

**THE THIRD GENDER IN PRESENT DAY INDIA:  
EXAMINING THE NALSA CASE OF 2014**

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# PREFACE

The basis for this research originally stemmed from my passion for understanding and acknowledging 'Diversity is Beauty'. Gender comes in all forms and we should accept them with respect and dignity.

Vick-Generation of Care #TouchOfCare was an eye opening advertisement for me. The heart touching advertisement tells the story of how Gauri Sawant, a Transgender woman and activist, came to adopt Gayatri, a young girl whose birth mother died of AIDS.

Transgender women have a long history in India, featured in Hindu mythology and giving blessings while seeking acceptance. This embarked a thirst for me to understand the meaning and concept of a 'Transgender'.

The society saw 'Hijras' the transgender as an outsider and often neglected them. My knowledge about this community too was only comprised of basic ideas on how they portrayed themselves.

This very research was conducted to see across the border of binary gender, where lays an identity two thousand years old, still fighting for justice and acceptance.

As India is progressing towards a brighter future where all genders are being recognized, it becomes rather pivotal to source down major judgements and decisions that laid the foundation for change and acceptance.

National Legal Services Authority (NALSA) v. Union of India 2014 was one of the landmark judgement that recognized transgenders as a 'Third Gender'. As the world moves further into progress and development of gender identity, this case made history.

# ACKNOWLEDGEMENTS

I would like to express my special appreciation and thanks to my advisor and guide Dr. Kakoli Sengupta who has been a tremendous mentor for me. I would like to thank her for encouraging my research and for allowing me to grow as a researcher in the field of Social Science. Her advice on both research as well as on my career have been invaluable. She has inspired me to become an independent researcher and helped me realize the power of critical reasoning.

My sincere thanks must also go to the Teaching Member of Research Advisory Committee Prof. Aishika Chakraborty (School of Women Studies). She generously gave her time to offer me valuable comments toward improving my work.

Special thanks must go to ‘People Like Us’ and ‘Amar Odbudh Cafe’ who helped me conduct my interviews in Kolkata.

I cannot forget my friend, Debasreeta Dey who went through hard times together, cheered me on, and celebrated each accomplishment.

I would like to take this opportunity for express my gratitude to my loving parents, Lakpa Sherpa and Renu Sherpa for their unfailing emotional support and also unconditional trust, timely encouragement, and endless patience.

It was their love that raised me up again when I got weary.

# ABSTRACT

The purpose of this research was to discern the pivotal point which laid the bedrock for the NALSA judgement that changed the entire picture of the transgender community of India. This research has been conducted to acquire the knowledge of the NALSA Case 2014, which for the very first time recognized the 'Transgender' as a 'Third Gender' in India. The respondents of this research gave insight to identity crisis and ignorance from the society.

The long and rich history of the Hijra identity was studied, which traces back from the Ramayana and the Mahabaratha and ended with the Criminal Tribes Act of 1857, introduced by the Britishers who regarded them as 'beasts of the field'.

As violence and atrocities towards them saw no limit, it was then the community itself, that came forward with the help of Non-Governmental Organization who started working for the hijra community and finally on 15<sup>th</sup> April 2014 filed a petition for their basic right of survival.

I have drawn my research extensively from the works of Serena Nanda, Judith Butler and Laxmi Narayan Tripathi. The findings suggest a definite correlation between the hijra community and the people of the society.

An important aspect of my research is to investigate the outcome of the NALSA judgement of 2014.

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# INTRODUCTION

*“The Tide of History only Advances when people make themselves Visible”*

-Anderson Cooper<sup>1</sup>

The debates and discussions on concepts, recognition and rights of the ‘Third Gender’ is a recent phenomenon though they have been part of human societies from the very beginning. They have struggled for their basic rights and recognition against the society. Since time immemorial ‘Third Gender’ people have faced discrimination, violation of their rights and abandonment from the mainstream society. While recognition of genders outside male and female has only recently been discussed in Western societies, in Hindu society, people of non-binary gender expression have played important roles for over 2000 years.<sup>2</sup> Evidence of their existence, in Hindu society, can be found in Hindu holy texts like the Ramayana and Mahabharata.

The rule of law is supreme and everyone is equal in the eyes of law in India yet, the ‘Third Gender’ community is in a constant battle as they fight against oppression, abuse and discrimination from every part of the society, whether it is their own family or friends. They are ridiculed by the people and ostracized by the society. All these forms of struggles led to a movement of change and called for a legal recognition thus started the fight for identity, recognition and rights.<sup>3</sup>

The denial of the existence of the ‘Third Gender’ in the past can be understood because of the prevalence of the ideology of binary sex as male and female and two corresponding genders as men and women. This binary idea went unchallenged until other kinds of human as the consequence of either biological defect at birth or behavioral deviance as they grow up came up on the surface. Thus the idea of a positive recognition

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<sup>1</sup> Anderson Cooper, journalist and TV personality.

<sup>2</sup> Gyanu Chhetri, Perception of the ‘Third Gender’ in Nepal, Dhaulagiri Journal of Sociology and Anthropology Vol.11, 2017 p.97

<sup>3</sup> Madhana, B. Third Gender Rights: Emerging Trends and Issues. The World Journal on Juristic Policy, ISSN 2394-5044 March 2017

of third or additional gender as normal people was an inconceivable thing in many human societies around the world in the past.

In order to understand the concept of the 'Third Gender' and their place in the modern society, we must understand their history and acknowledge the meaning of Gender and Sex. Together with this, one must also look into meaning of 'Transgender' as they are now recognized, in present day India as the 'Third Gender'.

## **DEFINING GENDER AND SEX**

How do we know whether a person is a male or a female? What we see in most cases are the outer appearances their physique, clothing and the way of behaving help us identify a person's sex and gender. In our society, knowing one's sex and gender builds the basis for all kinds of interactions with each other. The identity as being either male or female or as a member of an alternative gender makes a difference in who you are, what you have, how you interact, and what you can become.<sup>4</sup>

We are surrounded by gender lore from the time we are very small. It is ever present in conversation, humor, and conflict. Gender is embedded so thoroughly in our institutions, our actions, our beliefs, and our desires, that it appears to us to be completely natural. The world swarms with ideas about gender and these ideas are so common that we take it for granted.

Gender is not something we are born with, and not something we have, but something we do and something we perform.<sup>5</sup> In other words, gendered performances are available to everyone, but with them come constraints on who can perform which personae with impunity. And this is where gender and sex come together, as society tries to match up ways of behaving with biologically based sex assignments.

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<sup>4</sup> Butler, Judith. 1990. *Gender Trouble: Feminism and the Subversion of Identity*. New York and London: Routledge.

<sup>5</sup> Salley Ginett, Chapter one- *An Introduction to Gender* Second Edition. Cambridge and New York: Cambridge University Press 2000.

But how do we as individuals know which gender we belong to? To answer this we need to understand what ‘Sex’ means. Sex is the biological identity into which all humans are born it is the system of socially constructed ideas, beliefs, and associated behaviors of what is feminine or masculine within a given culture.<sup>6</sup> This definition clearly illustrates that if we refer to the term sex, there are only two categories that people could fit, namely being either male or female. On the basis of the binary system of sex, a firm belief within western society has arisen, that accordingly two and only two genders exist, namely being either feminine or masculine. In the course of one’s life, everybody learns right from the beginning on how to perform a certain gender role and how to be either male or female. One is not born, but, rather, becomes a man or a woman.

In other words, Sex is a biological categorization based primarily on reproductive potential, whereas gender is the social elaboration of biological sex.<sup>7</sup> Gender builds on biological sex, but it exaggerates biological difference, and it carries biological difference into domains in which it is completely irrelevant.

People tend to think of gender as the result of nurture as social and hence fluid, while sex is the result of nature, simply given by biology. However, nature and nurture intertwine, and there is no obvious point at which sex leaves off and gender begins. But the sharp demarcation fails because there is no single objective biological criterion for male or female sex. Sex is based on combinations of anatomical, endocrinal and chromosomal features, and the selection among these criteria for sex assignment is based very much on cultural beliefs about what actually makes someone male or female. Thus the very definition of the biological categories male and female, and people’s understanding of themselves and others as male or female, is ultimately social. Anne Fausto-Sterling sums up the situation as follows:

“Labeling someone a man or a woman is a social decision. We may use scientific knowledge to help us make the decision, but only our beliefs about gender – not science –

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<sup>6</sup> Butler, Judith. 1990. *Gender Trouble: Feminism and the Subversion of Identity*. New York and London: Routledge.

<sup>7</sup> Butler, Judith. 1993. *Bodies that matter*: New York. Routledge.



can define our sex. Furthermore, our beliefs about gender affect what kinds of knowledge scientists produce about sex in the first place”.<sup>8</sup>

However, these notions of roles are often idealized and do not address the possibility of people who do not fit a model based on binary opposition. Still, in every culture there are people whose sex cannot be clearly identified or who do not identify with the gender that is designated for them. These individuals are in a state of liminality, which means that they are in a situation that is “ambiguous or indeterminate”.<sup>9</sup> The word liminality comes from the Latin word *limen*, which means “threshold”. Hence, these people cannot exactly classify themselves as belonging to one or the other sex or gender.<sup>10</sup>

A famous example of such people are the ‘Hijras’ of India who represent an alternative or mixed sex and gender role since they are culturally conceptualized as neither man nor woman, neither male nor female. The Hijras, who are Third Gender in India, are usually represented by biological males who take on a feminine gender or sexual role. However, a great difference between alternative genders in India and the West can be seen especially concerning their social acceptance.

### **GENESIS OF THE TERM THIRD GENDER**

The term ‘Third Gender’ was apparently introduced in 1975 by M. Kay Martin and Barbara Voorhies, who employed it to draw attention to the ethnographic evidence that gender categories in some cultures could not be adequately explained with a two gender framework. This revelation had a great impact on the feminist and gender theory as well as on the social movements and political activists all around the world. Third gender began to be applied to behaviours that transcended or challenged dynamic male and female codes or norms.<sup>11</sup> Gilbert H. Herdt used the term ‘Third Gender’ to discuss gender

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<sup>8</sup> Anne Fausto-Sterling, *Myths of Gender: Biological Theories about Women and Men*, 1985 New York Basic Books.

<sup>9</sup> *Ibid.*

<sup>10</sup> West, Candace and Zimmerman, Don. 1987. *Doing gender*. *Gender and Society* Vol. 1, No. 2. (Jun., 1987), pp. 125-151.

<sup>11</sup> Leonard Zwilling and Michael J. Sweet, *The Evolution of Third Sex Constructs in Ancient India: A Study in Ambiguity in Invented Identities: The Interplay of Gender, Religion and Politics in India* (ed) Julia Leslie, New York: Oxford University Press 2000, pp. 99-101

and sexuality among the Sambia, a New Guinea group and more generally, to open the discursive space for analyzing non-dichotomous gender categories.<sup>12</sup>

Third gender is far from being a twenty-first century world's fabrication. In Plato's "Symposium" written around the 4<sup>th</sup> century BC Aristophanes, apart from female and male, enumerates androgynous as a third original sex involved in a creation myth.<sup>13</sup> Such references appeared in other cultures as well, including Mesopotamian, Indic and Israeli culture. In each of them this term embraced all the individuals born with both male and female biological traits, with neither of them or another independent category.

According to the Rig Veda, the world before creation lacked all distinctions and contrasts, including those of sex and gender. In order to express the sex-lessness of the source of creation, Rig Vedic poets often resorted to androgynous images, for example, a male with a womb, bisexual bull etc. this propensity towards androgynous thinking in evidence from the Rig Veda onwards provided the basic conceptual underpinning for the formation of a third gender concept.<sup>14</sup>

The term third gender is used to describe individuals who are neither male nor female in a society that promotes three or more genders to co-exist. The recognition of the third gender is not the only problem but the expectations from each gender of the society also pose difficulties.<sup>15</sup>

The conditions of the third gender across the world vary as different parts of the world practice different cultures and follow different norms and traditions. The present scenario of the lives of the people of this community is unacceptable and in some cases pitiable but again there are a few countries that are moving towards providing them with equal

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<sup>12</sup>Ibid, pp. 99-104

<sup>13</sup> Martha Stawska, The Concept of third Gender, United Nations 2015  
<https://tomun.eu/wp-content/uploads/2015/09/The-concept-of-third-gender.doc> (accessed on 13th April 2019)

<sup>14</sup> Leonard Zwilling and Michael J. Sweet, The Evolution of Third Sex Constructs in Ancient India: A Study in Ambiguity in Invented Identities: The Interplay of Gender, Religion and Politics in India (ed) Julia Leslie, New York: Oxford University Press 2000, p.101

<sup>15</sup> Serena Nanda, Neither Man nor Woman: The Hijras of India, 2nd ed. (Belmont, CA: Wadsworth Pub. Co., 1999)

status and recognition in the society for proper and dignified survival, India being one of the countries.

According to the World Health Organization, Gender refers to “socially constructed characteristics of women and men together with their roles and relationships that exist between them”. The organisation also emphasises the recognition of individuals that do not fit into the binary male or female sex categories and comprise the “other” group, often called “Third Gender”. This term has appeared a long time ago, remained present and lately its significance has been increasing noticeably.<sup>16</sup>

Currently governments of about eight countries allow citizens to legally identify themselves as a third gender and seven of them provide transgender people with fundamental rights. To specify, they include-Nepal, India, Pakistan, Bangladesh, Germany, New Zealand, Australia with the eighth one being Thailand.<sup>17</sup>

For some people “Third Gender” comprises the identity, for others a basis for discrimination and violence. In other words the term broadly refers to individuals being categorised as neither man nor woman, either by society or themselves. It is often used as a social category when more than two genders are recognised and means “other” the one apart from “male” and “female”. It has been used among many populations with alternative gender identities, for example, in India they are called the ‘Hijras’.

## **UNDERSTANDING THE TERM TRANSGENDER**

The term ‘Transgender’ is derived from a Latin word “trans” and the English word “gender”. The Latin word “trans” means across or beyond. Transgender persons born with either male or female anatomies but they feel different from their body structure. A transgender person is a person whose self-identified gender does not correspond to the gender assigned at birth. Their gender identity may or may not comply with the

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<sup>16</sup> Martha Stawska, The Concept of third Gender, United Nations 2015 <https://tomun.eu/wp-content/uploads/2015/09/The-concept-of-third-gender.doc> (accessed on 13th April 2019)

<sup>17</sup> Ibid.

conventional binary notions of male and female, but they may relate themselves as third gender. Hence they always experience an inconsistency between their gender identity, gender expression and their assigned sex.<sup>18</sup>

Transgender is also an umbrella term for people whose gender identity and gender expression differs from what is typically associated with the sex they were assigned at birth.

In India, transgender persons are categorized into Hijra, Eunuch, Aravani, Shiv-Shakthi, Kinnar, kothi, Jogtas, Jogappas, and Guru or Chela.<sup>19</sup> Hence the term ‘transgender’ has become an umbrella term that is used to describe a wide range of identities and experiences, which strongly identify with the gender opposite to their biological sex- male and female.

## **HIJRAS OF INDIA**

Society has stamped an image into the minds of people of how the role of each gender should be played out. There are two recognized types of gender, a man and a woman, however there are many types of gender roles a man or a woman may assume or be placed into by society. The ideas of how one should act and behave are often times ascribed by their gender, but these ascribed statuses and roles are sometimes not accepted.<sup>20</sup>

Amongst this gender chaos, Hijras are a social and religious group living in the parts of India. They are neither female nor male in their gender and are described as men who adopted the characteristics and behaviors of women. They are mainly involved in prostitution despite being religious and play the role of women. They are commonly referred to as beggars and people who blessed children traditionally. Serena Nanda

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<sup>18</sup> Rights of Transgender People Sensitizing Officers to Provide Access to Justice,1 (2011). <http://altlawforum.org/pedagogy/rights-of-transgender-people-sensitising-officers-to-provide-access-to-justice/> (accessed on 17th April 2019)

<sup>19</sup> Serena Nanda, *Neither Man nor Woman: The Hijras of India*, 2nd ed. (Belmont, CA: Wadsworth Pub. Co., 1999)

<sup>20</sup> Serena Nanda, *Neither Man nor Woman: The Hijras of India* 2nd ed. (Belmont, CA: Wadsworth Pub. Co., 1999)

describes hijras as people who are exploited for sex since they act and dress like women. They do not have other means of surviving a part from begging and being prostitutes.<sup>21</sup>

Hijras are devotees of Buhuchara Mata, a version of the Indian mother goddess. Through their identification with the goddess, ratified by an emasculation ritual, hijras are believed to be vehicles of the goddess's power.<sup>22</sup> Their traditional way of earning a living is by collecting alms, receiving payments for blessing newborn males, and serving at the temple of their goddess. Hijras are generally called eunuchs, and sexual impotence is central to the definition of a hijra and a major criterion for initiation into the group.

Most hijras come from poor backgrounds, which turn them to beggars and prostitutes. Most medical and literature reports and research shows that hijras are vulnerable to sexually transmitted infections and the dangerous human immunodeficiency virus, which causes AIDS.<sup>23</sup>

### **NATIONAL LEGAL SERVICES AUTHORITY v. UNION OF INDIA** **2014- NALSA CASE**

For a very long period of time, the transgender community in which the term 'transgender' is an umbrella term has been sidelined by the community and has been tormented and discriminated. They continuously face abuse and violence just because they do not come under the universally recognized genders that are male and female. They are tortured and do not enjoy the same freedom and rights which the citizens enjoy. They are shunned and defamed by the society and are considered as untouchables. They are considered as a liability and pain for the nation.

Finally a petition was filed by the National Legal Services Authority which was the primary petitioner which provides free legal aid to the disadvantaged and unprivileged sections of the society and resorts to solve their grievances. The organization works for the betterment of the society and thus the petition was filed so that Transgender can be recognized as a 'Third Gender' in the eyes of the law other than the binary genders that

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<sup>21</sup> Ibid.

<sup>22</sup> Devdutt Pattanaik, Shikhandi: And Other Tales They Don't Tell You. <https://devdutt.com/book/shikhandi-and-other-tales-they-dont-tell-you> (accessed on 17th April 2019)

<sup>23</sup> Rights of Transgender People Sensitizing Officers to Provide Access to Justice,1 (2011).

are male and female. The petitions were filed on the grounds that non recognition of the transgender community as a separate sexual and gender identity is a violation of many Fundamental and Human Rights, which are protected by the Indian Constitution and other International Human Rights documents.<sup>24</sup>

The judgement delivered on April 15, 2014 by a Supreme Court bench comprising of Chief Justices K.S. Radhakrishnan and A.K. Sikri in, response to a writ petition filed by NALSA, was hailed by legal activists and rights bodies as unmistakably progressive. In its 113 page verdict, the Judges left no scope for confusion on the import of the term ‘Third Gender’.<sup>25</sup> Showing extraordinary amplitude of legal reasoning, it detailed an archive of historical and textual attitudes towards transgenders and recounted international human rights provisions as well as judicial opinion across several nations to argue for a policy of affirmative action on the part of the Indian state.

The Court noted that the transgender community, broadly defined by the Court to include Hijras, Kothis, Aravanis and numerous others has faced prejudice and disadvantage since the eighteenth century in India. It acknowledged the discrimination that transgender people face in areas of life including health care, employment and education, which often leads to social exclusion. The Court declared that numerous steps were necessary in order for centre and state governments to comply with the constitutional rights to life, equality before the law, non-discrimination and freedom of expression.<sup>26</sup>

In reaching its decision, the Court stated that gender identity is an integral part of the personality and one of the most basic aspects of self-determination, dignity and freedom. The Court considered International Human Rights Conventions and norms to be significant for the purpose of interpreting gender identity equality, and used them to shed light on the interpretation of the Constitution. In addition, the Court stated that expressing

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<sup>24</sup> Geeta Pandey, “India court recognizes transgender people as third gender,” BBC News, Apr. 15, 2014. [https://rlp.hds.harvard.edu/files/hds-rlp/files/gender\\_hinduism.pdf](https://rlp.hds.harvard.edu/files/hds-rlp/files/gender_hinduism.pdf) (accessed on 26th April)

<sup>25</sup> National Legal Services Authority v Union of India and Others (Writ Petition No. 400 of 2012 with Writ Petition No. 604 of 2013)

<sup>26</sup> A Case Note on National Legal Services Authority v. Union of India by Salmaj, I pleaders, Sept 9, 2017 <https://blog.ipleaders.in/national-legal-services-authority-v-uoil/> (accessed on 26th April)

one's gender identity through words, dress, action or behavior is included in the Right to Freedom of Expression.<sup>27</sup>

On this basis, the Court upheld transgender persons to be treated as 'Third Gender'. The Constitution requires equal treatment of all people regardless of their gender identity or expression. The Court also declared that the Centre and State governments must grant legal recognition of gender identity.<sup>28</sup> A full recognition is to be given even in the absence of any existing statutory regime. Additionally, the Court declared that educational, social and health care issues faced by transgender people must be addressed both at the centre and state government levels.

The question of the 'Third' is not a question of numbers, but what exceeds the numerical imagination of binaries. The third gender therefore is not what comes after the first two, but what exists independently of them. 'Thirdness' is an allegory of otherness, resisting absorption within structures of power. The 'Third' is a possibility for the infinite, not a determinate object as other who one can pin down in a clarification. The NALSA judgement of 2014 recognized this infinity at the heart of the third gender.

Therefore, this research aims to trace the life of a transgender individual who enters the community of hijras, to be able to carve out a life for themselves, seeking legitimacy and inclusion in the democratic country of India, checking on the new possibilities the 2014 judgement made and looks into its developments and drawbacks.

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<sup>27</sup> Article 19, Indian Constitution

<sup>28</sup> National Legal Service Authority v. Union of India, AIR 2014 SC 1863 at 1890

<https://indiankanoon.org/doc/193543132/> (accessed on 26th April)

## **LITERATURE REVIEW**

- **Moving Truths: Queer and Transgender Desi Writings on Family by Aparajeeta 'Sasha' Duttchoudhury (2015)**

The overarching theme of the book is connecting cultural and ethnic identities with sexual and gender identities in a homophobic and transphobic world. But as one digs deeper, the book is really about 'helping our families to help us'. A community willing to talk and listen is a community that steps away from the notion of 'the closet' and towards a reality where the personhood of who the transgenders are is not just accepted but respected.

However this book, despite making approaches to build in a community for the transgenders and putting forward their basic needs leaves certain important questions unanswered such as- How do the transgenders engage with their family, community and culture? Who have been their support systems and their advocates? And what do the transgenders require to grow acceptance in the support of the community?

- **I Am Vidya: A Transgenders Journey by Living Smile Vidya (2013)**

I Am Vidya: A Transgenders Journey says that "Identities are not mere markers we are known by, but they define, as well as limit us. They can both confine or release a consciousness". This book is the story of one such journey—that of a declaration, of the claiming of an identity. It is an assertion of a consciousness that has suffered the agony of being trapped in a mould it does not belong to, a body it does not identify with. She has lived through all the indignities forced upon a thirunangai, a transgender, by a society which divides and defines itself as men and women in terms of biology alone—from being spurned by her family, to begging on the streets as a social outcast, from donning a woman's clothes, to undergoing excruciating surgery to lose her 'manhood' from suffering emotional and physical harassment, to arriving at her true identity. A compelling narrative about a woman trapped within a man's body, this is a story of extraordinary courage and perseverance.



The two most obvious themes forecasted in this book are discrimination and survival. Discrimination can be termed as the pejorative bifurcation of a being's very existence in pertinence to a flaw being etched in appearance or nature. It also succumbs into physical violence along with odious slurs wherein the receiving end is subject to a number of atrocities, injustice and malevolence. The malignancy has been on the conference of existence even from the primitive period. Thus, this book does not criticize the policies of the government and non-governmental bodies which failed to attempt in building an environment, where Transgenders can seek employment and work with dignity.

- **Same Sex Love in India: Readings from Literature and History by Ruth Vanita and Saleem Kidwai (2000)**

This book for the first time compiled extracts from Indian texts, from ancient to modern times, including many Hindu texts, translated from 15 Indian languages. In their accompanying analytical essays, they also demonstrated that Hindu texts have discussed and debated same sex desire from the earliest times, in tones ranging from critical to non-judgemental to playful and celebratory. Historian Devdutt Pattanaik summarizes the place of homosexuality in Hindu literature as follows: "though not part of the mainstream, its existence was acknowledged but not approved." Other Indologists assert that homosexuality was not approved for Brahmans but accepted among other castes.

The book has been categorized into ancient Indian texts, medieval texts and modern Indian texts. The selection of the modern Indian texts is the widest and the most interesting because it traces the increasing homophobia in India which was evident at that period of time and was influenced by the colonial legacy, imposition of the British anti-sodomy legislation and the Victorian morality. The only incongruous part of this book was it did not highlight Section 377 which criminalized the third gender and also did not give much importance to the print media, which was important for the contemporary treatment of homosexuality.

- **Because I Have A Voice: Queer Politics in India by Arvind Narrian and Gautam Bhan (2006)**

The story of queer people in India has, so far, been written and lived along the fault lines and margins of Indian history, but now the search for another moment of assertion is gaining momentum, and this anthology represents precisely that moment. The essays in this volume are a celebration, a defiant political resistance, and introspective reflection and a conceptual space. They talk of the past, present and future of queer lives, and share stories of pain, joy, struggle and victory in equal measure. They are the voice of a community that refuses to be silenced. It talks about the past, present and puts forth the most likely future of the “Queer” movement in India.

This book addresses and discusses different sexuality related issues with respect to Indian society, medicine, law and cinema but fails to raise questions on medical ethics and the existence of outdated law, for example Section 377 of the Indian Penal Code. It combines different struggles of the individuals but does not clearly state on to which grounds are the basic discriminations faced and what are the ways that can be adopted to bring in the change that is required.

- **Tritiya-Prakriti: People of the Third Sex: Understanding Homosexuality, Transgender Identity and Intersex Conditions Through Hinduism by Amara Das Wilhelm (2013)**

This book looks into the ancient expressions of Hinduism which accommodated homosexual and transgender persons much more positively than we see in India today. Early Vedic teachings stressed responsible family life and asceticism but also tolerated different types of sexualities within general society. Tritiya-Prakriti: People of the Third Sex are a collection of years of research into a topic seldom discussed within the Hindu-Vedic scriptural canon. Based entirely upon authentic Sanskrit references and modern concurring facts, the book guides us through the original Hindu concept of a "third sex" and this recognition of a third sex in ancient India and Hinduism, is highly relevant in many ways.

This book gives the details of the Indian culture and their traditions towards the third gender and also places the modern day progress in respect to their social status of the transgenders but it falls short on the ground that it does not come up with connections on advancement and modernity development and also fails to address the changes that were brought in from the ancient times to the modern period. The main question it fails to articulate is, how the third gender, bestowed with great respect in the ancient times now struggles for their basic rights.

- **The Truth about Me: A Hijra Life Story by A. Revathi (2008)**

This book argues a point that the axis of sexual difference through which hijras have traditionally been understood is intersected by a variety of other axes of identity, including religion, gender, kinship and class. Further, in each of these interconnected domains, hijras are deeply implicated in the local moral economy of honor or respect, a value that provides the primary impetus for the construction of their identities. An important icon around which hijras configure their identity is that of the renouncer, a figure with an extensive and complicated lineage in Indian religion, mythology, and history. Revathi's book is not just a vivid account of a hijras life but also sends out a strong message to the society at large. This book also gives insights on the grave Human Rights Violations that transgenders face. However, the main problems that are being faced by the transgender community like that of discrimination, unemployment, lack of educational facilities, homelessness and lack of medical facilities all these were failed to mention in this book.

- **The Invisibles: A tale of Eunuchs in India by Zia Jaffrey (1996)**

This book tells us about those people who were handed over to the hijra community. It portrays about their lifestyle, culture and various practices they follow and how society responds to it. "The Invisibles: A Tale of the Eunuchs of India" is an eloquent compilation of, historical and contemporary accounts of hijras by travelers of old, scholars, journalists, policemen, housewives, an auto mechanic and all but not mostly on the reliable hijras themselves.

The narrative is filled with contradictions. Some informants deemed the hijras disgusting, others maintained their holiness, and some saw them as victims of abuse, others as kidnappers who castrate little boys. Though the book sighted many perspectives on the hijras of India it did not clearly state the ongoing struggle and process of the hijra identity.

- **Changing Sex and Bending Gender, edited by Alison Shaw and Shirley Ardener (2005)**

This book is a compilation of nine essays about the cultural and historical construction and deconstruction of sex and gender. This book focuses on the point that sex and genders are not fixed. It provides powerful and compelling illustrations of how, across a wide range of cultures, processes of gender transformation are shaped within, and ultimately constrained by, social and political context. Overall, the book is an excellent example of cross-discipline contributions to one topical subject – ‘sex and gender’. To understand transgenders and their requirements this book gives the perfect example of gender binary and how they are constructed. Although this book constructs a gender identity it still falls short in addressing the ‘trans people and their sexuality’ their basic needs and struggles for their inclusion in the society.

- **Neither Man nor Woman: The Hijras of India by Serena Nanda (1998)**

This ethnography is a cultural study of the Hijras of India, a religious community of men who dress and act like women. It focuses on how Hijras can be used in the study of gender categories and human sexual variation. The author has clearly defined the issue in her book from her firsthand experience. She met with the Hijras to understand about their cultural dimensions, their individual aspects, their sexuality and sexual behavior, social organization and economic adaptation. Her work contributes a lot to the understanding of the discipline’s problems. Her extensive research covers almost all the aspects of Hijra life. It bears the testimony of the Hijras and can be considered as a landmark in this discipline.

However, in this study, the crucial issue regarding the volition exercised by individuals has not been dealt in a significant manner. The study could also have been more enriching had a perspective on the ongoing changes in the hijra community and its position within the Indian society been built into it. 'Neither Man nor Woman: The Hijras of India' avoids going beyond the static image of the hijra culture.

- **With Respect to Sex: Negotiating Hijra Identity in South India by Gaytri Reddy (2005).**

Reddy, in this book stresses on the importance of variations of thirdness, which differ according to the temporal, spatial, and life-historical positioning of the actors involved. She suggests a spectrum of identities within thirdness, with differentiations made between individuals as to how they become third, how they construct their identities, and how they enact them. As a further critique, Reddy maintains that variations of thirdness are embodied in other axes of difference, and thus require analysis that extends further than third sex analyses, which only reify the study of sexuality as a monolithic field. She argues that these types of analyses – although admirable in illustrating the cultural contexts of third-sex differentiation – have ignored the intersections of sexuality with other modes of difference, by effectively separating the domain of sexuality from that of political economy and the analysis of other axes of identity, thus limiting its usefulness as an articulation of the complexity of everyday life.

Though this book is largely a reaction to the literature on the hijras which emphasizes on the sexual nature of the group and also focuses on being constructed through multiplicity of the differences but does not highlight on the point of how notions of modernity versus the traditional aspect play into the subjectivity of the individuals within the hijra community.

## **RESEARCH QUESTIONS**

The main question of my research is-

To what extent has the Supreme Court's landmark judgement on the NALSA Case of 2014 helped the transgenders in their various fields and what are the challenges being faced?

Together with this following are the Sub-questions-

1. What constitutes the Hijra identity?
2. How has the government's formal acknowledgment of the hijra community affected them?
3. What are the negative and positive impacts of the policy change?
4. Is the policy that has been made, a complete, sound and functional policy?

## **AIMS AND OBJECTIVES**

Aims and objectives of the research are as follows-

- To check at what rate are the improvements being made post Supreme Court Judgement and the dynamic changes it has brought about.
- The narrower and broader interpretations of the transgender category.
- Pointing out the grave Human Rights Violation as against the transgenders in India, along with the Transgenders Persons Bill 2015.
- Highlighting the transgenders deep rooted causes of social eradication and pointing out major future possibilities of the community.

## **METHODOLOGY**

There are two specific sets of methods to be followed in regard to any finding and research in social sciences. These are (i) Quantitative and (ii) Qualitative.

This study focuses on the descriptive analysis of the human life phenomena and social meanings which are socially constructed and also exploratory research design so as to explore the different experiences of social exclusion and discrimination faced by the Hijra community. Since the focus of this research was to understand the subjective experiences of this group, this research design was considered most suitable. The research is qualitative in nature. This method was selected as it does not force the respondents to answer in rigid way rather it allows them to speak out their mind.

The interview was conducted on 22<sup>nd</sup> April 2019 in Kolkata. A total of fourteen Hijras were interviewed. The interview was unstructured interview with mainly open-ended questions. This provided the freedom to the respondents to answer questions in their own ways. However, the order of questions kept changing as the respondents narrated very personal events. The interviews were done face-to-face to have a better understanding of the responses and to gain in-depth knowledge of the subject matter. During the whole process, observation tool was used to gain insight about the community. Governmental documents also played an important part. The data gathered from these responses have shaped the course of this research.

This research focused mainly on those Hijras who are professionally experienced social workers and work with their community and the ordinary hijra who are leading traditional life. In this target group, hijra social workers were from Non Governmental Organizations, while the ordinary hijra were involved in traditional work. The reason of choosing Hijras in two groups was to understand their social experience and social changes, and their perspective towards the mainstream society and their approach to social work for the rights of hijra separately.

The research has been organized into five chapters, beginning with the history of the hijras and concluding with the understanding of the present status of the Third Gender community.

## **CHAPTER ONE- HISTORY OF THE HIJRAS**

The transgender or the Hijra community has vastly been affected by the various cultural, religious and social developments throughout history. Eunuchs, have been in existence in

India since the 9th Century BC. The word derives from the Greek "keeper of the bed" because castrated men were in popular demand to guard royal harems. Eunuchs have a history that spans back thousands of years. It is well known that eunuchs played an important role during the Mughal era in the Indian Subcontinent. They had access to royal palaces where they were employed as guards to the harems, administrators, teachers, treasurers, and loyal servants. Thus, this chapter will introduce the historical construction of the hijras in India and how the gender binary was created, starting from the ancient Bengal, Mughal Era and the British period focusing on the section 377 of 1861.

## **CHAPTER TWO- EXCLUSION OF THE TRANSGENDERS FROM THE SOCIAL AND CULTURAL PARTICIPATION**

Transgenders in India are a continuous victim of social and cultural exclusions, they face enormous amount of torture and problems. They face problems like poverty, illiteracy which is at a high rate, discrimination and ignorance etc. thus this chapter will see into the problems that the transgenders face in their daily lives. Common problems faced by the transgenders are health problems, harassment by police, economic problems, abuse in social places, lack of housing facilities etc.

## **CHAPTER THREE- NALSA CASE AND THE NAMING OF TRANSGENDER AS A THIRD GENDER**

On 2<sup>nd</sup> July 2009, the High Court of Delhi ended over a century of discriminatory treatment against people because of their sexual orientation by declaring the application of significant elements of Section 377 of the Indian Penal Code (IPC) unconstitutional. Section 377 is a relic of the British legal system and in effect it criminalized same-sex conduct. The Naz Foundation submitted that Section 377 violated the fundamental rights guaranteed under Articles 14, 15, 19 and 21 of the Constitution of India. However, this was later overturned by the Supreme Court of India in Suresh Kumar Koushal vs. Naz Foundation 2013 which reinstated Section 377 and in 2018 Navtej Singh Johar vs. Union of India decriminalized homosexuality once again.

The perks and troughs of Section 377 made countless decisions which led to public interest litigation by National Legal Services Authority, a statutory authority under the



Government of India. Blatantly empathetic in its tone and activist in its content, the NALSA judgement traced the history of violations on transgender community. Citing foreign authorities and international human rights instruments, it emphasized the changes in legislative and judicial treatment and analyzed the rights of transgender community under the lens of fundamental rights guaranteed by the Constitution of India to finally lay down a series of guidelines granting legal recognition to the sexual identities of members of the transgender community.

#### **CHAPTER FOUR- NALSA JUDGEMENT: RECOGNITION OF TRANSGENDER AS A THIRD GENDER**

A very important case that brought about recognition to the Transgenders of India was the NALSA Case, which highlighted the major changes in the lives of the transgenders. The National Legal Services Authority (NALSA) was formed under the Legal Services Authorities Act, 1987 and it aimed to provide free Legal Services. It has been actively involved in addressing the difficulties faced by Transgender persons. It has also taken various steps to allow transgender persons to adopt children legally. This Chapter will deal with the Case in particular and bring out the facts and orders of the case.

#### **CHAPTER FIVE- THE PRESENT SCENARIO OF THE TRANSGENDERS POST THE NALSA CASE**

The Supreme Court Verdict became an important turning point for the transgender community of India and it gave them a lot of recognition. Thus after the NALSA Case and its verdict the Government and its regulations for the transgenders changed. This chapter will look into the post verdict and the results it has brought about, focusing on the changing dimensions of the case. Together with this Transgenders Persons Protection of Rights Bill 2016 will also be dealt. The Bill was named The Transgender Persons (Protection of rights) Bill, 2016 and it was introduced in the Lok Sabha on August 2, 2016 by the Minister of Social Justice and Empowerment, Mr. Thaarwarchand Gehlot. The Bill was referred to the Standing Committee on Social Justice and Welfare headed by Mr. Ramesh Bais, on September 12, 2016. This Bill was a result of the order passed by the Honourable Supreme Court in the case of National Legal Services Authority v. Union of India, dated 15 April, 2014.

Hijras are deprived from social and cultural participation, are shunned by family and society, have only restricted access to education, health services and public spaces and have excluded rights as Indian citizens such as right to marry, to contest elections, to vote, employment, obtaining passport, driving license, ration card, identity card and livelihood opportunities in a large extent. Although in the 2011 census, the Indian State identified Hijras, which only met the approval of some Hijras. The 2014 Supreme Court verdict ruled that Hijras should be recognized under a separate, third gender category. Thus this chapter will finally also look into the changes and the recent verdict of the Supreme Court and the aftermath developments for the transgender people.

# CHAPTER ONE

## HISTORY OF THE HIJRAS

“As far as I’m concerned, I am the Ganga, the holy Ganga. My purity cannot be measured by society’s standards. My purity is to my own self, to my own parameters. It is how I have conducted myself throughout my life and continue to. I decide my own standards and I abide by them. I have my own sense of integrity that’s very strong and in place, which nobody else has decided for me. My spirituality is to my soul, and it is for me. It should work for me. The world cannot have a say in that”.

-Laxmi Narayan Tripathi on Why I chose to become a Hijra<sup>29</sup>

Transgender people in India have been in the limelight ever since the Supreme Court officially granted them the “Third Gender” category on April 15, 2014.<sup>30</sup> The long struggle for basic rights and recognition of their identity were heard on this date. Transgender people in India comprises of the old ethnic community called the ‘Hijras’. The history of the hijras and their cultures are very rich in the Indian contexts. Many historical texts mention about the power and status of the hijras in India. At present with the legal enforcements and developments of the policies by the government, they are able to carve a way up for themselves but still they would need the support of the mainstream society.<sup>31</sup>

But the main question that arises from the mainstream society are- How much does the society know about the history of hijras? Are hijras and kinnars same as eunuchs? How are Kothis different from hijras? Who do they worship? And many more questions as

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<sup>29</sup> Laxmi Narayan Tripathi on Why I chose to become a Hijra August 17, 2016  
<https://scroll.in/article/814182/why-i-chose-to-become-a-hijra-laxmi-in-her-own-words> (accessed on 22nd March 2019)

<sup>30</sup> National Legal Service Authority v. Union of India, AIR 2014 SC 1863 at 1890  
<https://indiankanoon.org/doc/193543132/> (accessed on 22<sup>nd</sup> arch 2019)

<sup>31</sup> Ibid.

such. It becomes inevitable at this point to understand and know about the hijra society, as they are now participating into important policy changing events of the nation.

Following are the few terminologies to begin with the history and introduction of the hijra community:

**Eunuch**: A person who is born male but is emasculated or castrated. If castration takes place at an early age, as is often the case, it can have major hormonal consequences. A eunuch can also refer to an intersex person whose genitals are ambiguously male-like at birth.<sup>32</sup>

**Hijra**: The Persian word is loosely translated as eunuch in English, but unlike eunuchs, not all hijras are necessarily castrated. According to the judgement, hijras are biological males who reject their masculine identity and identify either as women, or “not-men”, or “in between man and woman” or “neither man nor woman”.

In India, hijras tend to identify as a community with its own initiation rituals and professions like begging, dancing at weddings or blessing babies. They even have their own secret code language, known as Hijra Farsi, which is derived from Persian and Hindutani.<sup>33</sup>

**Kinnar**: Kinnar is the term for hijras in north India. In other parts of India, such as Maharashtra, the term kinnar is being used more recently by the better educated hijras to refer to themselves.<sup>34</sup>

**Aravani**: Aravani is the term for hijras in Tamil Nadu. They identify themselves as women trapped in male bodies, although many aravanis would prefer to be called ‘Thirunangi’.<sup>35</sup>

**Kothi**: The judgement describes kothis as a heterogeneous group, because it refers to biological males who show varying degrees of being effeminate. They prefer to take the

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<sup>32</sup> Michelra, M. (2015) Historical Evolution of Transgender Community in India, Asian Review of Social Sciences; Vol. 4 No. 1 2015 p17.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Hijra, kothi, aravani: a quick guide to transgender terminology <https://scroll.in/article/662023/hijra-kothi-aravani-a-quick-guide-to-transgender-terminology> (accessed on 12th April)

feminine role in same-sex relationships, though many kothis are bisexual. Some hijras identify as kothi as well, while not all kothis identify as hijra or even transgender. They do not live in separate communities.<sup>36</sup>

**Shiv-Shakthis**: Typically referring to a community of transgenders in Andhra Pradesh, Shiv-Shakthis are males who are considered “possessed by” or “married to” the gods, particularly Lord Shiva. They have a feminine gender expression and cross-dress as women during religious rituals and festivals. They work typically as astrologers or spiritual healers. The community is guarded by gurus who induct disciples and train them for the work.<sup>37</sup>

**Jogti Hijras**: In Maharashtra and Karnataka, jogtas and jogtis refer to male and female servants who dedicate (or are made to dedicate) their lives to gods in different temples. Jogti hijras refer to male-to-female transgenders who devote themselves to the service of a particular god.<sup>38</sup>

## **DEFINING THE WORD ‘HIJRA’**

Hijra is a term used in South Asia, India in particular to refer to transwomen that is from a male-to-female transsexual or transgender individuals. A Nepali branch of knowledge notes that the word Hijra is derived from the Persian ‘hiz’ meaning the one that is ‘effeminate’ ‘disdains women’ or ‘catamite’.<sup>39</sup> According to Muzaffar Alam ‘hiz’ was from an old Pahlavi Persian, a sister language of Sanskrit, before the eight century A.D. Hiz meant ineffective and incompetent. Other Persianists suggested that the origin of hijra was ‘hich’, from the work ‘Hichgah’ meaning nowhere. It meant a person that is nowhere, a thing that has no place, no identity or personality of its own.<sup>40</sup>

The Urdu and Hindi term for hijra are ‘hijda’, ‘hijada’, ‘hijara’ or ‘hijrah’. A number of terms across the culturally and linguistically diverse Indian subcontinent represent similar

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<sup>36</sup> Hijra, kothi, aravani: a quick guide to transgender terminology <https://scroll.in/article/662023/hijra-kothi-aravani-a-quick-guide-to-transgender-terminology> (accessed on 12th April)

<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

<sup>39</sup> A thesis presented by Syeda S. Shakat, Construction of the Hijra Identity. BARC University 2016

<sup>40</sup> Serena Nanda, “The hijras of India: Cultural and Individual Dimensions of an Institutionalized Third Gender Role”, *Journal of Homosexuality* (1986): pp 35–54.

sex or gender categories. While these are rough synonyms, they may be better understood as separate identities due to regional cultural differences. For example in North India, the goddess Bahuchara Mata is worshipped. In South India, the goddess Renuka is believed to have the power to change one's sex. Male devotees in female clothing are known as Jogappa. They perform similar roles to hijra, such as dancing and singing at birth ceremonies and weddings.<sup>41</sup>

The word kothi or koti is common across India. Kothis are regarded as feminine men or boys who take a feminine role in sex with men, but do not live in the kind of intentional communities that hijras usually live in.<sup>42</sup> Additionally, not all kothis have undergone initiation rites or the body modification steps to become a hijra.

Hijra used to be translated in English as “eunuch” or “hermaphrodite”, although LGBT (Lesbian, Gay, Bisexual, Transgender) historians or human rights activists have sought to include them as being transgender. In a series of meetings convened between October 2013 and January 2014 by the transgender experts committee of India's Ministry of Social Justice and Empowerment, hijra and other Transgender activists asked that the term “eunuch” be discontinued from usage in government documents, as it is not a term with which the communities identify themselves. In India, some hijras do not define themselves by specific sexual orientation but rather by renouncing sexuality altogether. Sexual energy is transformed into sacred powers.<sup>43</sup>

Although “hijra” has been in common use for years, the term itself is difficult because it has long stood more for a cultural identifier than a biological descriptor. Therefore, even though standard definitions of hijras have proven difficult to formulate, they are generally noted as a third sex, with the term hijra itself meaning “a man that is less than a perfect man” and is equivalent to eunuchs.<sup>44</sup> The hijra community is one that has grown over the years to represent not only those born “incompetent” or as a eunuch, but also those that

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<sup>41</sup> Revathi, A and Geetha, V. (2008). *The Truth about Me: A Hijra Life Story*. New Delhi: Penguin Books

<sup>42</sup> Hijra, kothi, aravani: a quick guide to transgender terminology <https://scroll.in/article/662023/hijra-kothi-aravani-a-quick-guide-to-transgender-terminology> (accessed on 12th April)

<sup>43</sup> Michelra, M. (2015) Historical Evolution of Transgender Community in India; *Asian Review of Social Sciences*; Vol. 4 2015

<sup>44</sup> Revathi, A and Geetha, V. (2008). *The Truth about Me: A Hijra Life Story*. New Delhi: Penguin Books

have deliberately castrated themselves or undergone surgery to be inducted into hijrahood.<sup>45</sup> While the community has been ostracized in much of India for the last decade, history does not support such treatment.

Historically, castration was a divine act that encouraged men to enter 'hijrahood'<sup>46</sup> and become legitimate and recognized members of the community who were viewed to have committed the ultimate sacrifice. That very belief and respect did not necessarily provide hijras with the support and religious protection they had hoped for despite performing a sacrificial ritual, India began to scorn the hijra community as it transitioned in to religious and political power.<sup>47</sup> This gave birth to the hijra as we see them today, living a rather nomadic lifestyle in cult-like groups traveling from various regions in the nation. Many live in designated districts and earn their livelihood by begging for money at weddings and childbirth ceremonies, with each district dividing out a portion to a specific group of hijras. Others renounce male sexuality and often earn a living as prostitutes. Given the nature of their work, the community has carried with it a social stigma akin to that of untouchables.<sup>48</sup>

Hijras represent an aspect of Indian society where the people feel awkward, frustrated or disgusted by their existence at auspicious events yet want their blessings. That is largely due to the belief that shunning a hijra, or causing one to leave empty handed at a wedding they attend could result in a curse upon that marriage. This has therefore created the cyclical life led by many modern day hijras, a life in which they are hated and only receive recognition out of fear, a life in which they are not embraced or considered whole by those around them. The patriarchal nature of Indian society has made life difficult for the hijras. Hijras are often victim to discrimination on the basis of sex, which only further stratifies their place in society.

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<sup>45</sup> M.D. Vyas and Yogesh Shingala, *The Life Style of the Eunuchs*. Anmol Publications Pvt. Limited, 01-Jan-1987

<sup>46</sup> 'Hijrahood' is an identity acquired through various and repeated ritual and gender practices.

<sup>47</sup> Adnan Hossain, *Beyond Emasculation: Being Muslim and Becoming Hijra in South Asia*, 36(4) *ASIAN STUD. REV.* 495 (2012)

<sup>48</sup> Babbar, S.K (2016) *The Socio-Legal Exploitation of the Third Gender in India*, *ISOR-JHSS*, Vol. 21 Issue. 5, Ver. 04.

In other parts of India, transgender people are also known as Aravani, Aruvani and Jagappa. Hijras have a recorded history in the Indian subcontinent from antiquity onwards as suggested by the Kama Sutra period. This history features a number of well-known roles within sub-continental cultures which are part gender liminal, spiritual and survival. In South Asia, many hijras live in well-defined and organized all-hijra communities, led by a 'Guru'. These communities have sustained themselves over generations by adopting young boys who are rejected by, or flee, their family of origin. Many work as sex workers for survival. Most hijras live at the margins of society with very low status the very word "hijra" is sometimes used in a derogatory manner. Few employment opportunities are available to hijras. Many get their income from extortion, performing at ceremonies (toli), begging (dheengna), or sex work (raarha) an occupation of hijras also recorded in pre-modern times. Violence against hijras, especially hijra sex workers, is often brutal, and occurs in public spaces, police stations, prisons, and their homes. As with transgender people in most of the world, they face extreme discrimination in health, housing, education, employment, immigration, law, and any bureaucracy that is unable to place them into male or female gender categories.<sup>49</sup>

Since the late 20th century, some hijra activists and Non-Government Organizations (NGOs) have lobbied for official recognition of the hijra as a kind of "third sex" or "third gender," as neither man nor woman. In India, the Supreme Court in April 2014 recognized hijra and transgender people as a 'Third Gender' in law.<sup>50</sup>

A prime cultural definition of hijra is that they begin life as men, although, not completely like men. Kotha or Hijras are neither men, nor women they are the beings in between and beyond the two codes. In accordance to the UNDP the hijra is considered an umbrella term for all sexual minorities. Hijra cultures are India's answer to support systems for sexual minorities. Long before the West gave birth to gay liberation, India's homosexuals, bisexuals, transvestites, transsexuals and kothis found refuge under this

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<sup>49</sup> Babbar, S.K (2016) The Socio-Legal Exploitation of the Third Gender in India, ISOR-JHSS, Vol. 21 Issue. 5, Ver. 04.

