



A Study of Socio-Legal History of Transgenders in India

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The community of people known as hijras has existed in India for a long time and is well known to students and observers of Indian society. These people are often described in various ways in both scholarly and popular literature, including eunuchs, transvestites, homosexuals, bisexuals, hermaphrodites, and more. They are also referred to as being intersexed, emasculated, impotent, transgendered, castrated, effeminate, or somehow sexually abnormal or dysfunctional. Within the hijra community, there is a distinction between those who are born with ambiguous genitals and those who are made such through castration, although other distinctions have been proposed. A recent anthropological study, with the enticing title of "Neither Man nor Woman," supports the view that "hijras may reasonably be described as an institutionalized third gender."¹ Through this paper we will look into the history of transgenders in India.

Keywords: Transgender, Fundamental Rights, Social History, Gender Laws

INTRODUCTION

A person who identifies as a gender other than the one they were assigned at birth is said to be transgender. This blanket term is used to describe people whose gender identities are not the same as their natal sex. Other culturally specific terms, such as 'hijra' (India), 'waria' (Indonesia), 'muxé' (Mexico), 'fa'afafine' (Samoa), 'kathoey' (Thailand), may also be used to refer to individuals who do not identify with either male or female gender norms (indigenous North Americans). There are a number of countries and civilizations that officially and culturally recognise a third gender.² The term *transgenderism* was coined by Virginia Prince who used it as an umbrella term for both transsexualism and transvestism.³

In Tulsidas' Ramayana, which was written in the 15th century, Rama says, "*Nar, napunsak, nari, va Jiva, charachar koi; sarva bhav bhaj kapat taji, mohe param priya soi.*" Meaning – "All, the men, queers, women, plants and animals are equally dear to me, if they come to me without malice."

Traditional notions of gender are centred on the male and female binaries. This sociocultural foundation is the basis for state policies and the governing system. Nonetheless, over time, diversity has infiltrated all aspects of society. Currently, a variety of races, faiths, groups, and languages are more readily tolerated; hence, society is fundamentally pluralistic. In the field of sexual identities, however, there is still room for improvement.

According to the 2011 India Census, the population of transgender people in India is around 4,87,000 (as on 2011). Despite constituting a sizeable portion of the population, transgender people in India are denied access to the fundamental circumstances required for a decent and dignified existence. This prejudice implies that development objectives cannot be attained if a substantial portion of the population is excluded.

¹Social Text 61, Vol. 17, No. 4, Winter 1999. Copyright © 1999 by Duke University

²Reddy G, With Respect to Sex: Negotiating Hijra Identity in South India (University of Chicago Press 2007)

³Transgenderism: Facts and Fictions, Sumasundaram O, Indian Journal of Psychiatry



HINDU MYTHOLOGY

In contemporary India, there is a continued presence of various mythological beliefs, even in the field of clinical practice. This is exemplified by situations where urban parents, who may support their child's gender transition, inquire about the medical practitioner's knowledge of transgender individuals in ancient Indian Epics. However, a brief review of such literature can provide useful information for medical professionals in answering related questions. One example of such literature is Sanskrit, which is among the oldest languages globally and incorporates three genders - masculine, feminine, and gender-neutral. The concept of "tritiyaprakriti" or "napumsaka" is prevalent in Hindu mythology, folklore, epic, and early Vedic and Puranic literatures.⁴

The transgender community has a deep-rooted presence in the history. The Hindu mythological texts describe the respectful existence of the transgender community in the society. The concept of "napumsaka" has finds references in the Hindu Mythology and Vedic and Puranic literature.

