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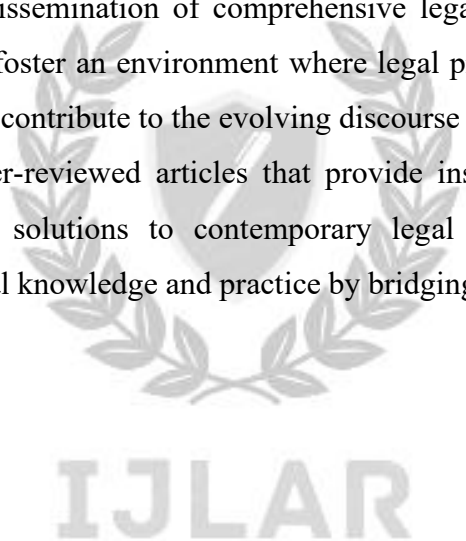
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## **Preface**

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## **Description**

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# **“HISTORICAL AND LEGISLATIVE ASPECTS LEADING TO THE INCEPTION OF TRANSGENDER RIGHTS IN INDIA: A BRIEF ANALYSIS”**

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## **ABSTRACT**

*The Transgender persons have been an integral part of the Indian society for over centuries. The telos of this present research is to contemplate the historical evolution and the legislative adoptions by the Government to thwart the prevailing issues and challenges encountered by the Transgender Community as a whole. The dearth of participation and equitable representation in the legal, political, societal, and legislative spheres in the contemporary scenario has led them to face social stigma and discrimination. The present study expounds upon the legislative actions envisaged and introduced to curtail the issues of non-conformity with the gender and sexual norms of heterosexuality prevalent in Indian society. Previously, legal obligation including the anti-sodomy law of section 377 of the Indian Penal Code, 1860 and the lack of gender classification for the transgender in official government document resulted in discrimination and marginalization of these communities. These communities are subject to harassment and violence from the police, medical establishment, and other individuals. These communities are not immune to inclusionary measures but rather experience systemic exclusion from vital social services like employment and healthcare. The Supreme Court in National Legal Services Authority v. Union of India & Ors, 2014 acknowledged the Transgender Community as a 'third gender' in the society and the decriminalization of sodomy law in 2018, have been somewhat positive approaches in improving the status of Transgender Community in the recent times. Furthermore, this paper explicitly examines the legal background and discrepancies brought for the inclusion of these communities in the mainstream society. aim of my paper is to express my views on the issues*

*of transgender in defining their socio-economic exclusion and inclusion problems and development process in the society, and perceptions by the mainstream society.*

**Keywords:** *Third gender, problems, social exclusion, discrimination, law, society, prerogative.*

## **1. INTRODUCTION**

The Indian transgender community is an indigenous population with a vibrant and extensive historical past. Unfortunately, democratic incorporation and adaptations of transgender people have never been possible due to the prevailing influence of heteronormative customs and practices. A new chapter in India's democracy unravelling emerged as a consequence of the agitation of multiple groups challenging this exclusion and neglect.

Individuals who identify themselves as transgenders in the communities defy the conventional notion of what men and women have in common because their determination of gender does not correspond to their true sexual orientation. "Transgender" is a lesser clinical phrase that refers to gender classification and gendered expressions; it precludes gender identification and physical attributes. People whose identities along with their conduct disregard conventional gender stereotypes becoming one of the impediments for their integration in the mainstream society. These communities are also referred to as gender-queer, gay, trans-sexual, or transvestite in the society.

### **1.1. The Position of Transgender: Ancient India till The British Regime**

The Indian subcontinent is one of the ancient civilizations of the world, and has experienced multiple conquests, prolonged over centuries. The culture of India has changed over time; with every Mughal conquest, and the subsequent colonization by the British, and the contemporary socio-cultural practices are a fusion impact of the multifaceted factors of these historical influences leading to the inception of Transgender rights. The Transgender persons had been the part of the Indian Society for centuries. Near the early writings of primitive India, there is historical evidence showing the views of individuals who do not confirm the "third – gender" or male or female sex in the vicinity of the beginning writings of primordial India. The notion of "*tritiyaprakriti*" or "*napuunsaka*" is an essential part of the Hindu mythos, folklore, and early Vedic and Quran literature. The term "*napuunsaka*" has been used to symbolize the scarcity of reproductive capability, which manifests itself as changes in

male and female signs.