<sup>50</sup> National Legal Service Authority v. Union of India, AIR 2014 SC 1863 at 1890 <https://indiankanoon.org/doc/193543132/> (accessed on 22nd March 2019)



umbrella.<sup>51</sup> The most noted expression of hijra is the female attire and their distinguishing clapping of hands. The hijras take female names when they join the community and use female kinship terms to address each other, such as, “aunty” “sister” and “grandmother”.<sup>52</sup>

## **ANCIENT TEXTS AND SACRED HISTORY**

Hijras and kinnars often emphasize that their gender presentation is sanctioned through ancient texts and myths. Satapatha Brahman confirms the existence of individuals who do not fit into ‘male’ or ‘female’ categories, it is the very fact that such beings are included in these ancient and sacred texts that hijras refer to as an identity that in some way has been sanctioned in ancient history by being referenced and worthy of study.<sup>53</sup>

Hijras also refer to ‘Amba’ or ‘Shikandini’, a female character in the Mahabharata who attains physical and psychological masculinity through rebirth in order to aid Arjuna in killing Bhishma, the forefather of the Pandavas and Kauravas.<sup>54</sup>

Another myth concerns Lord Rama and is told by hijras to justify their position in society and allude to possible rewards for their suffering. Hijras in Madhya Pradesh refer to this text which is to be associated with the Ramayana. In the mythology, Lord Rama returns from exile and finds those who are ‘neither man nor woman’ waiting on the banks of the river, from which he had left the city of Ayodhya to go into exile, fourteen years previously. When he left the city, he told the ‘men and women’ to go home, but these individuals, being neither, remained there. As a result, Rama is touched by their devotion and he blesses them, saying they will rule the world in the future.<sup>55</sup>

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<sup>51</sup> UNDP Report 2010.

[https://www.undp.org/content/dam/india/docs/hijras\\_transgender\\_in\\_india\\_hiv\\_human\\_rights\\_and\\_social\\_exclusion.pdf](https://www.undp.org/content/dam/india/docs/hijras_transgender_in_india_hiv_human_rights_and_social_exclusion.pdf) (accessed on 15th March)

<sup>52</sup> Revathi, A and Geetha, V. (2008). The Truth about Me: A Hijra Life Story. New Delhi:Penguin Books.

<sup>53</sup> Sacred Texts: Satapatha Brahma. Sacred Books of the East, Vols. 12, 26, 24, 37, 47 translated by Julius Eggeling published between 1882 and 1900

<sup>54</sup> Devdutt Pattanaik, Shikhandi: And Other Tales They Don't Tell You 2014. Penguin Group

<sup>55</sup> A thesis presented by Syeda S. Shakat, Construction of the Hijra Identity. BARC University 2016

Each of these narrative serves as an example as the mythological narratives used by hijras in the construction of their identity. By referring to individuals of an ambiguous gender status, temporarily or constantly, or to Rama, who had a special relationship with the gender ambiguous individuals of the past, hijras point to the existence of gender variant individuals and claim an authentic identity that has existed throughout history.

Moreover, by claiming association with significant individuals in history and mythology, hijras make a claim regarding their nature and character, perhaps in an attempt to challenge some of the derogatory, contemporary stereotypes. The story of Rama's blessing is employed to ameliorate some of the inequitable treatment they face in modern society, by alluding to rewards in the future. It also speaks to the devotion and loyalty of the community. By claiming this connection, hijras project an image of how they want themselves to be seen, as individuals who have existed throughout history, but who are also important within sacred history for their actions.<sup>56</sup>

## **THE HIJRA CULTURE AND RELIGIOUS PERSPECTIVE**

The Hijra community due to its peculiar place in sub-continental society which entailed marginalization yet royal privileges developed a secret language known as "Hijra Farsi".<sup>57</sup> The language has a sentence structure loosely based on Urdu and a unique vocabulary of at least thousand words. Beyond the Urdu-Hindi speaking areas of subcontinent, the vocabulary is still used by the Hijra community within their own native languages. Although many Hijras identify as Muslim, many practice a form of syncretism that draws on multiple religions seeing they to be neither men nor women, Hijras practice rituals for both men and women. Hijras belong to a special caste. They are usually devotees of the mother goddess Bahuchara Mata, Lord Shiva, or both.<sup>58</sup>

Many Hindu legends show that Hijras in India had a sanctioned role in Hindu society, especially through the practice of "badhai". The "badhai" culture is more characteristic of North India. Hijras in South India are involved in ritual roles as jogappas, jogammas,

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<sup>56</sup> A thesis presented by Syeda S. Shakat, Construction of the Hijra Identity. BARC University 2016

<sup>57</sup> Ibid.

<sup>58</sup> Nanda, S. (1998), Neither Man Nor Women: The Hijras of India. Wadsworth Publishing Co Inc; 2nd edition.

Shivshakthis, and so on.<sup>59</sup> They take part in Karaga processions and various jatras along with men who cross-dress as women for this occasion. Nevertheless, this ritual role is marginal to the life of Hijras in South India. Hijras of South India do not have the cultural role like that of North India, and mainly take up sex work as the way to earn a living, either by soliciting customers on the streets or by joining hamams.<sup>60</sup> It is a dangerous profession, as they are often subjected to contemptuous and violent treatment by customers and the police. They inhabit spaces openly, often drawing attention to them with loud speech and hand gestures, including their unique hand clap. Hijras also adopt male patterns of speech.

The hijra population in India is an invisible population that is embedded in the Indian society from a very long time. Hijras are linked with the religious-cultural background and are considered demi-gods. Hijras relate themselves to the Mohini avatar, a woman form of Lord Krishna and Lord Shiva in the form of Ardhanarishvara and Lord Ayyappa is said to be born to Lord Shiva and Lord Vishnu. Lord Vishnu took Mohini avatar and Lord Ayyappa was born. Lord Shiva is represented in the image of Ardhanarishvara, or 'the Lord who is half woman'. Lord Shiva and Parvati together in one body are called as Ardhanarishvara. In various paintings and sculptures Lord Shiva's half body is female and half is male.<sup>61</sup>

A group of myths utilized by hijras in identity formation are those associated with the goddess Bahuchara Mata. This goddess is worshipped by hijras as their protector and spiritual guide. According to a kinnar- 'a kinnar becomes a kinnar because of her blessings' which describes the strong link between the goddess and the hijra community. They also believe that they should not forget the Mata, and if so, then 'anything bad could happen'. Bahuchara serves as a protector for kinnars and is worshipped by many hijras, regardless of their individual religious identifications, particularly due to her association with transgenderism.<sup>62</sup>

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<sup>59</sup> Revathi, A and Geetha, V. (2008). *The Truth about Me: A Hijra Life Story*. Penguin Group

<sup>60</sup> Ibid.

<sup>61</sup> Jennifer Ung Loh, *Narrating Identity: Employment of Mythological and Literally Narratives in Identity formation Among the Hijras*, Religion and Gender Vol. 4, no. 1 (2014), pp, 21-39

<sup>62</sup> Ibid pp, 23-39

Bahuchara is also an important household goddess in Gujarat and is worshipped for her ability to give blessings associated with fertility to newlyweds and childless couples. There are a variety of myths linking Bahuchara Mata with the hijras.<sup>63</sup> These myths are significant in recognizing how, to a certain degree, the respect paid to hijras is dependent upon that paid to the goddess herself. As the principal goddess with whom the hijras associate, these myths are essential for constructing hijras' sense of identity and explaining aspects of their lives, including anatomical form, devotion to the goddess, and their ritual power and ability to give blessings.

Hijras employ multiple myths about Bahuchara, but tend to identify certain narratives as being key to understanding hijra identity, including explaining Bahuchara's gender transformations, ability to curse, and special connection to the hijras.<sup>64</sup>

Bahuchara's 'transgenderism' remains a key reason for her significance to kinnars. The origin of her worship emphasizes her spiritual power and ability to change bodily form. A common version of the myth begins when the maiden Bahuchara is passing through the forest in Gujarat thieves attack Bahuchara and to ensure that they do not rape her, she cuts off her breasts.<sup>65</sup> This act secures her deification for her virtue and purity. In another variation, the thieves rape her and she curses them. The thieves then realize she has turned them into hijras. In a further version, Bahuchara is a powerful man or prince when threatened by thieves he transforms himself into a woman through his 'spiritual power'. The thieves try to rape her and in her defense she cuts off her breasts so she no longer appears feminine, saying 'I am no longer a woman nor a man'.<sup>66</sup> This act fails to stop them, so she prays to the god Vishnu to give her a hiding place. The earth splits open and she jumps inside. She curses the thieves and they become hijras. Thus there are many narratives which showcase the power of boon and curse of goddess Bahuchara.<sup>67</sup>

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<sup>63</sup> Michelle, M. (2015) Historical Evolution of Transgender Community in India; Asian Review of Social Sciences; Vol. 4 2015

<sup>64</sup> Jennifer Loh Ung, Mythological and Literary Narratives in Identity Formation Among the Hijras Religion and Gender vol. 4, no. 1 (2014), p. 35

<sup>65</sup> A thesis presented by Syeda S. Shakat, Construction of the Hijra Identity. BARC University 2016

<sup>66</sup> Doniger, W. 1999. Splitting the Difference: Gender and Myth in Ancient Greece and India, Chicago: Chicago University Press

<sup>67</sup> A thesis presented by Syeda S. Shakat, Construction of the Hijra Identity. BARC University 2016

It is evident that gender identity, or indeed any identity, may not necessarily be constructed through ‘sacred’ or ancient texts and narratives, given that such narratives, at least in the case of the hijras, perform a double function in both sanctioning, and solidifying, a particular identity that can remain ostracized and deviant from heteronormative gender roles. Yet, such narratives do function to explain hijra identity in modern India, as well as sanction their ritual practices and anatomical form, establishing the role of narrativity in the construction of contemporary hijra identity.<sup>68</sup>

Myths and narratives thus do not appear as apolitical, timeless stories, but serve a real and necessary function as a type of ontological narrative, which bring identity into being and can cope with different challenges depending on the need of the group or individuals. In the hijras case, these narratives serve multiple functions, from sanctioning their ritual behavior to explaining their unique gender. This is done through constant retelling in contemporary arenas, which in turn secures their meaning and influence. Narratives thereby come to be instruments of self-definition and identity transfer, bringing hijra identity into being and also in line with the concept of ontological narrative, further providing other identifications to which hijras aspire. They are significant to defining identity, but also indicate the ongoing nature of this process and its dependence upon external factors, that affect how and why certain identifications may be preferential at different times.<sup>69</sup>

## **CONSTRUCTION OF HIJRA IDENTITY**

### **HISTORICAL BACKGROUND:**

The transgender or the Hijra community has vastly been affected by the various cultural, religious and social developments throughout history.

### **MUGHAL ERA:**

According to Hahm, Islam acknowledges persons who are born biologically indistinct and offers them with the equivalent rights as men and women though the rights of men and women are different in Islam and it is unclear as to which way they should have this

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<sup>68</sup> Goldman, Robert P. 1993. ‘Transsexualism, Gender, and Anxiety in Traditional India’, *Journal of the American Oriental Society* 113:3, 374–401.

<sup>69</sup> A thesis presented by Syeda S. Shakat, *Construction of the Hijra Identity*. BARC University 2016

right. During the Mughal Era, 'hijras' who were known as 'eunuchs' could be found in the Islamic Courts, garbed in turbans. The customary roles of the eunuchs were to guard the ladies of the harem and the children. Thus, 'Hijras' in the Mughal Period were given a position which provided them with respect and power.<sup>70</sup>

Hijras played a famous role in the royal courts of the Islamic world, particularly in the Ottoman empires and the Mughal rule in the Medieval India. They rose to well known positions as political advisors, administrators, generals as well as guardians of the harems. Hijras were consider clever, trustworthy and fiercely loyal and had free access to all spaces and sections of population, thereby playing a crucial role in the politics of empire building in the Mughal era.<sup>71</sup> The Hijras also occupied high positions in the Islamic religious institutions, especially in guarding the holy places of Mecca and Medina the person of trust, they were able to influence state decisions and also received large amount of money to have been closest to kings and queens. Thus hijra frequently state the role of their status in that period.

One such example is the Nizams of Hyderabad who employed and honored hijras. The sixth Nizam Mahboob Ali Pasha employed hijras as confidantes and advisors, domestic supervisors and menial domestics.<sup>72</sup> Even the Hyderabad State had an Inspector for hijras in the Police Department to look after their welfare and assured that they not be harassed. Hijras had claims on the public revenues through grants of cash and land and in some places they possessed an official and codified right to beg in India.

### **THE BRITISH PERIOD:**

In the beginning of the British period in the Indian sub-continent hijras were protected and received benefits by some Indian states through entry into the 'Hijra community'. The benefits comprised of provision of land, rights of food and smaller amount of money from agricultural households in particular areas which were ultimately removed through British legislation.

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<sup>70</sup> Jennifer Loh Ung, Mythological and Literary Narratives in Identity Formation Among the Hijras Religion and Gender vol. 4, no. 1 (2014), p. 35

<sup>71</sup> K. Delliswararao and C. Hangsing (2018) Social Cultural Exclusion and Inclusion of Trans-genders in India International Journal of Social Sciences and Management Vol. 5, Issue-1: 10-17

<sup>72</sup> K. Delliswararao and C. Hangsing (2018) Social Cultural Exclusion and Inclusion of Trans-genders in India Int. J. Soc. Sc. Manage. Vol. 5, Issue-1: 10-17

In the beginning of the British period in Indian subcontinent hijra used to accept protections and benefits by some Indian states through entry into the hijra community. Furthermore, the benefits incorporated the provision of land, rights of food and smaller amount of money from agricultural households in exact area which were ultimately removed through British legislation as because the land was not inherited through blood relations.

However many laws were introduced against hijras which led to their miserable situation. According to the Andhra Pradesh Eunuchs Act 1329 F (Act No. XVI of 1329 F)<sup>73</sup>, which is a State statutory law, the term ‘eunuch’ was used for those who admitted to be impotent or was proved impotent after undergoing a medical inspection.<sup>74</sup> Though the term eunuch was used to refer hijras, impotency was necessary to be eligible to be called as a eunuch. As per this Act the Government was required to keep a register to keep record of names of hijras and their resident details. Restriction was also placed on hijras engaged in ‘badhai’ or any other kind of street entertainment activity carried out secretly. There was also restriction on self emasculation and emasculation performed on others. The Act thus had a close surveillance on the lives of hijras, their traditional occupation, and also on their rituals.<sup>75</sup>

Thus the situation of hijras started deteriorating when British colonial rulers came with their ideologies of sex and gender binaries and heteronormative sexuality perspectives. The hijra body was problematic because of its ambiguity and its difference with the abled procreative heterosexual body.<sup>76</sup> Gradually various laws against hijras were introduced due to which the hijra community were deprived of their privileges provided by the Kings and Mughals.

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<sup>73</sup> Andhra Pradesh Eunuchs Act 1329 F (Act No. XVI of 1329 F) <https://clpr.org.in/wp-content/uploads/2019/03/Telanaga-Eunuchs-Act-PIL-Draft-4.1.2018-Disha-Chaudhry.pdf> (accessed on 12th March)

<sup>74</sup> Rules Supplement to Part-I Extraordinary of the Telengana Gazette published by Authority of Hyderabad, Wednesday, June, 2016  
<http://law.telangana.gov.in/pdf/go46.pdf> (accessed on 12th March)

<sup>75</sup> Andhra Pradesh Eunuchs Act 1329 F (Act No. XVI of 1329 F), <https://clpr.org.in/wp-content/uploads/2019/03/Telanaga-Eunuchs-Act-PIL-Draft-4.1.2018-Disha-Chaudhry.pdf> (accessed on 12th March)

<sup>76</sup> Criminal Tribes’ Act, 1871. Act XXVII <https://www.casemine.com/act/in/5a979daf4a93263ca60b7266> (accessed on 17th March)

Hijras were classified under the list of Criminal Caste or Tribes during the colonial rule. The Criminal Tribes Act (Act 27) of 1871 stated ‘registration, surveillance and control of certain tribes and eunuchs’.<sup>77</sup> This Act was applicable in all states of India. Thus the bodies and labour of hijras were controlled. The lands given to hijras during the kings and Mughal rule were also taken back by the colonial rulers.

Like the Criminal Tribes Act, Section 377 of the Indian Penal Code (IPC) was also introduced during the colonial period since 1860. The Section banned same sex sexual relationship and is often referred to as ‘Anti sodomy Law’.<sup>78</sup> In the year 2009 consensual same-sex acts between adults in private was decriminalized by the Delhi High Court. Since the British colonial rule the hijra community remained underground and led an isolated life. They primarily resided in the outskirts of the villages and remained a closed group for a long time.

## **DOWNFALL OF THE HIJRA IDENTITY**

The history of Hijras reveals that they were looked at as people with powers and they did enjoy unique way of recognition.<sup>79</sup> But this recognition started fading with time, some of the explanations that could be offered are as follows:

- During the freedom movement in India homosexual relationships and behaviors were not accepted and they were brought under criminal law. This could be compared with the homophobic attitude which prevailed in Victorian times.
- Earlier writing of Serena Nanda in 1998 also reveals that their sanctity and uniqueness has been looked down upon as they are involved in marketing sex.<sup>80</sup>
- Transgenders are bracketed along with homosexual people as they cater to homosexual and bisexual men as well as people with confused identity.

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<sup>77</sup> Act 027 of 1871: Criminal Tribes Act, 1871

<https://www.casemine.com/act/in/5a979daf4a93263ca60b7266> (accessed on 17th March)

<sup>78</sup> Section 377 of the Indian Penal Code (IPC) <https://indiankanoon.org/doc/1836974/> (accessed on 15th March)

<sup>79</sup> Seemanthini. T.S Hijras: The Transsexuals- A Psychological Perspective

<http://hdl.handle.net/10603/201046> (accessed on 13th March)

<sup>80</sup> Nanda, S. (1998), *Neither Man Nor Women: The Hijras of India*. Wadsworth Publishing Co Inc; 2nd edition



- Arvind Narrian in 2007 one of the legal advocate and a researcher cites that ‘The article 377of Indian penal code targets the act of ‘carnal intercourse against the order of nature’ and has nothing specific to say about identity’.<sup>81</sup> The article spoke about the gay but does not speak of lesbians. Thus, the absent figure of the queer citizen transmutes into the category of sexual offender who finds a place as an offender against public morality. The eunuchs were targeted based on their sexuality and eunuch’s referred to the Hijras. The criminal tribes act of 1987, under which a eunuch is considered to be all men who admit themselves or on a medical inspection appear to be impotent. The local government was expected to keep track of the addresses and names of all the eunuchs who were reasonably suspected of kidnapping or castrating the children or committing offense under 377 of Indian penal code.<sup>82</sup> Any eunuch who ‘appeared dressed or ornamented like a woman in public or street could be arrested without a warrant and punished with imprisonment up to two years or fined or both. This statement mimics the European courts treatment of the cross dressers Fanny and Stella cases.<sup>83</sup> Eunuchs are prohibited from acting as guardians, drawing a will or adopting a son. He also writes that according to the colonial law, being a eunuch was a criminal enterprise.

## **CRIMINALIZATION UNDER THE COLONIAL RULE**

Through the onset of colonial rule from the 18th century onwards, the situation changed drastically. Accounts of early European travelers showed that they were repulsed by the sight of Hijras and could not comprehend why they were given so much respect in the

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<sup>81</sup> Arvind Narrian, Section 377: A Greater Transformation The Hindu September 10, 2018 <https://www.thehindu.com/opinion/op-ed/a-greater-transformation/article24910086.ece> (accessed on 18th March)

<sup>82</sup> Seemanthini. T.S Hijras: The Transsexuals- A Psychological Perspective <http://hdl.handle.net/10603/201046> (accessed on 13th March)

<sup>83</sup> Neil Meccana, The Young men who shocked Victorian England. <https://www.irishtimes.com/culture/books/fanny-stella-the-young-men-who-shocked-victorian-england-by-neil-mckenna-1.1812422> (accessed on 21st March)

royal courts and other institutions.<sup>84</sup> In the second half of the 19th century, the British colonial administration vigorously sought to criminalize the hijra community and to deny them the civil rights. Hijras were considered to be separate caste or tribe in different parts of India by the colonial administration. The Criminal Tribes Act, 1871, this included all hijra who were concerned in kidnapping and castrating children and dressed like women to dance in public places. The punishment for such activities was up to two years imprisonment and a fine or both. This pre-partition history influences the vulnerable circumstances of hijra in this contemporary world.<sup>85</sup>

### **CRIMINALIZATION AND MARGINALIZATION DURING POST-INDEPENDENCE ERA**

Few years back, the Karnataka Police Act was amended in 2012 to “provide for registration and surveillance of Hijras who indulged in kidnapping of children, unnatural offences and offences of this nature” (Section 36A), in a similar vein to the Criminal Tribes Act, 1871, according to Section 36A, Karnataka Police Act, 1964<sup>86</sup>

Following are the regulations-

1. Preparation and preservation of a register of the names and places of residence of all eunuchs residing in the area under his charge and who are reasonably suspected of kidnapping or emasculating boys or of committing unnatural offences or any other offences or abetting the commission of such offences.
2. Piling objections by aggrieved eunuchs to the inclusion of his name in the register and for removal of his name from the register of reasons to be recorded in writing.

### **SECTION 377**

Transgenders, in our society, encompass all races, ethnicity, religious and social classes, yet, they have never enjoyed a respectable life, because of “what they are” and “how they

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<sup>84</sup> Criminal Tribes’ Act, 1871. Act XXVII <https://www.casemine.com/act/in/5a979daf4a93263ca60b7266> (accessed on 21st March)

<sup>85</sup> Criminal Tribes’ Act, 1871. Act XXVII <https://www.casemine.com/act/in/5a979daf4a93263ca60b7266> (accessed on 21st March)

<sup>86</sup> THE KARNATAKA POLICE ACT, 1963  
[http://dpal.kar.nic.in/pdf\\_files/4%20of%201964%20%28E%29.pdf](http://dpal.kar.nic.in/pdf_files/4%20of%201964%20%28E%29.pdf) (accessed on 21st March)

are”. They are subjected to confusions and anguish, resulting from the rigid, forced conformity to sexual dimorphism throughout the recorded history.<sup>87</sup> They are facing disparities linked to societal stigma, discrimination, and denial of their civil and human rights. Discrimination against them has been associated with high rates of substance abuse and suicides, and they are facing rampant discrimination in the areas of family life, social life, housing, education, health etc.<sup>88</sup>

### **MEANING OF SECTION 377**

The Indian Penal Code was an important experiment in the larger colonial project along with exercises in codification like the Civil Procedure Code and Criminal Procedure Code to apply the collective principles of common law in British India. Thomas Babbington Macaulay, the President of the Indian Law Commission in 1835, was charged with the testing task of drafting the Indian Penal Code also as a unifying effort to consolidate and rationalize the “splintered systems prevailing in the Indian Subcontinent”.<sup>89</sup> Section 377’s predecessor in Macaulay’s first draft of the Penal Code was clause 361, which defined a severe punishment for touching another for the purpose of unnatural lust. Macaulay abhorred the idea of any debate or discussion on this “heinous crime”, and in the Introductory Report to the proposed draft Bill dated 1837 stated that:

Clause 361 and 362 relate to an odious class of offences respecting which it is desirable that as little as possible should be said [...we] are unwilling to insert, either in the text or in the notes, anything which could give rise to public discussion on this revolting subject; as we are decidedly of opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision.<sup>90</sup>

The lack of any debate or discussion, suggesting the creation of this definition purely out of the discretion of Macaulay, also explains the sheer vagueness and ineffectiveness of

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<sup>87</sup> Section 377 of the Indian Penal Code (IPC) <https://indiankanoon.org/doc/1836974/> (accessed on 15th March)

<sup>88</sup> Ibid.

<sup>89</sup> Article 377 of the Indian Penal Code <https://indiankanoon.org/doc/1836974/> (accessed on 15th March)

<sup>90</sup> Report of the Indian Law Commission on the Penal Code, October 14, 1837, pp 290-98

the language of the proposed anti-sodomy section. Section 377 in its final draft is still shrouded with euphemisms.

The final outcome to prevent this “revolting” and injurious activity evolved in the form of the following text:

Section 377: Unnatural offences – Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to 10 years, and shall be liable to fine. Explanation – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section<sup>91</sup>.

Section 377 is both very similar to sodomy statutes around the world in that it re-instates and codifies the common law offence of sodomy, and at the same time, it is very different from a lot of the sodomy statutes:

(a) The statute, unlike many other similar laws, does not define a specific offence of sodomy. As a piece of legislation, Section 377 applies a vague offence – without defining what “carnal intercourse” or “order of nature” are – to the general public at large, the only criteria being “penetration”. It is a separate issue that the Indian courts over the decades have interpreted and constantly re-defined “carnal intercourse” read conjunctively with the “order of nature” – to include other non-procreative sexual acts.<sup>92</sup>

(b) It applies to both heterosexuals and homosexuals. Over the years, the general offence of sodomy became a specific offence of homosexual sodomy,<sup>93</sup> a significant distinction although never reflected in the Indian law has subsequently been read through in certain later cases by the Indian courts.<sup>94</sup>

There has been a tendency in Indian courts to create an association between the sexual acts and certain kinds of persons, who are more likely to commit the act – thereby giving a character and face to sodomy in the form of a homosexual. The objective of Section

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<sup>91</sup> Report of the Indian Law Commission on the Penal Code, October 14, 1837, pp 290-98

<sup>92</sup> Ibid.

<sup>93</sup> Section 13 of the Sexual Offences Act, 1956 of England [https://en.wikisource.org/wiki/R\\_v\\_Brown](https://en.wikisource.org/wiki/R_v_Brown) (accessed on 13th March)

<sup>94</sup> Report of the Indian Law Commission on the Penal Code, October 14, 1837, pp 290-98

377 has remained unclear and unsubstantiated. The offence was introduced into British India with a presumption of a shared Biblical morality.<sup>95</sup>

The abominable state of the third gender can be traced back from the colonial era, when the legislation was enacted to supervise the deeds of the transgender community, called the Criminal Tribes Act, 1871, which deemed the entire community of Hijras persons as innately 'criminal' and 'addicted to the systematic commission of non-bailable offences'.<sup>96</sup> The Act provided for the registration, surveillance and control of certain criminal tribes and eunuchs and had penalized eunuchs, who were registered, and appeared to be dressed or ornamented like a woman, in a public street or place. Such persons also could be arrested without warrant and sentenced to imprisonment up to two years or fine or both.

Section 377 of the IPC found a place in the Indian Penal Code in 1860, prior to the enactment of Criminal Tribes Act that criminalized all penile-non-vaginal sexual acts between persons, including anal sex and oral sex, at a time when transgender persons were also typically associated with the prescribed sexual practices. Reference may be made to the judgement of the Allahabad High Court in *Queen Empress v. Khairati* (1884) ILR 6 All 204,<sup>97</sup> wherein a transgender person was arrested and prosecuted under Section 377 on the suspicion that he was a 'habitual sodomite' and was later acquitted on appeal. This judicial legislation plays in contrast to the historical times in India where transgender community had got a strong historical presence in our country in the Hindu mythology and other religious texts. Jain Texts also make a detailed reference to transgender which mentions the concept of 'psychological sex'. Hijras also played a prominent role in the royal courts of the Islamic world, especially in the Ottoman empires and the Mughal rule in the Medieval India.

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<sup>95</sup> Section 377 of the Indian Penal Code (IPC) <https://indiankanoon.org/doc/1836974/> (accessed on 15th March)

<sup>96</sup> Act 027 of 1871: Criminal Tribes Act, 1871  
<https://www.casemine.com/act/in/5a979daf4a93263ca60b7266> (accessed on 15th March)

<sup>97</sup> *Queen Empress v. Khairati* (1884) ILR 6 All 204  
<https://www.casemine.com/judgement/in/5ac5e3264a93261a1a739419> (accessed on 17th March)

However, the abject conditions of the transgender communities have been redressed through a step taken by The National Legal Services Authority, constituted under the Legal Services Authority Act, 1997, to provide free legal services to the weaker and other marginalized sections of the society.

Laxmi Narayan Tripathi, a transgender activist who claims to be a Hijra, has firmly put forward the cause of the members of the transgender community and Tripathi's life experiences also for recognition of their identity as a third gender, over and above male and female. As a result, in 2009, India's Election Commission took a first step by allowing transgenders to choose their gender as "other" on ballot forms.<sup>98</sup>

The aforementioned judgement is buttressed by the landmark judgement of April, 2014 by Justice KS Radhakrishnan, who headed the two-judge Supreme Court bench, which recognized transgenders as the third gender.<sup>99</sup> The landmark ruling asked the Centre and State Governments to treat them as socially and 'economically backward classes', to enable them to get reservations in jobs and education. This goes along with the court's decision to grant them all facilities including a voters ID, passport and driving license. Further, The Centre and States were also directed to take steps for bringing the community into the mainstream by providing adequate healthcare, education and employment.

### **THE HIJRAS OF INDIA AS MARGINALIZED COMMUNITY**

Indian Hijra or a transgender person, which is known as the Third Gender globally, is considered physically and psychologically ambivalent. They are physically, verbally, and sexually abused. Hijras have been stigmatized and marginalized to a large extent. Thus, from the ancient India to the present day, Indian society made a distinction between Hijra

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<sup>98</sup> Laxmi Narayan Tripathi. *Me Hijra Me Laxmi*. 2015 New Delhi: Oxford University Press

<sup>99</sup> *National Legal Service Authority v. Union of India*, AIR 2014 SC 1863 at 1890  
<https://indiankanoon.org/doc/193543132/> (accessed on 6th March)

and predefined gender category. The term Hijra encompasses a wide range of identities, appearances, and behaviors that blur and cross the biological gender lines in India.<sup>100</sup>

Hijras are physiological males who have a feminine gender identity, adopt feminine gender role, and wear women's clothing. They do not conform to conventional notions of male or female gender but combine or move between the two.<sup>101</sup> Their vulnerabilities, frustrations, and insecurities have been historically overlooked by mainstream society. Therefore, they are a marginalized and stigmatized community.

The Hijra claim that mainstream society does not understand their culture, gender, mentality, and sexuality. Dimensions of their social deprivation and harassments to them have never received attention in the development society.<sup>102</sup> There are many myths, legends, rituals, religious roles, and themes in Hinduism which entertain the notion of sexually ambiguous or dual gender manifestations. More recently, Hijra is recognized as “transgender” which is an inclusive, umbrella term used to describe the diversity of gender identity and expression for all people who do not conform to common ideas of gender roles.

An estimated two lakhs transgenders live in India. In modern India, Hijras often live a ghetto-like existence, in their own communities which is called “Gharana.”<sup>103</sup> They make a living by dancing and celebrating in births and marriages ceremonies but often has to resort to other means to make both ends meet. Yet, the community is beginning to make a mark in the national mainstream as well. In the 2011 census, the Indian State identified Hijras as “other” which only met the approval of some Hijras. A 2014 Supreme Court verdict ruled that Hijras should be recognized under a separate “Third Gender” category.

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<sup>100</sup> Ishikawa, Takeshi. "The Works on Hijra in Indian Sub-Continent." <http://www.emahomagazine.com/tag/takeshi-ishikawa-hijras-the-third-gender-of-india/> (accessed on 16th March)

<sup>101</sup> Agrawal A. Gendered Bodies: The Case of the “Third Gender” in India. *Contributions to Indian Sociology* 1997;31: pp273-97.

<sup>102</sup> Ibid. pp274-97

<sup>103</sup> Nanda S. *Neither Man nor Woman: The Hijras of India*. Toronto: Wadsworth Publishing Company; 1999. 2nd edition

## **ADJUSTMENT OF HIJRA IN INDIAN SOCIETY**

Most Hijras live at the margins of society with very low status the very word “Hijra” is sometimes used in a derogatory manner. Few employment opportunities are available to Hijras. Many get their income from performing at ceremonies (toli), begging (dheengna), or sex work (“raarha”) an occupation of hijras, also recorded in pre-modern times.<sup>104</sup> Violence against Hijras, especially Hijra sex workers, is often brutal and occurs in public spaces, police stations, prisons, and their homes. As with transgender people in most of the world as well as in India, they face extreme discrimination in health, housing, education, employment, immigration, law, and any bureaucracy that is unable to place them into male or female gender categories.

## **TRADITIONAL SOCIAL ORGANIZATIONS**

Hijras refer to themselves using feminine pronouns. They typically live together in the traditional commune arrangement of five or more "chelas" (disciples), supervised by a "Guru." When a new chela is accepted into a Hijra household, she assumes not only the guru's surname but also membership in the guru's "house," one of seven lineages that confer a sense of kinship and identity, each house having its own history and rules of behavior. She receives training in singing, dancing, and other activities to enable her to earn a livelihood.<sup>105</sup>

Chelas are expected to turn their earnings over to the guru, who manages the funds for household upkeep. Gurus are expected to meet chelas needs for food, clothing, and pocket allowance. Sources of livelihood include performing at marriage and birth celebrations, begging for alms, and prostitution.<sup>106</sup>

The Hijras conduct at wedding and birth celebrations has won them a colorful and licentious reputation. At the news of a wedding or birth of a child in the neighborhood, a troupe of Hijras will show up unannounced and uninvited to bless the event by singing,

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<sup>104</sup> “A brief history of the hijras, India’s Third Gender” available at <https://theculturetrip.com/asia/india/articles/a-brief-history-of-hijra-indias-third-gender/> (accessed on 23rd March)

<sup>105</sup> Revathi, A and Geetha, V. (2008). *The Truth about Me: A Hijra Life Story*. New Delhi: Penguin Books

<sup>106</sup> Ibid.



drumming, and dancing. The ostensible purpose of the performance is a ritual entreaty for fertility on behalf of the bridegroom or newborn. Payment, or "badhai," consists of flour, sugar, sweets, cloth or a sari, or money.<sup>107</sup>

## **GENDER IDENTITY CONFLICT**

Most people experience their gender identity as correlating to, or in line with, their physical sex. For a transsexual person, however, there is a conflict between one's physical sex and one's gender identity as a man or a woman. Female-to-male transsexual people are born with female bodies but have a predominantly male gender identity. Male-to-female transsexual people are born with male bodies but have a female gender identity. Many, but not all, transsexual people undergo medical treatment to change their physical sex through hormone therapy and sex reassignment surgeries.<sup>108</sup>

The "unusual" growth of a feminine boy or masculine girl is not tolerated in schools, family, and society where the informants often encountered a hostile environment for incompatible sex-gender roles and attitudes.<sup>109</sup> They often experienced loneliness and abusive treatment. Unable to adapt within hostile civic environments, most became reluctant to continue schooling. Deprived from family, school environment, and neighbors the informants reported that, as Hijra, they were often told that their attitudes, body gestures, and behaviors were unlike other boys or girls. The informants became confused about their sex-gender alignment. Many Hijra claimed to have a soul of a female trapped in a male body.

Influenced by predominant norms and values of society and societal "decorum", their human dignity and self-esteem have been diminished. They feel themselves worthless and unfit to society searching a place where they live peacefully.<sup>110</sup>

Therefore they want to leave their family. The decision of leaving home will be finalized when they become closely associated with feminine male friends where they find

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<sup>107</sup> Revathi, A and Geetha, V. (2008). *The Truth about Me: A Hijra Life Story*. New Delhi: Penguin Books

<sup>108</sup> Butler, Judith. 1990. *Gender Trouble: Feminism and the Subversion of Identity*. New York and London: Routledge.

<sup>109</sup> "What is a Hijra?" available at <https://www.quora.com/What-is-a-%E2%80%9Chijra%E2%80%9D> (accessed on 13th March)

<sup>110</sup> "What is a Hijra?" available at <https://www.quora.com/What-is-a-%E2%80%9Chijra%E2%80%9D> (accessed on 13th March)

themselves fit psychologically, sexually, and socially. When a Hijra meets a Hijra guru and becomes a Chela of that guru, he finds a place to live. At the time of their dubious feeling, they cannot accept their gender differentiation properly. Due to mental stress, some of them attempted suicide where others get mental satisfaction.<sup>111</sup>

## **FAMILY AND SOCIAL LIFE**

Hijras are both shaped by their culture and the role they play in society but are also individuals who vary in their emotions, behavior, and outlook on life. Many Hijras play a double-life in this dichotomous gendered society to avoid stigma and discriminations. They cannot avoid the dilemma of their identity crisis and find a healthy, safe, and peaceful space in this heteronormative society.<sup>112</sup>

Hijras who earned a living performing at marriages and childbirth were regarded as the elite of their community. Although they also worked very hard, they were better rewarded financially and gained status within the Hijra community for earning a living in this traditional manner, rather than by practicing prostitution or eking out a living begging for alms. Feminine attitudes quite often become the source of physical and psychological trauma. Many Hijra lived at slums with a history of eviction. Some stay in parks or stations. Most Hijras are homeless and have a hopeless situation. Most hijras initially live with their families, but after encountering various adversities, they leave home. They have to change living arrangements for an unending search for a suitable place where they could live safely with dignity.

## **DAILY MOBILITY AND MIGRATION**

Hijra is an important segment of social structure in Indian society, especially in urban centers. Hijra lives mostly in the slum areas near bus terminals and railways junctions. The same area is mostly preferred although for different reasons of convenience by Hijras who are economic migrants. The life and activities including earning practices of Hijras are associated with spatial mobility which is either daily or periodic in nature. Maximum

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<sup>111</sup> Naskar P, Roy S, Naskar S, Gupta I. (2018) An assessment of quality of life of transgender adults in an urban area of Burdwan district, West Bengal. *International Journal of Community Medicine and Public Health* 2018;5:1089-95.

<sup>112</sup> Revathi, A and Geetha, V. (2008). *The Truth about Me: A Hijra Life Story*. New Delhi: Penguin Books

Hijras are engaged in daily spatial mobility. The nature and characteristics of spatial mobility of Hijras depends on the socioeconomic conditions and their culture which vary from place to place and time to time.

The activities of spatial mobility also affect their life styles as well as social, economical, and cultural matters. Therefore, the locations of their residence, health conditions, occupation and earning, public deals, migration attitude, etc., all are significantly depending on their spatial mobility practices.<sup>113</sup> Their spatial mobility is due to mainly of their contravening occupational tradition such as money collection from markets and roads, money collection through journey in buses and trains, money collection from the informal custom of child dancing with newly born baby, etc. Thus, we can see that Hijras are often encountered on streets, trains, and other public places demanding money from people. Sometimes the practices of spatial mobility are associated due to prostitution. Due to commercial sex working the prevalence of AIDS and STD is increased recently among the Hijras.

An estimated 50,000 Hijras lived in India as of 1990 but census data on them does not exist, making accurate enumeration impossible. They persist as a marginalized and secretive subculture in poorer urban districts of Bombay, Hyderabad, Ahmedabad, and Delhi there are also Hijra communities in southern India, Pakistan, and Bangladesh. In May 2014 the first count of the “Third Gender” post the Supreme Court Judgement was 4.9 lakh.<sup>114</sup>

Modernization of Indian society threatens to curtail opportunities for Hijras to practice traditional occupations and may be increasing their dependence on prostitution. In recent years organizations such as the Dai Welfare Society and Hijra Kalyan Sabha have been formed to address HIV/AIDS awareness and human rights issues. Some Hijras have become involved in politics in 2000 "Aunt" Shabnam Mausi was elected to her state legislature, and Kamla Jaan and Asha Devi were elected mayors of their towns.<sup>115</sup>

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<sup>113</sup> Revathi, A and Geetha, V. (2008). *The Truth about Me: A Hijra Life Story*. New Delhi: Penguin Books

<sup>114</sup> First Count of Third Gender in Census <https://timesofindia.indiatimes.com/india/First-count-of-third-gender-in-census-4-9-lakh/articleshow/35741613.cms>(accessed on 19th March)

<sup>115</sup> Success Stories of the Hijars. <https://www.indiatvnews.com/buzz/life/transgenders-in-india-204.html> (accessed on 19th March)

Hijras have been likened to transsexuals but the label is problematic given that most Hijras do not attempt to "pass" as the opposite sex, and engage in behaviors considered inappropriate for ordinary women. However, writer Zia Jaffrey in her book, 'The Invisibles- A Tale of the Eunuchs in India' did mention one male-to-female transsexual who had been accepted into a Hijra household.<sup>116</sup>

To anthropologist Serena Nanda, Hijras described themselves simply as "neither man nor woman."<sup>117</sup> Nanda argues that Hindu thinking allows for overlapping even contradictory categories, thus accommodating flexibility in gender roles. Regardless of one's analytical perspective, for those interested in cross-cultural perspectives on sex and gender, the Hijras will likely always inspire fascination.

The transgender in India is possibly the most well known and popular third type of sex in the modern world. The Supreme Court declared for transgender as third gender. The third genders in India have emerged as a strong faction in the LGBT rights. In the contemporary time the Government of India introduced so many welfare policy and schemes such as, census, documentation, issuing of the citizenship ID Cards, issuing passports, social-economical development and constitutional safeguards for the transgender people. The Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA) is a major initiative of the 11<sup>th</sup> Five Year Plan (2007-2012) period which brought employment opportunities for transgender people.<sup>118</sup>

## **LIVING CONDITIONS OF TRANSGENDERS IN INDEPENDENT INDIA**

The first Prime Minister of independent India, Jawaharlal Nehru, in 1952 repealed the Criminal Tribes Act, (CTA) 1871 calling it 'a blot on the law book of free India'. However, the same year the Government of India passed the Habitual Offenders Act which preserves most of the provisions of the CTA except for the premise that an entire

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<sup>116</sup> Jaffrey, Zia. *The Invisibles: A Tale of the Eunuchs of India*. New York: Pantheon, 1996.

<sup>117</sup> Nanda S. *Neither Man nor Woman: The Hijras of India*. Toronto: Wadsworth Publishing Company; 1999.

<sup>118</sup> Harvey, Nick. "India's Transgendered: The Hijras." *New Statesman* (May 13, 2008): <http://www.newstatesman.com/world-affairs/2008/05/hijras-indian-changing-rights> (accessed on 15th March)

community can be born criminal. The focus now shifted from criminalizing a tribe to criminalizing an individual.<sup>119</sup>

The transgender community lives a life of exclusion, which is socially, culturally, economically and politically excluded. The Indian government's census process which is the most authentic source of information on demography, literacy, and housing amongst other data points did not include transgenders for the first 64 years after independence in its exercise. When the community was given the option of identifying themselves as transgenders in the statistical exercise for the first time in 2011 half a million persons (amongst a 1.2 billion populace) identified themselves as transgenders.<sup>120</sup> The top three states with highest concentration of self identified transgenders in India are Uttar Pradesh, Bihar and Maharashtra.

Only 46% of transgenders are literate as compared to 74% literacy rate amongst the general population. Those who continue to be part of the education system often report harassment, bullying, physical and sexual abuse at the hands of older classmates and peers.<sup>121</sup>

Employability is low amongst transgenders and a larger part of them resort to begging, extortion, entertainment or prostitution. Indian folklore believed in the blessings of the transgender community especially after the birth of a male child and during weddings. In lieu of the blessings, a transgender would be rewarded with monetary benefit. These monetary rewards would become the main source of income for the group. However with increased resistance from the 'general' public, the practice of cash reward in lieu of blessings began to be looked down upon. Low literacy rates, low skill levels and general reluctance to hire transgenders all this pushed them further into sex work or the entertainment industry.<sup>122</sup>

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<sup>119</sup> Alok Gupta, Section 377 and the Dignity of Indian Homosexuals  
<https://www.outrightinternational.org/sites/default/files/15-1.pdf> (accessed on 15th March)

<sup>120</sup> Transgender in India 2011 <https://www.census2011.co.in/transgender.php> (accessed on 23rd March)

<sup>121</sup> Harvey, Nick. "India's Transgendered: The Hijras." New Statesman (May 13, 2008): <http://www.newstatesman.com/world-affairs/2008/05/hijras-indian-changing-rights> (accessed on 15<sup>th</sup> March)

<sup>122</sup> Alok Gupta, Section 377 and the Dignity of Indian Homosexuals  
<https://www.outrightinternational.org/sites/default/files/15-1.pdf> (accessed on 15th March)

Just as the rights of every Indian citizen, transgender rights should be protected under the constitutional framework and the international human rights instruments India is bound by. Transgenders often find themselves at the mercy of the police the ground level custodians of law and order. Cases of harassment, intimidation, violence against transgenders in the hands of the police are often reported by the media but no separate data is maintained by the National Crime Records Bureau (NCRB) on atrocities by the police of transgenders.<sup>123</sup>

Transgenders feel intimidated to approach the police to file complaints and even if they muster courage they are often implicated in return. Transgender witnesses to a crime do not trust the police to investigate fairly and without bias. Police accountability for violations against transgenders is a rarity. One of the notable exceptions is in the case of *Jayalakshmi vs. Tamil Nadu, 2007* where the police was held accountable for the wrongful death and repeated rape of a transgender.<sup>124</sup>

Living on the fringes of society, their right to identity, livelihood and entitlement to universal services is based on the whims of an apathetic state administration. Implementation gap in law is most often the cause for deprivation of individual rights in India. The judiciary and the administration have made visible efforts to de-marginalize the transgender community.<sup>125</sup> The biggest challenge is the parochial attitude and societal resistance to include transgenders as a normal part of daily lives. Large scale sensitization needs to happen starting from the school level to see transgenders not as an aberration, but an integral component of societal life. Once sensitization occurs the need to battle for the most basic human rights for the transgender community will no longer be a tough one.

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<sup>123</sup> National Crime Records Bureau (NCRB) <http://ncrb.gov.in/Downloads/Crime%20in%20India%20V4.0/3%20Crime%20in%20India%20V4%20-%20English.pdf> (accessed on 15th March)

<sup>124</sup> *Jayalakshmi vs. Tamil Nadu, 2007* <https://indiankanoon.org/doc/1373799/> (accessed on 18th March)

<sup>125</sup> Towle, E. B. (2002) "Romancing Transgender Native: Rethinking the Use of the "Third Gender" Concept." *GLQ: A Journal of Lesbian and Gay Studies*, vol. 8, no. 4, Jan. 2002, pp. 469–497., doi:10.1215/10642684-8-4-469.

# CHAPTER TWO

## EXCLUSION OF THE TRANSGENDERS FROM THE SOCIAL AND CULTURAL PARTICIPATION

### **CONCEPT OF SOCIAL EXCLUSION**

Social exclusion, discrimination and identity formation have become central focus of discourses in India today. Social exclusion and discrimination refer to process and outcome of keeping a social group outside the power centers and resources.

Exclusion, discrimination and identity formation are both individual and collective processes. Moreover, exclusion, discrimination and identity take place in an interactional process. Further, exclusion and discrimination take different form in different societies. Moreover, they adapt and change themselves according to the changing social reality. Hence, to state that in the modern, liberal society and polity, exclusion and discrimination are reduced or eliminated seem to be not in tune with the reality. In the same vein to deny the scope of identity formation of even the most discriminated social group also seems to be unrealistic.<sup>126</sup>

Social exclusion is a powerful form of discriminatory practice. In course of human development, exclusion has taken the form of segregating a group of people from the social, political, economic, cultural, educational and religious domains of societal life. But the fundamental social reality that needs to be exposed here is that social exclusion does not limit itself to segregation and deprivation.<sup>127</sup> Social seclusion and isolation provide base for a sense of superiority and inferiority among the members of the same society or culture. Further, it also culminates into a system of domination and subjugation. All these processes ultimately lead to oppression and exploitation. The

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<sup>126</sup> Social Exclusion Meaning, measurement and experience and links to health inequalities  
[https://www.who.int/social\\_determinants/media/sekn\\_meaning\\_measurement\\_experience\\_2008.pdf.pdf](https://www.who.int/social_determinants/media/sekn_meaning_measurement_experience_2008.pdf.pdf)  
(accessed on 25th April)

<sup>127</sup>Ibid.

seminal social fact of segregation is that it is justified and legitimized by social and or religious traditions.<sup>128</sup>

Amartya Sen has pointed out that the historical roots of the concept of social exclusion go back as far as Aristotle. The exploration of the contemporary interest in the concept began in 1974 when Rene Lenoir, then Secretary of State for Social Action in a French Gaullist government, first popularized the term.<sup>129</sup>

Given its origins and rapid spread across nation states and global regions, it is perhaps inevitable that the phrase ‘social exclusion’ is used in different ways at different times reflecting different institutional, political, historical and geographic contexts. In this section we describe some of the meanings attaching to the concept of social exclusion and consider the relationship between these meanings and policy and actions aimed at addressing social exclusion.

It can be defined narrowly – in which case it is used as a synonym for income poverty and refers specifically to either those people who are not attached to the paid labour market (exclusion from the paid workforce) or to those people in low-wage work. It is often used alongside the concept of “social cohesion” in the sense that a cohesive society is one in which (political, social and economic) stability is maintained and controlled by participation in the paid workforce.<sup>130</sup>

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<sup>128</sup> Social Exclusion Meaning, measurement and experience and links to health inequalities [https://www.who.int/social\\_determinants/media/sekn\\_meaning\\_measurement\\_experience\\_2008.pdf.pdf](https://www.who.int/social_determinants/media/sekn_meaning_measurement_experience_2008.pdf.pdf) (accessed on 25th April)

<sup>129</sup> Amartya Sen. Social Exclusion: Concept, Application and Scrutiny. Social Development Papers No. 1. June 2000 <https://www.adb.org/sites/default/files/publication/29778/social-exclusion.pdf> (accessed on 25th April)

<sup>130</sup> Social Exclusion Meaning, measurement and experience and links to health inequalities [https://www.who.int/social\\_determinants/media/sekn\\_meaning\\_measurement\\_experience\\_2008.pdf.pdf](https://www.who.int/social_determinants/media/sekn_meaning_measurement_experience_2008.pdf.pdf) (accessed on 25th April) 3:the lessons of Poverty 3 Programme, European Economic Interest Group, Animation and Research Lille

<sup>130</sup> Silver, H. (1995) “Reconceptualizing social disadvantage: three paradigms of social exclusion” in G. Rodgers, C. Gore and J.B. Figueiredo (eds.) Social Exclusion: Rhetoric, Reality, Responses, Institute of International Labour Studies, Geneva, pp.58-80

<sup>130</sup> Social Exclusion Meaning, measurement and experience and links to health inequalities [https://www.who.int/social\\_determinants/media/sekn\\_meaning\\_measurement\\_experience\\_2008.pdf.pdf](https://www.who.int/social_determinants/media/sekn_meaning_measurement_experience_2008.pdf.pdf) (accessed on 25th April)

<sup>130</sup> Bhalla, A., & Lapeyre, F. (1997). Social Exclusion: Towards an Analytical and Operational Framework. Development and Change, 28(3), pp,413-433



It can be defined broadly – in which case it refers to much more than poverty, income inequality, deprivation or lack of employment. The final reports on the European Union Poverty Programmes<sup>131</sup> systematically articulated social exclusion in this complex way. This set of 12 reports identified that exclusion was multidimensional, that it involved a lack of resources and/or denial of social rights and that exclusion was a dynamic process. The processes of exclusion resulted in multiple deprivations, the breaking of family ties and social relationships, and loss of identity and purpose.<sup>132</sup>

It is in this latter, broad and flexible sense that the concept of social exclusion can be useful for developing a different and more complex understanding of the factors and influences that lead to well-being and relative advantage on the one hand, and disparities, inequalities and relative disadvantage between members of a community on the other hand. In the United Kingdom, Northern Ireland and Scotland have introduced this complexity into definitions in their reference to “processes”, “complexity” and “causes”, and their references to “individuals”, “households”, “families” and “communities”. Concepts such as “participation” and “social inclusion” are highly visible in their definitions.<sup>133</sup>

## **CAUSES OF SOCIAL EXCLUSION**

Political exclusion can include the denial of citizenship rights such as political participation and the right to organize, and also of personal security, the rule of law, freedom of expression and equality of opportunity.<sup>134</sup> Political exclusion also involves the notion that the state, which grants basic rights and civil liberties, is not a neutral agency but a vehicle of a society's dominant classes, and may thus discriminate between social groups.