Vedas

The Vedic literature offers a more transparent perspective on human biology. According to this literature, human gender is precisely categorized into three groups based on prakriti or nature: male, female, and the third sex, also known as tritiya-prakriti. The third sex is also classified under the broader social category of the "neutral gender," whose members are referred to as napumsaka, and do not engage in procreation. Napumsaka people are further divided into five categories: children, the elderly, the impotent, the celibate, and the third sex.⁵

The "neutral gender" is a social category that includes the third sex, also known as napumsaka people, who do not engage in procreation. The napumsaka people are further divided into five subcategories, which include children, the elderly, the impotent, the celibate, and the third sex. According to Vedic definition, all members of this non-reproductive category were considered sexually neutral and were believed to bring good luck and prosperity. They played an important role in maintaining balance in human society and nature, as emphasized in Vedic literature which recognized the value, purpose and reason for existence of everything in nature. The Vedic classification of human beings was based on a holistic assessment of the physical body, psychological makeup, and social status related to procreation.⁶

The Vedic texts, such as Narada-smriti, Sushruta Samhita, Caraka Samhita, Smriti-ratnavali, Sabdakalpa-druma, among others (Galva 108), provide explanations of individuals belonging to the third gender, indicating that they are unable to procreate due to physical impotence or a lack of attraction to the opposite sex.

During the Vedic era, the belief was that every person played a crucial role in society. This included individuals who identified as third gender, who were afforded their basic rights and permitted to establish their own communities, marry, and engage in various professions with respect. Additionally, they were often invited to attend important events, as their presence was considered lucky and auspicious. The Vedic society recognized and respected the distinct status of third gender citizens, and there were no specific laws in place that punished them for their natural behaviour, according to Vedic literature.

According to the Vedic literature, the third gender community was well-known and acknowledged for their distinct characteristics. In the Vedic system, individuals who identified as third gender were provided with opportunities to cultivate their own personalities with the encouragement and

⁴ Srinivasan SP and Chandrasekaran S, "Transsexualism in Hindu Mythology" (*Indian journal of endocrinology and metabolism*2020) <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7539026/#ref2>> accessed February 26, 2023

⁵ Svetasvatara Upanisad, Galva 108

⁶ Wilhelm AD, *Tritiya-Prakriti: People of the Third Sex* (Xlibris Corporation 2010)

Cuest.fisioter.2025.54(2):4687-4697



assistance of their families and society. However, in modern-day India, the transgender community faces numerous challenges, including limited access to education, employment opportunities, financial stability, basic living conditions, and societal status and recognition. These struggles are in stark contrast to the acceptance and support offered to the third gender community during the Vedic period.⁷

Transgender in the Puranas

Mohini, the female aspect of the Hindu god Vishnu, is the first character to be shown as transgender. If one were to interpret the name Mohini literally, it would mean "enchantress." Mohini first made her debut, according to the Mahabharata, when the gods and asuras were churning the ocean with the assistance of Vishnu in the shape of the Kurma (tortoise) avatar in order to get Amrita, which is known as the elixir of immortality. In order to successfully hand over the Amrita to the devas, she had to use her charm to mediate the strife that existed between the devas and the asuras.⁸

In the Vishnu purana, Mohini makes a reappearance when she uses her guile to rescue Shiva after he has just handed Bhasmasura a blessing that would cause the head of everyone he touches to be eaten. Shankara-Narayanan (also known as Hariharan) is said to have been born as a result of the union of Shiva and Mohini in the LingaPurana (Vishnu). This story is also linked to the birth of Ayyappa, which occurred as a result of the union of Shiva and Vishnu (who is also known as Hariharaputra, which translates to "son of Shiva and Vishnu").

Transgender in Ramayana

In the 15th-century text known as the Ramayana, authored by Tulsidas, Rama is quoted as saying, "Nar, napunsak, nari, va Jiva, charachar koi; sarva bhav bhaj kapat taji, mohe param priya soi." Meaning "All of you, whether you're a man, a woman, a plant, or an animal, are equally dear to me as long as you don't intend any harm toward me."

