

Resilience of Transgender Identity: A Quest for Changing Societal Norms and Culture

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Abstract

The transgender communities are the most disadvantaged sections of our society and they are facing social exclusion and stigma on the basic premise that self-proclaimed gender does not conform to the binary gender. In constant conflict between the quest for self-determination of gender and the government and societal insistence on biological essentialism have potentially excluded this marginalized section of the society from mainstream. In absence of their self-determined gender recognition, discriminatory approach of the society and penal provisions of various countries have placed them in the category of criminals. The present article analyzed the suffering faced by the transgender community in general and legal measures taken at the international and national levels to address the suffering of these communities. For the sake of convenience the first part deals with the meaning of the term transgender and the dichotomy between gender identity and sexual orientation. The second part deals with international and global concerns for transgender and third part of the Article focused on the Indian approach to transgender from the prism of judiciary in famous National Legal Service Authority v. Union of India.

1.0 Introduction:

On the intersectional scale, the transgender people are the most marginalized section of the society who faces extreme forms of social exclusion in the economic, legal and social spectrum of our self-proclaimed highly civilized society and contemporary understanding dedicated to giving respect to human rights. Their exclusion becomes more acute when they are facing severe discrimination in health, housing, education and employment. They are not recognized in family, school or by right thinking members of the society and they live in acute physical, mental and emotional distress. Being rejected by mainstream society, they live in abject poverty, violence and are subject to humiliation and abuse on a day-to-day basis. The person of transgender community whose mind and body disown their biological sex are very often subject to ridicules and abuses at public places and the right-thinking members of the society hardly cares for their trauma, pain and agony.

The expression, 'Transgender' usually refers to persons whose gender identity, expression and behavior does not reflect their biological attributes. It also includes persons who do not identify with their sex assigned at birth as male or female. They are neither male due to their anatomical features or by psychological traits nor female due to absence of reproductive capacity, though they appear

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female. It also includes emasculated men, non-emasculated men and intersexed persons. The transgender also includes persons who have opted for sex reassignment surgery to align their biological sex with their gender identity in their endeavor to become male or female. Accordingly, the expression transgender is used in wider sense to include wide range of identities and experiences and who strongly identify with the gender opposite to their biological sex. The expression transgender is thus used in contradiction to the word cisgender whose gender identity and assigned sex at the time of birth correspond.

The transgender communities in India are known by various nomenclature such as *hijras*, eunuchs, *kothis*, *Aravanis*, *jogappas*, *Shiv-Shakthis* etc. However, these transgenders reflect the diverse types of identities, cultural characteristics and experience as follows:

- (i) "Hijras: they are biological males who reject their masculine identity to identify as 'women or not men' or 'in between men and women' or neither man or nor woman. They are at par with western equivalent of transgender or transsexual persons.
- (ii) Eunuch: It refers to an emasculated man whose genitals are male-like at birth but they would be recategorized as intersexed.
- (iii) Aravanis and Thirunangi: they are biological males who self-identified themselves as a woman trapped in male body.
- (iv) Kothi: they are described as biological males who show varying degrees of 'femininity' depending upon situations and some of them have bisexual behavior and get married to women. They are generally from lower socio-economic status and use sex work as means for their survival.
- (v) Jogtas/Jogappas: the expression 'jogtas' refers to male servant of Goddess and 'jogti' refers to female servant or 'devadasi' and they are mostly present in Maharashtra and Karnataka.
- (vi) Shiv-Shakthis: they are considered as males who are particularly closes to a goddess and who have feminine gender expression. They are mostly cross-dressers and use accessories and ornaments that are meant for women".

1.1 Dichotomy of Gender Identity and Sexual Orientation:

Gender identity is one of the most fundamental aspects of life when it is related to a person's intrinsic sense of being male, female or transgender or transsexual person. Countries across the world are confronted with the issues of assigning gender to persons who believe that they belong to opposite sex.

In societal perception, sex, gender identity and sexual orientation is related to three distinct concepts. The expression 'sex' refers to a person's biological and reproductive capacity or potential as reflected

by their chromosomal and physical features. It is determined usually at the time of birth on the basis of observable features at the time of birth.

On the other hand, the expression, “gender identity” refers to each person’s deeply felt internal and individual experience of gender, which may or may not corresponds with sex assigned at the time of birth, including their personal sense of the body which may incorporate freely chosen, modification of bodily appearance or functions by medical, surgical and other means and other expression of gender, including dress, speech and mannerisms”.