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<sup>131</sup> Andersen, J., A. Bruto da Costa, C. Chigot, K. Duffy, S. Mancho and M. Mernagh (1994) “The contribution of Poverty 3 to the understanding of poverty, exclusion and integration” in Poverty 3: the lessons of Poverty 3 Programme, European Economic Interest Group, Animation and Research Lille

<sup>132</sup> Silver, H. (1995) “Reconceptualizing social disadvantage: three paradigms of social exclusion” in G. Rodgers, C. Gore and J.B. Figueiredo (eds.) Social Exclusion: Rhetoric, Reality, Responses, Institute of International Labour Studies, Geneva, pp.58-80

<sup>133</sup> Social Exclusion Meaning, measurement and experience and links to health inequalities [https://www.who.int/social\\_determinants/media/sekn\\_meaning\\_measurement\\_experience\\_2008.pdf.pdf](https://www.who.int/social_determinants/media/sekn_meaning_measurement_experience_2008.pdf.pdf) (accessed on 25th April)

<sup>134</sup> Bhalla, A., & Lapeyre, F. (1997). Social Exclusion: Towards an Analytical and Operational Framework. Development and Change, 28(3), pp,413-433

Economic exclusion includes lack of access to labour markets, credit and other forms of ‘capital assets’.

Social exclusion may take the form of discrimination along a number of dimensions including gender, ethnicity and age, which reduce the opportunity for such groups to gain access to social services and limits their participation in the labour market.

Cultural exclusion refers to the extent to which diverse values, norms and ways of living are accepted and respected. These relationships are interconnected and overlapping, and given the complexity of influences on individuals, it is impossible to identify a single specific cause in the context of social exclusion. People may be excluded because of deliberate action on the part of others (e.g. discrimination by employers) as a result of processes in society which do not involve deliberate action; or even by choice. However, more generally, the causes of social exclusion that lead to poverty, suffering and sometimes death can be attributed to the operations of unequal power relations.<sup>135</sup>

Social exclusion is a socially constructed concept, and can depend on an idea of what is considered ‘normal’. In many developing countries, where most people do not enjoy an acceptable standard of living, defining what is ‘normal’ is not a simple task, especially given the lack of the welfare state and a formalised labour market. Indeed, as social exclusion can be structured around hierarchy, the exclusion of people on the basis of their race, caste or gender, may be viewed by the society excluding them as ‘normal’.<sup>136</sup> As such, the concept of social exclusion is contested, in that it is often difficult to ‘objectively’ identify who is socially excluded, as it is a matter of the criteria adopted and the judgements used.

Social exclusion can also be seen as a part of Sen’s capability approach, which is based on the ideas of ‘functionings’ and ‘capabilities’. ‘Functionings’ are those things that an individual is able to do or be in leading a life, such as having a healthy body, being educated, having self-respect, participating in community life, etc. ‘Capabilities’ are

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<sup>135</sup> Khan, S., Combaz, E. & McAslan Fraser, E. (2015). Social exclusion: topic guide. Revised edition. Birmingham, UK: GSDRC, University of Birmingham.

<sup>136</sup> Social Exclusion Meaning, measurement and experience and links to health inequalities [https://www.who.int/social\\_determinants/media/sekn\\_meaning\\_measurement\\_experience\\_2008.pdf.pdf](https://www.who.int/social_determinants/media/sekn_meaning_measurement_experience_2008.pdf.pdf) (accessed on 25th April)

combinations of various functioning's which allow an individual to lead the kind of life he or she values.<sup>137</sup> Social exclusion can thus be seen as a process leading to a state in which it is more difficult for certain individuals and groups to achieve certain 'functioning'. The impossibility of reaching a functioning leads to a state of deprivation, and the 'state' of social exclusion can be defined as a combination of deprivations.

## **PEOPLE'S EXCLUSION OF OTHERS**

Perceptions of valued or devalued roles also drive exclusion. Those who fill valued roles will be treated well, but those who fill devalued roles will be treated badly by others.<sup>138</sup> People who fill devalued roles often include those with impairments, unorthodox behaviours, body characteristics that are perceived negatively (e.g. obese, disfigured), who may rebel in some way against the social order, poor, unemployed and culturally unassimilated.

Each of these perceptions and ways of thinking can result in a range of exclusionary practices. For example, people with mental health problems are often excluded because of stigma and discrimination, and low expectations of what they can achieve.<sup>139</sup>

Social exclusion is also seen as both dynamic and relative. It is dynamic because it is based on past histories and future prospects of people, as much as current circumstances and relative in that it applies only within the context and society in which people live. Finally, social exclusion involves agency; that is to say, it is not simply about individual responsibilities and choices, but can only be assessed by identifying the individuals, institutions and structures that can actively or passively exclude others.<sup>140</sup>

Relational deprivation is important both in its own right and the impact it can have. For example, not to be able to socially interact with others can be a real source of

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<sup>137</sup> Amartya Sen. Social Exclusion: Concept, Application and Scrutiny. Social Development Papers No. 1. June 2000 <https://www.adb.org/sites/default/files/publication/29778/social-exclusion.pdf> (accessed on 25th April)

<sup>138</sup> Wolfensberger W. 2000. A brief overview of social role valorization. *Mental Retardation*. 38: pp,105-123

<sup>139</sup> Social Exclusion Unit. 2004b. *Mental Health and Social Exclusion*. London: Office of the Deputy Prime Minister.

<sup>140</sup> Grimaldi E. 2011. Neoliberalism and the marginalisation of social justice: the making of an education policy to combat social exclusion. *International Journal of Inclusive Education*. 16 (11): 1131-1154

impoverishment in one's life, and at the same time, reduce economic opportunities that come from social contact.<sup>141</sup>

Further, relational exclusion can occur both actively, through a conscious decision to exclude or passively, where there is no conscious intention to exclude but the structures of a community prevent inclusion from occurring.<sup>142</sup>

Sometimes exclusions can be seen in the deep-seated mental models, outlooks and values that may often be unexpressed and taken for granted. It is only by exploring such foundations that the underlying drivers of exclusion can be revealed and challenged. Often interventions are focused on responding to an event that has occurred, but a social change approach, such as that of Think Differently, is instead focused at challenging the deeper values and structures that form attitudes and behaviours to disabled people.

A historical theme in exclusion is that of mental models of difference or otherness. These have their roots in the exclusion of people over centuries on the basis of such characteristics as ethnicity, gender, identity, disability or other intrinsic features of people.<sup>143</sup> Through these perceptions, people have ascribed values or characteristics to others, which are perceived as alien and inferior to one's own personal and community values. Otherness in particular describes a category that is quite separate to one's own identity and membership of a social group.<sup>144</sup> These mental models have enabled not only exclusion, but also discrimination, alienation and persecution in different ways.<sup>145</sup> Otherness would therefore suggest that simply seeing people with disabilities solely in terms of their impairments or regarding them as people who are different can result in discriminatory behaviour toward them.<sup>146</sup>

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<sup>141</sup> Sen A. 2000. Social Exclusion: Concept, Application, and Scrutiny. Social Development Paper for the Asian Development Bank.

<sup>142</sup> Ibid.

<sup>143</sup> Das NK. 2009. Identity Politics and Social Exclusion in India's North-East: The Case for Redistributive Justice. Bangladesh e-Journal of Sociology.

<sup>144</sup> Harma K, Gombert A, Roussey J. 2013. Impact of Mainstreaming and Disability Visibility on Social Representations of Disability and Otherness Held by Junior High School Pupils. International Journal of Disability, Development and Education. 60(4): 312-331.

<sup>145</sup> Balibar E. 2005. Difference, Otherness, Exclusion. Parallax: 11:1, 19-34

<sup>146</sup> Harma K, Gombert A, Roussey J. 2013. Impact of Mainstreaming and Disability Visibility on Social Representations of Disability and Otherness Held by Junior High School Pupils. International Journal of Disability, Development and Education. 60(4): 312-331.

One concept informing much modern exclusionary debate, particularly in relation to disability, is Wolfensberger's social role valorisation theory, which posits that the value that people attribute to various social roles tends to shape their behaviour towards people who they see in valued or devalued roles. Those who fill valued roles will be treated well, but those who fill devalued roles will be treated badly by others.<sup>147</sup> He argues that people who are devalued include those with impairments, unorthodox behaviours, body characteristics that are perceived negatively (e.g. obese, disfigured), who may rebel in some way against the social order, poor, unemployed and culturally unassimilated.

Once devalued, these people are relegated to a low social status in society, and may be stigmatised or even scapegoated for society's problems.<sup>148</sup> The mental models that create this process of devaluing affects these people both materially and relationally. Social role valorisation can be seen to have basis in a range of exclusionary practices; for example, a review by the UK Social Exclusion Unit noted that people with mental health problems were often excluded because of stigma and discrimination, low expectations of what they can achieve, and a lack of ongoing support to enable them to achieve.<sup>149</sup>

### **SOCIO-ECONOMIC CONDITIONS OF THE HIJRAS**

Hijras are often considered as one of the most marginalized group within the country. Since their origins are mostly associated with ancient Hindu text, they had close affinity with mother goddess through which Hijras considered themselves as ambivalent figure of Lord Shiva signifying their identity. Hijras have a record history in the Indian subcontinent from antiquity onwards as suggested by the Kama Sutra period. This history features a number of well known roles within sub continental cultures, part gender luminal, part spiritual and part survival. Hijras were once a revered and accepted group in Indian culture. The Vedas, ancient Hindu texts, include eunuchs and characters with both male and female characteristics.<sup>150</sup>

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<sup>147</sup> Wolfensberger W. 2000. A brief overview of social role valorization. *Mental Retardation*. 38:105- 123

<sup>148</sup> Ibid.

<sup>149</sup> Social Exclusion Unit. 2004b. *Mental Health and Social Exclusion*. London: Office of the Deputy Prime Minister.

<sup>150</sup> Dr Sarah Appleton-Dyer Dr Adrian Field, Understanding the factors that contribute to social exclusion of disabled people Rapid review for Think Differently. 20 November 2014

They were believed to bring luck and provide special fertility powers. During the Mughal period, eunuchs played an important role in the court administration as royal guards. For centuries, they have performed badhai, or blessings at weddings and births. Their position altered during the British colonial period .But after the introduction of section 377 of Indian penal code they once again regain their recognition which enables them to fight for their rights and freedom.<sup>151</sup> Apart from that the Election Commission also passed a provision which helps to identify them as a third gender. Due to low population and gender variants they undergo several discrimination and abuse from all the sectors which led to various social and economic factors like low literacy rate, low income and social stigmata which in turn effect the life of Hijras.

Due to low literacy rate they mostly engaged in prostitution as a means of survival which can be a great threat to disease like AIDS or HIV. Other occupations may also include collecting alms in streets, temples and receiving payments for newborn babies. Due to their gender variants people are not willing to employ them, which gave them a minimal chance to express their ideas and talents.<sup>152</sup>

Many times they also face social and physical abuse which may lead to some physiological and disorder problem. In addition to that they are mostly excluded from all privileges which may lead to bias and injustice to them.

One of the greatest achievements was the freedom to franchise their vote in election which represent freedom of expression and speech in the society as Justice Radhakrishna has also rightly said that ‘transgender people should be treated consistently with other minorities under the law, enabling them to access jobs, healthcare and education’.<sup>153</sup> In addition, a bill has been passed in Indian parliament to ensure that transgender people get

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<https://www.odh.nyu.edu/assets/Guidance-and-Resources-files/Understanding-the-factors-that-contribute-to-the-exclusion-of-disabled-people-November-2014.pdf> (accessed on 14th April)

<sup>151</sup> Section 377 of IPC <https://indiankanoon.org/doc/1836974/> (accessed on 26<sup>th</sup> April)

<sup>152</sup> Social Exclusion Unit. 2004b. Mental Health and Social Exclusion. London: Office of the Deputy Prime Minister.

<sup>153</sup> National Legal Service Authority v. Union of India, AIR 2014 SC 1863 at 1890  
<https://indiankanoon.org/doc/193543132/> (accessed on 26<sup>th</sup> April)

same benefits like SC/STs and with this, steps has been taken to make sure that they get enrolment in schools, government jobs and protection from sexual harassment.<sup>154</sup>

## **EXCLUSION OF TRANSGENDERS**

Exclusion happens at different levels in the societal space. In the Indian context people are marginalised on the basis of caste, class, gender (male and female), culture, region, religion and so on. But the whole question is why? The process of marginalisation or social exclusion is to systematically keep individuals and communities away from the resources, opportunities and their rights. As a result of this the individuals and communities are kept away from socio, political, economical and cultural activities. So the society sees to that the power is restored with one individual or one community so that they have the extreme control over the others and resources. So technically majority of the Indian people are kept away from the production because of varied forms of social exclusion and marginalization.<sup>155</sup>

One such exclusion is exclusion of the transgender communities across the globe as well as in India. They have been the subject of mockery and social rejection. At the same time they are subjected to violence. Transgender people face staggering levels of discrimination and violence.<sup>156</sup> In 2012, 53% of anti-LGBT homicide victims were transgender women. Transgender people are four times more likely to live in poverty because of non-employability and unemployment. 90% of transgender people report experiencing harassment, mistreatment or discrimination on the job. Many transgenders are harassed by the police. Many of them commit suicide because of reject at multiple levels.<sup>157</sup>

Transgender people, particularly transgender women of color, face shockingly high rates of murder, homelessness, and incarceration. Most states and countries offer no legal

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<sup>154</sup> National Legal Service Authority v. Union of India, AIR 2014 SC 1863 at 1890  
<https://indiankanon.org/doc/193543132/> (accessed on 26<sup>th</sup> April)

<sup>155</sup> My Story by Ms. Kalki, Founder/Director Sahodari Foundation, Web :<http://www.sahodari.org>, (accessed on 12th April)

<sup>156</sup> Elango Felix, 2014 Transgender and our Society. <https://thecompanion.in/transgenders-and-our-society/> (accessed on 12th April)

<sup>157</sup> Ibid.

protections in housing, employment, health care, and other areas where individuals experience discrimination based on their gender identity or expression.

It is not the regular life that the transgender lead once they identify and associate themselves with the other gender. Humiliation and mockery becomes part of their life. There are different types of reactions from different actors in the society. As Ms. Kalki Founder and Director, Sahodari Foundation, writes in her article, My Story, sharing her experience said.

“When I was 13, one day my mom found my poems in a bunch of papers in which I had written about my feelings of femininity and my struggles with the world. She was upset and began to watch and care more for me. As a child, I was definitely feminine, I was so sure that I would be a complete woman one day. I used to think often One day I will make the world turn on me”.<sup>158</sup>

Early childhood preference of a hijra mostly goes for female clothing, make-up and attire, playing with girls rather than with boys, preferring household work culturally assigned for females, and possessing a ‘soft’ nature like girls, that makes all the family members tensed as they expect boys to portray ‘boy like’ image.<sup>159</sup>

She also added by saying, “Discrimination and humiliation starts from supposed to be the most comfortable social institution Family, as I was born with male genital organ, society immediately termed me as boy. Based on my biological organ, it started teaching me what should be my gender identity. But as I grew up I became more comfortable with what it goes for opposite gender. Due to this fact all the time I got pointed out by my family members and was blamed for tarnishing family image .In my broken heart

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<sup>158</sup> My Story by Ms. Kalki, Founder/Director Sahodari Foundation, :<http://www.sahodari.org>, (accessed on 12th April)

<sup>159</sup> Elango Felix, 2014 Transgender and our Society. <https://thecompanion.in/transgenders-and-our-society/> (accessed on 12th April)



sometimes I ask myself that all my capacities and talents got ignored as my mere gender identity becomes the major criteria of justifying me”.<sup>160</sup>

## **CHILDHOOD**

The humiliation and violence against hijras is not only limited in family sphere but also in every possible social institution. They face problems with their family members and yet try to attend schools in spite of belonging from a low economical social class. There continued to be a humiliation for them even in the school premises.

The presence of hostile school environment made the hijras leave school which ultimately diminished their future.

With the physical growth, sexual maturation also takes place during the puberty. Most of them realized at certain point that during the puberty sudden change in body structure and growing sexual aspiration lead more complication in life.<sup>161</sup>

Most HIjra described, as they grow up, their attraction towards man grows up significantly, which sometimes results in love relationship with their male partners whom they term as ‘Parik’. With a hope of staying with Parik throughout the life, although Hijras initiate love relationships with them, however in reality these relationships do not sustain further. As described most of the time Parik grow relationship out of their own need of amplifying sexual pleasure, so when the need is over, they just throw out the emotional bonding and put an end.<sup>162</sup>

## **FAMILY**

Family looks at the identity change of their boy or girl as a social humiliation. The family is not ready to accept them as they are with their present identity. Some parents employ violence to change the behaviour of their kids. Few take them to the doctor to be treated

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<sup>160</sup> My Story by Ms. Kalki, Founder/Director Sahodari Foundation, Web :<http://www.sahodari.org>, (accessed on 12th April)

<sup>161</sup> Safa, Noorie, Inclusion of Excluded: Integrating Need Based Concerns of Hijra Population in Mainstream Development. *Sociology and Anthropology* 4(6): 450-458, 2016 <http://www.hrpub.org> DOI: 10.13189/sa.2016.040603 (accessed on 27th April)

<sup>162</sup> Ibid.

for the illness. And most of the families in India take them to the priests because they believe that their sons and daughters are possessed. The family does not want their daughters and sons to be a transgender. The denial from the family forces them to run away from their home. Most often the families do not file a missing complaint in the police stations for the fear of being insulted by the community members.<sup>163</sup>

Heinous life experience of hijra people in their childhood and early adolescent period leaves a deep arch in soul which makes them more vulnerable in late adolescent period as with the course of time they realize dichotomous gendered society curtails their freedom in all aspects of life. Confrontation and conflict with family members continues with regard to their feminine behavior and attitude. To maintain respect of family, most often family members exclude them from any cultural event and even from funeral.<sup>164</sup> A state of being alienated continues despite being connected to a family. Although in initial adolescent period many hijra get connected with their peer community, but generally during that time they do not get the courage of leaving family. However, the decision of leaving home get finalized when they feel staying home will neither give them psychological comfort nor will allow them to earn the livelihood by getting integrated with the mainstream society.

“All the hijras those leave home and look for hijra community, basically hail from low socio economical status. In rich family although hijra born but to maintain family respect they hardly leave the attachment; to satisfy their natural instinct they usually do cross dressing during night. However, people like me those come from lower socio economical class, face multiple forms of exploitations which generally push us leave the home. Our families neither can guarantee a minimum standard of living due to poverty nor can ensure comfortable space for exercising freedom of choice. Consequently at one point

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<sup>163</sup> Safa, Noorie, Inclusion of Excluded: Integrating Need Based Concerns of Hijra Population in Mainstream Development. *Sociology and Anthropology* 4(6): 450-458, 2016 <http://www.hrpub.org> DOI: 10.13189/sa.2016.040603(accessed on 27th April)

<sup>164</sup> Jennifer Loh (2011) Borrowing Religious Identifications: A Study of Religious Practices among the Hijras of India the *SOAS Journal of Graduate Research*, Vol. 3, and March 2011.

with a view to ensuring both economical and mental freedom, we look for hijra community”. said Trishna Das<sup>165</sup>

Hijra community has its own unique formation. Every Hijra community is led by HIjra ‘Guruma’, who is considered as head of the community. When a hijra meets a hijra guru, becomes a chela of that guru. Guru and Chela relationship always go through some disciplines and rules in their community. One of respondents, named Kavita,<sup>166</sup> stated about the significance of living in Hijra community-

“Guruma lead Hijra community in one way support the chela to be with likeminded people and in another way give them the scope to earn some money through hijragiri and sex work”.

By analyzing life experience of hijra people starting from childhood, adolescent and adulthood, it becomes apparent that in none of stages they are free from the subject of being humiliated, violated or discriminated and it goes without saying such exclusion is the exact reason behind their chronic disempowerment.

Exclusion from family and society in general, Indians tolerate, accept, and respect a wide range of differences in cultures, religions, languages, and customs. Despite Indian society's general climate of acceptance and tolerance, there appears to be limited public knowledge and understanding of same sex sexual orientation and people whose gender identity and expression are incongruent with their biological sex. Human rights violations against sexual minorities including the transgender communities in India have been widely documented. Most families do not accept if their male child starts behaving in ways that are considered feminine or inappropriate to the expected gender role.<sup>167</sup>

Consequently, family members may threaten, scold or even assault their son/sibling from behaving or dressing-up like a girl or woman. Some parents may outright disown and evict their own child for crossing the prescribed gender norms of the society and for not fulfilling the roles expected from a male child. Parents may provide several reasons for

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<sup>165</sup> Trishna Das, 36 year old hijra was interviewed for the research in Kolkata on 22<sup>nd</sup> April 2019

<sup>166</sup> Kavita Dey 42 year old hijra was interviewed for the research in Kolkata on 22<sup>nd</sup> April 2019

<sup>167</sup> Safa, Noorie, Inclusion of Excluded: Integrating Need Based Concerns of Hijra Population in Mainstream Development. *Sociology and Anthropology* 4(6): 450-458, 2016 <http://www.hrpub.org> DOI: 10.13189/sa.2016.040603(accessed on 27th April)

doing so bringing disgrace and shame to the family; diminished chances of their child getting married to a woman in the future and thus end of their generation (if they have only one male child) and perceived inability on the part of their child to take care of the family.

Thus, later transgender women may find it difficult even to claim their share of the property or inherit what would be lawfully theirs. Sometimes, the child or teenager may decide to run away from the family not able to tolerate the discrimination or not wanting to bring shame to one's family. Some of them may eventually find their way to Hijras communities. This means many Hijras are not educated or uneducated and consequently find it difficult to get jobs. Moreover, it is hard to find people who employ Hijras people.<sup>168</sup>

Some members of the society ridicule gender-variant people for being 'different' and they may even be hostile. Even from police, they face physical and verbal abuse, forced sex, extortion of money and materials; and arrests on false allegations.<sup>169</sup> Absence of protection from police means ruffians find Hijras people as easy targets for extorting money and as sexual objects.

## **FRIENDS**

The friend circle that is supposedly to be the support group insults and humiliates them for what they are. The teachers insult and laugh at them in front of other students, thereby bringing down the curtain on their studies. They discontinue their studies and move in search of people like them. There are at times they face sexual violence from the friends and other youth from the communities.

Only the Department of Social Welfare in the state of Tamil Nadu has recently established 'Aravanis/Transgender Women Welfare Board' to address the social welfare issues of Aravanis/Hijras. No other state has replicated this initiative so far. Lack of

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<sup>168</sup> Elango Felix, 2014 Transgender and our Society. <https://thecompanion.in/transgenders-and-our-society/> (accessed on 27th April)

<sup>169</sup> Ibid.

access to Life and Health insurance schemes Most Hijras are not under any life or health insurance schemes because of lack of knowledge; inability to pay premiums; or not able to get enrolled in the schemes. Thus, most rely on the government hospitals in spite of the reality of the pervasive discrimination.<sup>170</sup>

## **SOCIAL ORGANIZATION AND KINSHIP**

The social life of Hijra is totally different from general human society. Their culture, rule and regulations, behavior, religious practices are much different and unique. They lived together in a household which is called according to their culture “Gharanas” led by “Nayaks” (topmost leaders) and “Gurus” (next level leaders). Several “Chelas” (disciples) live under one “Guru”. Hence, the social status of Hijras in their community as a member of the household is unequal.<sup>171</sup>

In the studied area the societal picture is little different. Hijras live in small groups, and in each of these groups, there is a kinship hierarchy. Each group consists of a guru and her disciples (Hijras always refer to themselves as females); these gurus in turn answer to other gurus and ultimately, all Hijras come under the auspices of a handful of “top” leaders (gurus). The leader of the Gharana (Mahalla) is called “Guru-Ma” which is also termed as “Ma,” “Malik,” “Murubbi,” “Malkin,” and “Mukh-hijre.” She is the guardian of all Hijras and the owner of all properties of the Gharana. Guru-ma is a senior Hijra by age and also intelligent and talented. She acts as household head. All Hijras are obedient to her. Under the advocacy of “Guru-Ma,” other hijras lived as “Chelas” (Disciples) with an interesting kinship among themselves. The Chelas under one Guru refer to one another as “Gurubhai” or “Gurubon.” For a Chela under a particular Guru, the “Gurubhai” of the Guru becomes the “Kala Guru” (Aunt) and the “Guru-Ma” of “Guru-Ma” becomes the “Nani-/Nana-Guru” or “Dada-Guru” Their society is strictly hierarchical and a eunuch’s life is governed by regulations laid down by immediate superiors.

## **EXCLUSION FROM POLITICAL PARTICIPATION**

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<sup>170</sup> UNDP V (2010) Hijras / Transgender Women in India: HIV, Human Rights and Social Exclusion. UNDP, India 1-15.

<sup>171</sup> Safa, Noorie, Inclusion of Excluded: Integrating Need Based Concerns of Hijra Population in Mainstream Development. *Sociology and Anthropology* 4(6): 450-458, 2016 <http://www.hrpub.org> DOI: 10.13189/sa.2016.040603(accessed on 27th April)

In 1897, the Criminal Tribes Act of 1871 was amended and under the provisions of this statute, “a eunuch [was] deemed to include all members of the male sex who admit themselves or on medical inspection clearly appear, to be impotent”. The local government was required to keep a register of the names and residences of all the eunuchs who are “reasonably suspected of kidnapping or castrating children or of committing offences under Section 377 of the Indian Penal Code. In addition, “any eunuch so registered who appear dressed or ornamented like a woman in a public street. Or who dances or plays music or takes part in any public exhibition, in a public street [Could] be arrested without warrant and Hijras were also reportedly harassed by police by threatening to file a criminal case under Sec-377 IPC.<sup>172</sup>

Legal recognition of gender identity as a woman or transgender woman is a complicated process. Lack of legal recognition has important consequences in getting government ration (food-price subsidy) shop card, passport, and bank account.

In July 2009, the Delhi High Court ruled that consensual same-sex relations between adults in private cannot be criminalized. Soon after that judgment, appeals in the Indian Supreme court objecting to the ruling were lodged; the Indian government has yet to submit a formal response. Legal issues can be complex for people who change sex, as well as for those who are gender-variant. Legal issues include: legal recognition of their gender identity, same-sex marriage, child adoption, Inheritance, wills and trusts, immigration status, employment discrimination, and access.<sup>173</sup>

Challenges in collectivization and strengthening community organizations a recent mapping study showed that only 103 organizations and networks (that include agencies providing services for MSM) were found to be working with transgender people in India.

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<sup>172</sup> Section 377 of IPC <https://indiankanoon.org/doc/1836974/>(accessed on 17th April)

<sup>173</sup> Jennifer Loh (2011) Borrowing Religious Identifications: A Study of Religious Practices among the Hijras of India the SOAS Journal of Graduate Research, Vol. 3, and March 2011.

Even among these, only half (46/103) of these organizations are community-owned organizations.<sup>174</sup>

Many Hijras play a double-life in this dichotomous gendered society to avoid stigma and discriminations. They wear female clothes and adopt feminine names while visiting general society. However, they wear male clothes and adopt male gestures while living with or visiting relatives. Their feminine role is denied. They cannot avoid the dilemma of their identity crisis. The informants reported that maintaining two different lifestyles in and outside the home created an identity crisis. It is difficult for them to cross the boundary of male-female dichotomous gender norms and to find a healthy, safe, and peaceful space in this heteronormative society.

Hijra sexuality and sexual behaviours conflict with her biological sex thus, the transgenders reported that conflicts relating to self-identity had diminished their human dignity and self-reliance.<sup>175</sup>

Hijras who earned a living performing at marriages and childbirth were the elite of their community. Although they also worked very hard, they were better rewarded financially and gained status within the Hijra community for earning a living in this traditional manner, rather than by practicing prostitution or eking out a living begging for alms. Feminine attitudes quite often become the source of physical and psychological trauma.<sup>176</sup>

## **MOBILITY AND MIGRATION**

Hijra is an important segment of social structure in Indian society, especially in urban centers. Hijra lives mostly in the slum areas near bus terminals and railways junctions. The same area is mostly preferred although for different reasons of convenience by Hijras who are economic migrants. The life and activities including earning practices of Hijras

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<sup>174</sup> Safa, Noorie, Inclusion of Excluded: Integrating Need Based Concerns of Hijra Population in Mainstream Development. *Sociology and Anthropology* 4(6): 450-458, 2016 <http://www.hrpub.org> DOI: 10.13189/sa.2016.040603(accessed on 27th April)

<sup>175</sup> Sibsankar Mal, *The Hijras of India: A marginal community with paradox sexual identity* 2018 Indian Journal of Social Psychiatry Published by Wolters Kluwer - Medknow

<sup>176</sup> Sibsankar Mal, *The Hijras of India: A marginal community with paradox sexual identity* 2018 Indian Journal of Social Psychiatry | Published by Wolters Kluwer - Medknow

are associated with spatial mobility which is either daily or periodic in nature. Maximum Hijras are engaged in daily spatial mobility. The nature and characteristics of spatial mobility of Hijras are depends on the socioeconomic conditions and their culture which vary from place to place and time to time.<sup>177</sup>

The activities of spatial mobility also affect their life styles as well as social, economical, and cultural matters. Therefore, the locations of their residence, health conditions, occupation and earning, public deals, migration attitude, etc., all are significantly depending on their spatial mobility practices. Their spatial mobility is due to mainly of their contravening occupational tradition such as money collection from markets and roads, money collection through journey in buses and trains, money collection from the informal custom of child dancing with newly born baby, etc. Thus, we can noticed that Hijras are often encountered on streets, trains, and other public places demanding money from people.<sup>178</sup>

### **HUMILIATION IN SCHOOL**

The ‘unusual’ growth of a hijra is not tolerated in schools where the informants often encountered a hostile environment for incompatible sex-gender roles and attitudes. They often experienced loneliness and abusive treatment for example, they were not allowed to share with classmates, extending from the classroom to the playground. Feminine attitudes of the informants were matters of jokes and humiliation.<sup>179</sup>

Unable to adapt within hostile school environments, most became reluctant to continue schooling. Teachers abused them, shouting for change in their feminine behaviours. Influenced by predominant norms and values of society, teachers accused effeminate boys of violating school and societal ‘decorum’.

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<sup>177</sup> Ibid.

<sup>178</sup> Gupta Indrani. Human Right of Minority and Women’s: Transgender Human Rights. Delhi: Gyan Publishing House 2005

<sup>179</sup> Sharful Islam Khan. Living on the Extreme Margin: Social Exclusion of the Transgender Population in Bangladesh 2009 Journal of Health Population Nutrition. Aug; 27(4): pp, 441–451.



## **SENSITIZING PRIMARY AND SECONDARY LEVEL SCHOOL GOVERNING BODY**

It could be seen that after experiencing family level violence they face newer forms of violence, as none of teachers or class mates leave them from the chance of being humiliated and discriminated. It is also revealed that many mainstreams educational institutions hesitate to admit children belonging to so called ‘unusual gender identity’ as their presence might create the feelings of discomfort to other students.<sup>180</sup> Although governmental project is providing stipend for hijra children to continue their study, but if we think logically we will find the aim of retaining this kind of children in school will not be sustainable through stipend provision unless and until initiatives are taken to sensitize the broader school environment. So development projects should focus on sensitizing school governing body by arranging awareness rising training session, so that among them the sense of treating every child equally irrespective of all diversities will be grown. The governing body should be consists of principles, teachers and other associated responsible people. Quarterly meeting with parents should also be arranged for sensitization. A complaint box in school can also be hanged where anyone subject to discrimination can issue a complain.

## **HEALTH ISSUES**

This part explores the impact of discrimination and stigma on health care access for rural and urban transgender individuals. Hijras suffer illnesses like knee pain (mainly caused due to strenuous walking and climbing during begging whether in trains or shops), cold, flu, typhoid, malaria, skin allergy, stomach pain, acidity, piles, herpes and Sexually Transmitted Infections (STI). Those who suffered herpes and STI infections also did not reveal their HIV status. There is need for social acceptance of transgender group. Many Hijras do not like to go to Government hospitals or any other health care sectors. For instances, there is no space available for them, say in hospital wards. The authorities do

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<sup>180</sup> Noorie Safa, Inclusion of Excluded: Integrating Need Based Concerns of Hijra Population in Mainstream Development. *Sociology and Anthropology* 4(6): pp, 450-458, 2016.

not admit them in women's ward because women do not feel comfortable or free in their presence and in men's ward they face sexual abuse.<sup>181</sup>

Some special issues, are emerged from the study, are following:

1. Hijras feel that health care provider attitudes and behavior towards them belie a lack of personal respect and believe that their health care is compromised as a result.<sup>182</sup>
2. Transition health care is delayed by physicians and health insurance companies who do not recognize gender transition as medically necessary.<sup>183</sup>
3. Anti-Trans discrimination in both rural and urban communities leads trans individuals to expect similar treatment from health care providers.<sup>184</sup>
4. Participants prioritized the need to increase the number of health care professionals who are well educated on transgender health concerns, and the importance of advocacy and social support in facilitating health care access.<sup>185</sup>

All this reveals that medical education and other professional health care training must be improved to address health care needs of transgender individuals. Health research is lacking in key areas of transgender health, including the implementation of a medical curriculum that successfully incorporates transgender health care, and inadequate funding opportunities for transgender health research. Finally, anti-trans attitudes of health care providers can and should be addressed from within the health care profession through education, community advocacy for transgender rights, and the passage of trans-inclusive anti-discrimination laws.

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<sup>181</sup> UNDP V (2010) Hijras / Transgender Women in India: HIV, Human Rights and Social Exclusion. UNDP, India 1-15.

<sup>182</sup> Ibid. pp, 1-16.

<sup>183</sup> Ibid. pp, 1-17.

<sup>184</sup> UNDP V (2010) Hijras / Transgender Women in India: HIV, Human Rights and Social Exclusion. UNDP, India 1-17.

<sup>185</sup> UNDP V (2010) Hijras / Transgender Women in India: HIV, Human Rights and Social Exclusion. UNDP, India 1-17.

## **POLICE REFORMS**

The police administration should appoint a standing committee comprising Station House Officers and human rights and social activists to promptly investigate reports of gross abuses by the police against hijras in public areas and police stations, and the guilty policeman immediately punished.<sup>186</sup>

The police administration should adopt transparency in their dealings with hijras make available all information relating to procedures and penalties used in detaining kothis and hijras in public places.<sup>187</sup>

Protection and safety should be ensured for hijras to prevent rape in police custody and in jail. Hijras should not be sent into male cells with other men in order to prevent harassment, abuse and rape.

The police at all levels should undergo sensitization workshops by human rights groups in order to break down their social prejudices and to train them to accord hijras the same courteous and humane treatment as they should towards the general public.

With subjection to physical violence such as beatings and threats of disfigurement with acid bulbs, the sexuality of the hijra also becomes a target of prurient curiosity, at the very least and brutal violence as its most extreme manifestation. With or without the element of physical violence, such actions constitute a violation of the integrity and privacy of the very sexual being of the person. The police attitude seems to be that since hijras engage in sex work, they are not entitled to any rights of sexual citizenship. What became apparent is that discrimination against hijras is embedded in both state and civil society. The violence that this community faces is not only due to the state but also has deep societal roots.<sup>188</sup>

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<sup>186</sup> Khushboo R. Hotchandani, PROBLEMS OF TRANSGENDER IN INDIA: A STUDY FROM SOCIAL EXCLUSION TO SOCIAL INCLUSION. International Research Journal of Human Resources and Social Sciences Vol. 4, Issue 4, April 2017

<sup>187</sup> Ibid.

<sup>188</sup> Human Rights Violation Against the transgender community. 2003

<http://ai.eecs.umich.edu/people/conway/TS/PUCL/PUCL%20Report.pdf> (accessed on 23rd April)

While India has made considerable progress on rights of transgender people in recent years, most remain socially marginalized and deprived of basic rights, including the right to vote, own property, marry, and claim a formal identity through a passport or other government identification. They are frequently publicly ridiculed and excluded from general society, enduring discrimination and humiliation from the police and medical authorities.<sup>189</sup>

### **IDENTITY CRISIS**

Deprived from family and school environment, hijras isolate themselves. Many hijra claimed to have a soul of a female trapped in a male body. Many play a double-life in this dichotomous gendered society to avoid stigma and discriminations. They wear female clothes and adopt feminine names while visiting peers. However, they wear male clothes and adopt male gestures while living with or visiting relatives. Their feminine role is denied. They cannot avoid the dilemma of their identity crisis.<sup>190</sup>

### **ESTABLISHING PSYCHO-SOCIAL COUNSELLING CENTRE FOR THE HIJRA POPULATION**

It is assumed that a sound mind gives a person the strength of utilizing the inner capacity at its fullest. However, the productivity goes down automatically when that individual has to go through a coarse path. Again, it is needless to say the situation gets much worse when the person does not get any space to vent out the inner pain. Realizing this fact, if we consider life cycle of any individual born with so called ‘deviant gender identity’, is likely to be the subject of mere humiliation, discrimination and violence. In this respect, when Hijra people’s experience is posed that basically reveals how these people

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<sup>189</sup> Topics on Transgender Issues <http://www.pucl.org/Topics/Gender/2004/transgender.htm> (accessed on 23rd April)

<sup>190</sup> **Sharful Islam Khan**. Living on the Extreme Margin: Social Exclusion of the Transgender Population in Bangladesh 2009 Journal of Health Population Nutrition Aug; 27(4): 441–451.

eventually diminish their own potentials being the subject of humiliation and discrimination.<sup>191</sup>

To rescue this potential social pool from the risk of being demoralized, it is obligatory to form national psycho social counseling center, which will provide rigorous counseling sessions for them to boost up their inner capacity. This counseling session is required in both individual and family level. As the violence against hijra people primarily starts from family level, it also essential to orient family members regarding how to deal with them. Through psycho social counseling center, diversified training sessions could also be arranged for Hijra people, so that they will be aware about their human rights and can be able to sprout out their inner capacity.<sup>192</sup>

### **SENSITIZING BROADER SOCIETY**

Although recognizing hijra as third gender has caught noteworthy political attention, the significance of this recognition will be unattainable if the broader society is not aware about the rights of Hijra population. Prevalence of poor knowledge and lack of awareness about Hijra population amid mainstream society basically multiplies incidents of violence against Hijra population to an extreme level.<sup>193</sup> So campaign through media and social media platforms should be well operated which will include: the problematic socialization process of Hijra population, institutional violence towards this marginalized group, the culture of Guruma lead Hijra community, challenges towards Hijra population to be in mainstream society etc. Sensitizing the mainstream society regarding different gender identity and sexual orientation is also an essential issue. Under the ministry of information, existing departments on press information, mass communication, films and publication can play catalytic role in disseminating concerned information.

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<sup>191</sup> Khan et al., 2009. Living on the Extreme Margin: Social Exclusion of the Transgender Population (hijra) in Bangladesh. *Journal of Health, Population and Nutrition*. 2009 Aug; 27(4): pp,41–451.

<sup>192</sup> Tahmina Habib, 2012 A Long Journey towards Social Inclusion: Initiatives of Social Workers for Hijra Population in Bangladesh University of Gothenburg International Master's Programme in Social Work and Human Rights

<sup>193</sup> Khan et al., 2009. Living on the Extreme Margin: Social Exclusion of the Transgender Population (hijra) in Bangladesh. *Health, Population and Nutrition*.

## **WORKPLACE**

In consultation with community groups and human resource professionals experienced in the area of Diversity and Inclusion, workplaces in public and private sector need to sensitize employers and employees on issues of transgender persons. Antidiscrimination policies must be instituted and meaningfully applied to the processes of hiring, retention, promotion, and employee benefits. Workplace sexual harassment policies should be made transgender-inclusive.<sup>194</sup>

## **CONDUCTING STUDY ON TRANSGENDER ISSUES**

Negligible number of literature and research work on hijra population signifies that the concern of this marginalized section is hugely ignored in both academic and practitioner level. It becomes an integral need to conduct thorough research on state sponsored third gender, to get exquisite understanding about their current condition and position in society. By capturing learning, future possibilities for Hijra people will be opened up.<sup>195</sup>

Considering all of mentioned concerns, pro active initiatives need to be taken as early as possible and in this regard strong coordination between Government and NGOs should be well maintained. But it is to be in mind transformative initiatives is likely to pose serious challenge in the existence of Guru ma led hijra community, surrounding which big business has been established and such situation might results in reversed outcome during project implementation. But it is true that, saving this marginalized group from the loop of chronic disempowerment will not be possible as long as they belong to guruma led hijra community and engage in traditional hijra profession by leaving the family and ignoring all the possible scopes of being mainstreamed. So in this regard, strong political intervention of Government is required.<sup>196</sup>

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<sup>194</sup> Khushboo R. Hotchandani, Problems of Transgender in India: A Study from social exclusion to social inclusion. International Research Journal of Human Resources and Social Sciences Vol. 4, Issue 4, April 2017

<sup>195</sup> Noorie Safa, Inclusion of Excluded: Integrating Need Based Concerns of Hijra Population in Mainstream Development. Sociology and Anthropology 4(6): pp, 450-458, 2016.

<sup>196</sup> Khan et al., 2009. Living on the Extreme Margin: Social Exclusion of the Transgender Population (hijra) in Bangladesh. Health, Population and Nutrition.

When we say about gender we should consider the issue of power dynamics and when we look on power dynamics we should visualize a ladder to envisage who is on top or on lower tier. It is needless to say due to the social, cultural and economic reality women are the poorest of the poor which make them more vulnerable in terms of getting equal treatment with men, nevertheless if we dig deeper and look through intersectional lens, vulnerability of diverse sections will also be popped out those also warrant serious consideration. With a view to including this excluded hijra population in mainstream society, mere concentration of sexual health or state sponsored stipend provision would not add any value unless and until initiatives are taken on the ground of hijra people's human right concern.<sup>197</sup> It is believed that sincere attention and intervention of Government and NGOs with regard to ensuring hijra people's human right would certainly bring positive outcome in broader society. It is high time to blow strong movement with an aim to letting this excluded yet fully potation pool of society to live with dignity and respect.

### **STRENGTHENING ADVOCACY AND NETWORKING**

To blow strong movement, it is obligatory to establish a strong alliance with organizations working on transgender issues in both national and transnational level. It is noteworthy to mention that through rigorous advocacy and networking support mechanism the vision of advancing the situation and condition of hijra population will be fostered.<sup>198</sup> Vigorous lobby with Government should be promoted to pave the way for negotiation with Government. With the power of strong lobby, strong push with regard to formulating and changing policies, laws and regulations more easier.

### **ROLE OF CIVIL SOCIETY**

First and foremost, excluded groups themselves have to be involved in changing their situation. This is critical, given that the political situation and government action or neglect is often responsible for exclusionary policies. In order to make lasting progress, it

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<sup>197</sup> Karim, M 2013, 'Hijras Now a Separate Gender', Dhaka Tribune (accessed on 23rd April)

<sup>198</sup> Noorie Safa, Inclusion of Excluded: Integrating Need Based Concerns of Hijra Population in Mainstream Development. *Sociology and Anthropology* 4(6): pp,450-458, 2016.

is often necessary to support excluded people so they can successfully challenge the power structures that cause their exclusion.<sup>199</sup>

Social movements play an important role in challenging governments and ensuring they are more accountable to their citizens and meet their legal obligations. These include government obligations to protect and realize the human rights of the whole population in a non-discriminatory way.<sup>200</sup>

Civil society organizations (CSOs), such as faith groups and charities, can help excluded groups to exercise their rights and obtain redress where this is not happening. In South Africa, for example, the Treatment Action Campaign in 2002 challenged the government on its constitutional obligations and secured the right for people living with HIV and AIDS to have access to anti-retroviral treatment. They achieved this through a combination of active participation by people living with HIV and AIDS and strong alliances with key civil society groups, such as trade unions, churches and the media.<sup>201</sup>

CSOs also have a role in advocating increased representation and voice for excluded groups and giving them a say in policy- and decision-making. They can link grassroots work to national and international policy processes.<sup>202</sup> But some governments may be threatened by the voice of civil society, and may try to undermine or prevent CSOs from playing this advocacy role. In such cases, other avenues should be explored.

International alliances are increasingly important in linking CSOs campaigning for groups like women and girls, children and young people, disabled people and older people. Organisations like Help Age International, for example, have developed effective alliances to gain commitments by UN member states to improve public services and provide social protection for older people.

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<sup>199</sup> Reducing poverty by tackling social exclusion A DFID policy paper Published by the Department for International Development September 2005

<sup>200</sup> Moser, C. and Rodgers, D. (2004) 'Change and violence in non-conflict situations', paper prepared for the DFID Urban and Rural Change Team.

<sup>201</sup> Noorie Safa, Inclusion of Excluded: Integrating Need Based Concerns of Hijra Population in Mainstream Development. *Sociology and Anthropology* 4(6): 450-458, 2016.

<sup>202</sup> Moser, C. and Rodgers, D. (2004) 'Change and violence in non-conflict situations', paper prepared for the DFID Urban and Rural Change Team.



In fragile states where public institutions are extremely weak or even non-existent, CSOs can also play a crucial role in delivering services to excluded groups who have no access to public services.<sup>203</sup>

The Self-Employed Women's Association in India, a trade union for women in the informal sector, has had a major impact on the lives of these women by providing direct services such as primary healthcare, savings and insurance.<sup>204</sup> It combines these with advocacy for policy change at municipal, state, national and global levels, challenging rules that discriminate against the women's interests (such as registration of trade unions).

CSOs may reflect patterns of exclusion in the wider society. Where they provide services they may treat socially excluded groups as passive recipients of welfare, rather than people with equal rights who are capable of taking their own decisions and contributing to society if given the opportunity. Governments may also rely on CSOs to provide services that they themselves should be providing. However, at times CSOs provide a vital lifeline for excluded groups.<sup>205</sup>

A strategy to tackle exclusion has to challenge deep-seated attitudes and prejudices. Facing such attitudes can affect people's self-confidence. When people feel they are being judged on the basis of whom they are, they may perform less well. The expectation of prejudice can undermine the motivation to achieve.<sup>206</sup>

Civil society can play an important role in helping to change attitudes. The media, in particular, while they have the potential to reinforce prejudices, can also play an important role in changing attitudes and behavior.

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<sup>203</sup> Reducing poverty by tackling social exclusion A DFID policy paper Published by the Department for International Development September 2005

<sup>204</sup> Reducing poverty by tackling social exclusion A DFID policy paper Published by the Department for International Development September 2005

<sup>205</sup> Ibid.

<sup>206</sup> Ibid.

## **ANALYSIS**

Since several years the social workers started to spread their activities among this community and mainstream society within various challenging environment.<sup>207</sup> Within this support the social situation of hijra community seems to be influenced.

Ordinary hijra argued about health care support which is good but the service is not available that cost more money. This indicates that Social workers might not reach yet to every individual's living area to improve their quality of life. This raises more social work supports to reach towards individuals door to door in order to provide sufficient health care service. Additionally, the materials of the study indicate that still hijra are remained under discrimination because yet they did not come out from their regular problems and lack of basic needs. Nevertheless, when the social workers have addressed the social acceptance of hijra community and provided initiatives to bring the social changes; this seems to be influenced on the hijra informants because most of them admired the freedom in their own local area where no one harasses them these days.<sup>208</sup>

Additionally, the social work services have provided the space for hijra in which they got the opportunity to share their own experience. This makes their hope to find out the path to include in the mainstream society while once they have spent their life in the margin position without paying attention by anybodies.

Working with any social problems could bring the challenges for activists whether it is by NGOs or Public department or any other systems. When a community is extremely marginalized from their gender identity, legal rights, social resources and social acceptance the Non-Governmental Organizations need to work with this community as well as with all the systems and the networks of this community. Because these different systems often influenced the community's life experience. Thus, it is obvious for social

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<sup>207</sup> Tahmina Habib, 2012 A Long Journey towards Social Inclusion: Initiatives of Social Workers for Hijra Population in Bangladesh University of Gothenburg International Master's Programme in Social Work and Human Rights.

<sup>208</sup> Ibid.

workers who work for disadvantage group face various circumstances which makes barrier in their activities.<sup>209</sup>

Additionally, the religious approach is not only a threat for the social worker activists who work with gender and sexual right but also it is a powerful part of mainstream society for the government. In this heterosexist norm, the religion usually plays a chief role that influences the societal approach and imposed on individual. It seems like accepting the legal rights for separate gender identity and for sex work are the threats for the religion and the society because it can break the sustained social norm.