After King Rama was sent out of his kingdom, the Ramayana recounts that he was given the mandate to spend 14 years of his exile living in the jungle. In spite of the fact that he was being pursued into the woods by his followers, he begged each and every one of them to return with him to the city of Ayodhya and implored with "all men and women to return." The transgender persons known as hijras stayed behind with Lord Rama since they did not identify as either male or female. They were given the right to bestow blessings on key events like as marriage, childbirth, and inauguration festivities because Lord Rama was greatly moved by their dedication and commitment. These noteworthy occasions include marriage, childbirth, and inauguration celebrations.⁹

Aravan, the progenitor

Aravan, the son of Arjuna and Ulupi (a "snake" princess) and literally "son of a snake" in Tamil, was delivered to Goddess Kali to be murdered in order to guarantee the Pandavas' victory in the Kurukshetra War. The sole requirement was that Aravan spend his final night as a married man. Aravan was supposed to be slain after the marriage; hence no woman was eager to marry him. In order to marry him, Lord Krishna assumed the appearance of a stunning woman named Mohini. Because of this, the Hijras of Tamil Nadu refer to themselves as Aravanis, after their ancestor Aravan.¹⁰ Every year, an 18-day celebration is held in Koovagam, Tamil Nadu, when the local transgender women masquerade as his wife and mourn Aravan's passing.

⁷ Tao W-yi, K, "Transgender Identity in Law and Society: Finding the Meaning of the Words 'Man', 'Woman' and 'Transgender'"

⁸ Konduru D and Hangsing C, "Socio-Cultural Exclusion and Inclusion of Trans-Genders in India" (2018) 5 International Journal of Social Sciences and Management

⁹ Kalra B et.al., "The Mahabharata and reproductive endocrinology"(2016) *Indian J Endocrinology and Metabolism*

¹⁰ Somasundaram O., "Transgenderism: Facts and fictions" (2009) *Indian J Psychiatry*.



Arjuna – Brihannala

Urvashi put a curse on Arjuna, claiming that he would lose his sense of manhood as a result of his refusal to accept her advances after he said that she was similar to his mother. Indra modified the curse so that it would only affect Arjuna for a year of his choosing. Arjuna benefited greatly from this turn of events since he was able to remain in the forest with his brothers for the last year of their exile by disguising himself as Brihannala, a dancing teacher. He was the one who passed on his knowledge of music and dance to King Virat's daughter and her attendants. As soon as King Virata saw who Arjuna truly was, he offered the hand in marriage of his daughter to him. In light of the fact that he had acted in the capacity of her teacher and considered her to be his daughter, King Arjuna declined the offer.¹¹

Ila

In Hindu mythology, the narrative of Ila recounts a singular incident of gender reassignment, which is very uncommon. It is stated that Ila was the daughter of Vivasvata Manu and his wife Shraddha, who had hoped for a boy but instead were blessed with a girl. There are many different tales of where Ila came from, but it is said that she was their answer to their prayers. As a result of a miraculous intervention, Ila was reborn as a man who was given the name Sudyumma. However, later on in the jungle Sudyumma was cursed to turn into a woman, but Shiva was able to lessen the severity of the curse by granting him the ability to switch between male and female forms on a monthly basis. Ila/Sudyumma had sexual contact with Budha (Mercury) during one of her phases as a female, and as a result, she became pregnant with the Pururavas, who would go on to form the Lunar dynasty. In the end, Ila/Sudyumma was able to successfully revert back to his male form forever owing to a blessing from Shiva.¹²

Ardhanarishwarar and Lakshmi Naryanan

The Ardhanarishvara form represents an androgynous manifestation of both the Hindu deities Shiva and Parvati. The Puranas offer various explanations for the existence of Ardhanarishvara, with some suggesting that it represents the perfect combination of male and female energies, known as Purusha and Prakriti, and signifies their inseparable nature. This idea is echoed in the androgynous form of Lakshmi–Narayan, which is a combination of Lakshmi, the goddess of wealth and prosperity, and her husband Vishnu.

