 24.6.24

²² https://translaw.clpr.org.in/wp-content/uploads/2021/08/S_Sushma_v_Commissioner_of_Police.pdf last accessed on 24.6.24

²³ <https://indiankanoon.org/doc/50953544> last accessed on 24.6.24

²⁴ <https://translaw.clpr.org.in/case-law/ashish-misra-vs-bharat-sarkar> last accessed on 24.6.24

²⁵ <https://indiankanoon.org/doc/187164/> last accessed on 24.6.24

²⁶ <https://www.firstpost.com/living/remember-pandian-kokila-and-many-others-why-sc-should-rethink-section-377-2606970.html> last accessed on 24.6.24

²⁷ <https://blogs.lse.ac.uk/gender/2019/06/17/hijras-and-the-legacy-of-british-colonial-rule-in-india/> last accessed on 28.6.24

Right to Contest Elections

Kamla Jaan,²⁸ a hijra, became the first transgender mayor of Katni in 1999. Her election faced legal challenges on the grounds that the position was reserved for females. The court ruled that hijras did not qualify as females for reserved seats, despite acknowledging ancient texts recognizing non-binary identities.

Custodial Violence

In Jayalakshmi vs. State of Tamil Nadu²⁹, a trans woman self-immolated due to police torture and harassment. The court ordered compensation and disciplinary action against the police.

Police Protection and Guidelines

In Sushma and Seema vs. Commissioner of Police³⁰, the Madras High Court issued guidelines to protect LGBTQIA+ individuals, including banning conversion therapy, promoting sensitization programs, and ensuring protection within prison settings.

Historical Discrimination

The hijra community has faced police persecution since colonial times. In 2008, the entire community in Bengaluru was unfairly targeted due to a single alleged abduction case, leading to widespread evictions.

Habeas Corpus Petition

In Kavin Thamizh vs. Inspector of Police³¹, a trans man successfully filed for the release of his unlawfully confined partner. The court upheld individual autonomy and personal liberty.

Sex Reassignment Surgery

Safe and affordable access to sex reassignment surgery remains a critical need. Legal ambiguities and societal transphobia create barriers for the transgender community in accessing proper healthcare.

3.1 Challenges Faced by Transgenders

Transgender individuals in India face several challenges:

Social Stigma and Discrimination: Transgender people often face widespread social stigma and discrimination in various aspects of life, including employment, education, and healthcare.

Legal and Bureaucratic Barriers: Despite the 2014 Supreme Court ruling recognizing transgender people as a third gender, legal processes for name and gender marker changes can be cumbersome and inconsistent.

Economic Hardship: Many transgender individuals struggle with unemployment and poverty due to discrimination in hiring and lack of access to education and training.

Violence and Harassment: Transgender people are at higher risk of physical and sexual violence, harassment, and abuse in both public and private spaces.

Lack of Healthcare Access: There is a lack of access to gender-affirming healthcare and mental health support, with many healthcare providers lacking sensitivity and knowledge about transgender health needs.

Social Exclusion: Transgender individuals often experience exclusion from family and community support, leading to isolation and mental health challenges.

Educational Barriers: Discrimination and lack of acceptance in educational institutions can hinder the academic progress and development of transgender students.

3.2 Suggestions

Efforts are being made to address these issues through legal reforms, advocacy, and support organizations, but significant challenges remain. Addressing the challenges faced by transgender individuals in India requires a multi-faceted approach:

Legal Reforms: Simplify and streamline legal processes for gender marker changes and ensure legal protections against discrimination in employment, education, and healthcare.

Education and Awareness: Implement nationwide education programs to raise awareness about transgender issues and promote understanding and acceptance in schools, workplaces, and communities.

Employment Initiatives: Develop policies and programs to promote inclusive hiring practices, provide job training and support, and create safe workplaces for transgender individuals.

Healthcare Access: Improve access to gender-affirming healthcare services and mental health support, train healthcare providers on transgender health issues, and ensure that healthcare facilities are welcoming and non-discriminatory.

²⁸ <https://www.indiatoday.in/education-today/gk-current-affairs/story/6-indian-transgenders-who-dared-to-make-a-difference-311154-2016-03-31> last accessed on 24.6.24

²⁹ <https://indiankanoon.org/doc/1373799/> last accessed on 26.6.24

³⁰ Supra 21

³¹ Supra 22

Anti-Violence Measures: Strengthen laws and enforcement mechanisms to protect transgender individuals from violence and harassment, and provide support services for victims.

Social Support Networks: Foster community-based support systems, including safe spaces and support groups, to help transgender individuals build connections and access resources.

Policy Implementation: Ensure that existing policies and laws protecting transgender individuals are effectively implemented and monitored, and address any gaps in enforcement.

Advocacy and Representation: Support and amplify the voices of transgender activists and organizations working to advance rights and equality, and ensure that transgender individuals are represented in policy-making processes.

By taking these steps, society can work towards reducing stigma and improving the quality of life for transgender individuals in India.

Conclusion

The constitutional protection of transgender rights in India is a critical step towards ensuring equality, dignity, and justice for all individuals, regardless of gender identity. The landmark 2014 Supreme Court ruling recognized transgender individuals as a third gender and affirmed their fundamental rights, setting a legal precedent for the protection and promotion of their rights. The Transgender Persons (Protection of Rights) Act, 2019, represents a significant legislative effort to safeguard the rights of transgender individuals in India by prohibiting discrimination and ensuring access to essential services, although its effectiveness is contingent upon robust implementation and addressing persistent social and systemic challenges. However, effective implementation of these protections remains a challenge, with ongoing issues of discrimination, stigma, and inadequate access to essential services. Comprehensive legal reforms, enhanced public awareness, and targeted support initiatives are essential to translating constitutional guarantees into meaningful and tangible benefits for transgender individuals. By addressing these challenges and reinforcing constitutional protections, India can move towards a more inclusive and equitable society for all its citizens.