Along with all these challenging experience, social workers are also concerned about financial supports of the organization as because there is no certain economical fund is approved by the government, only, the external funding is the source of economic support by which the organization is operated. While the organizations always have to be careful about the financial condition in order to provide supports, there is always remain a chance for the social workers to away from the needs of the beneficial with whom they are involved.

The social workers from hijra community feel the limitation in their work because their skills and academic knowledge regarding social work is not enough among them comparatively the social workers from mainstream society.

On the other hand, social workers from mainstream society have the knowledge and academic education which helps them to deal with complex structural problems within various systems. It is perceived that, these circumstances raise the requirement of engaging more social workers from mainstream society in order to provide knowledge based activities and supports for this disadvantage group to achieve full inclusion.<sup>210</sup>

As the civil society and government has now addressed the existence of hijra as well as their marginalized position they are now mainly concerned about the social inclusion of this community and their participation in mainstream economic field. Therefore, the

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<sup>209</sup> Tahmina Habib, 2012 A Long Journey towards Social Inclusion: Initiatives of Social Workers for Hijra Population in Bangladesh University of Gothenburg International Master's Programme in Social Work and Human Rights.

<sup>210</sup> Bangladesh rally to support transgenders. <http://www.bbc.co.uk/news/world-south-asia-15398437> (accessed 14th April)

vocational skill development training has been provided for hijra in order to build their capacity to engage in the mainstream jobs.<sup>211</sup> These initiatives have made the hope for the Non Governmental Organizations as well as for the community to bring further achievement about social inclusion of sexual minority group; however, the ordinary hijra have claimed about their lack of opportunity to participate in this action.

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<sup>211</sup> Tahmina Habib, 2012 A Long Journey towards Social Inclusion: Initiatives of Social Workers for Hijra Population in Bangladesh University of Gothenburg International Master's Programme in Social Work and Human Rights.

# CHAPTER THREE

## NALSA CASE AND THE NAMING OF TRANSGENDER AS A THIRD GENDER

### INTRODUCTION TO THE NAZ FOUNDATION TRUST

The Naz Foundation India Trust, abbreviated as Naz India, is a Delhi based NGO working on sexuality and sexual health since 1994. Naz Foundation vision is to create just and equitable society by transforming individuals from socially and economically excluded communities into agents of change. Through the years, Naz India opened up various programs for combating HIV, involving prevention as well as care, to reduce stigma, improve health, and empower families. Its aim is to sensitize the general population about the prevalence of HIV and also highlight the issues related to sexuality and sexual health.<sup>212</sup>

India is home to the world's largest population of HIV and orphans. Unfortunately, the number continues to rise. Naz India opened the first care home for the orphans living HIV in north India in 2001, after a child was abandoned at their doorstep. This thriving home currently looks after twenty-five children providing them with educational, medical, nutritional and psychological support.<sup>213</sup>

The Naz Foundation India Trust founded by Anjali Gopalan also identifies People Living with HIV/AIDS (PLHAs) who were not receiving adequate care. It is an important need not only for information on HIV/AIDS but also services like pre and post HIV testing and counseling and ongoing support in the form of home visits, etc for those who are HIV

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<sup>212</sup> Naz Foundation Trust. <https://letzchange.org/nonprofits/the-naz-foundation-india-trust> (accessed on 21st April 2019))

<sup>213</sup> Ibid.

positive.<sup>214</sup> There is a lack of specialized medical services for the treatment of opportunistic infections related to HIV and often people living with HIV experience discrimination from service providers and medical staff.

The funds received from The Infinity Foundation helped Naz India to start an HIV/AIDS clinic in July 1998, which was first of its kind in Delhi to offer specialized counseling and treatment services on STDs and HIV/AIDS a service previously not available.

## **I. MEDICATION AND TESTING FACILITIES**

The Naz Foundation now have managed to overcome the problem of lack of access to medications to a great extent because of the continuation of the grant and also due to donation of medicines mostly anti retro viral drugs from other countries. It provides free anti-retroviral drugs to HIV positive pregnant women from their seventh month of pregnancy to reduce the risk of HIV transmission to the baby. This is the only client group who receives free anti retro viral medication from the clinic.<sup>215</sup>

## **II. CLIENT VISITS AND HOME BASED CARE**

Care and Support staff meets regularly with PLHAs in a range of settings including clients homes, medical and testing centers, hospitals, care homes, etc. Visits are conducted on an ongoing basis as per need. Increasingly, the program is providing home based care. They also work to sensitize communities about the prevalence of HIV, and highlight issues related to sexuality and sexual health.<sup>216</sup>

Naz India has evolved and implemented a holistic approach to combat HIV, focusing on prevention as well as care and support. Naz India runs a home for orphan and abandoned HIV positive children and is committed to providing for their educational, medical, nutritional, and psychosocial needs. Naz Foundation's advocacy initiative to protect the

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<sup>214</sup> The Infinity Foundation <https://infinityfoundation.com/the-naz-foundation/> (accessed on 21st April 2019)

<sup>215</sup> Case Studies on Naz Foundation <http://guides.womenwin.org/ee/impact/case-studies/the-naz-foundation> (accessed on 21st April 2019)

<sup>216</sup> Ibid.

rights of the sexual minority community has become a nationwide movement. Young People's Initiative (YPI), a sport for development programme for adolescent youth, was launched in 2006 in New Delhi.<sup>217</sup>

### **MISSION:**

Naz India's mission is to build vibrant ecosystems that:

- i. Energize and enable individuals from excluded communities to realize their potential and act as agents of change.<sup>218</sup>
- ii. Expand partnerships, networks, and linkages to catalyze a critical mass of such leaders.<sup>219</sup>
- iii. Engage and influence governments, businesses and other stakeholders to take this movement to scale.<sup>220</sup>

### **VISION:**

Naz India's vision is to create a just and equitable society by transforming individuals from socially and economically excluded communities into agents of change<sup>221</sup>.

### **OBJECTIVES AND GOALS:**

- i. Naz India aims to expand the Young People's Initiative (YPI) through partnerships in other states.<sup>222</sup>

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<sup>217</sup> Young People's Initiative <https://letzchange.org/nonprofits/the-naz-foundation-india-trust> (accessed on 21st April 2019)

<sup>218</sup> Naz Foundation Missions. <https://guidestarindia.org/Organisation.aspx?ccreg=496> (accessed on 21st April 2019)

<sup>219</sup> Ibid.

<sup>220</sup> Ibid.

<sup>221</sup> Naz Foundation Vision <http://guides.womenwin.org/ee/impact/case-studies/the-naz-foundation> (accessed on 21st April 2019)

<sup>222</sup> Young People's Initiative <https://letzchange.org/nonprofits/the-naz-foundation-india-trust> (accessed on 21st April 2019)

- ii. The Care Home programme will focus on building the vocational skills of the older children to help them reintegrate into society and enable them to be financially independent.<sup>223</sup>
- iii. Naz aims to reach around 30,000 adolescents through YPI and pilot and expand the workplace readiness programme for the YPI alumni.

## **PAST YEAR OBJECTIVES:**

### Young People's Initiative (YPI)-

- i. Reach out to 15,000 girls through the YPI programme across Delhi, Maharashtra, and Tamil Nadu.<sup>224</sup>
- ii. Through the YPI partnerships model engage with two additional NGO partners to implement the programme in Tamil Nadu, which will raise the total number of YPI Partnerships to three organizations.

### Care Home-

- i. To continue to provides for the educational, nutritional, medical, and recreational as well as psychosocial needs of the children at the Care Home for kids with HIV.<sup>225</sup>
- ii. Constructively plan & execute the phase-out process for the care home wards who are adults, already or approaching adulthood.<sup>226</sup>

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<sup>223</sup> Young People's Initiative <https://letzchange.org/nonprofits/the-naz-foundation-india-trust> (accessed on 21st April 2019)

<sup>224</sup> Naz Foundation Trust <https://guidestarindia.org/Organisation.aspx?ccreg=496> (accessed on 21st April 2019)

<sup>225</sup> Ibid.

<sup>226</sup> Ibid.



## **PAST AND CURRENT YEAR ACHIEVEMENTS**

- i. Kalyani Subramanyam, Program Director, was appointed to the International Safeguarding Children in Sport Advisory Board.<sup>227</sup>
- ii. Naz Foundation advocacy initiative that led the nationwide movement to fight for the rights of the LGBTQ community resulted in decriminalizing homosexuality under section 377 of the Indian Penal Code in India.<sup>228</sup>
- iii. Anjali Gopalan, Founder and Executive Director, was awarded Justice Sunanda Bhandare Award in appreciation of Naz Foundation's sustained campaign on advocacy, empowering young adolescent girls through sport and educating the public about the prevention of transmission of HIV/AIDS.<sup>229</sup>

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<sup>227</sup>Naz Foundation Trust <https://guidestarindia.org/Organisation.aspx?ccreg=496> (accessed on 21st April 2019)

<sup>228</sup> Ibid.

<sup>229</sup> Ibid.

# **NAZ FOUNDATION v. GOVERNMENT OF NCT OF DELHI AND OTHERS 2009**

## **PROCEDURE OF THE CASE**

In 2001 a writ petition was filed by Naz Foundation, an NGO working in the public health field, to challenge the constitutionality of Section 377 of the Indian Penal Code, which criminalized as “unnatural offences” consensual oral and anal sex between adults in private. In 2004, the Delhi High Court dismissed the writ petition on the ground that it could not hear an academic challenge to the constitutionality of the legislation. Naz Foundation appealed to the Supreme Court, which held that the matter should be heard and remanded it for consideration.<sup>230</sup> Voices against 377, a coalition of associations representing the human rights of children, women and LGBT people, intervened in support of the petitioner. The respondent, Union of India, was represented by the Ministry of Home Affairs and the Ministry of Health & Family Welfare. However, the government position split and the Ministry of Health & Family Welfare argued in favour of the petitioner.<sup>231</sup>

## **ISSUE OF THE CASE**

The main issue was whether Section 377 infringed fundamental rights guaranteed under the Constitution of India.

From the Constitution of India, Articles 14 equality and equal protection, Article 15 non-discrimination and Article 21 right to life and liberty, were taken into account.<sup>232</sup>

## **FACTS OF THE CASE**

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<sup>230</sup> Navtej Singh Johar & Ors. v. Union of India thr. Secretary Ministry of Law and Justice, W. P. (Crl.) No. 76 of 2016 <https://indiankanoon.org/doc/119980704/> (accessed on 25th April)

<sup>231</sup> Naz Foundation v. Govt. of NCT of Delhi WP(C) No.7455/2001 of 2009 <https://www.escribnet.org/caselaw/2009/naz-foundation-v-government-nct-new-delhi-and-others-wpc-no-74552001> (accessed on 21st April 2019)

<sup>232</sup> Ibid.

The Naz Foundation India, a non-governmental organization committed to HIV/AIDS intervention and prevention, filed a Public Interest Litigation in the Delhi High Court challenging the constitutionality of Section 377 of the India Penal Code, which makes it illegal to engage in any "unnatural" sexual act, defined as sex other than heterosexual intercourse. The Delhi High Court dismissed the original writ of petition in 2004 for lack of a cause of action. However, on civil appeal the Supreme Court of India set aside the dismissal and ordered the Delhi High Court to hear the petition on the merits.<sup>233</sup> The petitioner argued that Section 377 encouraged discriminatory attitudes, abuse, and harassment of the gay community, and significantly impaired HIV/AIDS prevention efforts and access to treatment. The National AIDS Control Organization (NACO) under the Ministry of Health supported the petitioners in their response.

The Court found in favour of the petitioner and held that Section 377 was unconstitutional. First, the Court found it violated the right to dignity and privacy by citing the Universal Declaration of Human Rights and European Court of Human Rights as well as the case of Francis Coralie Mullin<sup>234</sup> in which the Indian Constitutional Court defined dignity as requiring adequate shelter, nutrition, clothing as well as the ability to freely socialize. Next, the Court held that under Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Article 21 of the Indian Constitution, the state must fulfill "everyone's right to access the highest attainable standard of health" as part of the right to life.<sup>235</sup> The Court agreed that criminalization of homosexual conduct pushes homosexuals into isolation and impedes access to adequate information for prevention of HIV/AIDS.

The Court also cited General Comment to the ICESCR in defining the right to adequate health as including the right to control one's health and body, including sexual reproductive freedom, the right to be free from interference, and most importantly non-

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<sup>233</sup> Naz Foundation v. Govt. of NCT of Delhi WP(C) No.7455/2001 of 2009 <https://www.escri-net.org/caselaw/2009/naz-foundation-v-government-nct-new-delhi-and-others-wpc-no-74552001> (accessed on 21st April 2019)

<sup>234</sup> Francis Coralie Mullin vs The Administrator, Union 1981 AIR 746, 1981 SCR (2) 516 <https://indiankanoon.org/doc/78536/> (accessed on 21st April 2019)

<sup>235</sup> Kapur, R NUJS Citation Standard and StyleSheet Law Review, Vol. II, No. 3, July-September 2009, p. 382.

discrimination and equal treatment with regards to accessing healthcare.<sup>236</sup> Finally, the Court cited numerous other international treaties and agreements to which India is a party that specifically declare a commitment on the part of India to address the needs and rights of groups with a high-risk of contracting HIV/AIDS.<sup>237</sup> After engaging in an analysis of the purpose of the law and the interests of state as weighed against the rights of the petitioners, the Court found no legitimate state interest in upholding the statute and found the classification of homosexuals to be in violation of the Constitution. Further, in light of the evolution of domestic and international law regarding privacy, dignity, and the right to health as well as changing social attitudes and understandings of sexual orientation, the Court found section 377 to be an unconstitutional infringement on fundamental rights.

### **SIGNIFICANCE OF THE CASE**

Advocates in India have hailed this decision as a major victory for LGBT rights and the right to adequate health, including information on HIV/AIDS and treatment in India. The reasoning of the Court makes the critical linkages between non-discrimination and access to adequate healthcare and how stigma and marginalization can impede access to substantive ESC rights. The Secretary of the Department of AIDS Control, K. Sujatha Rao, has declared that the decision is expected to increase the effectiveness of prevention programs and Director of the Lawyers Collective and current UN Special Rapporteur on the Right to Health, has applauded the Court for "affirming that fundamental rights of sexual minorities cannot be trumped by vague notions of culture and morality."<sup>238</sup>

### **REASONING OF THE COURT**

Naz Foundation presented evidence that Section 377, which had been interpreted by Indian courts to cover both oral and anal sex regardless of the sex of the partners, caused discrimination and stigma against gay, transgenders, and "men who have sex with men" (MSM) communities. As a result of Section 377, individuals were subjected to police

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<sup>236</sup>International Covenant on Economic, Social and Cultural Rights 2200A (XXI) of 16 December 1966

<sup>237</sup> Kapur, R NUJS Citation Standard and StyleSheet Law Review, Vol. II, No. 3, July-September 2009

<sup>238</sup> Naz Foundation v. Government of NCT of Delhi <https://www.escri-net.org/caselaw/2009/naz-foundation-v-government-nct-new-delhi-and-others-wpc-no-74552001> (accessed on 12th April)

abuse and violence.<sup>239</sup> Section 377 impeded Naz Foundation’s public health efforts, particularly in the field of HIV/AIDS prevention. Naz Foundation argued that the right to privacy was implicit in Article 21 and guarantee of the right to life and liberty and that private consensual sexual conduct was included within this right to privacy. The petitioner further maintained that Section 377 violated Article 14 that is equal protection because it failed the rational nexus test and created an arbitrary distinction between procreative and non-procreative sexual acts. Finally, the petitioner argued that Section 377 discriminated on the basis of sexual orientation and thus violated Article 15.

Voices against 377 submitted evidence of the extreme ostracism of the transgender community and used affidavits, media reports, and court cases to document exploitation, mistreatment, and violence at the hands of both State and non-State actors. Voices against 377 also introduced into evidence a variety of law review articles and public statements by Indian officials. Many of these exhibits were quoted or referred to throughout the judgment.<sup>240</sup>

The Ministry of Home Affairs justified retention of Section 377 on the grounds of protection of health and morals. It also asserted that Section 377 was mostly invoked in cases of child sexual abuse, not adult consensual sex, and submitted that removing the provision would “open flood gates of delinquent behavior” and could be “misconstrued as providing unfettered license for homosexuality”. With respect to morality, the Ministry of Home Affairs argued that “the legal conception of crime depends upon political as well as moral considerations” and that law could not run separately from society. It claimed that India was a more conservative society than other countries that had

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<sup>239</sup> Naz Foundation v. Government of NCT of Delhi <https://www.escri-net.org/caselaw/2009/naz-foundation-v-government-nct-new-delhi-and-others-wpc-no-74552001> (accessed on 12th April)

<sup>240</sup> Navtej Singh Johar & Ors. v. Union of India thr. Secretary Ministry of Law and Justice, W. P. (Crl.) No. 76 of 2016 <https://indiankanoon.org/doc/119980704/> (accessed on 12th April)

decriminalized homosexual conduct and that Indian society had yet to demonstrate “readiness or willingness to show greater tolerance”.<sup>241</sup>

The Court first discussed the protection of dignity, autonomy, and privacy. It found that although there was no specific privacy provision in the Constitution, the right had been read into Article 21. It reviewed American jurisprudence on privacy, beginning with *Griswold v. State of Connecticut* and continuing through *Lawrence v. Texas*<sup>242</sup>. Quoting Justice Ackermann in *National Coalition for Gay and Lesbian Equality v. Minister of Justice*<sup>243</sup>, the Court observed that expressing one’s sexuality and forming sexual relationships was “at the core of this area of private intimacy”.

The Court accepted that sexual conduct was about identity as well as privacy. Relying on a variety of sources, including the Yogyakarta Principles,<sup>244</sup> the Court noted that “the sense of gender and sexual orientation of the person are so embedded in the individual that the individual carries this aspect of his or her identity wherever he or she goes”.<sup>245</sup> The Court concluded that Section 377 “denies a person’s dignity and criminalizes his or her core identity solely on account of his or her sexuality”. This criminalization of identity denied “a gay person a right to full personhood which is implicit” in the notion of life under Article 21.<sup>246</sup>

The Court was concerned with the stigmatizing effects of Section 377 even when it was not enforced. Referring to evidence that showed Section 377 was used to brutalize and harass, the Court compared the criminalization of identity to the Criminal Tribes Act

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<sup>241</sup> *Naz Foundation v. Government of NCT of Delhi and Others* WP(C) No.7455/2001  
<http://lobis.nic.in/dhc/> (accessed on 12th April)

<sup>242</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003) No. 02-102. Argued March 26, 2003-Decided June 26, 2003  
<https://supreme.justia.com/cases/federal/us/539/558/> (accessed on 12th April)

<sup>243</sup> Gregory R. Kilpatrick, *The National Coalition for Gay and Lesbian Equality v. The Minister of Justice: A New Era in South African Sexual Orientation Protection*, 24 N.C. J. Int'l L. & Com. Reg. 699 (1998).  
<https://scholarship.law.unc.edu/ncilj/vol24/iss3/6> (accessed on 12th April)

<sup>244</sup> Yogyakarta Principle  
[http://data.unaids.org/pub/manual/2007/070517\\_yogyakarta\\_principles\\_en.pdf](http://data.unaids.org/pub/manual/2007/070517_yogyakarta_principles_en.pdf) (accessed on 12th April)

<sup>245</sup> *Ibid.*

<sup>246</sup> *Naz Foundation v. Government of NCT of Delhi and Others* WP(C) No.7455/2001  
<http://lobis.nic.in/dhc/> (accessed on 12th April)

1871. “These communities and tribes were deemed criminal by their identity, and mere belonging to one of those communities rendered the individual criminal.”<sup>247</sup>

When a provision infringes a fundamental right, it must satisfy the compelling State interest test. The Court held that the enforcement of public morality did not amount to a compelling State interest that justified invading the privacy of adults engaged in consensual sex in private who had no intention to cause harm. In so holding, it relied on O’Connor’s concurrence in *Lawrence*,<sup>248</sup> the European Court cases, the Wolfenden Committee Report,<sup>249</sup> and India’s Constitutional Assembly Debates. “Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of morality that can pass the test of compelling state interest, it must be constitutional morality and not public morality.” The Constitution, the Court recalled, recognized, protected, and celebrated diversity. “To stigmatize or to criminalize homosexuals only on account of their sexual orientation would be against the constitutional morality.”<sup>250</sup>

The Court next found that Section 377 violated the guarantee of equality under Article 14 and the guarantee of non-discrimination under Article 15. For a legislative classification to be constitutional, it must be “founded on an intelligible differentia” and have a rational relation to the objective sought. The Court held that the law failed this test because its objective was irrational, unjust, and unfair. Under Article 15, the Court concluded that “sexual orientation” was analogous to the protected ground of “sex”.<sup>251</sup> Because Article 15 prohibited private acts of discrimination, the Court held that discrimination on the

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<sup>247</sup> *Naz Foundation v. Government of NCT of Delhi* <https://www.escri-net.org/caselaw/2009/naz-foundation-v-government-nct-new-delhi-and-others-wpc-no-74552001> (accessed on 12th April)

<sup>248</sup> *Lawrence v. Texas* (02-102) 539 U.S. 558 (2003) 41 S. W. 3d 349, reversed and remanded. <https://www.law.cornell.edu/supct/html/02-102.ZC.html> (accessed on 12th April)

<sup>249</sup> Wolfenden Committee Report *Brit. J. vener. Dis.* (1957), 33, 205. <https://sti.bmj.com/content/sextrans/33/4/205.full.pdf> (accessed on 12th April)

<sup>250</sup> *Naz Foundation v. Government of NCT of Delhi and Others* WP(C) No.7455/2001 <http://lobis.nic.in/dhc/> (accessed on 12th April)

<sup>251</sup> *Ibid.*

ground of sexual orientation was impermissible “even on the horizontal application of the right”.<sup>252</sup>

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<sup>252</sup> Naz Foundation v. Government of NCT of Delhi and Others WP(C) No.7455/2001 <http://lobis.nic.in/dhc/> (accessed on 12th April)



## **SURESH KUMAR KAUSHAL v NAZ FOUNDATION 2013**

### **BACKGROUND**

T.H Green said “It is the business of the State to maintain conditions without which a free exercise of the human faculties is impossible.” The Indian Constitution is first and foremost a social document.<sup>253</sup> Fundamental Rights and Directive Principles of State Policy are the conscience of the Indian Constitution as pointed out by Granville Austin in his book “The Indian Constitution-Cornerstone of a Nation”.<sup>254</sup> The Fundamental Rights are in general, those rights of citizens or those negative obligations on the part of the State not to encroach on individual liberty. The idea of Fundamental Rights was first conceptualized in the Bill of Rights of the American Constitution and has been adopted into the Indian one. The State, in addition to obeying the Constitution’s negative orders not to interfere with the liberties of the citizens must satisfy its commitment to ensure that the rights of the citizens are not being infringed by the society.

This case deals with Article 14, 15 and 21 which envisage equality, anti-discrimination on the grounds of sex and life and personal liberty respectively. The project concerns itself with the topic of gay rights or to be more specific LGBT (Lesbians, Gays, Bisexuals and Transgender) rights, which has been one of the themes of heated discussion and debate across the globe.

The matter went to appeal to the Supreme Court of India in **Suresh Kumar Koushal and another v NAZ Foundation and Others**<sup>255</sup> where the Supreme Court struck down the decision by the High Court in the Naz Foundation Case. This case deals with the constitutionality of Section 377 of the Indian Penal Code which criminalizes sexual

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<sup>253</sup> Granville Austine, 2000 Indian Constitution-Cornerstone of a Nation Oxford University Press, USA p.50

<sup>254</sup> Ibid.

<sup>255</sup> CIVIL APPEAL 10972 OF 2013 [https://commons.wikimedia.org/wiki/File:Section\\_377\\_-\\_CIVIL\\_APPEAL\\_NO.10972\\_OF\\_2013\\_Judgement.pdf](https://commons.wikimedia.org/wiki/File:Section_377_-_CIVIL_APPEAL_NO.10972_OF_2013_Judgement.pdf) (accessed 15th April 2019)

activity ‘against the order of nature’ that is criminalizes any sexual activity other than the heterosexual penile-vaginal.<sup>256</sup>

Homosexuality, until very recently, was considered to be an aberrance or abnormality and for this very reason, transgender, gay people were subjected to torture, discipline and even corrective rapes to cure them of it. The legislative history of Section 377 suggests that homosexuality and sodomy as a crime was first recorded or chronicled in Fleta 1920 in England and later in Britton, 1300. Such acts later were penalized under the Buggery Act, 1553,<sup>257</sup> which prescribed death penalty by way of hanging for the perpetrators and it was re-enacted by Queen Elizabeth I in the year 1563. The offense of sodomy was first introduced in India through the Act for Improving the Administration of Criminal Justice in the East Indies. In 1837, a Draft Penal Code was prepared where Clauses 361 and 362 dealt with ‘Unnatural sexual offenses’ which were later incorporated in Section 377 as a part of the Indian Penal Code under offenses with respect to human body and under a separate heading of ‘unnatural offenses’ and reads as follows<sup>258</sup>

Section 377 Unnatural Offences – Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

## **FACTS OF THE CASE**

The NAZ Foundation (India) Trust is a New Delhi based NGO that has been working on HIV/AIDS and sexual health from 1994 onwards. They filed a writ petition in the Delhi High Court challenging the constitutional validity of Section 377 of the Indian Penal Code. The petitioner contended that Section 377 encroached upon Articles 14, 15,

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<sup>256</sup> Naz Foundation v. Govt. of NCT of Delhi WP(C) No.7455/2001 of 2009 <https://www.escri-net.org/caselaw/2009/naz-foundation-v-government-nct-new-delhi-and-others-wpc-no-74552001> (accessed 27th April 2019)

<sup>257</sup> The Buggery Act 1553 <https://www.bl.uk/collection-items/the-buggery-act-1533>(accessed 27th April 2019)

<sup>258</sup> CIVIL APPEAL 10972 OF 2013 [https://commons.wikimedia.org/wiki/File:Section\\_377\\_-\\_CIVIL\\_APPEAL\\_NO.10972\\_OF\\_2013\\_Judgement.pdf](https://commons.wikimedia.org/wiki/File:Section_377_-_CIVIL_APPEAL_NO.10972_OF_2013_Judgement.pdf) (accessed 27th April 2019)

19 and 21 of the Constitution of India and also that the section ought not to criminalize consensual penile non-vaginal sex between two consenting adults of the same sex.<sup>259</sup>

In a milestone judgment conveyed on July 2, 2009, the Delhi High Court decided that Section 377 of the Indian Penal Code, 1860 disregarded various fundamental rights, including the right to privacy and right to dignity under the fundamental right to life and liberty that is Article 21, the right to equality, Article 14 and forbiddance of separation on grounds of sex that is Article 15.

The said decision was appealed against in the Supreme Court of India in the Suresh Kumar Koushal and another v Naz Foundation and Others case and it was held that the Delhi High Court was wrong in its findings and was also wrong in reading down the section to allow consensual homosexual activities between two adults of the same sex.<sup>260</sup>

The decision was appealed to the Supreme Court and attracted a large number of interveners. Intervenors supporting the Appellants included organizations and individuals who have stated that they had an interest in protecting the moral, cultural and religious values of Indian society. Intervenors for the Respondents are composed of individuals and organizations arguing that Section 377 caused harm to the LGBT community and homosexual men in particular.

The Appellants denied that Section 377 was unconstitutional and made a variety of submissions as to why it was not:

- I. The High Court committed a severe error by declaring Section 377 to violate Articles 14, 15 and 21 of the Constitution as it ignored the lack of any foundational facts in the Respondent's writ which would be necessary for pronouncing upon the constitutionality of any statutory provision. The

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<sup>259</sup> Naz Foundation v. Govt. of NCT of Delhi WP(C) No.7455/2001 of 2009 <https://www.escribnet.org/caselaw/2009/naz-foundation-v-government-nct-new-delhi-and-others-wpc-no-74552001> (accessed 27th April 2019)

<sup>260</sup> CIVIL APPEAL 10972 OF 2013 [https://commons.wikimedia.org/wiki/File:Section\\_377\\_-\\_CIVIL\\_APPEAL\\_NO.10972\\_OF\\_2013\\_Judgement.pdf](https://commons.wikimedia.org/wiki/File:Section_377_-_CIVIL_APPEAL_NO.10972_OF_2013_Judgement.pdf) (accessed 27th April 2019)

documentary evidence supplied in its place was not a basis for finding that homosexuals were singled out for discriminatory treatment by the law.<sup>261</sup>

- II. The statistics incorporated in the Respondent's petition were insufficient for finding that Section 377 adversely affected the control of HIV AIDS and that decriminalization would reduce the number of such cases. The Appellants also argued that the data presented was manufactured and fraudulent.<sup>262</sup>
- III. Section 377 is entirely gender neutral and covers voluntary acts of carnal intercourse irrespective of the gender of persons committing the act. As no specific class is targeted by the law, no classification has been made, therefore rendering the finding of the High Court that it offended Article 14 to be without basis.<sup>263</sup>
- IV. Section 377 does not violate the right to privacy and dignity under Article 21 and the right to privacy does not include the right to commit any offence as defined under Section 377 or any other section.<sup>264</sup>
- V. If the declaration were approved, India's social structure and the institution of marriage would be detrimentally affected and it would cause young people to become tempted towards homosexual activities.<sup>265</sup>
- VI. Courts by their very nature should not undertake the task of legislating which should be left to Parliament. The High Court was unsure whether it was severing the law or reading it down and, as long as the law is on the statute book, there is a

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<sup>261</sup> S.M Akali, Learning from Suresh Kumar Koushal v. Naz Foundation Through Introspection, Inclusion, and Intersectionality: Suggestions from Within Indian Queer Justice Movements <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1359&context=bglj> (accessed on 28th April 2019)

<sup>262</sup> Ibid.

<sup>263</sup> Ibid.

<sup>264</sup> Ibid.

<sup>265</sup> Ibid

constitutional presumption in its favour. Whether a law is moral or immoral is a matter that should be left to Parliament to decide.<sup>266</sup>

## MAJOUR ISSUES OF THE COURT

The major issues that emerged before the Court for its attention and consideration involved the violation of Fundamental Rights under Article 14, 15 and 21 of the Constitution of India.<sup>267</sup>

- I. Whether Section 377 violates any of the provisions of Part III of the Constitution of India and therefore whether it is constitutionally valid or not?
- II. Whether Section 377, in so far it criminalizes consensual sexual activity of two adults of the same sex in private, is violating Article 21 that is Right to life and personal liberty guaranteed by the Constitution of India?

## DECISION OF THE SUPREME COURT

The panel of two Supreme Court judges deciding the case allowed the appeal and overturned the High Court's previous decision, finding its declaration to be "legally unsustainable". The Supreme Court ultimately found that Section 377 IPC does not violate the Constitution and dismissed the writ petition filed by the Respondents. Regarding its power to rule on the constitutionality of a law, the Supreme Court acknowledged that it and the High Court are empowered to declare as void any law, whether enacted prior to the enactment of the Constitution or after.<sup>268</sup> However, it noted

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<sup>266</sup> S.M Akali, Learning from Suresh Kumar Koushal v. Naz Foundation Through Introspection, Inclusion, and Intersectionality: Suggestions from Within Indian Queer Justice Movements <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1359&context=bglj> (accessed on 28th April 2019)

<sup>267</sup> Notes of proceedings Suresh Kumar Koushal v. Naz Foundation [http://orinam.net/content/wpcontent/uploads/2012/04/Naz\\_SC\\_Transcript\\_2012\\_final.pdf](http://orinam.net/content/wpcontent/uploads/2012/04/Naz_SC_Transcript_2012_final.pdf) (accessed on 28th April 2019)

<sup>268</sup> "Suresh Kumar Kaushal v. Naz Foundation: A Critical Analysis" available at <https://www.lawctopus.com/academike/suresh-kumar-koushal-vs-naz-foundation-critical-analysis/> (accessed on 28th April 2019)

that there is a presumption of constitutionality in favour of all laws, including pre-constitutional laws, as the Parliament is deemed to act for the benefit of the people.

The Court noted that the doctrine of severability seeks to enable unconstitutional portions of laws to be severed from the constitutional elements of the law in question with the remainder retained and that, alternatively, that Court has the option of “reading down” a law to prevent it from being rendered unconstitutional, whilst refraining from changing the essence of the law. With regard to Section 377 the court observed that whilst it and the High Court were able to review the constitutionality of the law, and were able to strike it down to the extent of its inconsistency with the Constitution, the analysis must be guided by the presumption of constitutionality and the courts must exercise self-restraint.<sup>269</sup> The court concluded that unless a clear constitutional violation was proved, the court was not empowered to invalidate the law.

The Supreme Court drew attention to the large number of amendments to the Indian Penal Code since its adoption in 1860, totalling around 30 amendments. The court recalled that Section 377, along with the rest of the statute, was originally passed in 1860. In explaining the development of Section 377, the court referenced numerous section 377 related cases dating back as far as the nineteenth century. The court noted that the previous cases referenced all related to nonconsensual situations and that no uniform test could be ascertained from them to classify acts would fall under Section 377. Rather, the court stated that acts can only be determined with reference to the act itself and the circumstances in which it is executed. Despite this, the court stated that in light of the legislative history of Section 377, it would still apply to same-sex couples irrespective of age and consent. The Court nevertheless maintained that:

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<sup>269</sup> Suresh Kumar Kaushal v. Naz Foundation Civil Appeal No. 10972 of 2013 <https://indiankanoon.org/doc/58730926/> (accessed on 28th April 2019)

“Section 377 does not criminalize a particular people or identity or orientation. It merely identifies certain acts which if committed would constitute an offence. Such a prohibition regulates sexual conduct regardless of gender identity and orientation”.<sup>270</sup>

Regarding whether the High Court was justified in entertaining the challenge to Section 377 despite the Naz Foundation not having laid a factual foundation to support its challenge, the Supreme Court stated that the party had “miserably failed” to provide the particulars of the discriminatory attitude exhibited by state agencies towards sexual minorities and of their consequent denial of basic human rights. The Court held that the details provided to the High Court were thus “wholly insufficient for recording a finding that homosexuals, gays, etc., are being subjected to discriminatory treatment”.

With little analysis, the court held that:

“Those who indulge in carnal intercourse in the ordinary course and those who indulge in canal intercourse against the order of nature constitute different classes [emphasis added] and the people falling in the latter category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification”.<sup>271</sup>

In reviewing the reading down of the Section 377 by the High Court, the Supreme Court stated that the High Court had overlooked the fact that “a miniscule fraction of the country’s population constitute lesbians, gays, bisexuals or transgenders” and that over the last 150 years, fewer than 200 persons had been prosecuted under Section 377, concluding from this that “this cannot be made sound basis for declaring that section ultra vires the provisions of Articles 14, 15 and 21 of the Constitution.”<sup>272</sup> The court also regarded the discriminatory treatment complained of by the Naz Foundation as a result of

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<sup>270</sup> Notes of proceedings Suresh Kumar Koushal v. Naz Foundation  
[http://orinam.net/content/wpcontent/uploads/2012/04/Naz\\_SC\\_Transcript\\_2012\\_final.pdf](http://orinam.net/content/wpcontent/uploads/2012/04/Naz_SC_Transcript_2012_final.pdf) (accessed on 12th April)

<sup>271</sup> Suresh Kumar Kaushal v. Naz Foundation Civil Appeal No. 10972 of 2013  
<https://indiankanoon.org/doc/58730926/> (accessed on 12th April)

<sup>272</sup> Notes of proceedings Suresh Kumar Koushal v. Naz Foundation  
[http://orinam.net/content/wpcontent/uploads/2012/04/Naz\\_SC\\_Transcript\\_2012\\_final.pdf](http://orinam.net/content/wpcontent/uploads/2012/04/Naz_SC_Transcript_2012_final.pdf) (accessed on 12th April)

Section 377 as being neither mandated nor condoned by the provision itself and the fact that the police authorities and others misuse Section 377 was not a reflection of the vires of the provision but instead may simply be a relevant factor for Parliament to consider whilst judging whether to amend Section 377.

Regarding the application of Article 21 of the Constitution, the Supreme Court stated that the law must be competently legislated whilst also being just, fair and reasonable, which give rise to notions of legitimate state interest and the principle of proportionality. The court specifically noted that the right to live with dignity had been recognized as a part of Article 21. In assessing the High Court's ruling that Section 377 violated the right to privacy, autonomy and dignity, the Supreme Court spent little time analyzing the application of Article 21 to Section 377, instead criticizing the High Court for relying too extensively upon judgments from other jurisdictions in its anxiety to protect the "so-called rights of LGBT persons". It concluded that "Section 377 does not suffer from the vice of unconstitutionality" with no further elaboration.<sup>273</sup>

The judges noted that whilst the court found that Section 377 was not unconstitutional, the legislature was still free to consider the desirability and propriety of deleting or amending the provision.

## **ARGUMENTS AND ANALYSIS OF THE CASE**

Naz Foundation case is an earnest emphasis of the vision of India's founding fathers to build an 'inclusive' and 'tolerant' republic. The decision is a reminder that the Indian Constitution is a vibrant, living document and its wide insurances must be alterably translated to include new circumstances and tests.<sup>274</sup> It was argued by the Respondents that Section 377 is based on traditional Judeo-Christian moral and ethical standards and is being used to legitimize discrimination against sexual minorities, that is LGBTs. They

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<sup>273</sup> Notes of proceedings Suresh Kumar Koushal v. Naz Foundation  
[http://orinam.net/content/wpcontent/uploads/2012/04/Naz\\_SC\\_Transcript\\_2012\\_final.pdf](http://orinam.net/content/wpcontent/uploads/2012/04/Naz_SC_Transcript_2012_final.pdf) (accessed on 12th April)

<sup>274</sup> Vikram Raghavan, 'Navigating the Noteworthy and Nebulous in NAZ Foundation' 2 NUJS Law Review 399 (2009) <http://nujlawreview.org/wp-content/uploads/2016/12/vikram-raghavan.pdf> (accessed on 27th April 2019)



also contended that the section is detrimental to people's lives and public health because of its direct impact on the lives of the homosexuals and serves as a weapon for police abuse.<sup>275</sup>

The petitioners argued that Section 377, on the face of it, does not mention or classify any particular group or gender and hence is not violative of Article 14 and 15 and 21 respectively. The Court accepted their arguments and held that Section 377 is not violative of Articles 14, 15 and 21 and that carnal intercourse, as intended and defined by the petitioners to mean unnatural lust ought to be punished. Justice Singhvi also said that Section 377 is pre-constitutional legislation and if it were violative of any of the rights guaranteed under Part III, then the Parliament would have noticed the same and repealed the section long ago.<sup>276</sup>

Based on this reasoning, it declared the section to be constitutionally valid. He also said that doctrine of severability and the practice of reading down a particular section flows from the presumption of constitutionality and that in the said case, the Delhi High Court's decision to read down the section was wrong because there is no part of the section that can be severed without affecting the section as a whole which also happens to be the only law which governs cases of paedophilia and tyke sexual abuses and assaults. So, the Supreme Court held that Section 377 of the Indian Penal Code does not suffer from any constitutional infirmity and left the matter to the competent legislature to consider the desirability and legitimacy of deleting the Section from the statute book or altering the same to allow consensual sexual activity between two adults of the same sex in private.<sup>277</sup>

After analyzing the decision it can be concluded that the Supreme Court has not acted wisely while interpreting Section 377. The Supreme Court of India is well known for protecting the rights of not only its citizens but also of aliens. Article 21 of the

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<sup>275</sup> CIVIL APPEAL 10972 OF 2013 [https://commons.wikimedia.org/wiki/File:Section\\_377\\_-\\_CIVIL\\_APPEAL\\_NO.10972\\_OF\\_2013\\_Judgement.pdf](https://commons.wikimedia.org/wiki/File:Section_377_-_CIVIL_APPEAL_NO.10972_OF_2013_Judgement.pdf) (accessed on 27th April 2019)

<sup>276</sup> Notes of proceedings Suresh Kumar Koushal v. Naz Foundation [http://orinam.net/content/wpcontent/uploads/2012/04/Naz\\_SC\\_Transcript\\_2012\\_final.pdf](http://orinam.net/content/wpcontent/uploads/2012/04/Naz_SC_Transcript_2012_final.pdf) (accessed on 27th April 2019)

<sup>277</sup> Vikram Raghavan, 'Navigating the Noteworthy and Nebulous in NAZ Foundation' 2 NUJS Law Review 399 (2009) <http://nujlawreview.org/wp-content/uploads/2016/12/vikram-raghavan.pdf> (accessed on 27th April 2019)

Constitution is a proof to this where the Supreme Court has widely interpreted it giving numerous rights not only to the citizens of India but also aliens and thus upholding the human rights jurisprudence. The Supreme Court has always acted as an anchor sheet for human rights.<sup>278</sup> But this decision of the Supreme Court was truly a regrettable one, a step towards backwardness for India where it has departed from its long tradition of protecting the human rights.

To criminalize private and consensual sex violates the right to privacy enshrined in Article 21 of the Constitution. Homosexuality is prevalent in Indian Society since time immemorial and one cannot shut eyes to this reality. Sexual orientation is not acquired willfully by any human being but it is natural and so our society has to accept this.<sup>279</sup>

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<sup>278</sup> Notes of proceedings Suresh Kumar Koushal v. Naz Foundation  
[http://orinam.net/content/wpcontent/uploads/2012/04/Naz\\_SC\\_Transcript\\_2012\\_final.pdf](http://orinam.net/content/wpcontent/uploads/2012/04/Naz_SC_Transcript_2012_final.pdf) (accessed on 27th April 2019)

<sup>279</sup> Ibid.

# **NAVTEJ SIGH JOHAR v. UNION OF INDIA 2018**

## **BACKGROUND**

### **Constitutionality of Section 377 of the IPC:**

Section 377 of the IPC categorized consensual sexual intercourse between same sex people as an “unnatural offence” which is “against the order of the nature”. It prescribed a punishment of ten years imprisonment.<sup>280</sup> The provision is a Victorian era law, which survived into the 21<sup>st</sup> century. Interestingly, about 123 countries around the world have never penalized or have decriminalized homosexuality.

## **ISSUE OF THE CASE:**

- I. Was the verdict of the Supreme Court Judgment in the Suresh Kumar Kaushal case in lieu with the understanding of social morality?<sup>281</sup>
- II. Whether Section 377 violates Article 14 and 15 by allowing discrimination on the basis of “sexual orientation” and “gender identity”?<sup>282</sup>

The Supreme Court reversed the Delhi High Court verdict in 2013 in its Suresh Koushal judgement and held that the decision of decriminalizing homosexuality can only be done by the Parliament and not by the Court. It also held that Section 377 criminalizes certain acts and not any particular class of people. It also alluded to the minuscule number of people who were members of the LGBT community and the fact that only a fraction amongst them had been prosecuted under Section 377.<sup>283</sup> Several curative petitions were filed challenging the Supreme Court judgement. While the curative petitions against Suresh Koushal judgement were pending. Five individuals from the LGBT communities-

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<sup>280</sup> Navtej Johar v. Union of India <https://www.firstpost.com/india/section-377-verdict-navtej-johar-vs-union-of-india-opens-doors-for-broader-rights-for-the-lgbtq-community-5137251.html> (accessed on 28th April 2019)

<sup>281</sup> “Navtej Johar, a verdict for all time.” <https://www.thehindu.com/opinion/op-ed/navtej-johar-a-verdict-for-all-times/article25866598.ece> (accessed on 28th April 2019)

<sup>282</sup> Ibid.

<sup>283</sup> Ibid.

Navtej Singh Johar, Ritu Dalmia , Ayesha Kapur, Aman Nath and Sunil Mehra filed a fresh writ petition for scrapping Section 377 IPC in so far as it criminalized consensual sex between same-sex individuals.

The Supreme Court on January 5, 2018 formed a constitutional bench for hearing the challenge of Section 377 in a comprehensive manner, even though the curative petitions were pending before the Court. The five Judge bench of Chief Justice Dipak Mishra, Justice A.M Khanwilkar, Justice D.Y Chandrachud, Justice R.F Nariman and Justice Indu Malhotra heard the matter from July 10, 2018.<sup>284</sup>

On 6<sup>th</sup> September, 2018 the five Judge Bench partially struck down Section 377 of the Indian Penal Code, decriminalizing same-sex relations between consenting adults. LGBT individuals are now legally allowed to engage in consensual intercourse. The Courts has upheld provisions in Section 377 that criminalize non-consensual acts or sexual acts performed on animals.<sup>285</sup>

The judgements unanimously cited fundamental rights violation in reading down Section 377. They found that Section 377 discriminates against individuals on the basis of their sexual orientation and or gender identity, violating Article 14 and 15 of the Constitution. Further, they ruled that Section 377 violates the rights to life, dignity and autonomy of personal choice under Article 21. They found that it inhibits an LGBT individual's ability to fully realize their identity, by violating the right to freedom of expression under Article 19.

## **FACTS OF THE CASE**

The central issue of the case was the constitutional validity of Section 377 of the Indian Penal Code, 1860 insofar as it applied to the consensual sexual conduct of adults of the same sex in private. Section 377 was titled 'Unnatural Offences' and stated that “ however voluntarily has carnal intercourse against the order of nature with any man,

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<sup>284</sup> “Navtej Johar, a verdict for all time.” <https://www.thehindu.com/opinion/op-ed/navtej-johar-a-verdict-for-all-times/article25866598.ece> (accessed on 28th April 2019)

<sup>285</sup> “Case Analysis of Navtej Singh Johar v. Union of India” <https://globalfreedomofexpression.columbia.edu/cases/navtej-singh-johar-v-union-india/> (accessed on 28th April 2019)

woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to a fine.”<sup>286</sup>

The issue in the case originated in 2009 when the Delhi High Court, in the case of Naz Foundation v. Govt. of N.C.T. of Delhi, held Section 377 to be unconstitutional, in so far as it pertained to consensual sexual conduct between two adults of the same sex.<sup>287</sup>

In 2014, a two-judge bench of the Supreme Court, in the case of Suresh Kumar Koushal v. Naz Foundation,<sup>288</sup> overturned the Delhi HC decision and granted Section 377 “the stamp of approval”. When the petition in the present case was filed in 2016 challenging the 2014 decision, a three-judge bench of the Supreme Court opined that a larger bench must answer the issues raised. As a result, a five-judge bench heard the matter.<sup>289</sup>

The Petitioner in the present case, Navtej Singh Johar, a dancer who identified as part of the LGBT community, filed a Writ Petition in the Supreme Court in 2016 seeking recognition of the right to sexuality, right to sexual autonomy and right to choice of a sexual partner to be part of the right to life guaranteed by Article 21 of the Constitution of India. Furthermore, he sought a declaration that Section 377 was unconstitutional. The Petitioner also argued that Section 377 was violative of Article 14 of the Constitution that is Right to Equality before the Law because it was vague in the sense that it did not define “carnal intercourse against the order of nature”.

There was no reasonable classification between natural and unnatural consensual sex. Among other things, the Petitioner further argued that-

- (i) Section 377 was violative of Article 15 of the Constitution that is Protection from Discrimination, since it discriminated on the basis of the sex of a person’s sexual partner,

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<sup>286</sup> Section 377 IPC <https://indiankanoon.org/doc/1836974/> (accessed on 28th April 2019)

<sup>287</sup> Section 377 IPC <https://scobserver.clpr.org.in/court-case/section-377-case> (accessed on 28th April 2019)

<sup>288</sup> Suresh Kumar Kaushal v. Naz Foundation Civil Appeal No. 10972 of 2013 <https://indiankanoon.org/doc/58730926/> (accessed on 28th April 2019)

<sup>289</sup> Section 377 of IPC <https://indiankanoon.org/doc/1836974/> (accessed on 28th April 2019)

- (ii) Section 377 had a “chilling effect” on Article 19 that is Freedom of Expression since it denied the right to express one’s sexual identity through speech and choice of romantic or sexual partner.<sup>290</sup>
- (iii) Section 377 violated the right to privacy as it subjected LGBT people to the fear that they would be humiliated or shunned because of a certain choice or manner of living.<sup>291</sup>

The Respondent in the case was the Union of India. Along with the Petitioner and Respondent, certain non-governmental organizations, religious bodies and other representative bodies also filed applications to intervene in the case.<sup>292</sup>

The Union of India submitted that it left the question of the constitutional validity of Section 377 to the “wisdom of the Court”. Some interveners argued against the Petitioner, submitting that the right to privacy was not unbridled, that such acts were derogatory to the “constitutional concept of dignity” that such acts would increase the prevalence of HIV/AIDS in society, and that declaring Section 377 unconstitutional would be detrimental to the institution of marriage and that it may violate Article 25 of the Constitution which is Freedom of Conscience and Propagation of Religion.<sup>293</sup>

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<sup>290</sup> Section 377 of IPC <https://indiankanoon.org/doc/1836974/> (accessed on 28th April 2019)

<sup>291</sup> Ibid.

<sup>292</sup> “Case Analysis of Navtej Singh Johar v. Union of India” available at <https://globalfreedomofexpression.columbia.edu/cases/navtej-singh-johar-v-union-india/> (accessed on 28th April 2019)

<sup>293</sup> Ibid.