Shikandini to Shikandi

According to the Mahabharata, Princess Amba was kidnapped by Bhishma for the purpose of marrying her step-brother, but afterwards her marriage proposal was declined by him. Amba, who was unable to stand the humiliation, committed herself and promised to get vengeance on Bhishma after her death. She was subjected to rigorous rituals in order to alter her gender before being resurrected as Shikhandini to King Drupada. During the battle of Kurukshetra, Bhishma realized that Shikhandini was Amba resurrected, and he refused to engage in combat with a "woman." On the ninth day of the battle, Arjuna drove in a chariot with Shikhandi, who he utilized as a shield to

¹¹ *Ibid* pt.7

¹² Srinivasan SP and Chandrasekaran S, "Transsexualism in Hindu Mythology" (2020) 24 *Indian Journal of Endocrinology and Metabolism* 235



attack Bhishma. Bhishma was on the receiving end of this assault. As a direct consequence of this, Shikhandi was an essential figure in Bhishma's downfall and the Pandavas' final triumph.¹³

The Brahmandapurana

The Brahmandapurana provides a detailed explanation of transgender identity, including its definition and how it is formed. According to this text, when a male and female have sexual intercourse, the male's semen combines with the blood in the female's uterus, resulting in the formation of an infant. The gender of the infant is determined by the ratio of semen to blood in the mixture, with a higher ratio of semen resulting in a male and a higher ratio of blood resulting in a female. However, if the ratio of semen to blood is equal, the infant will be born as a third gender or eunuch. The Brahmandapurana regards the birth of eunuchs as a natural process, and some believe that the transsexual form of Lord Shiva is a fusion of male and female.

ISLAMIC ERA

Hadiths

Many followers of Islam and the dominant Islamic schools of thought consider Hadith or Athar as a documentation of the sayings, deeds, and tacit endorsements of the Islamic Prophet Muhammad. This record has been transmitted through a series of narrators.

The al-Qur'an, which is the primary source in Islam, does not provide a specific explanation about transgender individuals. However, a more detailed explanation can be found in the hadiths. These are collections of sayings and actions attributed to the Prophet Muhammad, and certain hadiths in these books discuss the transgender phenomenon. For instance, Imam al-Bukhārī presents a hadith in his work that addresses this topic:

“Ibn ‘Abbās r.a. said: Rasūlullāh (peace be upon him) cursed men who resemble women and women who resemble men.”¹⁴

Ibn abbas said:

“Ibn ‘Abbās said that the prophet cursed a man who resemble women and women who resemble men.” The prophet said: “Get them out of your house”. Ibn ‘Abbās said: The prophet got a man out and “Umar got a woman out.”¹⁵

Another Hadith by Imam Abū Dāwūd says:

“One day the transgender perpetrator who coloured his fingernail and toenail with henna. So, the prophet asked them: What is wrong with this guy? They answered: O Rasulullah, this guy resembled women. So, he commanded to punish this guy, and this guy was exiled to the place called Naqi.”¹⁶

The hadith makes it clear that resembling or imitating the opposite sex is strictly prohibited in Islam. Experts who have studied this hadith have clarified that the prohibition is limited to the outward appearance of the opposite sex, such as clothing, gait, and speech. Transgender individuals who violate this prohibition are subject to punishment in Islam, including expulsion or exile. In Indonesia, however, the punishment of exile is considered inappropriate, as the country's constitution does not regulate the transgender phenomenon. Thus, while transgender individuals are not considered criminals as long as they do not violate any laws, they may benefit from

¹³ *Ibid.*

¹⁴ Al-Bukhārī, *The Fasting* (2002) p. 1485

¹⁵ *Id.* p. 1486

¹⁶ Abū Dāwūd, *The Rites of Hajj* (2009) pp. 288–289.

Cuest.fisioter.2025.54(2):4687-4697



psychological coaching. Additionally, educating children and teenagers about sexuality can help prevent any possibility of deviant sexual behaviour.¹⁷

Mughal Era

Historical reports from the Mughal era (1526–1858) make reference to the hijra society, which is frequently linked to Islamic Sufi practises. Hijras were thought to possess unique spiritual abilities and were capable of blessing or cursing people. As a result, they were frequently asked to play at weddings and other formal gatherings. They established their own settlements and were ruled by a hierarchy of chiefs as well.