Therefore, some of the original texts addressed sexual and third -gender issues in a comprehensive way, which was well- founded thinking in the past. In the Indian mythology, there is a concept of *Ardhanareeshwar*, which is a well-known Hindu deity. Ardha means half, Naree means women and Ishwar means the Lord. A lord who is half woman and half man. Ardhanareeshwar is a combination of Lord Shiva and Shakti. Shiva has been considered as destroyer whereas Shakti is the creator. Lord Shiva has been given a supreme place in Indian Mythology; therefore, he is also called as Maha Deva. The concept of Ardhanareeshwar explains that every human being is half man and half woman.

The Mythological account of the Mahabharata and Ramayana were the profound treasure boxes for references to transgender people. Shikhandi from Mahabharata is probably the most powerful transgender figure found in the Hindu mythology. Aravan or Iravan, son of Arjuna is another minor, yet crucial transgender character who is believed to have laid down the lineage from which the transgender persons are born. Lord Rama, in the epic Ramayana, an account of after being expelled from the empire for 14 years, he was going to the forest. He turned around and asked all the 'men and women' to return to the city. Amongst the believers, only the hijras was not bound by this direction and chose to stay by his side. Impressed with their allegiance, Rama endorsed them the power to bestow blessings on fortunate occasions like childbirth and marriage, and at inaugural gatherings where, it was intended to set the stage for the tradition of *badhai* in which hijras sing, danced, and bestowed blessings. The Jain scripts also make a detailed reference to the Transgenders which reveals the perception of 'psychological sex'.

Hijras additionally, played a prominent role in the royal courts in the Islamic realm, especially in the Ottoman Empire and the Mughal regime in the medieval India. Throughout the Mughal era, the hijras relished especial places in the royal courts and were appointed as political advisors, administrators, generals as well as guardians of the harems. Hijra is considered to be smart, trustworthy, and extremely loyal, with unrestricted access to all localities and population sectors, thus playing a decisive role in the ruling structure politics of the Mughal era. Consequently, many of the transgender courtier had unlimited access to all fields and people, thus playing a decisive role in the practices of the emperor's rule in the Mughal era. At the same time, hijras also occupied an important place in Islamic piety institutions.

The status of the hijras subverted during the British regime where the ideologies of sex/gender binaries bodies and hetero-normative sexuality perspectives were pervasive under

the colony rule. The hijras physical appearances were problematic because of its ambiguity and differences as compared to hetero-neutral physique. Progressively, many laws against the hijra community were enacted, so the hijra community in society was deprived of the rights granted by the Kings and the Mughals. Through the colonial government, the Hijra were classified on the delinquent caste/tribes list. The Criminal Tribes Law stipulates the conditions for the 'registration, surveillance and control of specific tribes and eunuchs. Section 26 of the Act classified all hijras as criminals along with dew other tribes like lodha, shabar, thugges, saints etc. Alas, this instigated the vulnerable conditions of hijras.

Under this Act, a government register was to be retained with the names of 'eunuchs' accused of abducting or sterilizing children or committing a grievance as specified under Sections 300 and 77 of the Indian Penal Code, 1962. This Act was applicable in all the States of India. The implications of this Act were adverse wherein the plots of lands granted to Hijras by the Mughal king and rule were confiscated by the colonial ruler. Additionally, Section 377 of the Indian Penal Code (IPC) was also enacted in 1860 during the colonial period and barred same sex affiliation often cited to as "Anti Sodomy Law."

## **1.2. Position in Post-Independence India**

After the Independence, the Government of India in 1952 repealed the Criminal Tribes Act, 1871 calling it 'a bolt on the law book of free India'. However, the same year the Government of India passed the Habitual Offenders Act, 1952 which preserved most of the provisions of the Criminal Tribes Act, 1871 except for the premise that an entire community can be born criminal. The focus now shifted from criminalizing a tribe to criminalizing an individual. The Immoral Traffic (Prevention) Act of 1956 which was amended in 1996 has become a legislation without gender prejudice. The scope of the Act applies to both male and female sex workers and people whose gender identity has not been determined. With the amendment, both the male and hijra sex workers became criminal subjects as this gives the police the legal basis for detention and oppression of the transgender sex workers. The punishment under this Act ranged from 3 to 10 years of imprisonment.