## **DECISION OVERVIEW**

The five-Judge Bench of the Indian Supreme Court unanimously held that Section 377 of the Indian Penal Code, 1860, insofar as it applied to consensual sexual conduct between adults in private, was unconstitutional. With this, the Court overruled its decision in *Suresh Koushal v. Naz Foundation* 2013 that had upheld the constitutionality of Section 377.<sup>294</sup>

The Court relied upon its decision in *National Legal Services Authority v. Union of India* (*National Legal Services Authority v. Union of India*, (2014) 5 SCC 438<sup>295</sup>) to reiterate that gender identity is intrinsic to one's personality and denying the same would be violative of one's dignity. The Court relied upon its decision in *K.S. Puttaswamy v. Union of India*<sup>296</sup> and held that denying the LGBT community its right to privacy on the ground that they form a minority of the population would be violative of their fundamental rights. It held that Section 377 amounts to an unreasonable restriction on the right to freedom to expression since consensual carnal intercourse in private "does not in any way harm public decency or morality" and if it continues to be on the statute books, it would cause a chilling effect that would violate the privacy right under Article 19.<sup>297</sup>

The Court affirmed that that "intimacy between consenting adults of the same sex is beyond the legitimate interests of the state" and sodomy laws violate the right to equality under Article 14 and Article 15 of the Constitution by targeting a segment of the population for their sexual orientation. Further, the Court also relied upon its decisions in *Shafin Jahan v. Asokan K.M.*<sup>298</sup> and *Shakti Vahini v. Union of India*<sup>299</sup> to reaffirm that

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<sup>294</sup> Case Analysis of *Navtej Singh Johar v. Union of India*" available at <https://globalfreedomofexpression.columbia.edu/cases/navtej-singh-johar-v-union-india/> (accessed on 28th April 2019)

<sup>295</sup> *Naz Foundation v. Govt. of NCT of Delhi* WP(C) No.7455/2001 of 2009 <https://www.escri-net.org/caselaw/2009/naz-foundation-v-government-nct-new-delhi-and-others-wpc-no-74552001> (accessed on 28th April 2019)

<sup>296</sup> *Justice K.S.Puttaswamy(Retd) vs. Union Of India* on 26 September, 2018 WRIT PETITION (CIVIL) NO. 494 OF 2012 <https://indiankanoon.org/doc/127517806/> (accessed on 28th April 2019)

<sup>297</sup> "Case Analysis of *Navtej Singh Johar v. Union of India*" available at <https://globalfreedomofexpression.columbia.edu/cases/navtej-singh-johar-v-union-india/> (accessed on 28th April 2019)

<sup>298</sup> *Shafin Jahan vs. Asokan K.M.* on 8 March, 2018 CRIMINAL APPEAL NO.366 OF 2018

an adult's right to "choose a life partner of his or her choice" is a facet of individual liberty.

**Some of the views of the Judges upon the decision were as follows-**

Chief Justice Mishra relied on the principles of transformative constitutionalism and progressive realization of rights to hold that the constitution must guide the society's transformation from an archaic to a pragmatic society where fundamental rights are fiercely guarded. He further stated, "constitutional morality would prevail over social morality" to ensure that human rights of LGBT individuals are protected, regardless of whether such rights have the approval of a majority of the government.<sup>300</sup>

Chief Justice J. Nariman in his opinion analyzed the legislative history of Section 377 to conclude that since the rationale for Section 377, namely Victorian morality, "has long gone" there was no reason for the continuance of the law. He concluded his opinion by imposing an obligation on the Union of India to take all measures to publicize the judgment so as to eliminate the stigma faced by the LGBT community in society. He also directed government and police officials to be sensitized to the plight of the community so as to ensure favorable treatment for them.<sup>301</sup>

Chief Justice J. Chandrachud in his opinion recognized that though Section 377 was facially neutral, its effect was to efface identities of the LGBT community. He stated that, if Section 377 continues to prevail, the LGBT community will be marginalized from health services and the prevalence of HIV will exacerbate. He stated that not only must the law not discriminate against same-sex relationships, it must take positive steps to

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<sup>299</sup> Shakti Vahini vs. Union of India on 27 March, 2018 WRIT PETITION (CIVIL) NO. 231 OF 2010

<sup>300</sup> Global Freedom of Expression <https://globalfreedomofexpression.columbia.edu/cases/navtej-singh-johar-v-union-india/> (accessed on 28th April 2019)

<sup>301</sup> Case Analysis of Navtej Singh Johar v. Union of India" available at <https://globalfreedomofexpression.columbia.edu/cases/navtej-singh-johar-v-union-india/> (accessed on 28th April 2019)



achieve equal protection and to grant the community “equal citizenship in all its manifestations”.<sup>302</sup>

Chief Justice J. Malhotra affirmed that homosexuality is “not an aberration but a variation of sexuality”. She stated that the right to privacy does not only include the right to be left alone but also extends to “spatial and decisional privacy” She concluded her opinion by stating that history owes an apology to members of the LGBT community and their families for the delay in providing redress for the ignominy and ostracism that they have suffered through the centuries.<sup>303</sup>

## **CASE SIGNIFICANCE**

The decision establishes a binding or persuasive precedent within its jurisdiction. The decision is historic in nature and holds an extremely high precedential value as it has been decided by a five-Judge Constitutional Bench of the Supreme Court of India. It establishes a binding precedent on all courts across India and smaller benches of the Supreme Court.<sup>304</sup>

Decision including concurring or dissenting opinions establishes influential or persuasive precedent outside its jurisdiction. Considering that the provision struck down was from colonial-era legislation and similar provisions still exist in some Commonwealth nations like Singapore, Sri Lanka, Malaysia, Pakistan, Ghana etc. the decision is likely to hold persuasive value in such jurisdictions too.<sup>305</sup>

After a prolonged battle marked by ups and downs, the LGBT community welcomed the Supreme Court’s judgment in *Navtej Johar v Union of India*, where it declared Section 377 violative of the Constitution to the extent that it criminalized consensual sex between

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<sup>302</sup> Case Analysis of *Navtej Singh Johar v. Union of India*” available at <https://globalfreedomofexpression.columbia.edu/cases/navtej-singh-johar-v-union-india/> (accessed on 28th April 2019)

<sup>303</sup> Ibid.

<sup>304</sup> SC verdict on Section 377 — A timeline of the case <https://indianexpress.com/article/india/section-377-to-be-revisited-timeline-of-the-case-5016095/> (accessed on 28th April 2019)

<sup>305</sup> Ibid.

adults of the same gender.<sup>306</sup> While Section 377 continues to remain on our statute book, it now applies only in cases of bestiality and rape, thus being stripped of its original draconian nature and while one can legitimately argue that this judgment was long due and the court simply performed its function as the protector of rights, one can't take away from the fact that Navtej Johar is more than just a judgment on Section 377.<sup>307</sup> For the LGBT community, it is narrative seeped in empathy and an opportunity to push for the realization of a broader range of rights.

At the end of Navtej Johar Case,<sup>308</sup> the court profoundly declared that “history owes an apology to the members of the LGBT community”. It repeatedly acknowledged the shame, persecution, and systemic exclusion that LGBT community members have had to face, an oppression legally legitimized by Section 377. Further, beyond the constitutional right to equality, liberty, dignity, health and privacy, it recognized and affirmed the human right to love without shame or fear.

In Suresh Koushal Case, the court viewed those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the “ordinary course of nature” as different classes of people, with the latter falling within the purview of Section 377.<sup>309</sup> It declared that such classification does not violate Article 14 and, as opposed to what is being argued, Section 377 being gender neutral criminalizes an activity and not an identity. However, it failed to explain the difference between the classes and reason for treating the two classes differently. It further added insult to injury by observing that the LGBT persons constitute a minuscule fraction of the country, and mere 200 prosecutions under Section 377 is not sufficient reason to declare it unconstitutional. This cut and dry, and deeply flawed application of the test of reasonable

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<sup>306</sup> SC verdict on Section 377 — A timeline of the case  
<https://indianexpress.com/article/india/section-377-to-be-revisited-timeline-of-the-case-5016095/>  
(accessed on 28th April 2019)

<sup>307</sup> Section 377 will not apply to consensual same-sex acts, says Supreme Court <https://www.thehindu.com/news/national/verdict-on-section-377-and-gay-rights-live-updates/article24878751.ece> (accessed on 28th April 2019)

<sup>308</sup> Case Analysis of Navtej Singh Johar v. Union of India” available at <https://globalfreedomofexpression.columbia.edu/cases/navtej-singh-johar-v-union-india/> (accessed on 28th April 2019)

<sup>309</sup> Suresh Kumar Kaushal v. Naz Foundation Civil Appeal No. 10972 of 2013  
<https://indiankanoon.org/doc/58730926/p> (accessed on 28th April 2019)

classification is enabled by the invisibility of the stories of persecution of LGBT persons at the hands of Section 377.<sup>310</sup>

In contrast, Navtej Johar, while criticising Suresh Koushal for its flawed analysis, called it to be formalistic and de-humanizing approach in carrying out the reasonable classification test. In this context, it noted the limitations of legal formalism which often values form over substance and warns against its ability to overshadow the powerful statement of values the Constitution imbibes. The undertone of these observations comes from the recognition that one of the primary functions of the Constitution is the protection of individual rights, and technical application of legal tests can't come at the cost of the humanity of people.

### **BEYOND SECTION 377**

While there are four concurring opinions in the Navtej Johar judgement, one opinion stands out in particular. Justice Chandrachud, in his opinion, while recognizing that the matter in reference is to rule on the correctness of Koushal, went beyond merely declaring Section 377 partly unconstitutional. He remarked on how countries around the world have gone beyond decriminalizing sodomy laws and ensure that LGBT persons have a right to full citizenship, the right to form unions and a right to family life. He went on to note that the right to sexual orientation imposes both negative and positive obligations on the state, that is not to discriminate as well as to recognize rights that bring true fulfillment to same-sex relationships.<sup>311</sup>

In the context of India, he spoke extensively of the role of constitutional morality that is morality dictated by the values of the Constitution as opposed to majority of social norms, in ensuring justice. He declared that constitutional morality is intrinsic to ensuring equality for LGBT persons, triumphs over tradition and culture, and is the pillar against

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<sup>310</sup> SC verdict on Section 377 — A timeline of the case <https://indianexpress.com/article/india/section-377-to-be-revisited-timeline-of-the-case-5016095/> (accessed on 28th April 2019)

<sup>311</sup> Section 377 will not apply to consensual same-sex acts, says Supreme Court <https://www.thehindu.com/news/national/verdict-on-section-377-and-gay-rights-live-updates/article24878751.ece> (accessed on 28th April 2019)

which all laws that deprive LGBT persons of their entitlement to a full and equal citizenship will be judged. Navtej Johar thus opened doors for the LGBT community to claim a broader range of rights that go beyond mere decriminalization.<sup>312</sup>

The judgment further attempts to address structural issues by recognizing the obligation of the State and the medical fraternity to sensitize the government and police, and ensure medical and counselling practices keep up with changing social norms, respectively. It is only a matter of time before we witness the judgment being deployed for making a claim for access to civil rights and equal moral citizenship.

### **KEY HIGHLIGHTS OF THE CASE-**

**Constitutional Morality:** One of the central themes of the court’s decision in Navtej Singh Johar is that the aim of the Constitution is to transform society, not to entrench and preserve the pre-existing values of the majority. In other words, though a majority of people in India may be heterosexuals, but the prevalent “social morality” in India which dictates sexual intercourse only between a man and a woman, it is “Constitutional Morality” which must prevail beyond this.<sup>313</sup>

Ambedkar himself had said that “our people have yet to learn” the “sentiment” of “constitutional morality”. In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943),<sup>314</sup> Justice Jackson of the U.S. Supreme Court famously wrote, “Compulsory unification of opinion achieves only the unanimity of the graveyard.” The Case also noted that “any attempt to push and shove a homogeneous, uniform, consistent and a standardized philosophy throughout the society would violate the principle of constitutional morality.” And “Democratic as it is, our Constitution does not demand conformity. Nor does it contemplate the mainstreaming of culture. It nurtures

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<sup>312</sup> SC verdict on Section 377 — A timeline of the case <https://indianexpress.com/article/india/section-377-to-be-revisited-timeline-of-the-case-5016095/> (accessed on 28th April 2019)

<sup>313</sup> Case Analysis of Navtej Singh Johar v. Union of India” available at <https://globalfreedomofexpression.columbia.edu/cases/navtej-singh-johar-v-union-india/> (accessed on 29th April 2019)

<sup>314</sup> *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) <https://supreme.justia.com/cases/federal/us/319/624/> (accessed on 28th April 2019)

dissent as the safety valve for societal conflict. Our ability to recognize others who are different is a sign of our own evolution.”<sup>315</sup>

**The Miniscule Minority:** In Suresh Kumar Koushal v. Naz Foundation, 2014 the Supreme Court had previously upheld Section 377 of the IPC because only “a miniscule fraction of the country’s population”, according to the court, belonged to the LGBT community. This argument was rejected by the court in Johar’s Case Of 2018. The number of people asserting a fundamental right, said Chief Justice Mishra, is “meaningless like zero on the left side of any number”.<sup>316</sup>

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<sup>315</sup> Case Analysis of Navtej Singh Johar v. Union of India” available at <https://globalfreedomofexpression.columbia.edu/cases/navtej-singh-johar-v-union-india/> (accessed on 29th April 2019)

<sup>316</sup> Suresh Kumar Kaushal v. Naz Foundation Civil Appeal No. 10972 of 2013 <https://indiankanoon.org/doc/58730926/> (accessed on 29th April 2019)

## CHAPTER FOUR

# NALSA JUDGEMENT: RECOGNITION OF TRANSGENDER AS A THIRD GENDER

The Constitution of India is the Supreme Law by which the Country needs to be governed. Any civil society follows a set of rules, stating rights and benefits provided to its citizens. Even the Countries having Monarchy or Military governance have their own Constitution. Indian Constitution is a written document stating the Fundamental Rights, Directive Principles for its Citizens and powers and duties of Government Institutions. The Constitution of India is the supreme Law according to which the State of India is to be governed.

The Constitution of India sets out the functioning, power, formation and constitution of government institutions. It is the Supreme Law according to which the state of India is to be governed. The Constitution of India was adopted by the Constituent Assembly on 26<sup>th</sup> Nov 1949, but it came on effect from 26<sup>th</sup> January 1950. The Constitution declares India as a Sovereign (self governed), Socialist (following uniform rules), Secular (rejecting religious considerations) and Republic (People have the Supreme power) ensuring all its citizens equality of opportunity, justice and endeavor to promote fraternity among them.<sup>317</sup>

The Constitution serves as a set of rules according to which a group of people or country is governed.<sup>318</sup> It provides the rules acceptable to all the citizens of the Country irrespective of their caste, creed and religion. The Constitution is very important for a civilized society to function and to ensure its citizens- equality of opportunity, justice and fraternity.

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<sup>317</sup> The Constitution of India was adopted by the Constituent Assembly on 26th November, 1949 and came into force on 26th January, 1950. <http://www.legislative.gov.in/sites/default/files/COI-updated-as-31072018.pdf> (accessed on 22nd April 2019)

<sup>318</sup> The Constitution of India. (As on 31<sup>st</sup> July 2018) <http://www.legislative.gov.in/sites/default/files/COI-updated-as-31072018.pdf>(accessed on 22nd April 2019)

## **THIRD GENDER RIGHTS IN INDIA**

Transgender, is a term that defines a spectrum for people whose identity, expression, behaviour, or a general sense of self, does not conform to what is usually associated with the sex they were born. It is often said sex is a matter of the body, while gender occurs in the mind. Gender is an internal sense of being male, female, or other.<sup>319</sup> People often use binary terms, for instance, masculine or feminine, to describe gender just as they do when referring to sex. But gender is more complex and encompasses more than just two possibilities. Gender is also influenced by culture, class, and race because behaviour, activities and attributes seen as appropriate in one society or group may be viewed otherwise in another.

India has many transgenders humans and a common term used to describe transgenders, is Hijra. They live on the fringes of society, regularly in poverty, ostracized due to their gender identity. Maximum make a living through singing and dancing or by means of begging and prostitution. Due to the fact that hijras do not have reproduction capacities as either males or females, they are neither men nor women and claim to be an institutional “Third Gender”.<sup>320</sup>

Transgender is an umbrella term that incorporates more possibilities of a gender identity than just being binary. Gender identity refers to someone’s inner experience of being male, female or anything that they want to be identified as. Gender expression refers to the manner a person communicates gender to others through behaviour, apparel, hairstyles, voice or frame characteristics. In the current paradigm, the transgender people are being talked about and there is a continuous discourse about them in cultures and academia which are subsequently affecting people’s consciousness, understanding, and openness to transgender people.<sup>321</sup>

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<sup>319</sup> Qamar Ali Jafri. 2018 Laws relating to Third Gender and Homosexuality- An Analysis <https://blog.ipleaders.in/laws-third-gender-india/> (accessed on 23rd April 2019)

<sup>320</sup> Ibid.

<sup>321</sup> Third Gender: Meaning and Concept <https://blog.ipleaders.in/laws-third-gender-india/> (accessed on 23rd April 2019)

Transgenders in our society encompass all races and ethnicity, yet they have never enjoyed a first-rate lifestyle due to the mis-informed prevalent notion of ‘what they are’ and ‘how they are’ according to the society. In reality, they are subjected to confusion and pain on account of the inflexible sexual dimorphism. They have to deal with disparities related to societal stigma, discrimination and denial of their civil and human rights. Discrimination in opposition to them has been the major cause of substance abuse and suicides among them. To make it worse, this discrimination starts inside the areas of their own family existence which transcends into their social life, education, health and so on.<sup>322</sup>

The judgement of the Allahabad High Court in *Queen Empress v. Khairati* (1884) ILR 6 ALL 204,<sup>323</sup> wherein a transgender is arrested and prosecuted under Section 377 on the suspicion that he changed into a ‘habitual sodomite’ lays an important road for the fight against the struggle. However, an acquittal was granted on appeal. This judicial precedent is highly in contrast to the historical instances in India where the transgender community has a robust ancient presence in the Hindu mythology and different non-secular texts. Hijras also played a prominent role in the royal courts of the Islamic international, particularly in the Ottoman empires and the Mughal rule in medieval India.<sup>324</sup>

The Constitution provides for protection under the Fundamental Rights chapter to all humans with a few rights being restrained to only citizens. Beyond this categorization, the Constitution makes no further distinction amongst the rights holders. The Preamble of our Indian Constitution mandates Justice – social, monetary, and political equality of status.<sup>325</sup>

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<sup>322</sup> Ibid.

<sup>323</sup> *Queen Empress v. Khairati* (1884) ILR 6 ALL 204, <https://www.casemine.com/judgement/in/5ac5e3264a93261a1a739419> (accessed on 23rd April 2019)

<sup>324</sup> Reddy, G (2003) "Men" Who Would Be Kings: Celibacy, Emasculation, and the Re-Production of "Hijras" in Contemporary Indian Politics *Social Research*, Vol. 70, No. 1, Pariah Minorities (spring 2003), pp. 163-200

<sup>325</sup> Qamar Ali Jafri. 2018 *Laws relating to Third Gender and Homosexuality- An Analysis* <https://blog.ipleaders.in/laws-third-gender-india/> (accessed on 23rd April 2019)



The Constitution provides for the fundamental right to equality and tolerates no discrimination on the grounds of sex, caste, creed or religion. The Constitution additionally guarantees political rights and other benefits to each citizen. The Constitution affirms equality in all spheres however the moot question is whether or not it is being implemented.

Most of the contraptions by means of which the Indian state defines, civil personhood and gender identity are a vital and unavoidable class. Identification on the idea of sex within male and woman is a vital aspect of civil identity as required throughout the country else this will lead to deprivation of numerous rights that Indian citizens take. These rights consist of the right to vote, the right to own property, the right to marry, the proper to claim a proper identity via a passport and a ration card, a driver's license, the right to education, employment, fitness so on. Such deprivation secludes hijras from the very material of Indian civil society.<sup>326</sup>

The needs of the 21<sup>st</sup> century and the enlightened vision of the Indian Constitution, with its attention on justice, liberty, equality, and fraternity assuring the distinction of the person, mandate a creative citing of the regulation. The judges who reinstated Section 377<sup>327</sup> opted not to heed the call of justice and renewed the guideline of the law. Alternatively, the judges of the Delhi high court on Section 377 and those of the Supreme Court on transgender status took up the undertaking and rethought the regulation and cited them in response to the call of justice.

The police use the law in question to threaten and blackmail transgender people. Violation of the law is punishable by means of a fine and imprisonment.

The British colonial authorities enacted Section 377 of the Indian Penal Code, primarily based on Victorian morality, to criminalize non-procreative intercourse. The Naz Foundation, a non-governmental enterprise operating inside the field of human immunodeficiency virus/obtained immunodeficiency syndrome (HIV/Aids) and sexual

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<sup>326</sup> Ibid.

<sup>327</sup>Section 377 of IPC. [https://www.sci.gov.in/supremecourt/2016/14961/14961\\_2016\\_Judgement\\_06-Sep-2018.pdf](https://www.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf) (accessed on 23rd April 2019)

health, challenged the Constitutional validity of Section 377 as it violated the right to privacy, to dignity and fitness, to equality and non-discrimination and to freedom of expression. It additionally argued that the law avoided public health efforts at lowering the threat of transmission of HIV/Aids as the concern of prosecution averted people from discussing their sexuality and lifestyles fashion. The Delhi High Court on 2<sup>nd</sup> July 2009, in a landmark judgement, held Section 377 to be violative of Articles 21, 14 and 15, as it criminalized consensual sexual acts between adults in non-public.<sup>328</sup>

## **HOMOSEXUALITY AND INDIA**

Human sexuality is complex. The attractiveness of the distinction between choice, behaviour and identification acknowledges the multidimensional nature of sexuality. The reality that those dimensions won't continually be congruent in people suggests the complexity of the problem.<sup>329</sup>

The superiority of homosexuality is difficult to estimate for many reasons it could be because of the related stigma and social repression, the unrepresentative samples surveyed and the failure to distinguish choice, conduct and identity. All these differences range in age, businesses, areas and cultures.<sup>330</sup>

The argument that homosexuality is a stable phenomenon is primarily based on the failure of attempts to change and the shortage of achievement with treatments to regulate orientation. There is a growing realization that homosexuality is not an unmarried phenomenon and that there can be multiple phenomena inside the construct of homosexuality.<sup>331</sup> Anti-homosexual attitudes, once taken into consideration, the norms get modified over time in many social and institutional settings like in the west. But,

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<sup>328</sup> Third Gender: Meaning and Concept <https://blog.ipleaders.in/laws-third-gender-india/> (accessed on 23rd April 2019)

<sup>329</sup> National Legal Services Authority v. Union of India, (2014) 5 SCC 438 [http://www.supremecourtcases.com/index2.php?option=com\\_content&itemid=9999999&do\\_pdf=1&id=45785](http://www.supremecourtcases.com/index2.php?option=com_content&itemid=9999999&do_pdf=1&id=45785) (accessed on 23rd April 2019)

<sup>330</sup> Ibid.

<sup>331</sup> National Legal Services Authority v. Union of India, (2014) 5 SCC 438 [http://www.supremecourtcases.com/index2.php?option=com\\_content&itemid=9999999&do\\_pdf=1&id=45785](http://www.supremecourtcases.com/index2.php?option=com_content&itemid=9999999&do_pdf=1&id=45785) (accessed on 23rd April 2019)

heterosexism, which idealizes heterosexuality, considers it the norm, denigrates and stigmatizes all non-heterosexual forms of behaviour, identity, relationships and communities, is likewise not unusual.<sup>332</sup>

Gay-affirmative psychotherapies have been developed, which help humans cope with the social stigmatization. There is no proof for the effectiveness of sexual conversion treatment plans. Such remedies also boost moral questions.<sup>333</sup> In fact, there may be proof that such tries might also reason more damage than desirable, consisting of inducing depression and sexual dysfunction. Physicians must provide a clinical carrier with compassion and respect for human dignity for all of us no matter their sexual orientation.

The landmark judgement of the Delhi High Court, which declared that Section 377<sup>334</sup> of the Indian Penal Code violates essential rights guaranteed by way of the Constitution, turned into in keeping with international, human rights and secular and legal developments. However, the anti-homosexual attitudes of many spiritual and community leaders reflect the life of tremendous prejudice in India. Prejudice in opposition to extraordinary existence is part of many cultures, included in maximum religions, and is a source of conflict in Indian society.<sup>335</sup>

The main question why Third Gender were ostracized? The answer is because of the large part of British Colonization. When the British took over direct rule of India and absolved the British East India Company, government officials sought to enforce their western ideas and beliefs on Indians. Lawmakers accomplished this goal by enacting moral laws that banned anything that western society viewed as unclean and dirty. This

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<sup>332</sup> Homosexuality in India: What data shows. <https://www.livemint.com/Politics/nLQiPp15UICajLDXETU3EO/Homosexuality-in-India-What-data-shows.html> (accessed on 23rd April 2019)

<sup>333</sup> Rukmini S.2018 Homosexuality in India: What Data Shows <https://www.livemint.com/Politics/nLQiPp15UICajLDXETU3EO/Homosexuality-in-India-What-data-shows.html> (accessed on 23rd April 2019)

<sup>334</sup> Naz Foundation v. Govt. of NCT of Delhi, 160 Delhi Law Times 277, (2009) <https://indiankanoon.org/doc/193543132/> (accessed on 23rd April 2019)

<sup>335</sup> Section 377 of IPC. [https://www.sci.gov.in/supremecourt/2016/14961/14961\\_2016\\_Judgement\\_06-Sep-2018.pdf](https://www.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf) (accessed on 23rd April 2019)

included the creation of Section 377 of the Indian Penal Code which made illegal any “unnatural offenses” that were deemed “against the order of nature.” From when Section 377 was implemented in 1858 to when it was recently deemed unconstitutional on 6 September 2018, Section 377 was used as justification to mistreat and punish Hijras, queers, and the LGBTQ community.<sup>336</sup>

The western concept of hating and marginalizing anybody who was not straight and cisgender took hold in Indian society. The Hijra community was forced from a well-respected role as pillars of religious and governmental society to being social outcasts. This social exile is responsible for the socioeconomic and medical difficulties that Hijras face. Hijras are prone to being economically challenged because of the stigmas that they face. They are denied educational opportunities, jobs, and discriminated against in every area of their lives.<sup>337</sup>

Article 14 to 16, 19 and 21 that deals with Gender Identity - Right of Transgender Community to seek gender identity alternate to the one assigned, male or female, at the time of birth and when such person has undergone surgical procedure to change sex and regard themselves as transsexuals. There is discrimination and denial of equality for them in matters of access to education, healthcare, employment, licenses, etc. and rights and privileges as persons and as citizens of India.<sup>338</sup>

Considering, denial of right to live with dignity, historical background of the community and situation in other countries were also examined. Stance of UN and other human right bodies were also taken into consideration. Yogyakarta Principles<sup>339</sup> held non-recognition of gender identity and equality of Transgenders violates Articles 14, 15, 16, 19 and 21. These articles are not restricted to males or females and also cover hijras or

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<sup>336</sup> Section 377 of IPC. [https://www.sci.gov.in/supremecourt/2016/14961/14961\\_2016\\_Judgement\\_06-Sep-2018.pdf](https://www.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf) (accessed on 23rd April 2019)

<sup>337</sup> Rukmini S.2018 Homosexuality in India: What Data Shows <https://www.livemint.com/Politics/nLQiPp15UICajLDXETU3EO/Homosexuality-in-India-What-data-shows.html> (accessed on 22nd April 2019)

<sup>338</sup> Ibid.

<sup>339</sup> Yogyakarta Principles, 2007 <https://www.refworld.org/pdfid/48244e602.pdf> (accessed on 22nd April 2019)

Transgenders. In the absence of any Indian law on Transgenders, in view of Article 53 and 51 of the Constitution, municipal courts in India must respect international law in respect of the Transgenders and finally being a democratic country right to gender identity is important for India.<sup>340</sup>

### **A FEW RIGHTS ENSHRINED IN THE CONSTITUTION THAT SAFEGUARD THE TRANSGENDER COMMUNITY**

- To help improve their poor living conditions, the Supreme Court of India titled the transgender community as an economically backward class in 2014, thus entitling them to reservations and benefits like skill enhancement, 2% reservations in public jobs, legal aid, pre and post retirement allowances.<sup>341</sup>
- The Ministry of Drinking Water and Sanitation permitted the transgenders in April 2017 to utilize the toilet facilities of their own will in all states in public. With this step, the authorities have successfully broken the ‘toilet’ stigma attached to this gender. Mysore city became the only city to construct a separate public restroom for the ‘third gender’.<sup>342</sup>
- Law makes it illegal to compel a transgender person to relinquish residence, undress or parade them naked, push them to beg or any varied sort of bonded labour. These acts shall be penalized with up to two years of incarceration, coupled with a fine and also seeks amendments in the law to incorporate cases of sexual molestation on the transgender community.
- Law criminalizes refusing a transgender his right to access any public property or causing them any bodily or psychological harm within and outside the premises of their home.
- OBC status is guaranteed to all transgenders not birthed as SC or ST and entitles them to due reservation rights under a plethora of categories for the same.
- The newly introduced Bill recognizes ‘Transgender’ as the third gender and renders them free to be identified as ‘man’, ‘woman’ or ‘transgender’, regardless of any

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<sup>340</sup> Rights of Transgenders in India

[http://www.supremecourtcases.com/index2.php?option=com\\_content&itemid=99999999&do\\_pdf=1&id=45785](http://www.supremecourtcases.com/index2.php?option=com_content&itemid=99999999&do_pdf=1&id=45785) (accessed on 22nd April 2019)

<sup>341</sup> Ibid.

<sup>342</sup> Ibid.

surgery that they might have undergone.<sup>343</sup> They cannot be called the ‘other’ gender, but a transgender. A certification of identity as a transgender is to be attained from a state level authority, and the same should be acceptable as a documented proof for any official document like passport, aadhar card, etc.

- Law also ensures that transgender adults and minors enjoy the right to equal treatment in all spheres, the right to life, dignity and personal liberty as guaranteed by the Constitution of India along with all human rights under Articles 14, 15, 16 and 21.<sup>344</sup>
- The Court also safeguards a transgenders gender expression enforced by Article 19 (1) (a) and holds that no restriction is supposed to and can be placed on one’s appearance or choice of dressing.<sup>345</sup>
- All state-owned bodies shall provide education and not discriminate against any transgender student. A transgender student will be provided with the same scholarship/privileges, free-waiver, books, hostel facilities and subsidized rates. Also, all educational institutions need to maintain in order an anti-discrimination body to monitor any prejudice against transgender students.<sup>346</sup>

## **INTRODUCTION TO NATIONAL LEGAL SERVICES AUTHORITY**

Article 39A of the Constitution of India provides for free legal aid to the poor and weaker sections of the society and ensures justice for all. Articles 14 and 22(1) of the Constitution also make it obligatory for the State to ensure equality before law and a legal system which promotes justice on the basis of equal opportunity to all. In the year 1987, the Legal Services Authorities Act was enacted by the Parliament which came into force on 9th November, 1995 to establish a nationwide uniform network for providing free and competent legal services to the weaker sections of the society on the basis of equal

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<sup>343</sup> Rights of Transgenders in India  
[http://www.supremecourtcases.com/index2.php?option=com\\_content&itemid=99999999&do\\_pdf=1&id=45785](http://www.supremecourtcases.com/index2.php?option=com_content&itemid=99999999&do_pdf=1&id=45785) (accessed on 24th April 2019)

<sup>344</sup> Ibid.

<sup>345</sup> Ibid.

<sup>346</sup> Ibid.

opportunity.<sup>347</sup> The National Legal Services Authority (NALSA) has been constituted under the Legal Services Authorities Act, 1987 to monitor and evaluate implementation of legal aid programmes and to lay down policies and principles for making legal services available under the Act.<sup>348</sup>

In every State, a State Legal Services Authority and in every High Court, a High Court Legal Services Committee has been constituted. District Legal Services Authorities, Taluk Legal Services Committees have been constituted in the Districts and most of the Taluks to give effect to the policies and directions of the NALSA and to provide free legal services to the people and conduct Lok Adalats in the State.<sup>349</sup>

Supreme Court Legal Services Committee has been constituted to administer and implement the legal services programme insofar as it relates to the Supreme Court of India.<sup>350</sup>

## **FUNCTIONS OF NALSA**

NALSA lays down policies, principles, guidelines and frames effective and economical schemes for the State Legal Services Authorities to implement the Legal Services Programmes throughout the country.<sup>351</sup>

Primarily, the State Legal Services Authorities, District Legal Services Authorities, Taluk Legal Services Committees, etc. have been asked to discharge the following main functions on regular basis:

- I. To Provide Free and Competent Legal Services to the eligible persons
- II. To organize Lok Adalats for amicable settlement of disputes and
- III. To organize legal awareness camps in the rural areas.

### **I. FREE LEGAL SERVICES**

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<sup>347</sup> NALSA: About Us. <https://nalsa.gov.in/about-us> (accessed on 22nd April 2019)

<sup>348</sup> Ibid.

<sup>349</sup> National Legal Services Authority. pp 1-3 <https://nalsa.gov.in/about-us> (accessed on 22nd April 2019)

<sup>350</sup> Ibid.

<sup>351</sup> National Legal Services Authority. pp 1-3 <https://nalsa.gov.in/about-us> (accessed on 22nd April 2019)

- a) Payment of court fee, process fees and all other charges payable or incurred in connection with any legal proceedings<sup>352</sup>
- b) Providing service of lawyers in legal proceedings
- c) Obtaining and supply of certified copies of orders and other documents in legal proceedings.
- d) Preparation of appeal, paper book including printing and translation of documents in legal proceedings.<sup>353</sup>

Persons eligible for getting free legal services include:-

- i. Women and children;
- ii. Members of SC/ST
- iii. Industrial workmen
- iv. Victims of mass disaster, violence, flood, drought, earthquake, industrial disaster.
- v. Disabled persons.
- vi. Persons in custody
- vii. Persons whose annual income does not exceed Rs. 1 lakh (in the Supreme Court Legal Services Committee the limit is Rs. 1,25,000/-).
- viii. Victims of Trafficking in Human beings or beggar.<sup>354</sup>

## **II. LOK ADALATS**

Lok Adalat is one of the Alternative Disputes Resolution Mechanisms. It is a forum where the disputes/cases pending in the court of law or at pre-litigation stage are settled/compromised amicably. The Lok Adalat has been given statutory status under the Legal Services Authorities Act, 1987. Under this Act, an award made by a Lok Adalat is

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<sup>352</sup> Introduction to NALSA <https://nalsa.gov.in/content/introduction> (accessed on 22nd April 2019)

<sup>353</sup> Ibid.

<sup>354</sup> Introduction to NALSA <https://nalsa.gov.in/content/introduction> (accessed on 22nd April 2019)



deemed to be a decree of a civil court and is final and binding on all parties and no appeal lies against thereto before any court.<sup>355</sup>

- a) Lok Adalats are being organized by the Legal Services Authorities/Committees for settlement of cases pending before courts u/s 19 of the Legal Services Authorities Act, 1987 and also for matters at pre-Litigative stage, under the guidance of NALSA.
- b) Chapter VI-A has been inserted in the Legal Services Authorities Act, 1987 in the year 2002, with a view to provide compulsory pre-Litigative mechanism for conciliation and settlement of disputes relating to 'Public Utility Services'.
- c) During the period 01.04.2014 to 30.09.2014 76551 Lok Adalats were organized and they settled more than 34.37 lacs cases. In about 46,768 Motor Vehicle Accident Claim cases, compensation to the tune of Rs.894.85 crores.

## **PRESENT STATUS AND DEVELOPMENT OF NALSA**

Article 39A of the Constitution of India provides that State shall secure that the operation of the legal system promotes justice on a basis of equal opportunity, and shall in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disability. Articles 14 and 22(1) also make it obligatory for the State to ensure equality before law and a legal system which promotes justice on a basis of equal opportunity to all. Legal aid strives to ensure that constitutional pledge is fulfilled in its letter and spirit and equal justice is made available to the poor, downtrodden and weaker sections of the society.<sup>356</sup>

The earliest Legal Aid movement appears to be of the year 1851<sup>357</sup> when some enactment was introduced in France for providing legal assistance to the indigent. In Britain, the

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<sup>355</sup> NALSA: About Us. <https://nalsa.gov.in/about-us> <https://nalsa.gov.in/about-us> (accessed on 22nd April 2019)

<sup>356</sup> Legal Aid. <http://vikaspedia.in/social-welfare/social-security/legal-aid#section-1> (accessed on 22nd April 2019)

<sup>357</sup> NALSA: About Us. <https://nalsa.gov.in/about-us> (accessed on 22nd April 2019)

history of the organized efforts on the part of the State to provide legal services to the poor and needy dates back to 1944, when Lord Chancellor, Viscount Simon appointed Rushcliffe Committee to enquire about the facilities existing in England and Wales for giving legal advice to the poor and to make recommendations as appear to be desirable for ensuring that persons in need of legal advice are provided the same by the State.

Since 1952, the Government of India also started addressing to the question of legal aid for the poor in various conferences of Law Ministers and Law Commissions. In 1960, some guidelines were drawn by the Govt. for legal aid schemes. In different states legal aid schemes were floated through Legal Aid Boards, Societies and Law Departments.<sup>358</sup> In 1980, a Committee at the national level was constituted to oversee and supervise legal aid programmes throughout the country under the Chairmanship of Hon. Mr. Justice P.N. Bhagwati then a Judge of the Supreme Court of India. This Committee came to be known as CILAS (Committee for Implementing Legal Aid Schemes) and started monitoring legal aid activities throughout the country.

The introduction of Lok Adalats added a new chapter to the justice dispensation system of this country and succeeded in providing a supplementary forum to the litigants for conciliatory settlement of their disputes.<sup>359</sup> In 1987 Legal Services Authorities Act was enacted to give a statutory base to legal aid programmes throughout the country on a uniform pattern. This Act was finally enforced on 9<sup>th</sup> of November, 1995 after certain amendments were introduced therein by the Amendment Act of 1994. Honourable Mr. Justice R.N. Mishra the then Chief Justice of India played a key role in the enforcement of the Act.<sup>360</sup>

National Legal Services Authority was constituted on 5<sup>th</sup> December, 1995. His Lordship Honourable Dr. Justice A.S. Anand, Judge, Supreme Court of India took over as the

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<sup>358</sup> Legal Aid. <http://vikaspedia.in/social-welfare/social-security/legal-aid#section-1> (accessed on 22nd April 2019)

<sup>359</sup> Lok Adalats. <http://vikaspedia.in/social-welfare/social-security/legal-aid#section-1> (accessed on 22nd April 2019)

<sup>360</sup> Breif Report on NALSA [http://doj.gov.in/sites/default/files/BRIEF-NALSA\\_0\\_3.pdf](http://doj.gov.in/sites/default/files/BRIEF-NALSA_0_3.pdf) (accessed on 25th April 2019)

Executive Chairman of National Legal Services Authority on 17th July, 1997.<sup>361</sup> Soon after assuming the office, His Lordship initiated steps for making the National Legal Services Authority functional. The first Member Secretary of the authority joined in December, 1997 and by January, 1998 the other officers and staff were also appointed. By February, 1998 the office of National Legal Services Authority became properly functional for the first time.<sup>362</sup>

The First Annual Meet of the State Legal Services Authorities was held on 12<sup>th</sup> of September, 1998 at Vigyan Bhawan, New Delhi which was presided over by His Lordship Honourable Dr. Justice A.S. Anand, the then Executive Chairman, NALSA. His Lordship Honourable Mr. Justice S.B. Majmudar, Judge, Supreme Court of India and Chairman, Supreme Court Legal Services Committee, the Members of the Central Authority and the Executive Chairmen and Member Secretaries of the State Legal Services Authorities attended this Meet.

In this Meet, the progress of on-going schemes which had been initiated by NALSA was examined and decisions of far reaching implications were taken with a view to strengthen and streamline legal aid programmes in the country. The Second Annual Meet of the State Legal Services Authorities was held at Jubilee Hall, Hyderabad on 9th of October, 1999. This Meet was inaugurated by His Lordship Honourable Dr. Justice A.S. Anand, the Chief Justice of India and Patron-in-Chief, NALSA. Honourable Mr. Justice S.P. Bharucha, Executive Chairman, NALSA delivered the keynote address. Other dignitaries present at the inaugural function included Honourable Mr. Justice S.B. Majmudar, Judge, Supreme Court of India and Chairman, Supreme Court Legal Services Committee, Honourable Mr. Justice M.S. Liberhan, Chief Justice of Andhra Pradesh High Court and Members of Central Authority.<sup>363</sup>

Permanent and Continuous Lok Adalats are being established in all the Districts in the country. NALSA has been providing and shall continue to provide funds to State Legal

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<sup>361</sup> NALSA: About Us. <https://nalsa.gov.in/about-us> (accessed on 22nd April 2019)

<sup>362</sup> Brief Report on NALSA [http://doj.gov.in/sites/default/files/BRIEF-NALSA\\_0\\_3.pdf](http://doj.gov.in/sites/default/files/BRIEF-NALSA_0_3.pdf) (accessed on 22nd April 2019)

<sup>363</sup> Brief Report on NALSA [http://doj.gov.in/sites/default/files/BRIEF-NALSA\\_0\\_3.pdf](http://doj.gov.in/sites/default/files/BRIEF-NALSA_0_3.pdf) (accessed on 22nd April 2019)

Services Authorities for the implementation of the Legal Aid Schemes and Programmes but the infrastructure has to be provided by the State Governments. Separate, Permanent and Continuous Lok Adalats in Government Departments are aimed at amicably settling pending cases as well as the matters at pre-litigative stage between Government Departments and general public so that the inflow of litigation to regular Courts is reduced.<sup>364</sup>

In so many Government bodies these Lok Adalats have become functional. In Delhi Permanent Lok Adalats have been established in Delhi Vidyut Board, Delhi Development Authority, Municipal Corporation Of Delhi. These Lok Adalats are becoming popular day-by-day and it is expected that very soon a large number of disputes between public and statutory authorities would start getting settled at pre-litigative stage itself saving the parties from unnecessary expense and litigation inconvenience. In other States also State Legal Services Authorities have initiated steps to persuade the State Governments and statutory bodies, etc. to set up separate Permanent Lok Adalats for amicable settlement of their legal disputes.<sup>365</sup>

"Legal Aid Counsel" Scheme which was conceived and introduced by His Lordship Honourable Dr. Justice A.S. Anand when His Lordship was the Executive Chairman, NALSA has been well received all over country. Legal Aid Counsel has been provided in most of the courts of the Magistrates in the country to provide immediate legal assistance to those prisoners who are not in a position to engage their own counsel.<sup>366</sup>

'Nyaya Deep', the official newsletter of NALSA is promoting a healthy working relationship between legal services functionaries throughout the country and is proving immensely useful for exchange of views and sharing of ideas. Statistical information in regard to legal aid schemes and programmes is also included in this newsletter which is printed on quarterly basis. The editorials written by Honourable Mr. Justice R.C. Lahoti

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<sup>364</sup> NALSA: About Us. <https://nalsa.gov.in/about-us> (accessed on 24th April 2019)

<sup>365</sup> NALSA: About Us. <https://nalsa.gov.in/about-us> (accessed on 22nd April 2019)

<sup>366</sup> Lok Adalats. <http://vikaspedia.in/social-welfare/social-security/legal-aid#section-1> (accessed on 22nd April 2019)

reflect the soul of 'Nyaya Deep'<sup>367</sup> and measure the depth of the material included therein. These provide a window to the reader who in one glance through it can appreciate the content and purpose of the articles.

NALSA is laying great deal of emphasis on legal literacy and legal awareness campaign. Almost all the State Legal Services Authorities are identifying suitable and trustworthy Non Governmental Organizations through whom legal literacy campaign may be taken to tribal, backward and far-flung areas in the country. The effort is to publicize legal aid schemes so that the target group, for whom Legal Services Authorities Act has provided for free legal aid, may come to know about the same and approach the concerned legal services functionaries.

NALSA is very sure that under the kind patronage and guidance of Honourable Chief Justice of India and Honourable Executive Chairman, a vibrant nationwide network of Legal Services Authorities shall be made available to the people to provide free and competent legal services to the eligible persons. NALSA is keen to develop and promote a culture of conciliation instead of litigation in the country so that the citizens of this country prefer to resolve their disputes and differences across the table in a spirit of goodwill and brotherhood. NALSA also wishes to ensure that even the weakest amongst the weak in the country does not suffer injustice arising out of any abrasive action on the part of State or private person.<sup>368</sup>

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<sup>367</sup> Navya Deep 2015 <https://nalsa.gov.in/sites/default/files/publication%20pdf/Naya%20Deep-October,%202015.pdf> (accessed on 24th April 2019)

<sup>368</sup> NALSA: About Us. <https://nalsa.gov.in/about-us> (accessed on 22nd April 2019)

# **NATIONAL LEGAL SERVICES AUTHORITY v. UNION OF INDIA 2014**

## **BACKGROUND OF THE CASE**

The judgement was delivered in pursuance of a Public Interest Litigation filed by the National Legal Services Authority (NALSA) seeking to address the grievance of the Transgender Community, for short TG community, and praying for a legal declaration of their gender identity other than the binary gender that is male or female. A similar writ petition was also filed by Poojaya Mata Nasib Kaur Ji Women Welfare Society seeking similar reliefs for the Kinnar community.<sup>369</sup>

The community coming within the umbrella term ‘Transgender’ suffers tremendous trauma and abuse from the society, as they do not fall under neither of the “socially-accepted genders”. The non-recognition and non-acceptance from the society, which shuns the TG community, causes this community to be side-lined and makes them untouchables.<sup>370</sup>

The non-recognition of their sexual and gender identity is a violation of their various Fundamental and Human Rights, which are protected by the Constitution of India and other international Human Rights documents.

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<sup>369</sup> Case summary National Legal Services Authority v Union of India and Others (Writ Petition No. 400 of 2012 with Writ Petition No. 604 of 2013)  
<https://www.equalrightstrust.org/ertdocumentbank/NLSA%20v%20Union%20of%20India.pdf>  
(accessed on 22nd April 2019)

<sup>370</sup> Ibid.

## **FACTS OF THE CASE**

The case concerns legal gender recognition of transgender people, and whether the lack of legal measures to cater for the needs of persons not identifying clearly as male or female contradicts the Constitution.

Pre-existing Indian law only recognized the binary genders of male and female, and lacked any provision with regard to the rights of transgender people, which advocates in India have also defined as “Third Gender”.<sup>371</sup> The gender of a person has been assigned at birth and would determine his or her rights in relation to marriage, adoption, inheritance, succession, taxation and welfare. Due to the absence of legislation protecting transgender people, the community faced discrimination in various areas of life.<sup>372</sup>

The main issue in the writ petition was the recognition of gender identities as perceived by the Transgender Community. The judges took into consideration the international legal scenario and the recognition of the rights of the transgender community by international human rights documents as well as human rights courts.<sup>373</sup>

The right to equality and equal treatment of persons is a right recognized by Article 14 of the Constitution. It specifically provides that no ‘person’ shall be discriminated on the basis of sex or gender. Article 14 does not restrict the word ‘person’ and its application only to male or female. The Transgender fall within the word ‘person’ and are entitled to equal protection of all laws.<sup>374</sup>

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<sup>371</sup>Case summary National Legal Services Authority v Union of India and Others (Writ Petition No. 400 of 2012 with Writ Petition No. 604 of 2013)  
<https://www.equalrightstrust.org/ertdocumentbank/NLSA%20v%20Union%20of%20India.pdf>  
(accessed on 22nd April 2019)

<sup>372</sup> Ibid.

<sup>373</sup> Ibid.

<sup>374</sup> NALSA vs. Union of India. [(2014) 5 SCC 438] <https://translaw.clpr.org.in/case-law/nalsa-third-gender-identity> (accessed on 23rd April 2019)

Article 15 provides for affirmative action for the advancement of minority and backward communities. The Transgenders have been for long denied their rights under Article 15(2). They are shunned from many public places including educational institutions, health care institutes, etc. These rights are not subject to any disability, liability, restriction or condition. Moreover, under Article 15(4) they must be accorded a status of socially and educationally backward class. Additionally, they are also entitled to reservation in the matter of appointment in public and state offices.<sup>375</sup>

One of the most important fundamental rights that is denied to the Transgender community is their right under Article 19 (1)(a).<sup>376</sup> Article 19 (1)(a) guarantees to citizens the freedom of speech and expression. This right includes the right to expression of one's self-identified gender. This expression may be done through dress, words, action or behaviour or any other manner.<sup>377</sup>

Article 21 is one of the most extensive fundamental rights provided by the Constitution. More and more rights have been read into the said right to life and personal liberty. Article 21 has within its ambit all those aspects of life, which gives meaning to a person's life. Life does not mean mere animal existence. It is the right to live with human dignity. It also includes one's personal autonomy. Expression of oneself according to his self-recognized gender is an aspect of personal autonomy protected under Article 21.<sup>378</sup>

Moreover, recognition of one's gender identity lies at the heart of the right to dignity. It is a positive right of persons to make decisions about their life, to express themselves in the way they choose and also to do what activities that they choose to do. The judges laid

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<sup>375</sup> Salma J. NALSA Case Summary September 9, 2017 <https://blog.ipleaders.in/national-legal-services-authority-v-uoil/> (accessed on 22nd April 2019)

<sup>376</sup> Article 19 (1)(a) [www.legalservicesindia.com/article/1847/Freedom-of-Press---Article-19\(1\)\(a\).html](http://www.legalservicesindia.com/article/1847/Freedom-of-Press---Article-19(1)(a).html) (accessed on 22nd April 2019)

<sup>378</sup> Article 21 of the Indian Constitution. <https://indiankanoon.org/doc/1199182> (accessed on 22nd April 2019)



down the Psychological Test as against the Biological Test to identify the gender of a person.