Hijras were known to have significant roles inside the imperial court during the Mughal Empire in India because they were regarded as reliable confidants and counsellors to the ruling class. Several Mughal emperors even had hijras as their personal attendants, and it was thought that the emperors themselves sought the blessings of hijras to ensure their legitimacy. They were attributed with the qualities of trustworthiness, intelligence and loyalty. In most of the Mughal rule, the Hijras were the guardians of harems. They had a very close relationship with the king and the queen.

The Hijras played a vital part in the Mughal military as well. They were feared for their bravery and talent, and they were frequently recruited as soldiers. They served as useful assets in the collecting of intelligence and were also used in espionage. Hijras were noted for their contributions to art and culture in addition to their positions in the imperial court and military.

The name "eunuch" comes from the Greek word "euneukhos," which literally translates as "bed chamber attendant." In this regard, they were given positions of authority inside harems during the latter part of the Mughal Empire. It was determined that eunuchs were suitable for the role of harem guards since they were unable to breed as a result of being emasculated (whether voluntarily or forcefully).

COLONIAL ERA

S.377 of the IPC was used as a political instrument to restore colonial power following a rebellion that challenged British colonial control in 1857, particularly over what it perceived to be a "deviant" segment within society (Reddy, 2010). The hijras had existed in South Asia for thousands of years, but their culture was fundamentally at variance with Western morality and gender norms. The literary tradition of the Jain religion, which dates back to the fifth century, as well as older Sanskrit texts like Vatsyayana Kamasutram (8th BCE), the Sufist tradition of erotic poetry known as Rheski (13th CE), and the Mughal erotic canon, all demonstrate historically that pre-colonial India was a culture open to sexual fluidity (17th CE).

During the colonial period, non-heteronormative behaviours were subject to body policing and medicalization, which pathologized them. Foucault argued that sexuality was repressed and silenced over centuries through discipline, which served to control bodies. The colonial government in India similarly sought to control hijras by constructing them as deviant and criminalizing them as a group. This was achieved through the use of forensic medical science, which was used to provide "rational" evidence linking fluid sexuality and criminal acts in court hearings. For example, in the case of Queen Empress v Khairati (1884), signs of syphilis and a distended anus were used to establish the subject's non-normative sexuality and criminality under Section 377. By reshaping the identity of hijras as a discourse of nuisance and pollution, which was imported from England and stood in

¹⁷ Afif M.B, "Islam and Transgender (a Study of Hadith about Transgender)" (2019) 7 *International Journal of Nusantara Islam*



opposition to pre-colonial India's tolerance of sexual diversity, the colonial state relied on forensic science to control hijras in the courtroom.¹⁸

The Criminal Tribes Act of 1871¹⁹ mandated that the police record any "eunuchs" who were 'reasonably suspected of sodomy, abduction, castration, or committing felonies under Section 377 of the Indian Penal Code, 1860', along with their names and addresses. These actions carried a maximum two-year jail sentence, a fine, or both. Its pre-partition past has an impact on hijra's precarious conditions in the modern world.

Additionally, if a transgender person was discovered with a boy under the age of 16, Section 27 of the Criminal Crimes Act allowed for their arrest without a warrant and their incarceration. As a result, the stereotype of hijras as perverted, abnormal, and criminal is reinforced.

According to Section 3 of the Criminal Tribes Act, any group of persons who were addicted to the routine committing of crimes not subject to bail might be designated as a criminal tribe.

Every member of the Criminal Tribes Act who had registered was required to report to the police or the village government in whose neighbourhood they happened to be at the time, whichever came first, once a week or whenever the District Magistrate deemed it necessary to do so.