### **1.2.2. Courts on Controversial Section 377**

The validity of Section 377 of the Indian Penal Code was challenged in *Naz Foundation vs. Government of National Capital Territory of Delhi*, since it penalizes consensual sexual intercourse between two adults in private. The challenge against the Section was founded on the ground that it violates Articles 14, 15, 19 and 21 of the Constitution of India. In this case,

the court observed that there is a growing jurisprudence relating to the human rights of person with sexual deviancy which would be seen in United Nations sponsored human rights treaties. The court identified and categorized these human justices allowed three dogmas namely: 'impartiality, protection of private rights; protection of universal human rights unique to all people, regardless of their sexual orientation or unique gender.'

Accepting the urgings of the petitioners in this situation, the Court held that 'so far as it condemns the wilful sexual behaviour of adults in seclusion, and violates Articles 21, 14 and 15 of the Constitution of India. The requirements of Section 377 Indian Penal Code will continue to apply to non-consensual penile non-vaginal intercourse including minors.

However, in *Suresh Kumar Koushal & Ors vs. Naz Foundation & Ors*, the decision in *Naz Foundation vs. The Government of National Capital Territory of Delhi* has been put in to severe legal scrutiny. The appellant in this case founded their argument on the ground that the Honourable High Court committed a serious error since the Writ Petition did not contain any fundamental facts to decide on constitutionality of a statutory provision. It was further submitted that Section 377 of the Indian Penal Code was being used for prosecuting homosexuals as a class and not for discriminating against the Transgender Community. The Court observed in this case that, while striking down a provision as unconstitutional, the courts must be guided by the presumption of constitutionality of the impugned provision.

The Court also observed that the deletion of Section 377 of the Indian Penal Code was recommended by the Law Commission of India in its 172<sup>nd</sup> Report, which was not taken into consideration by the Indian Parliament, and it shows that the legislature, undoubtedly the representatives of the people thought it improper to delete the provision. So, unless and until a clear violation of the Constitution is proved, the Court is not empowered to strike down a statutory provision. By observing that a mere chance of abuse is insufficient to strike down a statutory provision, the Court allowed the appeal undermining the rays of hope in the life of the Transgender Community.

### **1.2.3. The NALSA Judgement**

The National Legal Services Authority of India (hereinafter referred to as NALSA) was the primary petitioner. It had been constituted with the primary objective of providing free legal aid services to the disadvantaged sections of the Indian society. The case was filed in September, 2012 by the National Legal Services Authority, the writ petition had sought several directions from the Supreme Court, including granting of equal rights and protection to transgender persons; inclusion of a third category in recording one's sex/gender in identity

documents like the election card, passport, driving license and ration card; and for admission in educational institutions, hospitals, amongst others.

It was in the light of that when on 15 April 2014, Justices K.S. Radhakrishnan and A.K. Sikri in the case of NALSA wherein, the court granted legal recognition to 'transgenders' only. The court was of the view that only transgenders or eunuchs will be included in the category of 'third gender'. This has come to be recognized as the canopy terms including gay, lesbians, bisexuals, and transvestite within reach.

Though, the Supreme Court also provided guidance to the Centre and State governments to recognize the transgender persons as socially and educationally backward classes for the purpose of admissions to educational institutions. The implications of NALSA are far-reaching including the granting of legal status as a third gender. The transgender persons will be able to enjoy 'complete ethical citizenship'. The verdict given would set a precedent to prevent the police from conducting a shocking undressing, invasive search, or medical examination of transgender people to determine their gender. Discrimination in the fields of public employment, health care, education and access to facilities will face confrontations and be corrected. Transgender women may possibly be able to obtain protection under gender-specific directives for women.