The judges also took into consideration the various human rights provided under the Universal Declaration of Human Rights, the International Covenant of Civil and Political Rights, the Yogyakarta Principles, etc. in determining the extent of transgender rights. Moreover, the plethora of judgements and legislations in foreign countries recognizing the right of the TG community and the acceptance of a special social status in the world convinced the judges that it was high time that India also comes up with progressive measure for the protection of this vulnerable community.<sup>379</sup>

There were two writ petitions filed to protect the rights and identity of the transgender community:

1. NALSA constituted under the Legal Services Authority Act, 1997, filed a writ petition No. 400 of 2012.<sup>380</sup>
2. Poojaya Mata Nasib Kaur Ji Women Welfare Society, a registered association, has also preferred Writ Petition No. 604 of 2013, seeking similar reliefs in respect of Kinnar community, a TG community.<sup>381</sup>
3. Laxmi Narayan Tripathy, claimed to be a Hijra, has also got impleaded so as to effectively put across the cause of the members of the transgender community and Tripathy's life experiences also for recognition of their identity as a third gender, over and above male and female. Tripathi says that non-recognition of the identity of Hijras, a TG community, as a third gender, denies them the right of equality before the

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<sup>379</sup> Case summary National Legal Services Authority v Union of India and Others (Writ Petition No. 400 of 2012 with Writ Petition No. 604 of 2013)

<https://www.equalrightstrust.org/ertdocumentbank/NLSA%20v%20Union%20of%20India.pdf> (accessed on 26th April 2019)

<sup>380</sup>NALSA vs. Union of India. [(2014) 5 SCC 438]

[http://www.supremecourtcases.com/index2.php?option=com\\_content&itemid=99999999&do\\_pdf=1&id=45785](http://www.supremecourtcases.com/index2.php?option=com_content&itemid=99999999&do_pdf=1&id=45785) (accessed on 26th April 2019)

<sup>381</sup>NALSA vs. Union of India. [(2014) 5 SCC 438]  
[http://www.supremecourtcases.com/index2.php?option=com\\_content&itemid=99999999&do\\_pdf=1&id=45785](http://www.supremecourtcases.com/index2.php?option=com_content&itemid=99999999&do_pdf=1&id=45785) (accessed on 26th April 2019)

law and equal protection of law guaranteed under Article 14 of the Constitution and violates the rights guaranteed to them under Article 21 of the Constitution of India.<sup>382</sup>

### **ISSUES OF THE CASE**

As it is clear, these petitions essentially raise an issue of “Gender Identity”, which is the core issue. It has two facets:

- (a) Whether a person who is born as a male with predominantly female orientation (or vice-versa), has a right to get himself to be recognized as a female as per his choice more so, when such a person after having undergone operational procedure, changes his/her sex as well?<sup>383</sup>
- (b) Whether transgender, who are neither males nor females, have a right to be identified and categorized as a “Third Gender”?<sup>384</sup>

### **UNITED NATIONS AND OTHER INTERNATIONAL HUMAN RIGHTS BODIES**

United Nations has been instrumental in advocating the protection and promotion of rights of sexual minorities, including transgender persons. Article 6 of the Universal Declaration of Human Rights, 1948 and Article 16 of the International Covenant on Civil and Political Rights, 1966 (ICCPR) recognize that every human being has the inherent right to live and this right shall be protected by law and that no one shall be arbitrarily

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<sup>382</sup> Ibid.

<sup>383</sup> Case summary National Legal Services Authority v Union of India and Others (Writ Petition No. 400 of 2012 with Writ Petition No. 604 of 2013)

<https://www.equalrightstrust.org/ertdocumentbank/NLSA%20v%20Union%20of%20India.pdf>  
[http://www.supremecourtcases.com/index2.php?option=com\\_content&itemid=99999999&do\\_pdf=1&id=45785](http://www.supremecourtcases.com/index2.php?option=com_content&itemid=99999999&do_pdf=1&id=45785) (accessed on 26th April 2019)

<sup>384</sup> Ibid.

denied of that right. Everyone shall have a right to recognition, everywhere as a person before the law.<sup>385</sup>

Article 17 of the ICCPR states that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation and that everyone has the right to protection of law against such interference or attacks<sup>386</sup>. International Commission of Jurists and the International Service for Human Rights on behalf of a coalition of human rights organizations took a project to develop a set of international legal principles on the application of international law to human rights violations based on sexual orientation and sexual identity to bring clarity and coherence to States human rights obligations.<sup>387</sup>

A distinguished group of human rights experts has drafted, developed, discussed and reformed the principles in a meeting held at Gadjah Mada University in Yogyakarta, Indonesia from 6 to 9 November, 2006 which is unanimously adopted the Yogyakarta Principles on the application of International Human Rights Law in relation to Sexual Orientation and Gender Identity. Yogyakarta Principles address a broad range of human rights standards and their application to issues of sexual orientation gender identity. Some of the rights provided by the Yogyakarta Principles are, right to universal enjoyment of human rights, right to equality and non-discrimination, right to recognition before the law, right to treatment with humanity while in detention, protection from medical abuses etc.<sup>388</sup>

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<sup>385</sup> Salma J. September 9, 2017 <https://blog.ipleaders.in/national-legal-services-authority-v-uo/>  
[http://www.supremecourtcases.com/index2.php?option=com\\_content&itemid=99999999&do\\_pdf=1&id=45785](http://www.supremecourtcases.com/index2.php?option=com_content&itemid=99999999&do_pdf=1&id=45785) (accessed on 26th April 2019)

<sup>386</sup> Article 17 of the ICCPR <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>  
[http://www.supremecourtcases.com/index2.php?option=com\\_content&itemid=99999999&do\\_pdf=1&id=45785](http://www.supremecourtcases.com/index2.php?option=com_content&itemid=99999999&do_pdf=1&id=45785) (accessed on 26th April 2019)

<sup>388</sup>Yogyakarta Principles, 2007  
[http://www.supremecourtcases.com/index2.php?option=com\\_content&itemid=99999999&do\\_pdf=1&id=45785](http://www.supremecourtcases.com/index2.php?option=com_content&itemid=99999999&do_pdf=1&id=45785) (accessed on 26th April 2019)

## **JUDGEMENT OF THE CASE**

Justice Radhakrishnan delivered the majority opinion of the Supreme Court of India. After discussing a historical background of transgenders in India, the Supreme Court affirmably recognized that gender identity and sexual orientation include trans genders and that

“Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom and no one shall be forced to undergo medical procedures..as a requirement for legal recognition of their gender identity.” [para. 20]<sup>389</sup>

It then referred to relevant international human rights standards, particularly Yogyakarta Principles, which provides: “Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights.” [para. 22]<sup>390</sup>

In addition, the Court discussed in detail progressive jurisprudence of other countries, such as United Kingdom, Australia, New Zealand, and the United States towards recognizing the basic rights of transsexual persons. It found it necessary for India to follow international human rights conventions and non-binding principles as the country lacks “suitable legislation protecting the rights of the members of the transgender community.”<sup>391</sup>

The Court then proceeded in interpreting the Constitution of India in light of human rights conventions and principles. Under Article 14, “the State shall not deny to ‘any person’ equality before the law or the equal protection of the laws within the territory of India.” The Court held the article affords protection to ‘any person,’ “transgender persons

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<sup>389</sup> National Legal Services Authority v Union of India and Others (Writ Petition No. 400 of 2012 with Writ Petition No. 604 of 2013) pp.6

<sup>390</sup> Global Freedom of Expression <https://globalfreedomofexpression.columbia.edu/cases/national-legal-services-authority-v-union-of-india/>(accessed on 26th April 2019)

<sup>391</sup>Lavina Bhargava Supreme Court Case Analysis: NALSA v. Union of India and Ors. (Transgenders Rights Case) <https://www.latestlaws.com/case-analysis/supreme-court-case-analysis-nalsa-v-union-of-india-and-ors-transgenders-rights-case-by-lavina-bhargava/> (accessed on 26th April 2019)

who are neither male/female fall within the expression ‘person’ and, hence, entitled to legal protection of laws in all spheres of State activity, including employment, healthcare, education as well as equal civil and citizenship rights, as enjoyed by any other citizen of this country.” [para. 54]<sup>392</sup>

It also held that Articles 15 and 16’s prohibition of discrimination against any citizen, *inter alia*, on the ground of sex equally apply to transsexual persons. According to the Court, the use of word ‘sex’ in the articles “is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male or female.” [para. 59]<sup>393</sup>

As to the right to freedom of expression guaranteed under Article 19(1)(a) of the Constitution, the Supreme Court ruled that it “includes one’s right to expression of his self-identified gender,” and notwithstanding legitimate exceptions pursuant to Article 19(2) of the Constitution, “[n]o restriction can be placed on one’s personal appearance or choice of dressing.” [para. 62]<sup>394</sup>

It concluded that a transgender’s personality “could be expressed by the transgender’s behavior and presentation [and the government] cannot prohibit, restrict or interfere with a transgender’s expression of such personality, which reflects that inherent personality.” [para. 66]<sup>395</sup>

Lastly, the Court referred to Article 21 of the Constitution, which says-

“No person shall be deprived of his life or personal liberty except according to procedure established by law.” It interpreted that this provision broadly protects “those aspects of

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<sup>392</sup> National Legal Services Authority v Union of India and Others (Writ Petition No. 400 of 2012 with Writ Petition No. 604 of 2013) pp.27

<sup>393</sup> Ibid. p, 29

<sup>394</sup> Ibid.

<sup>395</sup> Case summary National Legal Services Authority v Union of India and Others (Writ Petition No. 400 of 2012 with Writ Petition No. 604 of 2013)

<https://www.equalrightstrust.org/ertdocumentbank/NLSA%20v%20Union%20of%20India.pdf>  
(accessed on 28th April 2019)

life, which go to make a person's life meaningful," including one's right of self-determination of the gender to which a person belongs. Accordingly, the Court held that "Hijras/Eunuchs, therefore, have to be considered as third Gender, over and above binary genders under our Constitution and the laws." [para. 74]<sup>396</sup>

Based on the foregoing analysis, the Supreme Court declared, *inter alia*, transgenders "apart from binary gender, be treated as 'third gender' for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by the Parliament and the State Legislature." [para. 129]

It also directed the state governments 'to grant legal recognition of their gender identity such as male, female or as third gender.' [para. 129]<sup>397</sup>

The court was constituted of two judges. The leading judgement was given by Judge K.S. Radhakrishnan, whose judgement was endorsed by Judge A.K. Sikri. However, the latter also gave a separate opinion providing some additional comments. We summarize below the leading judgement. The Court noted that the transgender community (broadly defined by the Court to include Hijras, eunuchs, Kothis, Aravanis and numerous others) has faced prejudice and disadvantage since the eighteenth century in India. It acknowledged the discrimination that transgender people face in areas of life including health care, employment and education, which often leads to social exclusion.<sup>398</sup>

The Court declared that numerous steps were necessary in order for centre and state governments to comply with the constitutional rights to life, equality before the law, non-discrimination and freedom of expression. In reaching its decision, the Court stated that gender identity is an integral part of the personality and one of the most basic aspects of self-determination, dignity and freedom. Thus, no one can be forced to undergo medical procedures, including sex reassignment surgery, sterilization or hormonal therapy as a

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<sup>396</sup> National Legal Services Authority v Union of India and Others (Writ Petition No. 400 of 2012 with Writ Petition No. 604 of 2013) p, 32

<sup>397</sup> Ibid. p, 46

<sup>398</sup> National Legal Services Authority v Union of India and Others (Writ Petition No. 400 of 2012 with Writ Petition No. 604 of 2013)

requirement for legal recognition of their gender identity. Psychological gender is to be given priority over biological sex. Rights have to be protected irrespective of chromosomal sex, genitals, assigned birth sex, or implied gender role.<sup>399</sup>

The Court considered international human rights Conventions and norms to be significant for the purpose of interpreting gender identity equality, and used them to shed light on the interpretation of the Constitution. It stated that the wide discrimination faced by the transgender community creates a “necessity to follow the international Conventions to which India is a party and to give due respect to other non-binding international Conventions and principles” and that any international convention not inconsistent with the fundamental rights of the Constitution must be read into the national provisions.<sup>400</sup>

Accordingly, it stated that it would recognize and follow the principles in the international covenants and the Yogyakarta principles. The Court held that the right to choose one’s gender identity is integral to the right to lead a life with dignity and therefore falls within the scope of the right to life (Article 21). In this regard, the Court emphasized the need to read the provisions of the Constitution in line with present day conditions, based on a factual and social reality that is constantly changing. Safeguarding the rights of transgender people was especially called for due to the increasing universal recognition and acceptance of transgender issues.<sup>401</sup>

The Court noted that Article 21 has been broadly interpreted to include all aspects that make a person’s life meaningful. It protects the dignity of human life, personal autonomy and privacy. As recognition of one’s gender identity lies at the heart of the right to dignity and freedom, it must be protected under Article 21 of the Constitution.

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<sup>399</sup> Ibid.

<sup>400</sup> Case summary National Legal Services Authority v Union of India and Others (Writ Petition No. 400 of 2012 with Writ Petition No. 604 of 2013) <https://www.equalrightstrust.org/ertdocumentbank/NLSA%20v%20Union%20of%20India.pdf> (accessed on 26th April 2019)

<sup>401</sup> Article 21 of the Indian Constitution. <https://indiankanoon.org/doc/1199182> (accessed on 28th April 2019)

With regard to the right to equality before the law (Article 14), the Court recalled that the state shall not deny “any person” equality before the law or equal protection of the laws. Article 14, in ensuring equal protection, imposes a positive obligation on the state “to ensure equal protection of laws by bringing in necessary social and economic changes”. Article 14 is a right enjoyed by “any person” (similarly, the reference to “citizen” in Article 15 is gender-neutral) and so applies equally to men, women and transgender people, who do not identify clearly as male or female. Hence, transgender people are entitled to equal legal protection of the law in all spheres, including employment, health care, education and civil rights. Discrimination on the grounds of sexual orientation and gender identity impairs equality before the law and equal protection of the law and violates Article 14. Articles 15 and 16 prohibit discrimination in certain areas based on a list of grounds, including sex. The reference to “sex” is to be understood as prohibiting all forms of gender bias and gender based discrimination, including discrimination against transgender people.<sup>402</sup>

The emphasis put on tackling sex-based discrimination in the Constitution means that people have a “fundamental right to not be treated differently for the reason of not being in conformity with stereotypical generalizations of the binary genders”. Furthermore, Article 15 includes a requirement to take affirmative action for the advancement of socially and educationally disadvantaged groups. The Court notes that transgender persons have not been afforded special provisions as envisaged under Article 15(4) for the advancement of the socially and educationally backward. They constitute such a group and the state is bound to take some affirmative action to remedy the injustice done to them for centuries. In addition, the Court stated that expressing one’s gender identity through words, dress, action or behaviour is included in the right to freedom of

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<sup>402</sup> Article 14. Equality Before Law <https://www.legalserviceindia.com/legal/article-353-article-14-equality-before-law.html> (accessed on 29th April 2019)



expression (Article 19). Privacy, self-identity, autonomy and personal integrity are fundamental rights protected by Article 19.<sup>403</sup>

As gender identity lies at the core of one's personal identity, gender expression and presentation, it has to be protected under Article 19(1)(a) of the Constitution. Often the state and its authorities, either due to ignorance or otherwise, fail to digest the innate character and identity of transgender persons, which it must do in order to realize their Article 19 rights. On these bases, the Court upheld transgender persons' right to self-identify their gender. The Constitution requires equal treatment of all people regardless of their gender identity or expression. The Court declared that the Centre and State governments must grant legal recognition of gender identity as male, female or third gender. A full recognition is to be given even in the absence of any existing statutory regime. Additionally, the Court declared that educational, social and health care issues faced by transgender people must be addressed both at the centre and state government levels.<sup>404</sup>

To safeguard and protect the rights of the transgenders guaranteed in the constitution of India, it was declared that:

1. Hijras, Eunuchs, apart from binary gender, must be treated as "third gender".<sup>405</sup>
2. Transgender persons' right to decide their self-identified gender is also upheld.<sup>406</sup>

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<sup>403</sup> Article 19 Freedom of Speech and Expression  
<https://www.lawctopus.com/academike/freedom-of-speech-and-expression/> (accessed on 29th April 2019)

<sup>404</sup> Lavina Bhargava Supreme Court Case Analysis: NALSA v. Union of India and Ors. (Transgenders Rights Case) <https://www.latestlaws.com/case-analysis/supreme-court-case-analysis-nalsa-v-union-of-india-and-ors-transgenders-rights-case-by-lavina-bhargava/> (accessed on 29th April 2019)

<sup>405</sup> Ibid.

<sup>406</sup> Ibid.

### **Supreme Court directed Centre and State Government to:**

- Grant legal recognition of their gender identity such as male, female or as third gender.<sup>407</sup>
- Take steps to treat them as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.<sup>408</sup>
- Operate separate HIV Sero-surveillance Centres since Hijras/ Transgenders face several sexual health issues.<sup>409</sup>
- Seriously address the problems being faced by Hijras/Transgenders such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma, etc. and any insistence for SRS for declaring one's gender is immoral and illegal.<sup>410</sup>
- Take proper measures to provide medical care to Transgenders in the hospitals and also provide them separate public toilets and other facilities.<sup>411</sup>
- Take steps for framing various social welfare schemes for their betterment.
- Take steps to create public awareness so that Transgender will feel that they are also part and parcel of the social life and be not treated as untouchables.<sup>412</sup>
- Take measures to regain their respect and place in the society which once they enjoyed in our cultural and social life.<sup>413</sup>

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<sup>407</sup> Case summary National Legal Services Authority v Union of India and Others (Writ Petition No. 400 of 2012 with Writ Petition No. 604 of 2013)

<https://www.equalrightstrust.org/ertdocumentbank/NLSA%20v%20Union%20of%20India.pdf>  
(accessed on 29th April 2019)

<sup>408</sup> Ibid.

<sup>409</sup> Ibid.

<sup>410</sup> Case summary National Legal Services Authority v Union of India and Others (Writ Petition No. 400 of 2012 with Writ Petition No. 604 of 2013)

<https://www.equalrightstrust.org/ertdocumentbank/NLSA%20v%20Union%20of%20India.pdf>  
(accessed on 29th April 2019)

<sup>411</sup> Ibid.

<sup>412</sup> Ibid.

<sup>413</sup> Ibid.

## **NALSA JUDGEMENT AS AN EXAMPLE FOR JUDICIAL PROCEEDINGS**

Courts in India have begun to use the NALSA judgement to expand legal protections for transgender persons and affirm an inclusive and substantive notion of gender equality. For example, in the case of Jackuline Mary (2014) at the Madras High Court, the petitioner (a transgender person) was dismissed from her position as a woman police constable on a number of grounds, including the fact that she had not disclosed her transgender identity, and had applied under the ‘woman’ quota.<sup>414</sup> The court upheld her right to self-identify her gender, and ordered that she be reinstated.

In Ram Singh (2015), the Supreme Court was considering who would fall within the notion of “backward classes” for the purposes of affirmative action policies, and held that the NALSA case was “an important reminder to the State of the high degree of vigilance it must exercise to discover emerging forms of backwardness”.<sup>415</sup>

Similarly, in the case of Shivani Bhat (2015) the Delhi High Court recognized the plight of a 19-year old transgender person who identified as male, and who was facing violence and harassment from his family in India. The Court cited NALSA while ordering that he be given police protection until he left India.

The 2015 Vimla Srivastava case at the Allahabad High Court also cited the NALSA decision while making a more general point about gender equality. The NALSA decision also noted that section 377 of the Indian Penal Code (which criminalizes consensual same-sex conduct) discriminated against certain identities, and “was used as an instrument of harassment and physical abuse against Hijras and transgender persons”.

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<sup>414</sup> Jackuline Mary (2014) [eministlawarchives.pldindia.org/jackuline-mary-v-the-superintendent-of-police](http://eministlawarchives.pldindia.org/jackuline-mary-v-the-superintendent-of-police) (accessed on 29th April 2019)

<sup>415</sup> ICJ Briefing Paper Implementation of the NALSA Decision <https://www.icj.org/wp-content/uploads/2016/04/India-QA-NALSA-Advocacy-Analysis-brief-2016-ENG.pdf> (accessed on 29th April 2019)

The constitutionality of section 377 is currently being challenged at the Supreme Court through a curative petition.<sup>416</sup>

The transgender community has been given various rights over a period of time. These rights have helped the community immensely in establishing themselves as equals amongst the people and create a better atmosphere for themselves. Though, India has not reached so far where a transgender would be accepted by his family or society without any hassles, but it is moving towards this mentality. The government through its legislations and the judiciary through its judgements try and make the life of such people easier so that they do not face any more discrimination from their peers, family and the society at large.<sup>417</sup>

Major steps towards this have been the Bill which was passed in the Rajya Sabha in 2015 and the judgement of the Supreme Court recognizing the transgender as the third gender. To rectify certain errors as pointed out above in the Bill would be, establishing proper redressal mechanism to take action against the non performance of state authorities, like the executive magistrate. Also, there should be strict penal provisions in the Act against the families who disown their transgender relatives.<sup>418</sup> It is very important for a person to have the support of his family and friends for their overall development. Also, there should be specific schemes launched only for transgender so that their upliftment can be taken care of. The scheme should ensure employment for them. Along with this, reservation should be given to transgender in government jobs.

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<sup>416</sup>Vimla Srivastava case at the Allahabad High Court 2015.  
[elegalix.allahabadhighcourt.in/elegalix/WebShowJudgement.do?judgementID=4459659](http://elegalix.allahabadhighcourt.in/elegalix/WebShowJudgement.do?judgementID=4459659) (accessed on 30th April 2019)

<sup>417</sup>Beginning of a Journey Towards the Legal Rights of Transgenders <http://ijlljs.in/wp-content/uploads/2016/04/11.pdf> (accessed on 30th April 2019)

<sup>418</sup>Transgenders Persons Protection of Rights Bill 2016

Transgender children deserve to attend public schools that are free from stress related to their gender identity; this can be provided by the government by ensuring that the school environment is free from worries regarding which restroom to use etc. It is also recommended that all the schools should accept a student's declaration of his or her own gender identity. A student who says he is a boy and wishes to be referred to in that way throughout the school day should be accepted and treated like any and every other boy. Doing this will not only remove the discrimination from the grass root level but will also create a healthy impact on the transgender child's life.<sup>419</sup>

Lastly, Non Governmental Organizations should form a city wise team and ensure that the implementation of the directions of the Supreme Court are made properly as ultimately, the change will only happen if the implementation is done in reality.

### **CRITICAL ANALYSIS OF THE CASE**

The Indian Supreme Court has recently delivered an important judgement in the case of National Legal Services Authority v Union of India. A two-judge bench comprising Justices Radhakrishnan and Sikri declared, that hijras (a traditional Indian male-to-female trans group) must be treated as a 'Third Gender' for all legal purposes, and that transpersons in general have the right to decide whether they want to be identified as male, female or belonging to the third gender. Given the specific declaration that hijras belong to the third gender, it is not clear whether the general right to choose one's gender is available to hijras too, or only other transpersons.<sup>420</sup> The Court also issued a number of other directions to the state remarkable in their breadth and, perhaps for that reason, vulnerable to remaining unimplemented.

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<sup>419</sup>National Legal Services Authority v. Union of India and Ors, (2014) 5 SCC 438.

<sup>420</sup>Tarunabh Khaitan: NALSA v. Union of India: What Courts Say, What Courts Do. <https://ukconstitutionallaw.org/2014/04/24/tarunabh-khaitan-nalsa-v-union-of-india-what-courts-say-what-courts-do/> (accessed on 30th April 2019)

In some respects, this judgement is in sharp contrast to the one delivered by another bench of the same Court in December 2013. In *Suresh Koushal v Union of India*, two other judges had overturned a Delhi High Court judgement declaring the criminalization of sodomy to be unconstitutional.<sup>421</sup> In effect, Koushal recriminalized India's LGBT minority after a brief and hard-won respite from the Delhi High Court. Unlike Koushal's complete failure to appreciate the counter-majoritarian judicial function in a constitutional democracy, the NALSA judges are acutely aware of their special duty to protect a 'marginalized section of the society' which is 'very small in number'.<sup>422</sup> Contrary to Koushal's rejection of comparative law, NALSA is replete with lengthy references to international and foreign judgements and legislation, surprisingly including material not only from the usual Western liberal democracies but also India's less liberal and less democratic neighbours such as Pakistan and Nepal.<sup>423</sup>

Unlike *Suresh Koushal's* miserliness in understanding the scope of fundamental rights, NALSA adopts expansive interpretations of fundamental rights. The right to equality in Article 14 is read to include positive obligations.<sup>424</sup>

The right against discrimination in Articles 15 and 16 is read to prohibit not only direct but also indirect discrimination.<sup>425</sup> Prohibition of discrimination on the ground of 'sex' specified in these Articles is read to include a prohibition on discrimination based on gender identity. The court compares gender identity to the paradigm ground in Indian discrimination law caste by acknowledging that transpersons are treated like 'untouchables'. It also sees the parallels between the protection of disability and that of

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<sup>421</sup>*Suresh Kumar Kaushal v. Naz Foundation Civil Appeal No. 10972 of 2013*  
<https://indiankanoon.org/doc/58730926/p> (accessed on 30th April 2019)

<sup>422</sup>Tarunabh Khaitan: *NALSA v. Union of India: What Courts Say, What Courts Do.*  
<https://ukconstitutionallaw.org/2014/04/24/tarunabh-khaitan-nalsa-v-union-of-india-what-courts-say-what-courts-do/> (accessed on 30th April 2019)

<sup>423</sup>*National Legal Services Authority v. Union of India and Ors*, (2014) 5 SCC 438.

<sup>424</sup> ICJ Briefing Paper Implementation of the NALSA Decision <https://www.icj.org/wp-content/uploads/2016/04/India-QA-NALSA-Advocacy-Analysis-brief-2016-ENG.pdf> (accessed on 30th April 2019)

<sup>425</sup>Lounge Opinion: Why the Transgender verdict is an incomplete one. <https://www.livemint.com/> (accessed on 30th April 2019)

gender identity. Noticing such continuity between different forms of discrimination is rare for Indian courts.<sup>426</sup>

The Court especially notes Articles 15(4) and 16(4), which allow the state to make special provisions for the advancement of socially and educationally backward classes. The judgement does not fully explain how this constitutional permission can lead to the conclusion that the state is bound to take some affirmative action for their advancement so that the injustice done to them for centuries could be remedied'. One possibility is that the Court is relying on its earlier premise that the right to equality under Article 14 imposes positive as well as negative obligations. Alternatively, the Court may be implying that once the state relies on the constitutional permission to take affirmative action for some backward classes, it must do so for *all* of them.<sup>427</sup> It would have been better if the Court had clarified the precise reasoning behind the directions to the state to extend affirmative action benefits to transpersons—effectively a recognition of a *right* to affirmative action.<sup>428</sup>

The right to freedom of expression in Article 19 is read expansively to include the freedom to express oneself through dress, words, action, behaviour etc. Thus, gender-non-conforming dress and behaviour are constitutionally protected. The right to life and personal liberty under article 21 is declared to rest upon notions of positive freedom, personal autonomy, self-determination and human dignity and not simply freedom from unjustified state interference. Thus, the state has a duty to enable transpersons to be free in the positive as well as the negative sense.<sup>429</sup>

The remedies that the court grants are also very interesting. Three directives have already been mentioned: that hijras are now recognized as the third sex, that transpersons have the right to choose between being male, female or belonging to the third gender, and that

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<sup>426</sup>ICJ Briefing Paper Implementation of the NALSA Decision <https://www.icj.org/wp-content/uploads/2016/04/India-QA-NALSA-Advocacy-Analysis-brief-2016-ENG.pdf> (accessed on 30th April 2019)

<sup>427</sup>Lounge Opinion: Why the Transgender verdict is an incomplete one. <https://www.livemint.com/> (accessed on 30th April 2019)

<sup>428</sup>ICJ Briefing Paper Implementation of the NALSA Decision <https://www.icj.org/wp-content/uploads/2016/04/India-QA-NALSA-Advocacy-Analysis-brief-2016-ENG.pdf> (accessed on 30th April 2019)

<sup>429</sup> Ibid.

transpersons are to be given affirmative action benefits, since they are a ‘backward class’. The Court goes on to give a slew of other directions, including some very specific orders (direction to provide specific toilets and HIV care centres for transpersons), some rather broad ones (direction to provide them with medical care in all hospitals, to frame various social welfare schemes for their betterment, and to take steps to create public awareness to ensure their social inclusion) and some wonderfully imprecise ones (direction to seriously address problems being faced by them and to take measures to ensure a respectful place for them in social and cultural life). To top it all, the Court notes that the government has already constituted an ‘Expert Committee’ to study the problems faced by the transpersons. Without specifically mentioning what its findings or recommendations actually are (the Committee submitted its report in January 2014), the Court orders the Executive to implement its recommendations within six months.<sup>430</sup>

It is only when we examine the remedies the Court grants in NALSA that we can see a common understanding of the judicial function with the Koushal bench. It is argued that the Koushal Court was not being deferential to Parliament in refusing to hold the colonial anti-sodomy provision unconstitutional. On the contrary, the judgement showed a characteristic lack of respect for separation of powers. The NALSA judges are much more benign and progressive, with a much better understanding of the counter-majoritarian judicial role than the Koushal judges. But when it comes to its attitude to the legislature, they match Koushal’s contempt for Parliament with indifference.<sup>431</sup>

Its champions as well as its critics agree that the Indian Supreme Court does not generally waste much time worrying about separation of powers. It makes drastic and frequent forays into the legislative domain with little hesitation. This is broadly true, but the manner in which these incursions are made is interesting and NALSA offers a good

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<sup>430</sup>Tarunabh Khaitan: NALSA v. Union of India: What Courts Say, What Courts Do. <https://ukconstitutionallaw.org/2014/04/24/tarunabh-khaitan-nalsa-v-union-of-india-what-courts-say-what-courts-do/> (accessed on 26th April 2019)

<sup>431</sup>Ibid.



illustration. In its social rights jurisprudence, one can see two very different types of remedies provided by the Court.<sup>432</sup>

On the one hand, one sees judicial legislation, usually in the form of an endorsement of a policy or a set of recommendations framed by the Executive, like the recommendations of the Expert Committee in this case. These recommendations are often precise and detailed, and therefore legislative in character. Frequently the government lawyer would have informed the Court of the Executive's support for these recommendations.<sup>433</sup> What the Court effectively does is collude with the Executive to stamp consultation documents and ad hoc committee reports with constitutional authority, entirely bypassing Parliament. In fact, faced with an un-obliging Parliament paralyzed by obstructionist politics, governments often find it easier to legislate through the courts than through Parliament.

Even in *Koushal*, the government had rather unusually admitted before the Court that the criminalization of sodomy was unconstitutional. It would have very much liked the Court to affirm the Delhi High Court order, one that it had chosen not to appeal. Ministers publicly endorsed gay rights only after the court refused to play ball, but the Executive response was to seek judicial review rather than go to Parliament. The Indian courts are no doubt legislating. But on the whole, the initiative remains with the Executive. Courts have simply become a parallel, albeit less predictable, forum for endorsing legislative proposals that still originate from the Executive.<sup>434</sup>

The Court not only interests in whether its vague orders are implemented therefore it also cares about participating actively in and shaping the political discourse on various issues. The Indian Supreme Court is an explicitly political institution which does not pretend to

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<sup>432</sup> Shreya Ila Anasuya. Over Two Years After Landmark Judgement, Transgender People Are Still Struggling by <https://thewire.in/gender/over-two-years-after-landmark-judgement-transgender-people-are-still-struggling> (accessed on 30th April 2019)

<sup>433</sup> Shreya Ila Anasuya. Over Two Years After Landmark Judgement, Transgender People Are Still Struggling by <https://thewire.in/gender/over-two-years-after-landmark-judgement-transgender-people-are-still-struggling> (accessed on 30th April 2019)

<sup>434</sup> *Suresh Kumar Kaushal v. Naz Foundation* Civil Appeal No. 10972 of 2013 <https://indiankanoon.org/doc/58730926/p> (accessed on 30th April 2019)

be otherwise. Even in NALSA, the judges are very clear that law must transform social realities. The Suresh Koushal judges were very keen to ensure that the law did not disturb the social status quo. Both positions, although diametrically opposed, are self-consciously political. Of course, all courts are political. The difference in India is that judges are not coy about acknowledging this reality. Whether this honestly is a virtue or whether at least the judicial pretence of functioning outside politics nonetheless imposes useful restraints on courts is a matter for another day.<sup>435</sup>

The reason that Indian courts spend time penning these unimplementable orders is that they know it is not just what they do that matter, but also what they *say*. As prominent political players whose words carry a lot of weight in the public discourse, these expansive and vague directions are not simply pious platitudes. They will be relied upon by activists, reported by the media, debated by politicians and as soft-law instruments lay the foundations for future judicial and legislative development.<sup>436</sup> Like its legislative role, the Indian Supreme Court has adopted a very expansive understanding of its expressive function. Debates on separation of powers need to consider the proper limits not only of what courts do, but also what they say.<sup>437</sup>

## **GAPS IN IMPLEMENTATION**

Transgender activist Vyjayanti Vasanta Mogli agrees.

“Access to education and consequently to employment continue to evade the transgender community. Transpeople continue to face the violation of their right to life, facing unreported and unregistered hate crimes. There is very poor access to

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<sup>435</sup>Social Justice for Transgender Person <http://socialjustice.nic.in/transgenderpersons.php> (accessed on 30th April 2019)

<sup>436</sup>Tarunabh Khaitan: NALSA v. Union of India: What Courts Say, What Courts Do. <https://ukconstitutionallaw.org/2014/04/24/tarunabh-khaitan-nalsa-v-union-of-india-what-courts-say-what-courts-do/> (accessed on 26th April 2019)

<sup>437</sup>Suresh Kumar Kaushal v. Naz Foundation Civil Appeal No. 10972 of 2013 <https://indiankanoon.org/doc/58730926/p> (accessed on 30th April 2019)

health and medical care, and many transpeople continue to be pathologised as having ‘gender identity disorder’ due to inaction by the Medical Council of India.”<sup>438</sup>

Akkai Padmashali, transwoman and the co-founder of organisation Ondede said,

“I’m thankful to the Supreme Court, which delivered a judgement based on constitutional equality, and spoke about rights. They took the issue very seriously. But they directed the governments to develop a policy, and I feel that the states largely have failed to do this.”<sup>439</sup>

This is despite the fact that the NALSA judgement explicitly asked an expert committee on transgender rights which had already been constituted by the Central Government to examine its recommendations based on the legal declarations made in the NALSA judgement, and implement them within six months.<sup>440</sup>

Part of the delay can be attributed to what transpired after the NALSA judgement was passed. In September 2014, the Ministry of Social Justice and Empowerment (MSJE) asked the Supreme Court of India to clarify certain aspects of the NALSA ruling. According to the ICJ report, these included clarifying “which groups fall within the ambit of ‘transgender’ persons for the purposes of implementing the NALSA judgement” and “what classification and procedure, given existing frameworks, should be followed while designing affirmative action policies for transgender persons in public institutions.”<sup>441</sup>

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<sup>438</sup> Shreya Ila Anasuya. Over Two Years After Landmark Judgement, Transgender People Are Still Struggling by <https://thewire.in/gender/over-two-years-after-landmark-judgement-transgender-people-are-still-struggling> (accessed on 30th April 2019)

<sup>439</sup> Ibid.

<sup>440</sup> ICJ Briefing Paper Implementation of the NALSA Decision <https://www.icj.org/wp-content/uploads/2016/04/India-QA-NALSA-Advocacy-Analysis-brief-2016-ENG.pdf> (accessed on 26th April 2019)

<sup>441</sup> ICJ Briefing Paper Implementation of the NALSA Decision <https://www.icj.org/wp-content/uploads/2016/04/India-QA-NALSA-Advocacy-Analysis-brief-2016-ENG.pdf> (accessed on 30th April 2019)

The MSJE also asked whether the six-month time limit for implementation could be extended, arguing that the recommendations were too broad to be implemented so swiftly. Unfortunately, the Supreme Court has still not responded to the ministry on this matter.

Activists are now saying that the delay has been used by state governments to stall action. Laxmi Narayan Tripathi, transgender activist and one of the original petitioners in the NALSA judgement said, “There may be a pending issue of clarification in the court, but I don’t understand why that has to stop policy-level decisions. That’s the excuse they’re giving us at the state-level, which is obnoxious. It is sad that the governments are waiting for petty things when the community has been facing discrimination and ostracisation for hundreds of years.”<sup>442</sup>

A lot of the confusion has actually arisen from the much-hailed NALSA judgement. Even as the mainstream press and civil society was celebrating the judgement, many transgender commentators were pointing out its inherent problems and contradictions.

The fact that transgender is an umbrella term for people whose gender identity and/or expression is different from the gender assigned to them at birth, and specifically in the case of India, may used to describe a variety of identities, such as kothi, transman, transwoman, hijra, aravani, genderqueer, etc. is not clearly outlined in the judgement.

Gee Imaam Semmalar points out that the judgement also pathologises transgender people, does not address issues faced by transmen and repeatedly uses offensive terms like ‘eunuch’, a word which has been used to criminalise transgender communities.<sup>443</sup>

Semmalar also predicted a lot of the problems of conceptualization as well as implementation that are now apparent with the draft transgender rights bill, such as the issue of certification or reservations:

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<sup>442</sup>Tarunabh Khaitan: NALSA v. Union of India: What Courts Say, What Courts Do. <https://ukconstitutionallaw.org/2014/04/24/tarunabh-khaitan-nalsa-v-union-of-india-what-courts-say-what-courts-do/> (accessed on 30th April 2019)

<sup>443</sup>ICJ Briefing Paper Implementation of the NALSA Decision <https://www.icj.org/wp-content/uploads/2016/04/India-QA-NALSA-Advocacy-Analysis-brief-2016-ENG.pdf> (accessed on 30th April 2019)

“To avail benefits like OBC reservation in jobs and education, would it be compulsory for trans women to get third gender identities? The process is not clear and neither is whether they have a choice. What does a blanket OBC reservation mean to a community that has a large number of dalit trans people? An unwarranted promotion? What does an OBC status mean to internal hierarchies?”<sup>444</sup>

He also argues that it is not clear from the NALSA judgement whether sex reassignment surgery would be necessary for gender identity to be legitimized by the state.

In a written critique of the NALSA judgement, Dutta also points out that the judgement is far from clear on its stance on the recognition of gender identity. “At one point it cites the Argentina model which allows for self-identification without requiring medical certification, a model which has been lauded by many trans activists. Yet at other points it seems to suggest that ‘psychological tests’ would be necessary, which is potentially very problematic given the constraints of how diagnosis of gender dysphoria works in psychiatry and medicine,” writes Dutta.<sup>445</sup>

## **DEBATE ON THE TWO BILLS**

Meanwhile, MP Tiruchi Siva introduced a private member’s bill – the Rights of Transgender Persons bill in the Rajya Sabha, which was unanimously passed in April 2015.

As the ICJ paper says, “The structure and substance of the Bill draws heavily from the NALSA judgement. The Bill’s broad definition of the term transgender relies on the judgement’s call for inclusiveness. The different rights recognized and given

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<sup>444</sup>LACUNA: DIBYADARSHINI NANDANALSA VS. UOI- A CRITICAL ANALYSIS  
<https://racolblegal.com/nalsa-vs-uo-i-a-critical-analysis/> (accessed on 30th April 2019)

<sup>445</sup> Shreya Ila Anasuya. Over Two Years After Landmark Judgement, Transgender People Are Still Struggling by <https://thewire.in/gender/over-two-years-after-landmark-judgement-transgender-people-are-still-struggling> (accessed on 22nd April 2019)

protection under the Bill include the right to equality, life, free speech, community, integrity, family, along with the right to be free from torture and other abuse.” Siva’s bill is yet to be passed in the Lok Sabha.<sup>446</sup>

Then, in late 2015, the MSJE published a draft bill of the same name on its website with what activists say includes a number of problematic changes. “The gatekeeping of transgender identities is facilitated and institutionalised by the ministry in its bill.”<sup>447</sup>

“Say a transgender person wants to file a case against perpetrators of hate crime, assault or discrimination: will they then have to first obtain a certificate from the state proving that they are trans? If one already has other ID cards saying ‘other’ or ‘trans’, would one still need this certificate?”<sup>448</sup> This manner of legislating identity is extremely restrictive. What would happen if a transgender wanted a male or female ID card, instead of one that identifies them as Third Gender?

Although the draft bill says that transgender will be given OBC status, it is still confusing on the matter of affirmative action. The MSJE bill takes away incentives for private sector reservations, which the Tiruchi Siva bill had included. It also does not specify how reservations will be allocated. Obviously transpeople can also be dalit, so do they get two sets of reservations? How about OBC transpeople: do they not get anything new? It is highly likely that a cisgender OBC person would be chosen over a transgender OBC person for most posts.<sup>449</sup>

Mogli says, “The government’s bill has altogether deleted the section of the private member’s bill that gave transgender people recourse to the Executive Magistrate apart from the police. Also, there is no reservation in the government’s bill for education,

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<sup>446</sup>Lacuna: Dibyadarshini Nanada NALSA VS. UOI-A critical Analysis <https://racolblegal.com/nalsa-vs-uoia-critical-analysis/> (accessed on 22nd April 2019)

<sup>447</sup> Ibid.

<sup>448</sup> Ibid.

<sup>449</sup>ICJ Briefing Paper Implementation of the NALSA Decision <https://www.icj.org/wp-content/uploads/2016/04/India-QA-NALSA-Advocacy-Analysis-brief-2016-ENG.pdf> (accessed on 22nd April 2019)

but there is one for employment. How will anyone access employment without access to education?”<sup>450</sup>

Transgender activist Raina Roy, too, takes exception to the provision for the formation of state welfare boards to give out transgender identification.

“We need to understand the consequences of this kind of gatekeeping very thoroughly. It is bound to include a few, and is likely to exclude a majority of people.” On this matter, Mogli asks, “Would women be alright with the Women’s Commission being given the power to reject their womanhood?”<sup>451</sup>

In its response to the draft bill, the Telangana Hijra Intersex Samiti tackles precisely this issue, demanding that the bill be amended to clearly allocate 2% reservations for transpeople in every government establishment.

“When it comes to the issue of reservations, we as a community would like a clearly demarcated internal reservation quota based on gender – within the SC/ST or OBC categories depending on whether the transgender individual is born SC/ST or not, respectively.”<sup>452</sup>

Another transgender activist, Sampoorna, asks for the inclusion of intersex people in the scope of the bill:

“All intersex people face acute issues like lack of access to healthcare, education, and employment and face violence, stigma and discrimination at multiple levels. Moreover, there are people with intersex variations who also identify as transgender.”

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<sup>450</sup> Shreya Ila Anasuya. Over Two Years After Landmark Judgement, Transgender People Are Still Struggling by <https://thewire.in/gender/over-two-years-after-landmark-judgement-transgender-people-are-still-struggling> (accessed on 22nd April 2019)

<sup>451</sup> Lacuna: Dibyadarshini Nanada NALSA VS. UOI-A critical Analysis <https://racolblegal.com/nalsa-vs-uo-i-a-critical-analysis/> (accessed on 22nd April 2019)

<sup>452</sup> Shreya Ila Anasuya. Over Two Years After Landmark Judgement, Transgender People Are Still Struggling by <https://thewire.in/gender/over-two-years-after-landmark-judgement-transgender-people-are-still-struggling> (accessed on 23rd April 2019)

Recommendations were also sent to the Ministry by a group of activists with a special focus on transmasculine communities.<sup>453</sup>

Activists have also criticized the manner in which the bill has been drafted by the MSJE, saying that the process has been largely undemocratic and non-transparent. When the ministry made an updated version of the draft bill available on their website in January 2016, they asked for responses to be sent via email within a short time. After transgender rights collectives across the country protested the deadline was extended by another ten days, but remained restricted to people who could read English and access the Internet, leaving a majority of people out of the conversation.<sup>454</sup>

The subsequent in-person consultation was also not nearly as inclusive as they feel it should have been. “How many working class, non-English speaking transpeople have gone through this bill?”<sup>455</sup>

Another huge problem, one that is central to the exercise, is the fact that parliamentarians are not sensitized or educated about transgender issues and rights.

The change in the law is not enough given the level of sensitization that is required among the people who are required to implement the law, from officers in lower courts, to lawyers and the police force. Even if the judgement recognizes transgender people, society is still transphobic and patriarchal. It is the government’s responsibility to properly sensitize people, otherwise it is very difficult and painful for us to avail things that should be simple, like an ID change. Advocacy is required at every level.<sup>456</sup>

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<sup>453</sup>Lacuna: Dibyardarshini Nanada NALSA VS. UOI-A critical Analysis <https://racolblegal.com/nalsa-vs-uoi-a-critical-analysis/> (accessed on 23rd April 2019)

<sup>454</sup> Ministry of Social Justice and Empowerment Report. <http://socialjustice.nic.in/> (accessed on 23rd April 2019)

<sup>455</sup> Critical Analysis of the Case <https://lexquest.in/nalsa-v-uoi-critical-analysis/> (accessed on 23rd April 2019)

<sup>456</sup> Shreya Ila Anasuya. Over Two Years After Landmark Judgement, Transgender People Are Still Struggling by <https://thewire.in/gender/over-two-years-after-landmark-judgement-transgender-people-are-still-struggling> (accessed on 23rd April 2019)



## **THE ROAD AHEAD**

The MSJE has not yet uploaded a revised version of the draft bill onto its website, so it is unclear whether they have accepted any of the numerous suggestions given by transgender rights collectives.<sup>457</sup>

Another concrete example of the huge lack of political will on the issue is the fact that not a single ministry sent in its comments on the draft bill during a process of inter-ministerial consultation. A senior official of the Ministry of Social Justice said, “But even after the passage of 15 days (the timeline on inter-ministerial consultation), the concerned ministries have not sent their comments, following which it was sent to the Legislative Department of the Law Ministry for finalizing the Bill so that it can be sent to the Cabinet for approval.”<sup>458</sup>

Mogli says, “The continued criminalization of begging and sex work as traditional sources of livelihood for transgender and hijra communities allows the police to further victimize a highly marginalized and vulnerable population. There are enough and more instances of custodial sexual and physical torture and violence against transgender people. In the cases of custodial torture and sexual violence by the police that we complained against, no departmental action was initiated.”<sup>459</sup>

“The criminalization of begging is draconian and posited on the flawed classist approach of ‘garibon ko hatao’ (remove the poor) instead of ‘garibi hatao’ (remove poverty). The criminalisation of begging adversely and predominantly affects the poor just for being poor,” she adds.<sup>460</sup>

Abhina Aher, transgender activist and national programme manager with the India HIV/AIDS Alliance says:

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<sup>457</sup> Ministry of Social Justice and Empowerment Report. <http://socialjustice.nic.in/> (accessed on 23rd April 2019)

<sup>458</sup> Ministry of Social Justice and Empowerment Report. <http://socialjustice.nic.in/> (accessed on 23rd April 2019)

<sup>459</sup> Vaibhav Sara. Begging for Change: Hijras: Law and Nationalism Contributions to Indian Sociology 53, 1 (2019): 133–157

<sup>460</sup> Ibid.

“Things have moved very slowly by the government, and we are still struggling for basic things. There is immense violence against transgender people every day. As for employment in the private sector, transpeople are facing a Catch-22 situation, where employers are perhaps not ostensibly transphobic, but expect qualifications and experience that most don’t have access to. The Prime Minister is talking about skill development programmes, I think there should be a specific skill development programme for transpeople. It shouldn’t be tokenistic, like the bar dancers in Maharashtra who were made to make agarbattis. Economic disempowerment and residential issues are also huge concerns.”<sup>461</sup>

Abhina Aher also adds by saying “We are asking for identity, employment, education, recognition and dignity. We want human rights first and everything else next.”<sup>462</sup>

The NALSA judgement “put in a strong pitch for two very positive things – the self-determination of gender, without insistence of gatekeeping or certification through surgery or hormones, and affirmative action for transpeople. At least it attempted to understand transgender identities in a relatively broad and intersectional fashion, as opposed to one or two identities. However, the Ministry of Social Justice has had a much more limited and problematic approach overall.”<sup>463</sup>

Firstly, the judgement limited its applicability to the communities identified in it like Hijras, Kinnars, Kothis, Shiv-shaktis etc. Transgender is a broad term and includes many others identities like trans-men, trans-women, gender-queer etc. The rest of the judgement treats transgender as an umbrella term. Therefore, there is confusion about status of other identities within the term transgender. The judgement also used the term

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<sup>461</sup> Abhina Aher is a transgender activist. <https://www.npr.org/.../a-journey-of-pain-and-beauty-on-becoming-transgender-in-india> (accessed on 25th April 2019)

<sup>462</sup> Ibid.

<sup>463</sup> Shreya Ila Anasuya. Over Two Years After Landmark Judgement, Transgender People Are Still Struggling by <https://thewire.in/gender/over-two-years-after-landmark-judgement-transgender-people-are-still-struggling> (accessed on 23rd April 2019)

eunuchs interchangeable with transgender, which many persons of transgender community finds insulting.<sup>464</sup>

Secondly, the judgement preferred to be silent about the issue of Section 377, IPC. This makes the rights granted to transgender incomplete because it prohibits the transgender from enjoying sexual relationship of their choice and this section can be used to discriminate and harass the transgender. Even the judgement pointed out instances in past where this section had been misused. The Yogyakarta principles also recommends repeal of any such criminal laws and considers right to form sexual or intimate relationship is an integral part of personality. Further, the judgement included marriage rights in the rights of the transgender. Marriage rights cannot be fully enjoyed if right to form sexual relationships is not granted.<sup>465</sup>

Thirdly, the Court directed the government to confer OBC status to the transgender. There are many dalits in the community and hence the deciding their status for providing reservation benefits will be very confusing. Not to mention the discontentment among the youths regarding reservation in general.<sup>466</sup>

Lastly, the Court describes in great detail the historical position of the transgender in the Indian society, but did not mention the Mughal period, an important phase in the history of transgender.

The judgement adopts a progressive, right-based approach towards transgender and hence paved the way for the social recognition and acceptance of the transgender and other communities who do not confirm to the binary view of the gender. It may not bring any over-night phenomenal change in the mind-set of the people. But it is the first step none the less. With government measures and amendments in various laws and awareness among the general public, a gender inclusive society can be built on the very foundation

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<sup>464</sup> Ibid.

<sup>465</sup> Akansha Mishra Third Gender Rights: The Battle for Equality Christ University Law Journal, 5, 2 (2016), 9-21

<sup>466</sup> Ibid.

laid down by this judgement where no person shall be discriminated on the grounds of gender and sexual orientation.<sup>467</sup>

Another important issue raised in this judgement was with regard to the validity of the Sex Reassignment Surgery (SRS) from the point of view of Human Rights and the court held the test to be illegal and insisted on using the “Psychological test”.<sup>468</sup> The court here emphasized on the psychological factors of relating to a gender than the binary notion of gender of that person, thereby focusing on the root cause of trauma of the Transgender community.