The transgender people suffered grave injustice as a result of colonial practises and legislation. It is clear that the legislation was strictly enforced or that illegal policing tactics were used, such as the Criminal Tribes Act's criminalization of unregistered individuals for their gender identity or for performing in public while dressed as a woman. Similar to this, we discover that the anti-Hijra campaign was ignored and given little priority by British authorities and Indian police. Due to their nomadic lifestyle, several clans were classified under this colonial statute as "criminal tribes." In an unnatural way, British courts described "Eunuchs" as transgender people, beggars, and prostitutes. It is obvious that the British made an effort to eliminate the third gender in India.

Although the Criminal Tribes Act was initially aimed at tribal communities, some versions of the Act also restricted the rights of transgender individuals and gender non-conforming communities in India. Unfortunately, even today, transgender people continue to face the repercussions of the historical injustices imposed upon them before the partition of India.

In post-independent India, it is often argued that the legal system was shaped by the legacy of colonial rule and law, which had a negative impact on the transgender community, causing their marginalization over time. Once revered and sought after for divine blessings in public places and ceremonies, they gradually became excluded from society. The legal struggles of the transgender community during the colonial era highlight the significant issues at stake. They demonstrate how legal frameworks have the power to both construct and regulate identities, while also serving as a means for prejudice and discrimination.

The Criminal Tribes Act²⁰ was replaced by the Habitual Offenders Act²¹ in 1952 by the Indian government, which ended the practice of considering transgender individuals as legal deviants. Nevertheless, it took many years after India gained independence before transgender individuals were granted legal recognition under the law.

SOCIAL EXCLUSION OF HIJRAS

The Social Exclusion Framework is an increasingly popular tool for drawing attention to the challenges experienced by marginalized and disadvantaged groups. This framework is multidimensional and dynamic, enabling a comprehensive examination of the causes and consequences of social disadvantage. In particular, it has proven useful in identifying the obstacles

¹⁸ "Hijras and the Legacy of British Colonial Rule in India" (*Engenderings* June 17, 2019)

<<https://blogs.lse.ac.uk/gender/2019/06/17/hijras-and-the-legacy-of-british-colonial-rule-in-india/>> accessed February 27, 2023

¹⁹ Criminal Tribes Act, 1871

²⁰ *Id.*

²¹ Habitual Offenders (Control and Reform) Act, 1952

Cuest.fisioter.2025.54(2):4687-4697



that hinder progress towards achieving the Millennium Development Goals, particularly in situations where exclusionary social structures and institutions are at play. When applied to Hijras/TG women, this framework illuminates the ways in which these communities have been prevented from fully participating in social and cultural life, the economy, and political decision-making processes. This section employs the Social Exclusion Framework to demonstrate the numerous forms of oppression that Hijras/TG communities face, as detailed in a UNDP report from 2010.²²

Exclusion from Economic Participation and Lack of Social Security

Hijras and transgender (TG) communities encounter a range of social security problems due to their high likelihood of leaving or being expelled from their homes, resulting in a lack of support from their biological families. This often leads to numerous difficulties, particularly when they are unable to earn a living due to health issues, insufficient job opportunities, or old age. One of the main concerns for Hijras/TG communities regarding social security measures is the lack of livelihood opportunities, as many employers refuse to hire even qualified and skilled transgender individuals. Although some Hijras have succeeded in becoming self-employed by running food shops or organizing cultural events in certain states, this is not the norm. As a result, a significant number of transgender individuals are compelled to engage in sex work, which carries associated risks such as HIV and other health problems.

CASES FILED BY DIFFERENT TRANSGENDER PERSONS HIGHLIGHTING THE DISCRIMINATION AND INEQUALITY THEY FACE

1. *Jackuline Mary v. The Superintendent of Police, Karur, and Ors*²³

The claimant, I. Jacqueline Mary, who identifies as female, secured a position as a police constable and was required to undergo training at the Police Recruit School in connection with her new role. During the medical checkup as part of the training, it came to light that the claimant was transgender. Subsequently, she received a show-cause notice and was dismissed from service. In response, she submitted a writ petition to the Madras High Court under Article 226/194 of the Constitution. The court ruled in her favor, overturning the dismissal and permitting her to resume her duties. In their judgment, the court emphasized the legal obligation of both courts and authorities to recognize medically certified transsexuals as either male or female, ensuring equal treatment, basic human rights, and other entitlements.