The decision is a momentous decision that strengthens and promotes fundamental rights. It strikes a reasonable balance amongst the philosophical, legal and sensible considerations that encompass the vicinity of gender identity and perception. The Court was unwilling to deal with the constitutionality of Section 377 of the Indian Penal Code in this case since it was decided by the Division Bench of the Noble Supreme Court in *Suresh Koushal's* case and referred that, the rights of transgender was completely a separate problem.

## **2. LEGISLATIVE ACTIONS TO PROCURE THE RIGHTS OF TRANSGENDERS**

### **2.1. The Transgender Rights Bill, 2014**

After the recognition of the transgender as 'third gender' by the Supreme Court in its NALSA verdict. It paved the way for enshrining the rights of transgender in law, the first effort at framing legislation for the transgender rights was made in December 2014 by Tiruchi Siva, a Dravida Munnetra Kazhagam (DMK) Rajya Sabha MP. He came up with a Private Member's Bill, namely The Transgender Persons Bill, 2014 (hereinafter referred to as the Private Membership Bill) pioneered in Rajya Sabha on December 12, 2014. According to Siva, he was

motivated to draft the Bill as he had been engaged with transgender groups for a long time.

A private Member's Bill can be introduced by any member of Parliament. The 2014 Bill unanimously passed in the Rajya Sabha, making it the first Private Member Bill to pass in the upper house after a gap of 45 years. The Bill has significant progressive clauses, including recognizing the right of transgender persons to self-identity as well as creating commissions and legal courts to consider transgender persons' grievances. Furthermore, the Bill guaranteed reservations for placements in government employment, financial aid awards, and education services for transgender persons.

Clause 2 (t) of the 2014 Bill described a 'transgender persons' as follows:

[A] person, whose gender does not conform with the gender allotted to that person at birth comprising of transgender men and transgender women (regardless of whether they have endured sex reassignment surgery or hormone therapy or laser therapy etc.), gender-queers and a number of socio-cultural personalities such as – kinnars, hijras, aravanis, jogtas etc.

This definition transcended the binary understanding of gender and included a wide range of socio-cultural identities. The government stated that it would bring the Private Member's Bill to the Lok Sabha for vote after 'correcting infirmities. However, it is said that the Bill was never presented to the Lok Sabha allegedly because it 'gives too much obligation on the part of the government' and had conditions for reservation which the authority had difficulties with.

## **2.2. The Transgender Persons (Protection of Rights) Bill, 2016**

In March of 2016, the Ministry of Social Justice and Empowerment prepared the Transgender Persons (Protection of Rights) Bill, 2016 and was sent for partial two-week inter-ministerial negotiations. While the remarks from other ministers were poorly upcoming, the Bill was forwarded to the Legal Ministry in April 2016. (before being sent to Cabinet for approval). To understand the importance of post-consultation deliberation, it is worth noting that in 2015, the Ministry of Social Justice and Empowerment had prepared an alternative bill, the Rights of Transgender Persons Rights Bill, which seems to be more in line with the Private Membership Bill of 2014.

The Ministry invited comments on this Bill, but many organizations states that the timeline for sending recommendations was too short and unfeasible. Nevertheless, several transgender-led groups submitted recommendations for this draft. However, suggestions on expanding the bill to cover intersex people, streamlining gender recognition procedures,

incorporating rights of transgender children, repealing section 377 and so on all appear to have gone unheard. The 2015 Bill was never introduced in Parliament and appears to have been shelved to make room for the more draconian 2016 Bill.

Although, the government made efforts to hold public consultations after drafting the 2015 Bill, it did not deliberate on any of the recommendations made by any transgender groups. Instead, the Ministry of Social Justice and Empowerment drafted another bill that deleted many of the important provisions that were present in the 2014 and 2015 Bills. Thus, a uniform policy on proper consultation and deliberation is required to avoid such issues. On 2 August, 2016, the Ministry of Social Justice and Empowerment introduced its newly drafted Bill in the Lok Sabha. It inevitably met with severe backlash from the Transgender Community because of its failure to adopt a right-based framework. Due to the backlash, Lok Sabha's Standing Committee invited recommendations on the Bill. Crowdsourced responses from transgender and intersex people indicated that the 2016 Bill was a massive disappointment, with many callings this based on 'undermined, proscribing and anthologies based on distorted premises that constitute or mount towards human rights infractions'