In other words, the word gender identity indicates an individual, “innermost concept of self” irrespective of being male, female or neither. It incorporates the internal sense of self irrespective of physical or sex-based characteristics.

The expression sexual orientation refers to an individual’s enduring physical, romantic or emotional attraction to another person. Sexual orientation includes transgender and gender variant people with heavy sexual orientation and it may not change during or after transmission and it also includes homosexual, bisexual, heterosexuals or asexual etc.

However, it may be noted here that, sexual orientation may shift depending on person’s gender identification, sexual orientation does not dictate gender identity and vice versa.

1.2 International Concerns for Transgender:

The United Nations has been instrumental in protecting and promoting the rights of sexual minority including transgender. Articles 6 of the Universal Declaration of Human Rights, 1948 and Article 16 of the International Covenant on Civil and Political Rights, 1966 stipulates that every human being has the inherent right to live and it shall be protected by law and no one shall be denied of that right. Further, everyone shall have right to recognition everywhere as a person before law. Article 17 of the ICCPR, 1966 State that “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, or communications, nor to unlawful assaults on his honor and reputation, and everyone has the right to legal protection against such interference or attacks”.

On behalf of a coalition of Human Rights Organizations, the International Commission of Jurists and the International Service for Human Rights embarked on a mission to develop a set of international legal principles regarding the application of international law to human rights violations on consideration of sexual orientation and sexual identity just to ensure greater clarity and coherence to the human rights obligations of States.

In 2006 at Gadjah Mada University in Yogyakarta, Indonesia, ‘Yogyakarta Principles’ have been endorsed by United Nations bodies, regional human rights bodies, national courts, government commissions and commissions for human rights, the Council of Europe, and others as an important tool for identifying States’ obligations to respect, protect, and fulfill the human rights of all persons, regardless of gender identity or sexual orientation.

1.3 Yogyakarta Principle:

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For the purpose of universal enjoyment of human rights, Yogyakarta Principle recommended the following measures by introducing the suitable change in national Constitution or statutory provisions by the Nations across globe by undertaking education or awareness about rights of transgender irrespective of the sexual orientation or gender identity.

- (1) "The Right to Universal Enjoyment of Human Rights: all persons born free and equal in dignity and rights are entitled to full enjoyments of all human rights and States are required to follow pluralistic approach in policy and decision to affirm interrelatedness of all aspects of human identity".
- (2) "The Rights to Equality and Non-discrimination: Everyone is entitled to equality before law and equal protection of law without any discrimination in enjoyment of human rights. Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction or preference for purpose of impairing equality in enjoyment of human rights. Further, discrimination is further compounded by the differentiation created on the grounds of gender, race, age, religion, disability, health or economic status".
- (3) "The Right to Recognition Before Law: It provides that each person's self-defined sexual orientation and gender identity is integral to their personality and most basic aspects of self-determination, dignity and freedom and no one shall be compelled to any medical procedure, sex reassignment surgery, sterilization or hormonal therapy as a requirement of their gender identity. Further, marriage or parenthood cannot be invoked to prevent the legal recognition of a person's gender identity and they will have legal capacity to conclude contract and manage property and obtained the State issued identity paper, birth certificates, passport, electoral records and other documents reflecting person's self-defined gender identity".
- (4) "The Right to life: Everyone has right to life and no person shall be arbitrarily deprived of life on the basis of sexual orientation or gender identity. Further, State sponsored or condoned attacks to be stopped on the basis of sex orientation or gender identity and death penalty not to be imposed for consensual sexual activities".
- (5) "Right to Privacy: Everyone is entitled to privacy of their family, home or correspondence and protection from unlawful attacks on their honor and reputation. Further, right to privacy includes choice to not disclose information relating to sexual orientation or gender identity including one's own body and consensual sexual and other relations".
- (6) "Right to treatment with humanity while in detention: Since sexual orientation and gender identity are integral to each person's dignity, and everyone deprived of liberty shall be treated with humanity and dignity. Further, the detaining authority will ensure that such person is not subjected to marginalization or subject to violence, ill treatment, physical, mental or sexual abuse on the basis of sexual orientation and gender identity. They will also

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be provided adequate medical care and counselling with regard to reproductive health, access to HIV/AIDS therapy having regard to reproductive health, hormonal therapy and gender reassignment treatments”.