2. *Nangai v. Superintendent of Police*²⁴

The individual who identifies as female was appointed as a police constable and had to undergo training at the Police Recruit School. During a medical exam within the training, it was revealed that the individual was transgender. After receiving a show-cause notice, she was dismissed from her position. Consequently, she filed a writ petition with the Madras High Court under Article 226 of the Constitution²⁵. The court ruled in her favour, citing the *National Legal Services Authority v. Union of India*²⁶ case, and instructed the government to revoke the termination and allow her to re-join the service. The court further asserted that if transsexuals are not recognized as male or female under the law and given that there is no specific legislation recognizing them as a third gender with distinct rights, transsexuals would be relegated to the status of mere animals.

²² Konduru D and Hangsing C, "Socio-Cultural Exclusion and Inclusion of Trans-Genders in India" (2018) 5 International Journal of Social Sciences and Management

²³ I. Jackuline Mary v. The Superintendent of Police, Karur and Ors. W.P. NO. 587/2014.

²⁴ Nangai v. Superintendent of Police (2014) 4 MLJ 12.

²⁵ The Constitution of India (n 180).

²⁶ 2014 5 SCC 438



3. Kabeer C. v. State of Kerala and Ors²⁷

Kabeer C., a transgender individual, filed a public interest litigation in the Kerala High Court concerning this issue. The petitioner argued that amid the COVID-19 pandemic, transgender people experienced unequal treatment concerning relief efforts during the lockdown. Additionally, the petitioner maintained that the state's arbitrary treatment of them violated their fundamental rights, as protected under Articles 14, 15, and 21 of the Indian Constitution. In this case, the court adopted a balanced stance, ruling in favor of both the petitioners and the state. The court opined that “*when the State Government has taken enough and more steps to provide various facilities and the authorities are appointed for addressing their issues, it is for members of that community or the NGOs or the*

members representing the transgender community to approach the said authorities and put forth the rights, they are entitled to.”

S. Tharika Banu v. The Secretary to Government, Health and Family Welfare Department and Ors²⁸

The petitioner S. Tharika Banu, a transgender woman (Male to Female) who identifies as such, has submitted an application for the BSMS programme. The minimum aggregate score required for enrollment in the aforementioned course is 50%, and the petitioner's score was 45.25 percent, hence she was not admitted in accordance with the eligibility requirements. The petitioner argued that the respondents' application form did not include a transgender category, and as a consequence, her name was not on the merit list. As a consequence, the petitioner used Article 226/180 of the Indian Constitution to dispute the merit list for the UG programme in Indian medicine and homoeopathy. The petitioner argued before the court that his basic rights, which are guaranteed by Articles 14/181, 15/182, and 21/183 of the Indian Constitution, are violated by their not being a particular category of reservation for transgender individuals. The court acknowledged the significance of establishing a distinct class for the third gender in the areas of education and work, supporting the views of both parties. As a result, the court gave the respondent instructions to accept the petitioner during BSMS within the transsexual category.

Manju v. State of Tamil Nadu

After making it to the last round of testing for the recruitment of Grade-II constables, the petitioner was ultimately rejected. The petitioner challenged the disqualification decision before the Madras High Court. The petitioner claimed in his writ that transgender persons deserved special consideration and a more lenient evaluation. The court rejected the case because it found that the state had already provided an accommodation by allowing transgender people to take the exam alongside women. Therefore, he will get no additional accommodations.

LANDMARK JUDGEMENTS BY THE SUPREME COURT

In *Suresh Kumar Koushal v. Naz Foundation and Others*²⁹ legal challenge was brought before the Indian Supreme Court in 2013 regarding the constitutionality of Section 377 of the Indian Penal Code, which criminalized certain sexual acts. The court ultimately upheld the constitutionality of the law, stating that individuals who engaged in acts deemed to be “against the order of nature” should be subject to punishment.