However, the Supreme Court rulings on August 24, 2017, that the Right to Privacy was a fundamental right, and was thereby applicable to the protection of sexual orientation of citizens gave a reprieve to the LGBTQ community. The government remodelled a new bill i.e., The 2017 Transgender persons (Protection of Rights) Bill, who has been prepared and retained, and then was subsequently forwarded to the Standing Committee on Social Justice and Empowerment for consultation, was scheduled to be re-introduced in next meeting of the Parliament.

In January 2018, the Supreme Court agreed to hear the petition for review of the *Naz Foundation* 2013 ruling. On September 6, 2018, the Supreme Court proclaimed unanimously in *Navtej Singh Johar v Union of India* that Section 377 was unlawful which proscribes consensual sexual act between same-sex adults. The judgement was given by a five judge's bench comprising the then Chief Justice of India Dipak Mishra, Justices R.F. Nariman, D.Y. Chandrachud, A.M. Khanwilkar and Indu Malhotra.

The Section 377 was partially struck down by the Constitution Bench and will no longer apply to consensual sex acts between homosexuals, heterosexuals and lesbians but will continue to apply to bestiality and sexual acts without consent by one of them.

After the above judicial developments, the Lok Sabha submitted and voted for a fresh edition of the proposed law in December, 2018. In view of the failure of the Transgender

Persons (Protection of Rights) Bill, 2018 which was heralded by a 2016 edition, Indian transgender groupings, lawyers, and campaigners have protested and criticized.

### **2.3. The Transgender Persons (Protection of Rights) Bill, 2018**

On December 17, 2018, certain amendments to the Bill were introduced in Lok Sabha. The Cabinet approved 27 changes to the 2016 Bill. However, the definition was the only major change accommodated in the new draft. The classification of 'transgender person' is modified to 'a person whose sexual characteristics does not meet with the gender allotted at birth comprising of trans-men, trans-women, gender-queer, and more socio and cultural personalities, such as kinnars, hijras, aravanis, jogtas etc'. It also incorporated self-declaration/self-recognition of gender identity, that is, an individual will have the prerogative to make a decision to be identified as a man, female, or transgender, regardless of sex reassignment surgery (SRS), hormonal therapy, laser therapy, or other similar treatments. However, all the other suggestions from transgender groups were ignored. The 2018 Bill upholds the criminalization of begging, including lighter penalties for discriminating against transgender people, and the creation of a two-level structure in which only individuals who have not endured SRS can identify them as transgender. Hence, the Bill in its current form violates the fundamental rights of transgender and gender non-conforming people as recognized in the NALSA judgement.

These developments in the Transgender Rights Bills are an excellent example of the importance of deliberation. The process during drafting of the 2014 Bill and later debates on the 2016 Bill indicated that education, employment, housing, healthcare, and freedom from violence are routine concerns of transgender people that ought to be engaged with in law and policymaking. Furthermore, it is imperative to have multiple perspectives on the table as transgender people in India make up a very heterogenous community.

### **2.4. The Transgender Persons (Protection of Rights) Bill, 2019**

The Transgender Persons (Protection of Rights) Bill, 2019 was presented by the Ministry of Social Justice and Empowerment, Mr. Thaawarchand Gehlot, before the Lok Sabha in July, 2019. The Bill was introduced to prevent discrimination against transgender persons. This type of discrimination includes the negation of service or biased conduct with regard to education, employment, health care, access or enjoyment of properties facilities, publicly available prospects, right to movement, right to reside, rental rights, or other forms of

occupation of the property. The prospects to hold public or private offices and gain access to a government or private institutions in whose care or guardianship a transgender person is under. The bill recognizes the illegality of forced or bonded labor, refusal to work, or mental work. The consequences for these wrongdoings diverge from six months to an extent of two years including a fine. The Bill also introduced a committee, the National Council for Transgender Persons (NCT). The Committee would recommend the advice to the central government and scrutinize the influence of the policies, legislation, and ventures with deference to the concerns of transgender individuals. It will also resolve the grievances confronted by the transgender persons.