- (7) “Protection from medical abuse: It is intended to provide protection from medical abuse by subjecting person to testing, procedure etc. on the basis of their sexual orientation and gender identity. No person may be forced to undergo medical or psychological treatment, procedure or treatment on the consideration of their sexual orientation or gender identity and no child’s body is irreversibly altered by medical procedure to impose gender identity without free and informed consent. It also provides the child protection mechanism by providing protection from unethical and involuntary medical procedure and research”.
- (8) “The right to freedom of opinion and expression: It recognizes everyone’s right to freedom of expression and opinion regardless of sexual orientation and gender identity through speech, deportment, dress as well as bodily characteristics. Further, they will have legal rights to publication of materials, broadcasting, organization and participation in conference and access to safer sex information. The State regulated media are also required to adopt pluralistic and non-discriminatory approach in recruitment and promotion of such persons”.
- (9) The other principle includes the protective measures like protection from all forms of sexual exploitation, sale and trafficking of human beings, right to adequate standard of living, freedom of thought, conscience and religion, right to seek asylum, right to found a family, right to participate in public and cultural right, including right to effective remedies and redress.

The United Nations Development Program in its 2010 report on Hijras/ transgender in India: HIV Human Rights and Social Exclusion argued for hijra/transgender specific social welfare scheme along with changing negative attitude of general public and society and increasing accurate knowledge about hijra/transgender communities.

The Key Recommendation are as follows:

- (i) “Addressing the gaps in National AIDS Control Program -III: for this purpose, HIV sentinels Sero surveillance sites for hijras/transgender to be established at specific sites and culturally relevant package for HIV prevention and care intervention to be devised.
- (ii) Structural change in HIV intervention: Instead of individual level HIV prevention activities, the focus to be shifted to mental health counselling, crisis intervention, addressing alcohol and drug abuse and livelihood program to be part of HIV intervention.
- (iii) Trained health care providers: Health care service providers to be competent and sensitive in providing health care services to transgender and they must monitor implementation of guidelines related to gender transition and sex reassignment surgery.

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- (iv) Reduction in Stigma and Discrimination: Effective steps to be taken through mass media, public awareness, training and sensitization to police personnel and health care service providers to reduce stigma and discrimination against the transgender persons.
- (v) Further, steps to be taken for legal recognition of gender identity of hijras or transgender in consultation with them and other stakeholders”.

1.4 Global Response to Recognition of Transgender Rights:

With evolving dynamics of international human rights law, many countries in the world have enacted laws for recognizing rights of transgender person. The progressive countries of the world such as Sweden, Australia, Germany, Netherlands, Canada, Argentina and United Kingdom have laws for recognizing rights of transsexual person.

On the other hand, the countries like “United Arab Emirates, Saudi Arabia, Jordan, Lebanon, Nigeria, Malaysia, Indonesia explicitly criminalize persons based on their gender identity and expression. Some of the countries like Saudi Arabia and Guyana penalize “Cross Dressings” regardless of birth assigned sex”.

In United Kingdom, the General Recommendation Act, 2004 provides legal recognition to acquired gender of a person and also provides for legal rights and entitlements relating to marriage, parentage, succession, social security, pensions etc. Under this Act, it is not necessary for the person to go for sex reassignment surgery (SRS) to apply under this Act. In United Kingdom, the Equality Act, 2010 consolidated, repealed and replaced nine different discriminatory legislation including the Sex Determination Act, 1986. The Act defines certain features as “Protected Characteristics” and provides that no one shall be discriminated or treated less favorably on the grounds that one possesses one or more of “protected characteristics”. It also imposes duties on the public official to eliminate all kinds of discrimination, harassment and victimization.

In Australia, the Sex Determination Act, 1984 and the Sex Determination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act, 2013. The 2013 Act defines gender identity as the appearance or mannerisms or other gender related characteristics of a person with or without medical intervention and irrespective of person’s designated sex at birth. Sections 5A, 5B and 5C of 2013 Act prohibits discrimination on the ground of sexual orientation, gender identity and intersex status respectively.

The European Parliament adopted a resolution in 1989 asking member States to take steps for the protection of transsexual person. Recital 3 of the preamble to the Directive 2006/54/EC of European Parliament and Council makes an explicit reference to discrimination based on gender reassignment for the first time in European Union Law.

Hungary has enacted the Equal Treatment and the Promotion of Equal Opportunities Act, 2003 which includes sexual identity as one of the grounds of discrimination. The Paper on Transgender person’s

Rights in EU Member States on 2010 presents the specific situations of transgender person in 27 members States of European Union.

In United States of America, the Federal Law provides protection to transgender under Hate Crimes Prevention Act, 2009 which includes offence motivated by actual or perceived gender identity and expression although there is wide disparity in State Laws relating to transgender.