With regard to the detailed procedure for implementation and recognition of the third gender, the report of Ministry of Social Justice and Empowerment Expert Committee will play a very important role as has been stated in the judgement. The Court states that the recommendations should be examined based on the legal declarations made in this judgement and implemented within six months. This order by the court broadens the scope of rights that can be granted to the Transgender community as the report of Ministry of Social Justice and Empowerment Expert Committee essentially covers up most aspects of life that could help in upliftment of the gender minority. For instance, recommendations include Setting up of crisis centers, and gender sensitization in institutional settings.<sup>469</sup>

The only point where the court seems to lack a stance is on Section 377. Though the judgement recognizes the harm done by Section 377 to the Transgender community, it did not make any orders or recommendations regarding the same.<sup>470</sup>

## **POST JUDGEMENT SCENARIO**

The Two Sided Coin The judgement was definitely a constructive step towards humanization of the judicial system and was a major step towards eliminating the

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<sup>467</sup> Ibid.

<sup>468</sup> Akansha Mishra Third Gender Rights: The Battle for Equality Christ University Law Journal, 5, 2 (2016), 9-21

<sup>469</sup> Vaibhav Sara. Begging for Change: Hijras: Law and Nationalism Contributions to Indian Sociology 53, 1 (2019): 133–157

<sup>470</sup> Ibid.

injustice done to almost five million people who were running from one place to another without any identity. The Supreme Court's ruling acted as the conformity to basic human rights and people's dignity, finally assigning the true meaning to Right to life and human dignity guaranteed under Article 21 of the Constitution of India. The first stream of development was seen with the constitution of an Expert Committee to make an in-depth study of all the difficulties faced by the transgender community and further suggest measures to mitigate their problems and finally submit the report along with the suggestions and recommendations within three months of its establishment.<sup>471</sup>

The cloak of invisibility of transgender persons was first seen to wear out successfully in Tamil Nadu, with inclusion of special "Third Gender" category for them on ration cards. Further, government orders were issued announcing unfettered access to education and counseling services. More recently, the state's social welfare department announced the constitution of a separate welfare board for transgender people. Taking inspiration from Tamil Nadu, Maharashtra became the second state to set up a welfare board for transgender persons and also took an initiative to set up the cultural institute dedicated to their community.<sup>472</sup>

### **POSITION IN OTHER COUNTRIES**

Nepal was the first country to establish a third gender category ("other") on citizenship documents, following the Supreme Court's ruling in the country's landmark decision in the case of Sunil Babu Pant and Others v. Government of Nepal,<sup>473</sup> which ordered the government to scrap all the discriminatory laws and recognized the fundamental rights of transgender persons. The Supreme Court of Pakistan recognized the rights of eunuchs in the case of Dr. Mohammad Aslam Khaki & Anr. v. Senior Superintendent of Police (Operation) Rawalpindi & Ors.<sup>474</sup>

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<sup>471</sup> National Legal Services Authority v. Union of India & Ors, (2014) 5 SCC 438

<sup>472</sup> Tamil Nadu Pioneers in Transgender Inclusion, <http://infochangeindia.org/agenda/social-exclusion/tamil-nadupioneers-transgender-inclusion.html> (accessed on 23rd April 2019)

<sup>473</sup> Sunil Babu Pant and Others v. Government of Nepal, Writ No. 917 of the year 2064 BS (2007 AD), (Supreme Court of Nepal, 21/12/2007).

<sup>474</sup> Dr. Mohammad Aslam Khaki v. Senior Superintendent Police, Constitution Petition No.43 of 2009 (Pakistan Supreme Court, 22/03/2011).

The recognition came as an after effect of the attack and rape of eight hijra wedding dancers, by the local police. This disturbing event led Mohammad Aslam Khaki, a lawyer specializing in Islamic law, to file a private case in the country's Supreme Court, asking to recognize hijras as a third gender. This judgement recognized the rights of eunuchs as citizens of the country, subject to constitution of the Islamic Republic of Pakistan, 1993 and further acted as a catalyst to various initiatives taken to protect their legal rights. The situation in Bangladesh is as follows. Trans-sexual people were given the right to vote since 2009, but true meaning to its implementation was given in November 2013, with the government recognition of “hijra” as third gender category in all national documents and passports.<sup>475</sup>

Further west, Germany was the first European country to officially recognize a “third gender” category on birth certificates. A new law on 5<sup>th</sup> November, 2013 allowed parents to register the sex of the children as „not specified“ in the case of children with intersex variation.<sup>476</sup> Taking inspiration from Germany, France became the second country in Europe to recognize the identity of third gender by moving away from the rigid biological determinism of man and woman. The case was brought by a 64-year-old plaintiff, who was assigned male at birth, despite genitalia that presented as neither completely male nor female.<sup>477</sup>

## **CONCLUDING VIEW**

It is distinctly clear from the above observations that transgender individuals with different sexual orientation face intolerance, discrimination and exclusion in the society. This isolation varies from private reasons to the most common social incomprehension. While judiciary has taken a significant step to remove the stigma attached to the third gender, it is our turn to recognize the true implication of this judgement and prioritize its enforcement.

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<sup>475</sup> Vaibhav Sara. Begging for Change: Hijras: Law and Nationalism Contributions to Indian Sociology 53, 1 (2019): 133–157

<sup>476</sup> Akansha Mishra Third Gender Rights: The Battle for Equality Christ University Law Journal, 5, 2 (2016), 9-21

<sup>477</sup> Ibid.

While throwing money at hijras to spurn them away, we are not just insulting these individuals, but are relegating the very basic principle of humanity even curs are better treated by the love of humanity. Such actions will only lead the transgender community to toil and struggle in the same quagmire of indignity that they have been facing for generations together.<sup>478</sup> In this country where there is a galaxy of reasons to grant reservations, the community which is synonymous to social backwardness is seldom thought about. It is hence necessary to not only pen down laws, but also bring them to action for the upbringing of the transgender community to the basic rostrum of human dignity.<sup>479</sup>

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<sup>478</sup> Akansha Mishra Third Gender Rights: The Battle for Equality Christ University Law Journal, 5, 2 (2016), 9-21

<sup>479</sup> Vaibhav Sara. Begging for Change: Hijras: Law and Nationalism Contributions to Indian Sociology 53, 1 (2019): 133–157

# CHAPTER FIVE

## PRESENT SCENARIO OF THE TRANSGENDERS POST THE NALSA CASE 2014

Indian Supreme Court now has acknowledged transgender people as the Third Gender by the amendment of Indian Constitution, and it has created a special pulse over the nation. By this amendment the Third Gender community will have their scheduled quota in job and educational institutions and they will be able to select their sex as a 'Third Gender'. This moderation is obviously a significant progress toward eliminating the discrimination these people face in general, which is not only inhuman but also against humanity as well.<sup>480</sup>

Previously, commonly known as transsexuals, these transgender people lived in a separate community and led their life by dancing and singing, which some of them still continue. Some of them earn their livelihood by begging or prostitution. In reality, neither they are considered as members of mainstream community, nor are they given general respect as a common human being.<sup>481</sup> The worst part of their identity was despite knowing that neither these people are neither male nor female, society enforced them to select between the identity of a male or a female.

As per latest census, there are more than twenty lakhs of *transgender people in India* and 95% of them are leading a life that is not worth living. However, in ancient India situation was not like this.<sup>482</sup>

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<sup>480</sup> Sakshi Parashkar. Inclusion of Transgender community within Socially and Educationally Backward Classes: Examining the Deeper Concerns. Winter Issue 2017 ILI Law Review Vol. II

<sup>481</sup> Ibid.

<sup>482</sup> Nousheen Zeeshan. Transgender people as a third gender – social recognition <https://womennow.in/transgender-people-third-gender-social-recognition/> (accessed on 15<sup>th</sup> April)



India is not the only country that has bestowed social status to these cross-dressed people. Before India, Nepal and Bangladesh have recognized and declared the human rights of these people legally. Justice KS Radhakrishnan has declared in his verdict that-

“These people are Indian Citizens too, and they are eligible to enjoy equal opportunity like other members of the Indian community”.<sup>483</sup>

He has clearly mentioned that this recognition is an issue of human rights and it should be accepted nationwide undisputed.

A mixed reaction has been observed against this Third Gender issue from Indian citizens. While some of the esteemed personalities like lawyer Anita Shenoy, social activist like Laxmi Narayan Tripathi, different political leaders as well as socialites and intellectuals have expressed their support and applause for the Supreme Court’s decision, a few of them has raised a subtle issue. However, after the enforcement of this Third Gender law transgender people is a victory of humanity and it is a step toward an undisputed impartiality of society.<sup>484</sup>

The society is changing and the people are now becoming more aware of the dynamic concept of sex and gender. They also try to understand the identity and respect them with dignity. Though the policy has brought about many changes among the Third Gender community it has also helped in opening about the torture and harassments each individual faced.<sup>485</sup>

On conducting my research<sup>486</sup> I interviewed two groups of ‘Hijras’ and came to know a lot about their identity, living and basic issues they are now facing after the judgement.

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<sup>483</sup> Nausheen Zeeshan Transgender people as a third gender – social recognition  
<https://womennow.in/transgender-people-third-gender-social-recognition/> (accessed on 15<sup>th</sup> April)

<sup>484</sup> Ibid.

<sup>485</sup> Sakshi Parashkar. Inclusion of Transgender community within Socially and Educationally Backward Classes:Examining the Deeper Concerns. Winter Issue 2017 ILI Law Review Vol. II

<sup>486</sup> On 22<sup>nd</sup> April 2019 the interview was conducted in Kolkata, which focused on two hijra groups. The first one was those hijras who work with the NGO and the other who have no professional work. There were 14 respondents.

Some of the respondents knew about their rights and recognition and have been working towards living a better life and applying for education and job facilities. While the others were still not aware of the judgement in which they were given constitutional rights. Thus, the research shows a lack of awareness even among the transgender community.

The research was conducted with the help of Non-Governmental Organization which aided me to come in contact with fourteen transgender people, each from a different background and professionals. Some of the respondents were reluctant to give away any response while the others were very comfortable and determined to keep their stories and demands forward. I conducted this research in Kolkata on 22<sup>nd</sup> to 25<sup>th</sup> April 2019. Prior to conducting research I had to send emails to the Non Governmental Organizations and to the concerned people to fix a time and schedule. After the date, venue and time was fixed, I started with my interviews. On conducting my interviews I came across a variety of thoughts and ideas about the transgender people.

The interview started first by introducing myself to the group which made them feel comfortable and relaxed. The questionnaires were open-ended questions, so that the respondents would not get nervous. This was followed by the head of the organization, addressing the group and highlighting the main reason for this consultation and interview. Next, I kept forward my aims and objectives on why I am conducting this research and what I wanted to see and acknowledge. The head of the organization requested all the participants to utilize the space for a fruitful result.<sup>487</sup>

All participants were requested to introduce themselves in a line. A wide range of gender and sexual identities and professions were mentioned by the participants. Some of them identified themselves as Hijra, some identified as Transgenders. There were participants who were working for Transgender community organizations. There were also other participants who were engaged in Badhai that is giving blessing at social ceremonies,

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<sup>487</sup> On 22<sup>nd</sup> April 2019 the interview was conducted in Kolkata, which focused on two hijra groups. The first one was those hijras who work with the NGO and the other who have no professional work. There were 14 respondents

child birth in return for money, which usually believed to be near the College Street, Kolkata.

While conducting my interview I came across Kavita Dey, 42 year old and asked her about her first memories when she felt she was different. She replied saying to me, "I never felt I was different. It was the world that made me realize I was different".<sup>488</sup> This very statement made me realize that the society and the people were yet to see a different and deeper view of the identity people carry with it.

Born a boy biologically and given the male name Somnath Das, he grew up in Kestopur, Kolkata India.<sup>489</sup> The son of a single mother who nurtured a love of dance, Somnath was very inclined towards his mother's performance since childhood.

"I used to love to wear the clothes that my mother used to wear her jewelry, her makeup that is something which used to extremely fascinate me."

Both Somnath Das and Kavita Dey were very simple and clear about what they wanted. Things grew more complicated as Kavita grew more effeminate and became the object of abuse and dragged into the school library, stripped and taunted by older male students. Kavita's teacher was no source of comfort because she declared the tormentors were in the right. A sense of isolation drove Kavita into the arms of a guru, or mentor, within a community of like-minded souls known as *hijras*.<sup>490</sup>

On joining on the 'gharana'<sup>491</sup> the hijras make a pledge to hand over all earnings to the guru, who in exchange supports them and thus there "gharana" becomes their alternative home as most *hijras* are evicted by their families. Then there are the protocols for the physical transformation. On joining the 'gharana' the male form is cast off of the hijras

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<sup>488</sup> Kavita Dey, 42 year old was one of the respondent with whom the interview was conducted on 22<sup>nd</sup> April 2019 in Kolkata.

<sup>489</sup> Somnath Das, 36 year old was one of the respondent with whom the interview was conducted on 22<sup>nd</sup> April 2019 in Kolkata.

<sup>490</sup> Kavita Dey, 42 year old was one of the respondent with whom the interview was conducted on 22<sup>nd</sup> April 2019 in Kolkata.

<sup>491</sup> The term 'gharana' is used by the hijra community who have left their respective family and home and live with the 'guru'.

and they cut their hair or shave their face. Traditional "pluckers" from the hijra community pluck all the hair the faces of the initiates.<sup>492</sup> They then start going out in public as females. Joining this group that traces its roots back to antiquity is not something to be taken lightly. Kavita said "it was not a joke and they surrendered everything to this community"<sup>493</sup>

Another respondent, Sweta Maity 38 year old added by saying, "After the castration, you cannot work for almost one and a half month. It was not an easy task, it was a journey of pain."<sup>494</sup>

The hijra experience multiple dimensions of exclusion. Such experiences instigate negative health and rights outcome, particularly in terms of their vulnerabilities to HIV. They often experienced loneliness and abusive treatment. Having a feminine attitudes of the informants were matters of jokes and humiliation, as Trishna Das, 42 year old<sup>495</sup> stated:

"When I went to school, the classmates used to criticize me. They pointed me by saying, "he is napunsak. He will end up as hijra. He cannot play with us. He cannot sit with us. They used to throw me out of the class. When I went to play with the boys, they did not accept me, and even the girls also did not want to play with me. Often I found myself sitting in a corner in the class or playground"<sup>496</sup>.

Most informants failed to find a safe space at school. Unable to adapt within hostile school environments, most became reluctant to continue schooling. Teachers abused them, shouting for change in their feminine behaviours. Influenced by predominant norms and values of society, teachers accused effeminate boys of violating school and

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<sup>492</sup> Revathi, A and Geetha, V. (2008). *The Truth about Me: A Hijra Life Story*. New Delhi: Penguin Books

<sup>493</sup> Kavita Dey, 42 year old was one of the respondent with whom the interview was conducted on 22<sup>nd</sup> April 2019 in Kolkata.

<sup>494</sup> Sweta Maity 38 year old was one of the respondent with whom the interview was conducted on 22<sup>nd</sup> April 2019 in Kolkata.

<sup>495</sup> Trishna Das 42 year old was one of the respondent with whom the interview was conducted on 22<sup>nd</sup> April 2019 in Kolkata.

<sup>496</sup> Response of Trishna Das 42 year old was one of the respondent with whom the interview was conducted on 22<sup>nd</sup> April 2019 in Kolkata.

societal 'decorum'. Eventually, they could not stay in schools, resulting in discontinuation of education which ultimately diminished future employment opportunities.<sup>497</sup> As a hijra, they were often excluded from family events, weddings, and funerals.

Most hijra informants expressed their desire to be involved in any occupation. However, they were denied in the job market. They were involved in hijra giri which referred to bazaar tola that is collecting money from the market place and badhai which is blessing a newborn child through dancing and singing.<sup>498</sup> Traditional hijra occupations are constrained in many ways at present.

Piyush Banerjee one of the respondent said that many were abused at workplaces and are eventually ousted from jobs. As a result, their human dignity and self-esteem were diminished. They reported feeling worthless and unfit to family and society.<sup>499</sup>

Access of hijra to healthcare services is constrained due to marginalized social status. They reported hiding their identity while visiting doctors whether in government or private sectors. They were not allowed to seek healthcare at the private chambers of doctors no matter whether they could pay the doctor's fee or not. It was considered that their presence may create fear and discomfort for other patients. This reality was depicted by a Hijra guru, Antara Mitra.<sup>500</sup>

Majority of the respondents reported that due to lack of adequate education and employment opportunities, they are forced into sex work and begging. While some Hijra manages to sustain their job in spite of social obstructions in the workplace, most of them resign their jobs without tolerating stigma and discrimination. A variety of multiple-level factors such as lack of gender reorganization, lack of social justice, lack of social well-

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<sup>497</sup> On 22<sup>nd</sup> April 2019 the interview was conducted in Kolkata, which focused on two hijra groups. The first one was those hijras who work with the NGO and the other who have no professional work. There were 14 respondents

<sup>498</sup> On 22<sup>nd</sup> April 2019 the interview was conducted in Kolkata, which focused on two hijra groups. The first one was those hijras who work with the NGO and the other who have no professional work. There were 14 respondents

<sup>499</sup> Piyush Banerjee, 41 year old was one of the respondent with whom the interview was conducted on 22<sup>nd</sup> April 2019 in Kolkata.

<sup>500</sup> Antara Mitra 55 year old was one of the respondent with whom the interview was conducted on 22<sup>nd</sup> April 2019 in Kolkata.

being, and lack of family support put them into an introvert community. Similarly, sexual and mental health needs are often not adequately addressed. In particular, most Hijra do not get adequate state's support for sex transition surgeries such as hormone administration, emasculation, and breast augmentation surgery.<sup>501</sup>

The transgenders identity are still stigmatized by the wider society. Resisting this stigma has been part of the long struggle for survival of the transgender community to live alongside the society at large.<sup>502</sup>

The Hijras are an important, and integral, part of Indian society. No celebration is considered complete without their participation and blessing yet multiple problems are faced by Hijras, which necessitate a variety of solutions and actions. While some actions require immediate implementation such as introducing Hijra specific social welfare schemes, some actions need to be taken on a long-term basis reducing the negative attitude and molestation of the general public and increasing accurate knowledge and humanity about Hijra communities. The required changes need to be reflected in policies and laws, attitude and notice of the government, general public, and health-care providers.<sup>503</sup>

Finally after conducting these interviews, following were some of the highlighting points which the transgender people mentioned.

- i. There was a lack of health services availability as well as accessibility. Stigma against these communities forced them to remain invisible most of the time.
- ii. Hijras or Transgenders and other similar groups were not treated equally in society. The law of the land also remained vague on how violence against

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<sup>501</sup> Lakshmikant Aparajit, Equality and Compensatory Discrimination under the Indian Constitution (Dattsons, Nagpur, 1992).

<sup>502</sup> Nausheen Zeeshan Transgender people as a third gender – social recognition <https://womennow.in/transgender-people-third-gender-social-recognition/> (accessed on 15<sup>th</sup> April)

<sup>503</sup> Ibid.

them was to be treated, thereby making them more vulnerable to violence. Equality in the eye of the law was the need of the hour.<sup>504</sup>

- iii. It was observed that transgender persons faced stigma and discrimination in all walks of lives. There was a need to generate more advocacy material on these issues.<sup>505</sup>
- iv. Voter identity cards, ration cards, and other similar identity proof documents were needed to be introduced for these individuals in their desired gender identities.
- v. There was little information available about health and development services and human rights.

Hijra community leaders had total control over their communities but they did not necessarily possess information or the means for the development of their communities. Unfortunately, the rigidity of their hierarchical community structure meant that their Chelas (disciples or followers) could not question their authority and suggest new ways of community development.<sup>506</sup>

There was need for sensitizing health service providers towards Transgender persons. Advocacy was needed to ensure that health service providers did not discriminate against these groups of people, who also needed proper guidance to avail of the best possible medical services.<sup>507</sup>

In suburban Kolkata, Transgender persons had closer knit community structures, but larger society was unaware about them. There was little security for Hijras and Transgender persons in various walks of lives. There was no guideline for these

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<sup>504</sup> Report of the Regional Transgender / Hijra Consultation in Eastern India.  
<http://saathii.org/calcuttapages/undp-tg-hijra-cnslltn-report-final.pdf> (accessed on 15<sup>th</sup> April)

<sup>505</sup> Ibid.

<sup>506</sup> Ibid

<sup>507</sup> Ibid.

communities to access information and services. They also did not have enough education to be able to access the services that were available.<sup>508</sup>

Transgender persons were often denied employment opportunities in spite of possessing the required qualifications, and this led to poor self-esteem.

One of the respondents whom I came in touch with through mail, as she could not come down to Kolkata. Pratik Subba,<sup>509</sup> a resident of Darjeeling said that these days there were few Hijras remaining in Darjeeling. Earlier they were there, but since no work was initiated for their health and development, they had to leave. Many of them were currently living in Siliguri. When I asked her about the incidence of violence she informed that they were often treated as substitutes for women. The cases of harassment had reduced a little. In one of the cases, a drunk client had harassed one of her friends. But she did not take this lying down and filed a complaint against him with the police, who put him behind bars.

## **DISCUSSIONS AND DEBATES**

The members of mainstream society refuse to develop social relations with the *hijra*. On the other hand, they prevent access of hijra to social institutions, resources, and services. Powerless hijra cannot participate in social, economic, cultural and political activities, nor are they associated with the mainstream social systems and institutions. They are dominated and abused by the members of mainstream society, are unable to exercise power or to establish citizenship rights at home or in society. Access to social, cultural, educational, legal and health services is extremely restricted from anyone with a *hijra* identity.<sup>510</sup>

Violations of their human and sexual rights have been overlooked in the traditional dogma. There is a significant lack of understanding of those transgender people as human beings whose lives encompass a complexity which goes beyond the normative correlation

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<sup>508</sup> Ibid.

<sup>509</sup> Pratik Subba 29 year old was one of the respondents with whom the interview was conducted on 22<sup>nd</sup> April 2019 via email.

<sup>510</sup> [Sharful Islam Khan](#), Living on the Extreme Margin: Social Exclusion of the Transgender Population (*Hijra*) in Bangladesh, *Journal of health population and nutrition*. 2009 Aug; 27(4): 441–451.



between biological sexes on the one hand and gender identity and sexual orientation on the other. In the following section, diverse but inter-related experiences are described to demonstrate the gender controversy and social exclusionary pathways.<sup>511</sup>

Yet, Hijras remain a neglected part of our population. Although they have obvious endocrine dysfunction, no systematic attempt has been made to evaluate, assess, and improve their endocrine health. Their face is their fortune.<sup>512</sup>

It is an age-old custom in India to have eunuchs bless childbirths, weddings, housewarmings and other auspicious occasions. They are also believed to possess occult powers and their blessings and curses are both considered potent.<sup>513</sup>

The main factor behind the violence is that society is not able to come to terms with the fact that Hijras do not conform to the accepted gender divisions. In addition to this, most Hijras have a lower middle-class background, which makes them susceptible to harassment by the police and the civic society members. The systematic violence that Hijras face is reinforced by the institutions such as the family, media and the medical establishments and is given legitimacy by the legal system.<sup>514</sup>

The Hijras face many sorts of state and societal harassments such as:

- Harassment by the police in public places
- Harassment at home
- Verbal, physical and sexual abuse
- Police entrapment
- Abuse/harassment at social space
- Rigid dress codes that differ for males and females

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<sup>511</sup>Ibid.

<sup>512</sup> Mal (2015) Let Us to Live: Social Exclusion of Hijra Community Asian Journal of Research in Social Sciences and Humanities, Vol. 5, No.4, pp. 108-117

<sup>513</sup> Ibid.

<sup>514</sup> Report of the Regional Transgender / Hijra Consultation in Eastern India.  
<http://saathii.org/calcuttapages/undp-tg-hijra-cnsltn-report-final.pdf> (accessed on 25th April 2019)

- Lack of role models; lack of accurate information and education
- Deliberately incorrect and disrespectful use of names and pronouns
- Lack of housing facilities and social participation

Hijras face multiple forms of oppression. The various issues faced by Hijras are frightened with different social exclusions. The concept of ‘Social Exclusion’ is a pertinent issue with reference to the treatment of the Hijras in the society.

The interviews revealed no safe sociopolitical space where a Hijra can lead a life of a human being with dignity.<sup>515</sup> In India, there is less space for Hijras in socio-cultural, economical and political spheres they are unable to get proper benefits from conservative social structures and institutions. They are incapable to use power or enjoy citizenship rights at their homes or in society.<sup>516</sup> Socio-cultural, legal, educational and health services are extremely constrained for a person with a Hijra identity. The overall findings signify that most deprivations in the lives of Hijra are grounded in non-recognition of a Hijra as a separate gendered human being beyond the male-female dichotomy. This has prevented them from positioning themselves in the greater society with human potential and dignity. Thus, Hijra are extremely excluded, particularly because of moralistic standpoints regarding gender and sexualities of the mainstream society where diversity is synonymous with deviation and deprivation.

The primary aim of this research was to evaluate the present day condition of the Hijra community of India.

When asked about the current situation concerning transgender community, the majority of the respondents said there are still huge amounts of stigma discrimination towards this

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<sup>516</sup> Mal (2015) Let Us to Live: Social Exclusion of Hijra Community Asian Journal of Research in Social Sciences and Humanities, Vol. 5, No.4, pp. 108-117

community. Education, Employment and Housing were three important issues raised by the respondents.<sup>517</sup>

The respondents mentioned that lack of education results in economic vulnerability, and both are linked with the gender identity. They also noted that family rejection is another important issue, and that there continues to be extremely low family acceptance. Many transgender persons lack support and as a result face mental health issues and harbour suicidal tendencies. Substance abuse is also high due to lifestyle. It is a vicious circle of life for transgender persons in India, especially if they are HIV positive.<sup>518</sup>

Accesses to health care services are limited, and there are no information available on transitioning and safe feminization processes. The transgender community relies on private health care for care and support since they face stigma in the public health setting which is still not equipped and educated to address the health care issues related to feminization and hormone treatment. In government hospitals, the transgenders are treated as anomalies.<sup>519</sup>

Despite the Supreme Court judgement of legal gender recognition of Third Gender, there continues to be unresolved issues relating to issues around the sexual practices, marriage, children, rights to adoption, and social entitlements. The lack of political attention has kept issues of transgender woman hijra welfare on the back burner.<sup>520</sup>

Through qualitative method this research has found out that there is mass awareness as now they are already recognized by law. Their social acceptance will have to be created now. In this research we have seen the Hijra community in different aspects. The life of the Hijras along with how and what they are has been discussed.

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<sup>519</sup> Multiple Identities of Hijra Individuals: A Case Study of the Hijra People  
[file:///C:/Users/YOGA/Downloads/Multiple Identities of Hijra Individuals%20\(1\).pdf](file:///C:/Users/YOGA/Downloads/Multiple_Identities_of_Hijra_Individuals%20(1).pdf) (accessed on 17th April 2019)

<sup>520</sup> Ibid.

We have a clearer view in understanding them. The lack of government recognition was a huge obstacle in regard to upgrade the overall social and legal condition of the Hijra community. But that has been achieved now. From now on, the community will have to go forward in regard to the mainstream society.<sup>521</sup>

The Hijra identity is different from other conventional identities. What makes them different regarding different aspects is their diversity. The concept of ‘Diversity is Beauty’ is spreading day by day creating awareness regarding the concept of gender.<sup>522</sup>

The Hijra community is mainly Guruma based. In every community or family there is one Guruma who controls the way of life and activities of other subordinate Hijras known as Chela. Guruma is a key figure in understanding the community of Hijras’. The Hijras engage in sexual activity. Although they don’t have any fully formed sexual organs, but even then they feel the urge of sexual activities. The Guruma engages in sexual activities with the Chelas and also with other males. The Chelas also engage in sexual activity. But it will have to be remembered that they engage in sexual activities only to play the passive role, they can never play the active role.<sup>523</sup>

The Hijras engage in different types of activities as adaptation processes to the society. They usually collect alms, perform at birth and marriage ceremonies, and engage in sex work to survive and adapt with the larger society. In short, the recent social and legal developments along with the past conditions of the Hijra community have been reflected in the findings of this research.

After analyzing the data, some key aspects regarding the Hijra community was found. These are as follows:

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<sup>521</sup> Multiple Identities of Hijra Individuals: A Case Study of the Hijra People [file:///C:/Users/YOGA/Downloads/Multiple\\_Identities\\_of\\_Hijra\\_Individuals%20\(1\).pdf](file:///C:/Users/YOGA/Downloads/Multiple_Identities_of_Hijra_Individuals%20(1).pdf) (accessed on 17th April 2019)

<sup>522</sup> Sharful islam Khan. Living on the Extreme Margin: Social Exclusion of the Transgender Population (*Hijra*) in Bangladesh Journal of Health Population and Nutrition. 2009 Aug; 27(4): 441–451.

<sup>523</sup> Ibid

## **I. CLASSIFICATION OF THE HIJRAS**

Some males and females mix up with the Hijra community to earn money. The respondents classified the original Hijras into three categories. Real Hijra are the Hijras who have just a tiny hole for urination and no trace of genitalia. These types of Hijras can be flat chested or even big-breasted. Male Hijra are the Hijras with tiny but non-erectile genitalia. Some of them are said to have small sized bust and Female Hijra are the Hijras who pretty much look like normal females and have breasts along with female genitalia. But they do not menstruate like normal females. Beside these three categories of Hijras, the eunuchs or castrated males also live with them. Sometimes normal males and females also join the community to earn money.<sup>524</sup>

## **II. CHAIN OF COMMAND**

The chain of command is strictly followed in Hijra community. In every Hijra family there is a chief. The chief is known as ‘Guruma’ and the subordinates are known as ‘Chela’. The subordinates follow the instructions of that chief. They also pay the guruma from their earnings. In exchange the guruma provides them with safety and security along with a place to live.<sup>525</sup> Their chain of command is as follows-

- a. Guruma-** The chief of the Hijra family is known as Guruma. She is like a mother to all the other Hijras. All the Hijra families are Guruma centered. When somebody joins the community for the first time, that individual must be approved by the chief.<sup>526</sup>

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<sup>524</sup> Sharful islam Khan. Living on the Extreme Margin: Social Exclusion of the Transgender Population (*Hijra*) in Bangladesh Journal of Health Population and Nutrition. 2009 Aug; 27(4): 441–451.

<sup>525</sup> Multiple Identities of Hijra Individuals: A Case Study of the Hijra People [file:///C:/Users/YOGA/Downloads/Multiple\\_Identities\\_of\\_Hijra\\_Individuals%20\(1\).pdf](file:///C:/Users/YOGA/Downloads/Multiple_Identities_of_Hijra_Individuals%20(1).pdf) (accessed on 17th April 2019)

<sup>526</sup> Ibid.

- b. Chela-** The Chelas are the ordinary Hijras of the community or family. They are the subordinates of Guruma. They abide by the rules and instructions provided by Guruma.

### **III. RITUALS**

The Hijras are culturally prominent community. They follow a lot of rituals in their day to day life. Their rituals are of different types. But broadly these rituals can be classified into two categories. These two categories of Hijra rituals are described below-

#### **a. Initiation rituals**

The Hijras are unable to reproduce. So their number cannot increase unless new people join their community. When someone joins a Hijra family, some rituals are followed. These rituals can be termed as Initiation Rituals. When someone joins the family or the community, who is usually guided by a chela, is at first brought to the Guruma. Guruma provides the newcomer with a feminine name and some gifts. The new chela vows to follow and obey the rules of that Guruma. Upon initiation, usually a cultural program is arranged. They welcome the novice with different songs and dances. In this program others also gifts different things and money to the novice.<sup>527</sup>

#### **b. Religious rituals**

The religious rituals of the Hijra community are mixed. As usually Hijras coming from different religions follow the same rituals, so all the religious rituals get mixed up. But the rituals of Hinduism and Islam are mostly prominent among the religious rituals. This is because they have been following these rituals as traditions for a long period of time. They do not practice all of the rituals like other non-hijra people. They obey both Hindu and Muslim saints.<sup>528</sup>

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<sup>527</sup> Multiple Identities of Hijra Individuals: A Case Study of the Hijra People  
[file:///C:/Users/YOGA/Downloads/Multiple\\_Identities\\_of\\_Hijra\\_Individuals%20\(1\).pdf](file:///C:/Users/YOGA/Downloads/Multiple_Identities_of_Hijra_Individuals%20(1).pdf) (accessed on 17th April 2019)

<sup>528</sup> Ibid.

#### **IV. RELATION WITH THE FAMILY OF ORIGIN**

Almost all of the Hijras join the community being forced by family. This is supported by the findings of this research and also by secondary data and some of the text books. That is why almost none of them visit their family of origin. Some of the Hijras are left by their family who is then taken in by the community. Some Hijras are handed over to the Hijra families by their family of origin after birth. Some others are sent to live with them when the signs show up during puberty. If the infants are clearly visible to be Hijras, then most of the times they are given to the community. If the signs are uncertain, then they can live with their family of origin for a certain time period, mostly up to puberty. Then they are forced to or in some rare cases willingly join the Hijra family or community. In this research it has been found that the mentality of the Hijras towards their family of origin is mixed. Some of them feel for the family of origin sometimes. But they don't usually visit their families. A portion of the money they earn from different activities is to be submitted to the Guruma. The rest can be kept by them. They usually don't share this money with anybody else; mostly not even with their family of origin. They rather invest this money in Interest related businesses.<sup>529</sup>

#### **V. ADAPTION PROCESS**

The Hijras are not born in a Hijra family or community. They join in the community from outside. So they have to learn to adapt with the community. They have to learn about the way of talking, language and behavior. Again they have to learn to adapt with the larger society. They have to come out of their community for various purposes in their day to day life. They had to find some processes to adapt with the larger mainstream society. To conduct their day to day activities and way of life, they have adapted different forms.<sup>530</sup>

Three most common aspects of adaptation processes are:

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<sup>529</sup> Sharful islam Khan. Living on the Extreme Margin: Social Exclusion of the Transgender Population (*Hijra*) in Bangladesh Journal of Health Population and Nutrition. 2009 Aug; 27(4): 441–451.

<sup>530</sup> Ibid.

- a. **Collecting alms-** They collect a fixed amount of money or some products from the shops and business institutions. This money collection is also known as ‘Tola’ or ‘Badhai’. The shopkeepers around the country have accepted the fact that they will have to provide that alms. The Hijras also collect alms from the common people. Usually they come out in a group and demand money. In most cases, the common people too provide them with money.<sup>531</sup>
- b. **Performing at birth and marriage ceremonies-** They also perform in birth and marriage ceremonies in exchange of money. They can be hired for performing in such events. In some cases, they visit the places where these ceremonies take place and demand money after voluntarily performing with songs and dances.<sup>532</sup>
- c. **Sex work-** Hijras have a very high demand among the homosexual males. They are sometimes engaged in prostitution. From this research it has been found that in sub-urban areas they don’t usually engage in full time prostitution. Even if somebody offers them money, then they may not engage in prostitution. It completely depends upon their will. In sub-urban areas the exposure is too high. So in fear of further social exclusion, they usually do not engage in prostitution. But in urban areas, the process is not same. Here they can engage in prostitution. Some Hijras live in brothel rather than with a Hijra family. This enables them to engage in full time prostitution. In some Hijra family, the Guruma compels the Chelas to be engaged in prostitution. Because through prostitution they earn a lot of money, a part of which goes to Guruma.<sup>533</sup>

## VI. PROSPECT FOR SOCIAL INCLUSION

Most of the respondents are concerned regarding social inclusion. They are mostly deprived of the basic rights. They are yet a marginalized community, even after government recognition. Although recently after being recognized as third gender, the

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<sup>531</sup> Jami H. Condition and Status of Hijras (Transgender, Transvestites Etc.) in Pakistan. Islamabad, Pakistan: National Institute of Psychology, Quaid-i-Azam University; 2005.

<sup>532</sup> Ibid.

<sup>533</sup> Ibid.



government officials instructed the Hijra community to contact their offices regarding legal documentation. This is the first step after recognizing them. The Hijras are now very much aware of their situation.<sup>534</sup> Most of them think that their traditional activities has no more demand among the modern people and their profession of sex work has too put them in a risky zone. The respondents have emphasized on getting the jobs as a regular person to benefit them most. In ordinary jobs they can upgrade their position by showing their quality. Just a few days ago, they faced troubles while opening bank accounts in their names as because the banks required information regarding gender. But now that obstacle has been overcome. This has paved the way for their initiation in social inclusion.<sup>535</sup>

It has been five years since the NALSA Judgement of 2014 and many changes have been taking place. Society now understands the ‘concept’ and the very meaning of ‘Transgender’ and how now they are recognized as ‘Third Gender’. Prior to this the scenario and the status of the community was different. We should believe in change and the society should always accept the fact that a static policy would only lead to a non-functional government.

On interviewing my respondents to understand their perspective and vision for the future, I could see a hope for a better future where the government would acknowledge them in various more fields and open a wide range of scope for their identity and self development.<sup>536</sup>

## **DEVELOPMENT AFTER THE JUDGEMENT**

Under the Ministry of Social Justice and Empowerment a committee called Expert Committee on issue relating to transgender has been constituted to conduct an in depth study of the problems relating to transgender persons to make appropriate

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<sup>534</sup> Mal S. Consequences of Spatial Mobility among Hijras of Kharagpur Town, West Bengal, India. M. Phil Thesis, Fakir Mohan University, Department of Population Studies, Odisha, India; 2015

<sup>535</sup> Ibid.

<sup>536</sup> On 22<sup>nd</sup> April 2019 the interview was conducted in Kolkata, which focused on two hijra groups. The first one was those hijras who work with the NGO and the other who have no professional work. There were 14 respondents

recommendation to it. States have setup various welfare boards for transgender like Aravani Welfare Board in TamilNadu. The civilian welfare foundation, in Non Governmental Organization in Kolkata studying the medical problems faced by transgender people in urban areas & healthcare they receive because in a detailed study conducted by United Nation Development programme in Dec 2010 on transgenders in India, which stated that HIV is increasingly seen in transgenders population . Transgenders women have indicated a very high HIV prevalence & upto 41% are extremely vulnerable to HIV.<sup>537</sup>

The LGBT rights are protected by organizations outside the UN framework like amnesty international and American civil liberties Union. Judgement puts transgender people in a strange situation on the one hand they are now legally recognized & protected under the constitution but on the other hand they may be breaking the law if they have consensual gay sex as per section 377 of IPC which states that a same sex relationship is an unnatural offence & punishable by a 10 years jail term. The Supreme Court judgement, while wholly welcome cannot be seen in isolation though. If the court acknowledges that gender is crucial to personal identity & thus also a matter of human rights this is to obviously a court caught in two minds.<sup>538</sup>

The rights of transgender people like their own identity & access to health, education, work, housing and other rights are being increasingly widely recognized after the court's decision to legalize third gender.<sup>539</sup>

After Supreme Court ruling of considering third gender as OBC for admission in educational institutions, many universities introduced space for third gender in application forms. Banglore Universites was the first one in India to allow eligible transgender people pursuing higher education to take admission and avail reservation

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<sup>537</sup>Discussion Paper on Transgender Health and Human Rights  
<https://www.undp.org/content/undp/en/home/librarypage/hiv-aids/discussion-paper-on-transgender-health--human-rights.html> (accessed on 23rd April 2019)

<sup>538</sup> Sharmila Chandran- Rights of Trasgender.

[file:///C:/Users/YOGA/Downloads/RIGHTS\\_OF\\_THIRD\\_GENDER%20\(1\).pdf](file:///C:/Users/YOGA/Downloads/RIGHTS_OF_THIRD_GENDER%20(1).pdf) (accessed on 18<sup>th</sup> April)

<sup>539</sup> Mal S. Let us to live: Social exclusion of Hijra community. Asian J Res Soc Sci Humanit 2015;5:108-17.

quota of one seat in each of 60 post graduate courses offered.<sup>540</sup> The centre for environment planning & technology (CEPT) University became the first institute in Gujrat to include third gender in admission session in 2014.<sup>541</sup> Following Delhi University, JNU even Fergusson college in Pune have acknowledged third gender students but universities like IIMS, Symbiosis & many are yet in dilemma.

Constitution has fulfilled its duty of providing rights to transgenders. Now it is time for us to recognize this and to extend and interpret the constitution in such a manner to ensue dignified life of Third Gender people.

Article 15 (2) to and Act.16 (4) were read with Directive Principles of State Policy and various international instruments to which Indian is a party call for social equality, which the third gender would realize only if facilities & opportunities are extended to them so that they can also line with dignity and equal status with other gender.<sup>542</sup>

Some of the recommendations that were put forward and are to be considered with more attention are:

- The state must construct special public toilets and launch dedicated department to look into their welfare.
- International conventions including Yogyakarta principles which we have found consistent with various fundamental rights guaranteed under the Indian constitution must be recognized and followed which sufficient legal& historical justification in our country.<sup>543</sup>

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<sup>540</sup>The Right of the Third Gender <http://timesofindia.indiatimes.com/india/UGC-opens-all-its-scholarships-for-third-gendercandidates/articleshow/39515161>. (accessed on 25th April 2019)

<sup>541</sup> The Third Gender Rights <http://www.deccanherald.com/content/414779/archives.php>(accessed on 25th April 2019)

<sup>542</sup> Mal S. Let us to live: Social exclusion of Hijra community. Asian J Res Soc Sci Humanit 2015;5:108-17.

<sup>543</sup> Connell RW. Change among the gatekeepers: Men, masculinities, and gender equality in the global arena – Equality between women and men has been a doctrine well recognize, signs. J Women Cult Soc 2005;30:1801-25.

- Take all necessary legislation administration other measures to ensure that nobody is irreversibly altered by medical procedures in an attempt to impose a gender identity without the full, free & informed consent.<sup>544</sup>
- Since there is high HIV prevalence it is necessary to take emergent steps to improve their sexual health, mental health and also address the issue of social exclusion.<sup>545</sup>
- Immediate actions are required to implement Third Gender specific social welfare schemes, some actions need to be taken on a long term basis changing the negative attitude of the general public and increasing accurate knowledge about Third Gender communities. The required change needs to reflect in policies and laws, attitude of government, general public.<sup>546</sup>
- In respect to health, one must make doctors aware through training, old age support for transgender people. Departments of Health & Family Welfare and Social Justice & Empowerment, government hospitals, municipal bodies etc should be working for them.<sup>547</sup>

### **POSITIVE IMPACT OF THE CASE**

The NALSA judgement is, in many ways, everything that the Suresh Koushal judgement was not. Instead of disparagingly writing off the “so-called rights” of “minuscule” minorities like the Suresh Koushal bench, this judgement sees the Supreme Court reclaiming its traditional role in protecting the marginalized instead of deflecting the issue towards the legislature. In fact, the judgement exhibits remarkable empathy in describing the “trauma, agony and pain” experienced by the transgender community.<sup>548</sup>

Whereas the Suresh Koushal judgement conveniently glossed over many of the issues raised and seemed almost suspicious of learning from the experiences of other countries,

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<sup>544</sup>Connell RW. Change among the gatekeepers: Men, masculinities, and gender equality in the global arena – Equality between women and men has been a doctrine well recognize, signs. J Women Cult Soc 2005;30:1801-25.

<sup>545</sup> Ibid.

<sup>546</sup> Ibid.

<sup>547</sup> Ibid.

<sup>548</sup> Ibid.

this judgement deals exhaustively with each legal issue presented while drawing liberally from the rich pool of international jurisprudence.<sup>549</sup>

The crowning achievement of this judgement, however, lies in its articulation of the fundamental rights guaranteed under our Constitution, which inures not only to the benefit of the transgender community, but to each and every one of us who may, one day, need to turn to the Constitution to realize our right to simply be who we are.<sup>550</sup>

The first thing that this judgement correctly recognizes is that labels do matter, especially when that label is state-mandated. They matter even more when that label is state-mandated. They matter even more when people are forced to accept an identifier that society creates for them, based on an artificial idea of what is normal or moral or correct. Labels go to the very root of our personhood.<sup>551</sup>

In this case, transgender individuals were falling through the cracks of binary gender identification, and the binary gender labels mandated by the state constituted a refusal to recognize and embrace the distinct identity of transgender individual as neither male nor female.

Supreme Court's decision essentially states that "determination of gender to which a person belongs is to be decided by the person concerned". This judgement has essentially protected our right to decide the labels that we carry and, in doing so, the Supreme Court has put its finger on the integral link between the legal recognition of every individual's distinct identity and their right to live with dignity.<sup>552</sup>

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<sup>549</sup> Supreme Court Ruling on Transgender Rights <http://orinam.net/resources-for/law-and-enforcement/nalsa-petition-tg-rights-india/> (accessed on 19<sup>th</sup> April 2019)

<sup>550</sup> Ibid.

<sup>551</sup> Over Two Years of NALSA Judgement. <https://thewire.in/gender/over-two-years-after-landmark-judgement-transgender-people-are-still-struggling> (accessed on 19<sup>th</sup> April 2019)

<sup>552</sup> Ibid.

## **FREEDOM FOR ALL**

The second major achievement of this judgement, which will have a huge impact with the passage of time, is its recognition of personal autonomy and privacy as rights contained within the Article 19(1)(a) of the Constitution, which protects freedom of expression, and Article 21, which protects life and personal liberty.<sup>553</sup>

Traditionally, the Supreme Court has defined and protected privacy in the context of surveillance. In other words, it has protected our right not to be overheard. This judgement expands the meaning of privacy, links it to autonomy and extends it to our core right to be who we are.<sup>554</sup>

It gives us breathing room, without being constricted by the government and the majority, to make decisions about our own identity and express that identity in the way we choose. To borrow from Justice Kennedy of the US Supreme Court, this case protects liberty “both in its spatial and more transcendent dimensions”.<sup>555</sup>

It is a matter of fact that ever since the commencement of the Constitution the Supreme Court has been very active in protecting the fundamental rights of the people as enshrined in the Constitution and interpreted it in light of the international developments also. The Court made the law-making bodies more accountable and made some laws too. It is well-known how the Supreme Court put a brake on the amending power of the Parliament in the Golaknath case.<sup>556</sup> Though after a few years the Supreme Court overruled the Golaknath judgement in the Kesavananda Bharati,<sup>557</sup> it imposed a heavy restriction on the

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<sup>553</sup>Supreme Courts Judgement on transgenders will positively impact society  
economictimes.indiatimes.com/articleshow/33970200.cms?from=mdr&utm\_source=contentofinterest&utm\_medium=text&utm\_campaign=cpp(accessed on 19<sup>th</sup> April 2019)

<sup>554</sup> Over Two Years of NALSA Judgement. <https://thewire.in/gender/over-two-years-after-landmark-judgement-transgender-people-are-still-struggling>

<sup>555</sup> Supreme Courts Judgement on transgenders will positively impact society  
economictimes.indiatimes.com/articleshow/33970200.cms?from=mdr&utm\_source=contentofinterest&utm\_medium=text&utm\_campaign=cpp (accessed on 19<sup>th</sup> April 2019)

<sup>556</sup> [Golaknath Case 1965 www.supremecourtcases.com/index2.php?option=com\\_content&itemid=1](http://www.supremecourtcases.com/index2.php?option=com_content&itemid=1).  
(accessed on 13<sup>th</sup> April 2019)

<sup>557</sup> Kesavananda Case 1973  
[https://en.wikipedia.org/wiki/Kesavananda\\_Bharati\\_v.\\_State\\_of\\_Kerala](https://en.wikipedia.org/wiki/Kesavananda_Bharati_v._State_of_Kerala)(accessed on 13<sup>th</sup> April 2019)

Parliament in the latter case and held that the basic features of the Constitution cannot be altered or destroyed by the Parliament during the amendment process carried out as per Article 368 of the Constitution. The Public Interest Litigation jurisprudence has been created by the judiciary particularly the Supreme Court and is a clear example of judge-made law. The judgement in NALSA case is also an example of Public Interest Litigation jurisprudence.<sup>558</sup>

Before this judgement, there was no law to deal with the legal recognition of transgenders in our country. It is a matter of deep concern that the law-makers spared some time on the problems of transgenders.

The transgenders were not able to protect their dignity as they had been intended to indulge in begging and other mean jobs which were contrary to their dignity. They were not able to raise their voice through the electoral means as their voice was not heard by the law-makers but the apex court of the country heard their voice and came to their rescue. It is only the judgement delivered by two great Justices Mr. Radhakrishnan and Dr. Sikri of the Supreme Court that asserted their rights and dignity through judicial process and compelled the arrogant and insensitive lawmakers to enact a law for their welfare and survival. After this judgement, a Bill has been passed by the Rajya Sabha and still waiting to be tabled in the Lok Sabha for necessary process. This judgement is a unique example of liberal interpretation of constitutional text in the light of humanitarian approach and democratic discourse. It humanizes the law. By this judgement began a new process of judicial assertiveness and the Court continued to engage in the law-making process through interpretation.<sup>559</sup>

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<sup>558</sup> NALSA Judgement <https://www.livelaw.in/asserting-the-human-dignity-the-judgement-of-the-supreme-court-of-india-in-nalsa-case/> (accessed on 13th April 2019)

<sup>559</sup> NALSA Case Analysis <https://www.latestlaws.com/case-analysis/supreme-court-case-analysis-nalsa-v-union-of-india-and-ors-transgenders-rights-case-by-lavina-bhargava/> (accessed on 13th April 2019)

It is well-known that the Constitution of India, supreme law of the land, provides fundamental rights to the people of the country irrespective of their caste, class, and race, colour or gender in Part III against the State which is defined under Article 12 of the Constitution. In essence, the Constitution is 'sex blind'. It does not allow the lawmakers to discriminate on the basis of sex. Like the other people that is the ordinary male and female, the transgenders are also entitled to get the protection of fundamental rights such as equality before the law, and other rights as they constitute the corum of 'people of India'.<sup>560</sup> Article 14 of the Constitution prohibits discrimination on the basis of sex. Other clauses of the article equally prohibit discrimination on the basis of sex if someone wants to have access to shops, public restaurants, hotels and places of public entertainment or the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of state funds or dedicated to the use of the general public.<sup>561</sup> Similarly, Article 16 of the Constitution provides equality of opportunity in matters of public employment to all citizens under the state employment. And the state is prohibited to discriminate against any citizen on the basis of sex in giving public employment. Article 19 provides various freedoms to all citizens of India and Article 21 provides protection of life and personal liberty of any person. All these rights and freedoms are equally available to the transgenders also. But in practice the situation is entirely different. Whenever these people approach government functionaries for their rights, the government does not listen to them and takes the plea of gender binary.<sup>562</sup>

The 'transgender' community falls within the purview of the Constitution of India and thereby they are fully entitled to all the rights as guaranteed under it. Unfortunately the term 'natural person' is interpreted as male and female of any age. The people who are neither male nor female are not included in the definition of person. This is a wrong practice as well as perception. Only the private part does not certify the identity of any human being. It is the physical persona and mental assets which matters. Except the private part, the God has given all faculties to the transgenders which they can exercise

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<sup>560</sup> Lal V. Not This, Not That: The Hijras of India and the Cultural Politics of Sexuality. Social Text. No. 61, Out Front: Lesbians, Gays, and the Struggle for Workplace Rights. Winter; 1999. p. 119-40.