This bill was subsequently approved as an Act in 2019, of which was the first regulation aimed at the enhancement of the conditions of the transgender's individuals. However, several supporters of the Transgender Community also condemned this form of legislation as a 'strict and discriminatory' legislature. It also strongly opposes that the Act does not plainly cater to the needs of all communities and forms of manifestations of gender individuality, gender expression and sexual traits problems and that the description of 'transgenders' is not thorough and extensive.

Further, some ambiguities in certain terms or provisions of the Act are quite evident, nonetheless, the reality persists that the exclaimed Act is the earliest phase of measure in the perennial battle for the identification of the Transgender Community.

### **2.5. The Transgender Persons (Protection of Rights) Rules, 2020**

The Transgender Protection Rules 2020 was passed mainly to explain the 2019 Act in a broader sense. The rules seem to have tried to bridge the gap between the Act and the directions given by the Supreme Court in *NALSA vs. Union of India*. The draft rules 2020 was introduced to people for suggestions but no proper discussion was held because of the coronavirus lockdown. Some of the activists contended that the rules in consonance with the Act failed to meet the expectations of the community as most of the problems remain unsolved and the government again ignored the suggestions and recommendation of the transgender and right activists. The second draft rules included the definition of discrimination, which was praised by the people but unfortunately, it was removed from the final rules that were notified.

## **3. CONCLUSION**

The LGBT community, which stands for Lesbian, Gay, Bisexual, and Transgender,

includes the transgender community in India. These populations are frequently the targets of prejudice and unfair treatment in society. The government is putting forth an immense effort to integrate the third gender into society. Previous to the historic 2014 NALSA decision by the Supreme Court, which recognized transgender people as belonging to the third gender and incorporated strategies giving them an independent identity and mandating government bodies to set aside restrictions for them in the workforce and in school. The earliest form of recognition of the concept of gender, including legal regulations relating to marriage, adoption, inheritance, and various other circumstances, depending on the binary classification of male and female, which were the only genders recognized by Indian law overall in its entirety.

Even though these communities had important roles and positions throughout the Mughal era, their standing quickly declined when British administration over India commenced. On the other hand, these communities have benefited somewhat from the policies and initiatives that the government has put in place and endorsed. These measures have also protected these communities' civil rights and best interests while giving them a route to societal integration and assimilation. In addition, the laws passed in response to their extensive struggles for acceptance and socioeconomic standing lack a solid strategy for reducing societal stigmas and persistent discrimination in the workplace, healthcare, and education sectors, all of which frequently make it more difficult for them to achieve their fundamental human rights.

Every step farther is sure to bring up recognition and social integration of transgender communities in its entirety definitely questions the legitimacy of the procedures recommended by the laws enacted in the recent years for the upliftment of these marginalized and vulnerable communities in the society. The conciliation of these assertions in a way that expands our perspective is a challenge to the transgender communities and also to the State, formulating guidelines and policies for the recognition of these fractions who are devoid of basic human rights in every sphere of their livelihood. The goal of this kind of cognitive expansion is to instil capability growth while also pushing the boundaries established by the heteronormative paradigm.

Transgender communities social and political activism encompasses numerous concerns pertaining to the fundamental conception of the democratic society. The importance of transgender activism and outreach must be understood in the context of expanding Indian democracy, which has hitherto been dominated by social, economic, and caste issues. In India, the recent legislations encourage the upliftment and elevation of the socio-economic status of these communities by creating new opportunities for social justice and democratic

inclusiveness. The social recognition and inclusiveness of transgender communities adapt to fresh and altered interpretation to concepts that have historically been taken for granted by displaying identity and individuality in a nuanced manner for their marginalization and ostracization from the society. In fact, the transgender community's social uprising aims to make connections between the various issues that affect them in general. These symbols reveal the prevailing concerns about redistributive justice and sense of identity for the members of these community who undergo severe mental and physical apprehensions in their lives. The social involvement of these communities often lead to disgruntled political discussions resulting to unresolved matter in issue which is rarely examined and frequently misinterpreted.