²⁷ Kabeer C. v. State of Kerala and Ors. W.P.(C) NO. 9890/2020.

²⁸ S. Tharika Banu v. The Secretary to Government, Health and Family Welfare Department and Ors. 2018 (2) CTC 683.

²⁹ SLP (C) No.15436 of 2009

Cuest.fisioter.2025.54(2):4687-4697



A landmark judgment was made in *Navtej Singh Johar v. Union of India*³⁰ by a 5-judge bench consisting of CJI Dipak Mishra, Justice A.M Khanwilkar, Justice Rohinton Fali Nariman, Justice D.Y. Chandrachud, and Justice Indu Malhotra. This ruling overturned the decision made in the Suresh Kumar Koushal case and upheld the rights of the LGBT community by partially decriminalizing Section 377 of the IPC.

In the landmark case of *NALSA v. Union of India*³¹, court held that under Article 21, individuals have the right to self-determination, which includes the ability to determine their own gender identity. The court emphasized that gender identity is an essential aspect of an individual's personal autonomy and dignity. Therefore, the court declared that Hijras/Eunuchs should be recognized as a third gender beyond the binary genders recognized by the Constitution and law. The court rejected the "Biological Test" in favour of a "Psychological Test" to determine gender and sex, and held that Article 14, 15, 16, 19, and 21 should also apply to the transgender community. Justice A.K. Sikri supported the decision of Justice K.S. Radhakrishnan and emphasized the importance of non-discrimination and reasonable differentiation in promoting equality. The court directed the Centre and the State to legally recognize the third gender, treat them as socially and educationally backward, provide them with benefits, establish HIV surveillance centres for trans people, construct public toilets, provide medical care, create public awareness, and help them regain their status in society.

The most recent landmark judgement of the Supreme Court concerning the rights of the Transgenders is *Supriyo v. Union of India*³² wherein the petitioners reached out to the Apex Court praying for Marital and Adoption rights under the Special Marriage Act³³. The contention of the petitioners was that the right to marry was Fundamental Right under the Part III of the Constitution and by not recognizing the marital rights of the LGBTQ community, the community was being deprived of their Fundamental Rights. The Supreme Court unanimously held that there is no unqualified right to marry under the Constitution of India. Further the court held that extending marital and adoption rights to the LGBTQ community are not a judicial but a legislative function.

LEGISLATION

The Transgender Persons (Protection of Rights) Bill, 2019 was passed by Parliament on November 26, 2019. The 2019 Transgender Persons Act³⁴ aims to acknowledge the identity of transgender individuals and prevent discrimination in various areas, including but not limited to education, employment, healthcare, property rights, holding public or private positions, and accessing public services and benefits. The Legislation however, is widely criticized for being ineffective.

CONCLUSION

The socio legal position of transgender community in India has been different in different phases of the history. While they enjoyed Godly positions in the ancient texts, they were categorized as criminals during the Colonial era. The transgender population in India have faced discrimination since a very long time. They have been subjected to violence, inequality and injustice. Even with legislation for the protection of the transgender community and several guidelines of the Supreme Court, the equal status of the third gender seems farfetched. Several pertinent social and legal rights like marital and adoption rights have not yet been granted. Though, after a long struggle there have been certain developments towards the betterment of the transgender community, there is still a lot left that transgender persons don't and binary genders have. There are several schemes being

³⁰ W. P. (Crl.) No. 76 of 2016 D. No. 14961/2016

³¹ 2014 5 SCC 438

³² Writ Petition(s)(Civil) No(s).1011/2022

³³ Special Marriage Act, 1954

³⁴ The Transgender Persons (Protection of Rights) Act, 2019
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launched by Government of India for the betterment of the third gender which aim at providing them with shelter and employment. The Indian society is yet to be completely sensitized in order to include them as an integral part of the society. To say that there has been no improvement in the status of transgenders would be wrong.

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