<sup>561</sup> Ibid.

<sup>562</sup> Lal V. Not This, Not That: The Hijras of India and the Cultural Politics of Sexuality. Social Text. No. 61, Out Front: Lesbians, Gays, and the Struggle for Workplace Rights. Winter; 1999. p. 119-40.



properly and make their visible contribution in the society if opportunities are given to them.<sup>563</sup>

The transgenders are citizens of India and are fully entitled to get the benefit of all schemes and programmes launched by the Government irrespective of their population. Now the Election Commission of India has also taken special measures to enroll the transgender persons as electors. The other lawmaking authorities should also take a lesson from the Election Commission and should recognize the third gender specifically. This is a naked truth that lakhs of people are there who belong to this category of third gender and are deprived of the constitutional guarantees and other statutory protections. Without any fault on their part they have become the victims of grammatical interpretation by the state and humanity is thrown into dustbin by the lawmakers. Is it not against the human dignity? It is a gross violation of human rights and dignity as well.<sup>564</sup>

The police and municipal authorities treat these people badly and exploit them for many reasons which cannot be accepted in a constitutional democracy based on the rule of law. For many years, no affirmative action was taken by the Governments to recognize their gender and these people were thrown at the mercy of God. It is only the Supreme Court of India which took the cognizance of their plights in the NALSA case and came to their rescue and recognized their dignity by declaring them third gender and directed the state to implement its verdict. This judgement humanized the law by giving protection to lakhs of people who were kept outside the citizenry for a long time by the law makers without any fault. As per the mandate of Article 141 of the Constitution of India the judgement has become the law of the land and the Government is bound to implement it in its letter and spirit under Article 144 of the Constitution. This judgement will be long remembered in the judicial history of India.<sup>565</sup>

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<sup>563</sup> Kalra G. Hijras: The unique transgender culture of India. *Int J Cult Ment Health* 2012;5:121-6

<sup>564</sup> *Ibid.*

<sup>565</sup> Jami H. Condition and Status of Hijras (Transgender, Transvestites Etc.) in Pakistan. Islamabad, Pakistan: National Institute of Psychology, Quaid-i-Azam University; 2005

The judgement of the Supreme Court in the NALSA case has protected the dignity of lakhs of people and gave them status and respect in the society that they truly deserved. It gave them a confidence that they are also the part of the society like other males and females and have full stake in its welfare and have all rights to grow. They have all rights to get the benefit of fruits of an independent and secular country, a country which is based on the rule of law. It gave them a right to be the part of the electorate which elects its government periodically and also an opportunity to be the part of the lawmaking bodies.

Earlier they were not allowed to be the part of public meetings and dialogues. They were treated uncivilized by so-called civilized men and women. In public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, everywhere they were sidelined and kept out of the social fabric. In his judgement in the NALSA case Justice Radhakrishnan admits this fact in these words:

“Seldom, our society realizes or cares to realize the trauma, agony and pain which the members of Transgender community undergo, nor appreciates the innate feelings of the members of the Transgender community, especially of those whose mind and body disown their biological sex. Our society often ridicules and abuses the Transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are sidelined and treated as untouchables, forgetting the fact that the moral failure lies in the society’s unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change.”<sup>566</sup>

Indeed, these are shocking observations which need a serious consideration by the policy-makers. It is submitted that by recognizing the transgender community as a third gender entitled to the same rights and constitutional protection as all other citizens that is male and female, the Supreme Court of India has put in place a sound basis to end discrimination based on gender, especially gender as presumed to be assigned to individuals at birth. Further, beyond prohibiting discrimination and harassment, the Court

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<sup>566</sup> NALSA vs. Union of India. [(2014) 5 SCC 438]

has extended global principles of dignity, freedom and autonomy to this unfairly marginalized and vulnerable community and has met the norms of Universal Declaration of Human Rights. The judgement lays down a comprehensive framework that takes into its fold not merely the negative right against discrimination, but also “the positive right to make decisions about their lives, to express themselves and to choose which activities to take part in.” It is not their birth duty to earn by begging or singing and dancing on roads. They are equally entitled to be the part of the public services and other jobs. In particular, the direction of the court that they should be treated as ‘socially and educationally backward’ and given reservation in education and employment, is a far-reaching contribution to their all-round development.<sup>567</sup>

Recently the Supreme Court has reiterated its stand for including the transgenders in the category of other backward classes in *Ram Singh v. Union of India* case.<sup>568</sup> Appreciating the NALSA case the Supreme Court observed in this case:

The recognition of the third gender as a socially and educationally backward class of citizens entitled to affirmative action of the State under the Constitution in *National Legal Services Authority vs. Union of India* is too significant a development to be ignored. In fact it is a path finder, if not a path- breaker. It is an important reminder to the State of the high degree of vigilance it must exercise to discover emerging forms of backwardness. The State, therefore, cannot blind itself to the existence of other forms and instances of backwardness. An affirmative action policy that keeps in mind only historical injustice would certainly result in under-protection of the most deserving backward class of citizens, which is constitutionally mandated. It is the identification of these new emerging groups that must engage the attention of the State and the constitutional power and duty must be concentrated to discover such groups rather than to enable groups of citizens to recover “lost ground” in claiming preference and benefits on the basis of historical prejudice. The above mentioned observations compel the government to take a note of

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<sup>567</sup> Mal S. Let us to live: Social exclusion of Hijra community. *Asian J Res Soc Sci Humanit* 2015;5:108-17.

<sup>568</sup> *Ram Singh Narain Singh vs Union Of India (Uoi) And Ors.* on 16 November, 1953

third gender in the society. It reiterates the previous observations given in the NALSA case.<sup>569</sup>

The jurisprudential basis for the judgement in the NALSA case is that sex identity cannot be based on a mere biological test but must take into account the individual's psyche. The Court has noted that Indian law treats gender as a binary male/female concept, with sections of the Indian Penal Code and Acts related to marriage, adoption, divorce, succession, and even welfare legislation, being examples. The Court has also relied on the Yogyakarta Principles norms on sexual orientation and gender identity evolved in 2006 at Yogyakarta in Indonesia to bolster its reasoning. But only the judicial verdict is not sufficient.<sup>570</sup> There is an urgent need of attitudinal change in the society. The society would have to accept these people so that they should not feel segregated. The society should bring these people in mainstream. The Supreme Court has given the society a chance to contribute for these people so that we might achieve our common goal. The judgement of the Supreme Court in the NALSA case will give huge relief to the transgenders. By virtue of this judgement, all identity documents, including a birth certificate, passport, ration card and driving license would recognize the third gender. It is a historical judgement. It has determined the legal destiny of lakhs of people whose human rights were willfully violated by the state for a long time. The Supreme Court has declared the law in favour of these people who have become the part of "We, the People of India", the people who made their supreme law of the land. It will certainly please our Founding Fathers who are sitting in the heaven that their people are happy and prosperous and the document which they drafted to govern the nation is governing the nation well. It will make the legal order human friendly and inclusive.<sup>571</sup>

Now once the transgenders are recognized as third gender in the legal documents by all states and their agencies, the third gender people can move to courts of law if any of their right is violated by the state or even private persons also as access to justice is the essence

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<sup>569</sup> Ibid.

<sup>570</sup> Yogyakarta Principles <http://orinam.net/resources-for/law-and-enforcement/un-yogyakarta-and-lgbt-equality/>

<sup>571</sup> NALSA vs. Union of India. [(2014) 5 SCC 438]

of rule of law. The hammer of Article 144 of the Constitution will compel the state and its instrumentalities to implement the verdict of the Supreme Court in its letter and spirit. Let us hope that the Government implements the verdict of the Supreme Court honestly and gives these people their dues for which they are fully entitled.<sup>572</sup> It is a matter of fact that though this judgement is a historical judgement which has protected the dignity and identity of the transgender, only this verdict is not sufficient. This verdict should be implemented by the Central Government, State Governments, and all other agencies of the Government and a particular policy should be framed by the different ministries and departments to prepare a national plan for the welfare of transgenders.<sup>573</sup>

The Government should constitute a National Commission for the Transgenders which should look after the interests of these people and protect their rights effectively. If possible, either the constitutional or statutory status should be given to this commission.<sup>574</sup> Until and unless the transgenders get a fair deal, the vision of inclusive growth will not be achieved.

It is a matter of deep concern that despite the submission of the report by an expert committee to the Ministry of Social Justice and Empowerment, Government of India, the recommendations of the committee are yet to be implemented by the Centre and the States. It shows that the Governments are not taking the welfare of transgenders seriously as they do not constitute a visible electoral constituency. This matter needs a serious consideration and the Government should take it seriously and frame the national policy for these people as soon as possible.<sup>575</sup>

### **ISSUES AND CHALLENGES**

In the five years that have passed since impetus was provided to the debate on transgender and their reservation in the NALSA judgement on April 15, 2014, the issue

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<sup>572</sup> Mal S. Let us to live: Social exclusion of Hijra community. *Asian J Res Soc Sci Humanit* 2015;5:108-17

<sup>573</sup> *Ibid.*

<sup>574</sup> National Legal Services Authority v Union of India and Others (Writ Petition No. 400 of 2012 with Writ Petition No. 604 of 2013)

<sup>575</sup> *Ibid.*

has been subject to both appreciation and criticism. The recent clarification sought by the Central Government exposes the ambiguity which prevails in the judgement and has also served as a ground for delay in further action. The issues intertwined with the reservation for transgender are itself numerous. Legislative, theoretical, legal as well as practical difficulties surround the contention of providing reservation to transgenders as OBCs.<sup>576</sup>

The legislative attempt towards providing reservation to transgender has fallen short due to the absence of any provision pertaining to reservation in the Transgender Persons (Protection of Rights) Bill, 2016, introduced by Minister for Social Justice and Empowerment. The absence of provisions pertaining to reservation is despite the recommendation of NCBC for inclusion of transgenders in the central list of OBCs.<sup>577</sup> The stand of the centre on the reservation aspect appears indeterminate owing to the staunch opposition from the OBC groups fearing reduction in the size of their existing piece of the metaphorical pie.<sup>578</sup> It is pertinent to note that, prior to the 2016 Bill, The Rights of Transgender Persons Bill was introduced in the Rajya Sabha in 2014 which incorporated the provisions pertaining to reservation and provided for 2% horizontal reservation for transgender persons in admission and appointments.<sup>579</sup> However, the 2014 Bill was never debated in the Lok Sabha.<sup>580</sup>

The 2016 Bill is not free from ambiguities and raises various questions, not just pertaining to reservation, but also with regard to defining the beneficiaries of the

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<sup>576</sup> Case Summary: NALSA

<https://www.equalrightstrust.org/ertdocumentbank/NLSA%20v%20Union%20of%20India.pdf> (accessed on 22nd April 2019)

<sup>577</sup> Shalini Nair, “Transgender Bill has no provision for quota in jobs, education” The Indian Express Aug. 5, 2016, available at: <http://indianexpress.com/article/india/india-news-india/transgender-bill-has-no-provision-forquota-in-jobs-education-2954328/>(accessed on 22nd April 2019)

<sup>578</sup> Shalini Nair, “Transgender Bill has no provision for quota in jobs, education” The Indian Express Aug. 5, 2016, available at: <http://indianexpress.com/article/india/india-news-india/transgender-bill-has-no-provision-forquota-in-jobs-education-2954328/>(accessed on 22nd April 2019)

<sup>579</sup> The Rights of Transgender Person Bill, 2014, available at: <http://164.100.47.4/BillsTexts/RSBillTexts/asintroduced/trangder-E.pdf> (last visited on Dec.12, 2017). (accessed on 22nd April 2019)

<sup>580</sup> Rohan Abraham, “All you need to know about the Transgender Persons Bill, 2016” The Hindu, Nov. 20, 2017, available at: <http://www.thehindu.com/news/national/all-you-need-to-know-about-the-transgender-persons-bill2016/article21226710.ece> (accessed on 22nd April 2019)

reservation i.e., transgenders. The Bill defines transgender more in terms of biology than psychology.<sup>581</sup> This seems to reflect the carry forward of the restrictive interpretation in the NALSA judgement at places. The Parliamentary Standing Committee on Social Justice and Empowerment chaired by Ramesh Bais, in the 43<sup>rd</sup> Report has stated that the definition of transgender is “unscientific and primitive and based on biological attributes”.<sup>582</sup> Further, it fails to recognize that many persons are born with ambiguous or typical sexual organs, whether external or internal, and identify themselves as male, female or transgender. Hence, the bill conflates gender, which is a societal construct, with biological sex in contrast to the expansive definition provided in para 11 of the judgement.<sup>583</sup>

Further, the definition of transgender in the Bill leaves out persons who cross-dress or who undergo sex reassignment surgery, even though the NALSA judgement in para 11 considers them as transgender.<sup>584</sup> Thus, the question remains, whether males/females that undergo sex reassignment surgery or those who occasionally cross dress be included as a transgender and entitled to reservation as OBC?

Before taking a decisive stand on the issue of reservation for transgenders as OBCs, we need to take into consideration the social and economic background that surrounds the issue. It would not be too far-fetched to raise the question that ‘what happens if a person undergoes sex reassignment surgery or cross dresses to take economic benefit of the reservation in jobs?’<sup>585</sup> Would such person still get the benefit of reservation? In addition, reservation for transgenders in public posts like police, army, military<sup>586</sup> etc. which

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<sup>581</sup> Section 2(i) of the Bill provides: (i) transgender person means a person who is— (A) neither wholly female nor wholly male; or (B) a combination of female or male; or (C) neither female nor male; and whose sense of gender does not match with the gender assigned to that person at the time of birth, and includes trans-men and transwomen, persons with intersex variations and gender-queers.

<sup>582</sup> 43rd Report of The Parliamentary Standing Committee on Social Justice And Empowerment. See para 1.21

<sup>583</sup> Divya Trivedi, “A flawed bill” The Frontline, Nov.11, 2016, available at: <http://www.frontline.in/socialissues/a-flawed-bill/article9266479.ece> (accessed on 22nd April 2019)

<sup>584</sup> Ibid.

<sup>585</sup> This aspect is reflected in a recent case before the Delhi District Court (Rohini), State v. Bobby Kinner (Session Case No. 63/2014, decided on Dec. 20, 2014).

<sup>586</sup> Julie H. Davis and Helene Cooper, “Trump says transgender people will not be allowed in the military” The New York Times, July 26, 2017, available at:

prohibit their appointment by policy or on medical grounds, becomes a conundrum of utmost significance. This is especially relevant in light of the recent case, where the Indian Navy terminated the services of a transgender sailor after he underwent a sex reassignment surgery.<sup>587</sup>

Another aspect which requires attention is the applicability of creamy layer to transgenders once they are provided reservation as OBC. The apex court in the NALSA judgement employed reservation as a means to remedy the century old injustice against transgender. Hence, economic considerations ought not to play any role with respect to the discrimination faced by the transgenders. However, inclusion of transgenders within OBCs will necessarily require applicability of the creamy layer concept, which in-turn will nullify the object sought to be achieved by the Supreme Court in the NALSA judgement.

Moreover, some have pointed out that dalit transgender persons do not want to come under the OBC category, as they will lose out on the benefits granted to SC/ST categories.<sup>588</sup> Similarly, it has been pointed out that some upper caste transgenders and hijra leaders do not wish to be categorized as OBCs.

The urgency of the clarity on the issue is highlighted by the petitions filed before some high courts to provide OBC reservation to transgender after the NALSA judgement. In *Aslam Pasha Urf Chandini v. State of Karnataka*,<sup>589</sup> as well as *Swapna v. The Chief Secretary*,<sup>590</sup> the petitioners, who belonged to the third gender, requested the court to issue a direction to the respective state governments to provide reservation to the

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<https://www.nytimes.com/2017/07/26/us/politics/trumptransgender-military.html> (accessed on 22nd April 2019)

<sup>587</sup> Nivedita Ganguly, "Sailor sacked for sex change says she will move court" *The Hindu*, Oct. 11, 2017, available at: <http://www.thehindu.com/todays-paper/tp-national/tp-andhrapradesh/sacked-sailor-plans-to-movecourt/article19836204.ece> (accessed on 22nd April 2019)

<sup>588</sup> *Ibid.*

<sup>589</sup> Writ Petition No. 11610 of 2013 (S-RES/PIL), Karnataka High Court, decided on July 18, 2014. 68 Writ Petition No. 31091 of 2013, Madras High Court, decided on July 5, 2016.

<sup>590</sup> *Swapna v. The Chief Secretary* 2016. <https://indiankanoon.org/doc/124330195> (accessed on 22nd April 2019)



transgenders by issuing a writ of mandamus. The courts, however, dismissed the petitions stating that the matter has been decided by Supreme Court, and held that the petitioners were seeking an administrative action rather than judicial interpretation which could only be provided by the Legislature.

In light of the above discussion, it can be said that before granting reservation to transgenders the government needs to fill several gaps relating to the ‘class’ and ‘gender’ debate. Hence, there are multiple options that can be explored and both Central and state governments need to deliberate effectively before arriving at any schema of reservation or affirmative action.<sup>591</sup>

Transgender persons are continuously facing multiple forms of social discrimination and oppression in the country. Discrimination is so wide and pronounced even in basic necessities like healthcare, employment and education, that it makes their social inclusion a daunting task. It is the need of the hour, that step be taken to remedy the deplorable situation and advance social inclusion for the members of this community through strong legal as well as social angles.<sup>592</sup>

NALSA judgement can be considered as a good step in the direction towards recognition of the rights of the transgenders and their right of self-determination. However, the challenges lie deep within the judgement. The major challenge is the inclusion of transgenders within the ambit of the OBCs entitling them for reservation in education and appointment.<sup>593</sup>

Further, the state needs to take positive steps to ensure that transgenders do not drop out of school at an early stage due to the social harassment as is the case in many places. Awareness programs and sensitization of transgenders as well as the members of the

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<sup>591</sup>Sakshi Parashar. Inclusion of Transgender Community within socially and educationally Backward Classes: Examining Deeper Concerns. Winter Issue 2017 ILLI Law Review Vol. II

<sup>592</sup> Ibid.

<sup>593</sup> NALSA: Starting guide [https://nalsa.gov.in/lsams/pdf/NALSA-Getting\\_Started\\_Guide\\_0.1.pdf](https://nalsa.gov.in/lsams/pdf/NALSA-Getting_Started_Guide_0.1.pdf) (accessed 23rd April 2019)

society needs to be carried out in order to ensure their social inclusion. The process of social inclusion of transgenders is definitely going to be a gradual process, which requires cooperation at the level of state, society and individuals. What is required is that calculated steps are taken in the right direction to ensure that the laws and policies act as a catalyst in their development and not create hindrance for them in future.<sup>594</sup>

After analyzing the NALSA Case of 2014 and conducting interviews, many views came forward. The complex nature of the hijras and their basic understanding of the case makes some of the transgenders at a vulnerable position whereas, a lot of transgenders today is aware of their basic rights and acknowledgements. This surely changes a picture for them and maps out a long and promising road ahead for the transgender community.

Presence of the Hijras and Transgenders were seen in the ancient Indian writings and literature. There are references to Kinnars, Shikhandi, Brihannala in ancient Indian epics who were used to fulfil the purpose of larger community. But not a single tale is found through which the transgender or a Hijra has expressed himself. Thus, there is a total Lack of Self-Writing. Self writing of the hijras on their part is missing.<sup>595</sup>

Many small town organizations have been left out of the consultations. There is presence of criticisms on how the State, powerful Non-Governmental Organizations and activists often adjudicate who is to be recognized as ‘transgender’ and who is not. Leading to the exclusion of less privileged and particularly rural communities from state initiatives.<sup>596</sup>

In the NALSA Case of 2014 there was a ‘Confusion’ regarding who are the ‘Transgenders’. Transgender in respect to the Indian community were the ‘Hijras’. This

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<sup>594</sup> Supreme Courts Analysis on NALSA <https://www.latestlaws.com/case-analysis/supreme-court-case-analysis-nalsa-v-union-of-india-and-ors-transgenders-rights-case-by-lavina-bhargava/>(accessed 23rd April 2019)

<sup>595</sup> Reddy G. 2003. “Men” who should be kings: celibacy, emasculation and reproduction of hijra in contemporary Indian politics. Soc Res. 70 pp. 163–70.

<sup>596</sup> Stephen Whittle, Lewis Turner and Maryam Al-Alami. 2007. Engendered Penalties: Transgender and Transsexual People’s Experiences of Inequality and Discrimination

very Judgement made them the 'Third Gender'. Transgender' would only include the 'Hijras' India's Third Gender and not the Lesbian, Gay and Bisexuals.<sup>597</sup>

In regard to Health Issues, transgender people were on HIV infection, mental disability, sexual and reproductive health negligence, violence and victimization, and on the effects of stigma and discrimination. Every transgender person has a Right to Reside as well as to be included in his household. But the sad reality is that, they still face problem of housing and comfort. For example some of the landlords refused to give tenants to the hijras.

Many Non-Governmental Organizations work for the development and upliftment of the transgender community. But there is still problem of funding. Many Non-Governmental Organizations are now facing this problems and on the verge of shutting it down.

Though many changes on part of the mainstream society towards the transgenders can be seen, yet a lot needs to be done. As stated by Antonio Gramsci on The Prison Notebooks<sup>598</sup>, "Conscious Leadership" or "restless impulse and instant to revolt" are the key instruments points for any revolt or bringing a change in society. Thus this was missing points among the 'Transgender' themselves, as they lacked leadership qualities. Transgender people in many more areas do not come forward with their identity as of shame and unawareness.

There is a Hierarchy among the 'Hijra' community. They are led by 'Guruma' and the others are her 'Chelas'. There is constant exchange of respect between them. Thus this relationship plays an important role on the 'Hijras' life. They accept their duties given to them by their 'Guruma'.<sup>599</sup>

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<sup>597</sup> National Legal Service Authority vs. Union of India and others, 5 SCC 438, (2014)

<sup>598</sup> Antonio Gramsci, The Prison Notebooks. <http://abahlali.org/files/gramsci.pdf> (accessed 23rd April 2019)

<sup>599</sup> Lal V. Not This, Not That: The Hijras of India and the Cultural Politics of Sexuality. Social Text. No. 61, Out Front: Lesbians, Gays, and the Struggle for Workplace Rights. Winter; 1999. p. 119-40.

## **CROSSING THE BARRIES: SUCCESS STORIES OF THE TRANSGENDERS IN INDIA**

Answering the question, whether or not India has opened its heart for the transgender persons, here are a few successful stories, from 2017 of people from the marginalized community:

India got its first transgender judge, Joyita Mondal from West Bengal made history on July 8, 2017<sup>600</sup>, when she became the first transgender judge to attend a Lok Adalat at Islampur in North Dinjapur district of the state. Beginning her journey as a social worker, Mondal worked for the betterment of her community, sending a strong message against 'gender bias' against the transgender people.

"If transgenders start getting government jobs, then their condition will become better, as due to the social discrimination, they are forced to run away from their homes and indulge in age-old hijra activities in India, like dancing in marriages, functions etc." Mondal said after being appointed a Lok Adalat judge.

Tamil Nadu gives India's first transgender Police Sub-Inspector, born a male in Salem, Prithika Yashini felt as a "woman trapped in a man's body" when she reached teenage<sup>601</sup>. The 26-year-old underwent a gender reassignment surgery after coming to Chennai and went on to apply for the post of sub-inspector as a 'transgender'.

One advertisement of Vick's called Touch of Care was a mind changing advertisement. It touched upon the issues of adoption and transgender rights. It featured Gauri Sawant, a beautiful, magnanimous transgender woman and LGBT activist, who adopted a girl named Gayatri, whom she had saved from being sold. "I was the first transgender petitioner to file a case in the Supreme Court regarding adoption rights to transgenders. I

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<sup>600</sup>Mallika Bhagat, Transcending barriers: Past, present and the uncertain future of India's third gender September 12, 2018. <https://timesofindia.indiatimes.com/blogs/incessant-musings/transcending-barriers-past-present-and-the-uncertain-future-of-indias-third-gender/> (accessed 23rd April 2019)

<sup>601</sup>Ibid.

am not proud of it but ashamed that I had to go to the court to ask for what should be mine intrinsically.’<sup>602</sup>

Gauri has set up her own Non Governmental Organization, Sakhi Char Chowghi in Malad, Mumbai and dedicates her time to providing for other marginalised transgenders, hijras, female sex workers among other people. She added by saying “Motherhood is not a state, it is a behaviour. We love someone, which automatically makes us a mother. This need to nurture is natural, and we deserve it as much as a heterosexual woman or man.”<sup>603</sup>

Gauri has also started Aaji cha Ghar, a safe and friendly home for the abandoned girl children of sex workers and destitute senior Transgenders. It is a project under Sai Sawli Trust and is her dream project. But sadly, Gauri has had little support from the government. All help comes from Milaap fundraisers. But she believes like Swami Vivekananda did, albeit a little-altered version, that you must not ask the society what it can do for you, but prove that you can do so much for the society.

Somnath Bandopadhyay lived a dual life where it was a ‘he’ outside and a ‘she’ at home. In the privacy of his home in West Bengal’s North 24 Parganas district, Bandopadhyay would try out clothes that belonged to his sisters and admire his looks in the mirror.<sup>604</sup> He loved what strangers, unaware of his gender, had to say about his kohl-smear eyes

That dual life ended in 2003, when at the age of 39, Somnath became Manabi, which means woman in Bengali. Manabi Bandopadhyay, became the principal of Krishnagar Women’s College in Nadia district, the first transgender principal of any Indian college. That might be her only achievement that got highlighted, but she thinks she has much

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<sup>602</sup>Mallika Bhagat, Transcending barriers: Past, present and the uncertain future of India’s third gender September 12, 2018. <https://timesofindia.indiatimes.com/blogs/incessant-musings/transcending-barriers-past-present-and-the-uncertain-future-of-indias-third-gender/> (accessed 23rd April 2019)

<sup>603</sup> Is Society Changing for transgenders. <https://www.livemint.com/Politics/SoaUxMFvsHpu9rCAU7QUIM/Is-society-changing-for-transgenders.html> (accessed 12th April 2019)

<sup>604</sup> Is Society Changing for transgenders <https://www.livemint.com/Politics/SoaUxMFvsHpu9rCAU7QUIM/Is-society-changing-for-transgenders.html> (accessed 12th April 2019)

more to her that people totally miss, because the outcomes always overshadow the struggles. A PhD in Bengali, she penned the best-seller novel *Endless Bondage* (English translation) which was published in 2002. She is also the editor and publisher of *Sub-human*, India's only magazine on issues of transgenders, that is, people with a gender identity or gender expression that doesn't conform to their assigned birth sex.

Despite odds, transgenders are carving out their own space in the society. Consider a few examples. In Maharashtra, Dnyandev Shankar Kamble defeated six candidates to become the sarpanch of the Tarangfal gram panchayat in Solapur district.<sup>605</sup> In July, The Indira Gandhi National Open University (IGNOU) exempted the community from paying fees for all its courses.

After the Supreme Court judgement, many states started taking steps towards the mainstreaming the community. Kerala, which became the first state to declare a transgender policy in 2015, has opened exclusive clinics for transgenders. Karnataka too passed its own policy for transgenders. In June 2017, Tamil Nadu announced free education for transgenders in all colleges affiliated to the Manonmaniam Sundaranar University.<sup>606</sup>

"People might say it is too little and too late, but I think these are very courageous steps. This doesn't mean that discrimination faced by the community isn't faced by the community anymore because the vast majority is still uneducated, poor, with no access to resources, but what we are seeing now, wouldn't have been possible just a few years back," says Anjali Gopalan.

After India granted voting rights to transgenders in 1994, Shabnam Mausi Bano was elected India's first hijra Member of the Legislative Assembly (MLA) in 1999 from

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<sup>605</sup>Swati Bisen, Case Studies, Statistics and Survey on Hijras <https://www.lawctopus.com/academike/case-studies-statistics-survey-hijras/> (accessed 12th April 2019)

<sup>606</sup>Ibid.

Madhya Pradesh's Sohagpur constituency.<sup>607</sup> Kamla Jaan became mayor of Katni in Madhya Pradesh as an independent in December 1999. In 2000, Asha Devi became the first elected mayor of Gorakhpur in a post that was reserved for women. While politics is a profession where several attempts, failed ones included, have been made by transgenders, other professions have only recently started opening their doors for them.<sup>608</sup>

But as transgender rights activist Kalki Subramaniam says, "The police officer, the principal, the judge – their success should be attributed to them alone. What they achieved is because of their individual struggles. Even if the government, the corporates and institutes say that their doors are open for the transgenders, the discrimination inside does not let them survive. So, unless and until that is taken care of, it will still be an uphill task for the community."<sup>609</sup>

Laxmi Narayan Tripathi is a Hijra Guru. She is also spokesperson for the Kinnar community. She is originally from Uttar Pradesh, India. Laxmi is a famous dancer, dance instructor, and Hijra guru. She is well-known campaigner and quintessence of elegance and courage faces the reality. She also adopted two grown up child as her kids. In 1979, Laxmi was born in Thane as the eldest child of an orthodox Brahmin duo from Uttar Pradesh. She was very sick in her childhood as she had double pneumonia, typhoid and asthma. In the second standard, Laxmi was enthralled by Bharatanatyam, its costumes, make-up and jewellery. Laxmi was first sexually abused by an acquaintance at the age of 6 years. After some years, Laxmi met Shabina Frances, another Hijra. They became friends and Shabina promised her that she will be her guru if she joined them. Afterwards her journey started and she became one of the Hijra's.<sup>610</sup>

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<sup>607</sup>Ibid.

<sup>608</sup>Ibid.

<sup>609</sup>Swati Bisen, Case Studies, Statistics and Survey on Hijras <https://www.lawctopus.com/academike/case-studies-statistics-survey-hijras/>(accessed 12th April 2019)

<sup>610</sup>List of Transgenders who made it big in their field. <https://www.indiatoday.in/education-today/gk-current-affairs/story/list-of-transgenders-firsts-who-made-it-big-in-their-fields-1276415-2018-07-03>(accessed 12th April 2019)

She is the first transgender person to represent Asia Pacific in the UN. Laxmi has served on the boards of several Non Governmental Organizations conduct LGBT activist work. In 2002 she became president of the Non Governmental Organization Dai Welfare Society, the first registered and working organization for eunuchs in South Asia.

Sathyasri Sharmila, 36 year old became India's first transgender lawyer. Shunning the stereotypical mindset behind, she set an example by pursuing law so that she can fight against the injustice. Despite coming from Tamil Nadu, a state which has been securing highest literacy rank, she became subject to torture abuse on the account of her gender.<sup>611</sup>

Shabi, India's first Transgender Soldier joined Marine Engineering Department of the Eastern Naval Command around eight years ago. However, she underwent the sex reassignment surgery in 2016 in Delhi. After the surgery she joined the naval base in Vishakhapatnam. Kolkata's Jiya Das became the first transgender operation theatre or OT technician.<sup>612</sup>

From working as a sex worker while her parents thought she worked in a private company, to attempting to kill herself twice at the age of 12, to being questioned and even tormented at several turns of her life, Akkai Padmashali's life and childhood mirrors one of hardship, persistence, and strength to overcome social stigma in all public and private spaces. Her accomplishments pile up pretty high, as she was invited by the President to attend the Chief Justice of India's swearing-in ceremony, and founded and currently leads the organization 'Ondede', meaning convergence in Kannada, striving to create awareness about sexual diversity, and the right to choose one's sexual identity for oneself.<sup>613</sup> Additionally, the International Bar Association conference held in Tokyo in 2014 invited her to speak about legal rights of sexual minorities, showing how far she's come despite the problems of her early life. She was even the first Indian transgender woman to get a driving license with her gender stated as 'female'. Today, she stands as a

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<sup>611</sup> List of Transgenders who made it big in their field <https://www.indiatoday.in/education-today/gk-current-affairs/story/list-of-transgenders-firsts-who-made-it-big-in-their-fields-1276415-2018-07-03> (accessed 12th April 2019)

<sup>612</sup> India's Transgender Icons Thriving Against the Taboos <https://homegrown.co.in/article/44544/meet-7-of-indias-transgender-icons-thriving-despite-social-taboo>(accessed 12th April 2019)

<sup>613</sup> Ibid.



vocal transgender rights activist, and has become an extremely respected household name in Bengaluru.

Looking back at her early life, Akkai was born into a middle-class family as Jagadeesh. As a child, she would dress up in her sister's clothes and played with other girls, which didn't sit too well with her parents. They beat her up for the same, and even tried to get her 'cured' by doctors and healers. Her grandmother, a trained Carnatic vocalist who used to teach music to several children in the neighbourhood, wouldn't let her sit in, worried that learning music would 'influence' her. Eventually as her confidence grew, she confided in her brother, who supported her will to transform into a woman and even spoke up to their parents in her favour. During the time of her life working as a sex worker, Akkai witnessed wide-spread sexual violence and discrimination, and she was motivated to join the Non Governmental Organization Sangam that works with sexual minorities, to make a difference using her strong voice.

"Why should I die? Let me fight for my community members. I have a huge responsibility on my shoulders," she said.<sup>614</sup>

Although India has had transgender mayors in the past, such as Asha Devi and Kamla Jaan since the Supreme Court recognized the third gender only in 2014, Madhu Bai Kinnar is India's first officially recognized transgender mayor.<sup>615</sup> Fighting two stigmas at once, her low-caste as well as sexual minorities were obstacles she battled only to emerge victorious in Raigarh's Municipal Corporation elections and that too against BJP candidate Mahavir Guruji. Previously, the 35-year-old sang and danced on trains to earn a living-a path several transgender community members in India adopt-until she decided to represent her community in a local administrative capacity. After winning the elections by over 4,500 votes, Madhu told reporters,

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<sup>614</sup>India's Transgender Icons Thriving Against the Taboos <https://homegrown.co.in/article/44544/meet-7-of-indias-transgender-icons-thriving-despite-social-taboo>(accessed 12th April 2019)

<sup>615</sup> Ibid.

“People have shown faith in me. I consider this win as love and blessings of people for me. I’ll put in my best efforts to accomplish their dreams.”<sup>616</sup>

Rose, an engineering graduate who completed her biomedical engineering course in the US, had a lot to overcome growing up. She was forced out of her home as her parents disapproved of her cross-dressing and ‘other girlie ways’. But as the woman she identified herself being was strong and determined, she got a sex change operation done in Thailand and became the Rose she is today.<sup>617</sup>

In 2008, Rose’s public debut appeared on Vijay TV’s talk show ‘Ippadikku Rose’.<sup>618</sup> As a highly qualified, confident and accomplished woman, and an important voice for the transgender community, she said, “I believe transgenders are also members of the general public, but we are isolated in the society. I am highly educated. I have international experience. I am confident. I can talk well. Why not make use of my ability in a constructive way? This way, I want to change the way Indian society looks at us.”<sup>619</sup>

Indian governmental organization, for the first time, hired transgender staff. Kochi Metro hired 23 transgenders as ground staff, a move that was hailed as progressive for both India and the world. Kerala has achieved many firsts for the transgender community in the country. For the first time in April, Kerala State Sports Council organized athletes meet to bring transgender sports persons to the forefront.<sup>620</sup>

Delh-based Rudrani Chettri is a rights activist and a professional model whose agency helps transgender models find work and recognition. The idea struck Chettri when she saw many young and beautiful transgender models, including her, being refused work because of large-scale social reluctance to accept them in the mainstream. Traditional

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<sup>616</sup>India’s Transgender Icons Thriving Against the Taboos <https://homegrown.co.in/article/44544/meet-7-of-indias-transgender-icons-thriving-despite-social-taboo> (accessed 12th April 2019)

<sup>617</sup> Ibid.

<sup>618</sup> Ibid.

<sup>619</sup> Ibid.

<sup>620</sup> Ibid.

modelling agencies were inimical to the idea, which spurred Chettri to open her own agency.<sup>621</sup>

The first transgender pastor of India, Esther Bharathi was thrown out of her home after she baptised into Christianity. She was considered an untouchable in her village and went through immense hardships. Bharathi earned a bachelor's degree in theology and now serves as a pastor at the Chengalpattu Evangelical Church of India (ECI). From being an untouchable, Bharathi is today called to bless newborns and conduct weddings.<sup>622</sup>

The initiatives taken by the Indian Government for the welfare of Hijras and also to provide various suggestions and recommendations as to how, passing of more mandates, legislations, and proactive role of Indian government can change the viewpoint of Indian society toward Hijra and bring them to the social mainstream. The Hijras thus defy the natural boundaries of man and woman by presenting themselves as a rather unique perspective on gender, sexuality, and the body. Being in the marginalized groups, they are not only the socially excluded groups of the society but also fall preys because many have them are infected with HIV. Considering the complex activity in socio environmental phenomenon and the sizeable number of Hijras in India as well as in the world, it is not possible to close our eyes easily and ignore their existence in our societal periphery. It must be noted that the third gender in India is not adequately provided for, though their existence is evident in our country, society, and customs.<sup>623</sup>

A vertical intervention of rights is necessary in recognizing Hijras as equal citizens of India. Hijras require understanding and support of the government, health-care professionals, general public as well as their family members. We need to understand and

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<sup>621</sup> India's Transgender Icons Thriving Against the Taboos <https://homegrown.co.in/article/44544/meet-7-of-indias-transgender-icons-thriving-despite-social-taboo> (accessed 12th April 2019)

<sup>622</sup>Famous Transgender Personalities <https://outofpandora.com/6-famous-transgender-personalities-india/2/>(accessed 12th April 2019)

<sup>623</sup> Gayathri & Karthikeyan (2016). Inclusion and Exclusion of Third Genders – Social Hinderance in India Asian Journal of Research in Social Sciences and Humanities, Vol. 6, No.3, pp. 20-30

accept that humans are diverse. People have the right to be what they are and what they want to be. For Hijra people, the same holds true.<sup>624</sup>

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<sup>624</sup> Nanda S, Belmont CA, 1999. Wadsworth Publishing. Neither man nor woman: the hijra of India. pp. 196.

## CONCLUSION

“I am neither male nor female.

I am both male and female.

I am firm and flexible.

I am aware and I am not.

To appreciate this fluidity of nature,

And the shifting rigidities of culture,

Is to appreciate queerness”.

-Shikandini<sup>625</sup>

On 19<sup>th</sup> April 2014, four days after the historical judgement of National Legal Services Authority v. Union of India, the headline of ‘The Hindu’ newspaper read ‘Beyond Male and Female, the Right to Humanity’ signifying a constructive change and a better future for the transgender community. This marked the beginning of new life for the transgenders community of India. The main purpose of the research was to highlight the NALSA Case of 2014 and various challenges it had faced prior to the verdict.

In India, people with a wide range of transgender related identities, cultures, or experiences coexist, which includes Hijras, Kinnars, Aravinis, Kothis and Jogappas or Jogtas. These people have been part of the broader culture and were treated with respect. Socialization, relationships and expectations, values and perceptions are shaped by whether one is male or female.

The whole world is filled up with beautiful things, places, men and women making up a society, but somewhere with these two genders, there comes those who roam around in streets, villages, trains and bless people. They are the Transgender, the third gender of our society, believed to be neither women nor men. Transgender are the people who differ

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<sup>625</sup> Pattanaik, D. 2014 Shikandini and other tales they don't tell you.

from others in their characteristics, appearances, or behavior. This is the hidden part of our society. In mid of 1990's the term 'Transgender' was used to address such people. In India, they are commonly called as Hijras or Kinnars or in common language 'Eunuch'.

The third gender among people is not a very new and surprising phenomenon. Rather, it has always been present across various cultures and lifestyles all over the world and innumerable mentions of it have been found in many scriptures including the ancient religious ones like Hinduism, Jainism, etc. with respect to Indian culture.

Rights made for transgender community should be implemented fairly and properly, so that the inequality faced by transgender community gets abolished and they get free from crimes and offences done against them. They are also a part of our society and complete it as much as male and females do.

Gayatri Reddy argues that in recent years hijras have emerged as perhaps the most frequently encountered figures in the narrative linking of India with sexual difference. As the quintessential "Third Sex" of India, they have captured the Western scholarly imagination as an ideal case in the transnational system of "alternative" gender or sexuality.

What is noteworthy about the Third Gender is that the role is so deeply rooted in Indian culture that it can accommodate a wide variety of temperaments, personalities, sexual needs, gender identities, cross-gender behaviors, and levels of commitment without losing its cultural meaning. The ability of the Third Genders to succeed as a symbolic reference point giving significant meaning to the lives of the many different kinds of people who make up the 'hijra community', is undoubtedly related to the variety and significance of alternative gender roles and gender transformations in Indian mythology and traditional culture.

This research attempted to explore the lived realities of transgenders who enter the hijra community and strategies of negotiation they use, in order to address the social exclusion and oppression they face, both within the family, and subsequently in the community and the larger society. The research also highlighted certain themes to provide insight into the

journey of 'becoming hijra' by examining the life histories and narratives of the respondents.

Some of the interpretations fall within a broad understanding of the gender binary and the ways in which they have been challenged in the lives of the hijras. However, in the narratives it is quite clear that the hijras did not consciously set out to challenge the gender binary.

What comes across through these narratives is strong sense of hijra personhood and identity, which may not have been intended to challenge any norms or necessarily even be caught in the binary. However, the complexity of this identity is not captured in the politics of representation.

This research also provides insights into the oppression, discrimination and violence faced by the respondents at the hands of the primary institutions of care and the impact that humiliation has on the identity of individuals as well as the choices that one makes in the course of their life. It also brings out the various ways in which the respondents found reconciliation within the community and the ways in which they cope with the unacceptance and lack of care.

Childhood and family, the world of work and intimate relationships are the central planks on which the identity of a hijra is formed, apprenticeship is the crucial link that enables these aspects that form their identity.

Some forms of social exclusion faced by the Hijra community include exclusion from family leading to exclusion from social and cultural participation, harassment at home by parents, relatives and neighbours which includes humiliation and violence, lack of role models, deliberate use of disrespectful names and pronouns (labelling), difficulty in finding housing facilities as owners hesitate to rent rooms to members of the hijra community, lack of protection from state authorities such as the police which also includes physical and verbal abuse, forced sex, extortion of money and materials and arrests on false allegations, restricted access to education, health services and public spaces as well as exclusion from economic, employment and livelihood opportunities.

This is made worse by the discrimination they face from employers due to their feminine characteristics, sometimes even despite being qualified for the job. Due to their feminine behaviour, these individuals encounter serial harassments, gross human rights violation, ostracism, extreme forms of discrimination and systematic abuse beginning at home, extending, and unfolding to all spheres of their life.

Many were abused at workplaces, eventually ousted from jobs. Those involved in prostitution, are harassed verbally, physically, sexually and also mentally. They are assaulted in public places, in buses and trains. Wherever or whenever these incidents take place, they don't have a source to seek support.

The basis of the community lay in intimate relationships, for instance the guru-chela relationship, which enables an individual to learn and connect to the larger group, enabling them to find a place to live in and find a work. However, such relationships are not always based on choice, rather the lack of it and it does come with certain costs or compromises that an individual is compelled to make. Thus this research also highlights the presence of hierarchy between the guru and the chela.

The fact that they move into the guru chela relationship has its root in their biological family that they leave. Finding the guru, to enter the community, to then find work and other sources of love and acceptance is also a strategy to cope with the exclusion faced within their own families. In spite of recognizing the enabling characteristics of the community, I have also tried to elucidate the nature of violence and exploitation that exists within the community, in order to be able to explain the impact of both the enabling as well as exploitative characteristics of the community and the guru-chela relationship on the identity of a hijra.

National Legal Services Authority v. Union of India and Others 2014 which was brought before the Supreme Court of India, concerned the grievances of the members of the transgender community, who sought a legal declaration of their gender identity different from the one assigned to them, male or female, at the time of their birth, and also stated that non-recognition of their gender identity violated Articles 14 and 21 of the Constitution of India.



The petitioner highlighted the traumatic experiences of the members of the transgender community and submitted that every person of that community has a legal right to decide their sex orientation and to espouse and determine their identity. It was submitted that since transgender people are treated neither as male or female, nor given the status of a third gender, they are being deprived of many of the rights and privileges which other people enjoy as citizens of India. Transgender people are deprived of social and cultural participation and hence are restricted from access to education, healthcare and public places which deprives them of the constitutional guarantee of equality before the law and equal protection of the laws. Furthermore, it was also pointed out that members of the community also face discrimination with regard to candidacy for election, the right to vote, employment, obtaining licences, etc. and, in effect, are treated as outcasts and untouchables.

India follows a democratic model of governance. The Indian courts have recognized democracy as the basic structure underpinning the Constitution of India.

There is no denying the fact that such an inception is a welcome step forward for the Transgender community in India and this judicial pronouncement has also been applauded by the United Nations, and soon it will set its benchmark in identifying the rights of the LGBT community in all nations.

This long-awaited judgement on the human rights of the transgender community has made a respectable statement in identifying transgender as a Third Gender, not only in India, but in the whole world.

This research informs us that India is taking steps, though small, but precious ones, to accept the people of the community that has been discriminated against and ignored for decades. This research also portrays many success stories of the transgender community who have 'Broken the Barriers' of the society and have made a name for themselves.

The new India is welcoming and futuristic towards its approach and goals. It also needs to be considered that laws and policies take time for them to come into action. Thus the final duty after the policy making lies with the people and how they accept it.

Just like the year 2014 has made a landmark judgement in the Indian society regarding the recognition of the transgender community. 2019 falls under a very speculative year, as it is for the very first time after the NALSA judgement, that the transgender community will be coming out with their right to vote. This long suppressed minority will now raise their voice for equality and justice. Many candidates have filed their names for contesting election for example, Bhavni Nath from Mumbai, Valmiki from Aam Admi Party (AAP) and many more.

The Approach after 2014 and the Lok Sabha Election of 2019 is sure to bring change for the transgender community in the political sphere. Only time can tell, how much progress and developments can be made.

We have a long way ahead to completely accept transgender people irrespective of their sexual orientation, but with these small steps we have hopes of becoming a society that treats transgender people as equals.

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## **ANNEXURE**

The interview was conducted on 22<sup>nd</sup> to 26<sup>th</sup> April 2019 in Kolkata with the help of Non-Governmental Organization- 'People Like Us'. The respondents were from different work backgrounds.

### **LIST OF PARTICIPANTS**

Following are the list of the participants interviewed through 'People Like Us' located in Narkeldanga Main Road, Kolkata and Amar Odbudth Cafe located in 27A Jadaupur East Road, Kolkata.

1. Kavita Dey 42 year old, resident of Kolkata (Social Worker) interview conducted on 22<sup>nd</sup> April 2019 in Narkeldanga Main Road, Kolkata.
2. Somnath Das 42 year old, resident of Kolkata (Social Worker) interview conducted on 22<sup>nd</sup> April 2019 in Narkeldanga Main Road, Kolkata.
3. Sweta Maity 38 year old, resident of Kolkata (Social Worker) interview conducted on 22<sup>nd</sup> April 2019 in Narkeldanga Main Road, Kolkata.
4. Trishna Das 42 year old, resident of Kolkata (Non Social Worker) interview conducted on 26<sup>th</sup> April 2019 in 27A Jadaupur East Road, Kolkata
5. Antara Mitra 55 year old, resident of Kolkata (Non Social Worker) interview conducted on 26<sup>th</sup> April 2019 in 27A Jadaupur East Road, Kolkata
6. Piyush Banerjee 41 year old, resident of Kolkata (Non Social Worker) interview conducted on 25<sup>th</sup> April 2019 in 27A Jadaupur East Road, Kolkata

7. Pratik Subbha 29 year old, resident of Darjeeling (Non Social Worker) interview done via email on 22<sup>nd</sup> April 2014
8. Deblina Maity 38 year old, resident of Kolkata (Non Social Worker) interview conducted on 25<sup>th</sup> April in 27A Jadaupur East Road, Kolkata
9. Soumita Gosh 38 year old, resident of Kolkata (Social Worker) interview conducted on 25<sup>th</sup> April in Narkeldanga Main Road, Kolkata.
10. Soniya Maity 42 year old, resident of Kolkta (Non Social Worker) interview conducted on 25<sup>th</sup> April in 27A Jadavpur East Road, Kolkata
11. Pallavi Gosh 38 year old, resident of Kolkata (Social Worker) interview conducted on in Narkeldanga Main Road, Kolkata.
12. Sweta Tiwari 36 year old, resident of Kolkata (Non Social Worker) interview conducted on 25<sup>th</sup> April in 27A Jadavpur East Road, Kolkata.
13. Fatima Shek 32 year old, resident of Kolkata (Social Worker) interview conducted on in Narkeldanga Main Road, Kolkata.
14. Mrinalini Mondol 38 year old. Resident of Kolkata (Non Social Worker) interview conducted on 25<sup>th</sup> April in 27A Jadavpur East Road, Kolkata.

## **INTERVIEW QUESTIONS**

The following were the Open- Ended Questions asked to the respondents:

- What do you prefer to be addressed as- Hijra/ Transgender/ Third Gender?
- How did your Family and Society respond?
- What are the changes you can see at present in the society? (In regard to the acceptance of their Identity)
- What are the aims and objectives of the NGO's? (For the NGO)
- What are the challenges being faced?
- Are you aware of your Legal Rights?
- How has the Government addressing your problems?
- Do you feel you are being heard?
- What do you expect from the society, government and the people?