In South Africa, the Alteration of Sex Description and Sex Status Act, 2003 permits transgender person who have undergone gender reassignment test or the people whose sexual characteristics have evolved naturally or an intersexed person to apply for alteration of sex description in the birth register.

In the year 2012 Argentina passed a law which provides for recognition of gender identity and change of first name and image as per person's self-perceived gender identity without proof of the fact that gender identity was changed by surgical procedure or hormonal therapy or other psychological or medical treatment.

The German Law of 2013 permits the parents to register the sex of the children as "not specified" in case of children with intersex variation.

1.5 Judicial Approach across jurisdiction in matters of sexual orientation and gender Identity:

The judiciary all over the world have confronted with the issues of gender identity recognition to be carried out on the basis of biological essentialism or on the basis of self-perceived gender identity. This issue has become more acute when the persons started asserting their rights after undergoing sex reassignment surgery of their reassigned sex.

The Court of Appeal in England was concerned with the gender of a male to female transsexual in the context of the legitimacy of a marriage in *Corbett v. Corbett*. In this case, Ormrod, J. took the view that a person's sex for the purpose of marriage should be determined by his/her *biological and sexual constitution* attained at birth and it cannot be changed by natural development of organs of opposite sex or by medical or surgical means. Thus, this case clearly established that, sexual orientation of an individual can be determined through majorly three tests, i.e. *chromosomal, gonadal and genital tests*.

In *R. v. Tan* The Court of appeal applied Corbett principle and upheld the conviction on Gloria Greaves, a post-operative male to female transsexual as they are being considered male for conviction under criminal laws.

However, the Corbett Principle did not find favor with Australia and New Zealand on the premises that it would lead to substantial different outcome in cases of an individual becoming a post-operative intersexual and post-operative transsexual. In *Attorney General v. Otahuhu Family Court* Justice Ellis noted that, "once a transsexual person has undergone surgery, he or she is no longer able to operate in his original sex and there is no social advantage in the law for not recognizing the validity of their marriage on reassignment of sex". The Court further laid down that, the adequate test to determine a person's sexual orientation lies in his/her physical conformation of being of a

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specified sex, irrespective of the fact that the individual has undergone any surgical or medical procedures that has resulted in giving him/her any specified sex.

Chisholm, J. opined that, "in order to determine an individual's sex for the purpose of validity of marriage, there exists no *"formulaic solution"* and person's life experience and self-perception is to be considered".

Further, in Attorney General for the Commonwealth v. Kevin and Jennifer and Human Rights and Equal Opportunity Commission the Court said that, the words "man" and "woman" were defined in relevance to a Commonwealth marriage statute in the sense that it includes, under the former, a post-operative female to male transsexual person and in the latter, a post-operative male to female transsexual person. The Court further remarked that there was a biological basis for transsexualism and there was no reason to exclude the psyche as one of the relevant factors in determining sex and gender.

Further, Lockhart, J. in the case of *Deptt. Of Social Security v. "SRA"* observed that an individual's sexual orientation should not be merely contingent upon his/her structured chromosomes but should also include individual's sexual reassignment surgeries, considering their psychological question, one's self-perception and partly a social question as to how the society perceives the individual keeping in mind developments in the arena of surgical and medical techniques.

Moreover, attempts have been made to recognize sexually reassigned individuals a valid statutory status in the society. Upholding the opinion of Lockhart, J. in the *SRA case*, Section 15 of the Gender Reassignment Act, 2000 provided that a recognition certificate shall be issued by the Gender Reassignment Board to a transsexual individual after verifying that the applicant has adopted the *lifestyle and gender characteristics* of the gender that he has been through a reassigned procedure.

Following the above notion of determining a person's gender does not merely depend on its structure of chromosome attained at birth but also upon the "psychological factor". But in the case of *Bellinger v. Bellinger*, the House of Lords failed to acknowledge the "psychological factor" in determination of a person's gender and rejected Mrs. Bellinger's claim for a declaration under Section 55 of the Family Law Act, 1986 to declare her marriage "at its inception valid marriage".

In *JG v. Pengarah Jabatan Pendaftaran Negara* the Malaysian Court initially applied biological test but granted permission to change gender status on the ground that she behaves like a woman and her psychological thinking is that of women.

In *Christine Goodwin v. United Kingdom* The European Court of Human Rights was required to examine the violation of Articles 8,12,13 and 14 of the Convention for Protection of Human Rights and Fundamental Freedoms, 1997 regarding the legal status of transsexual in field of employment, social security, pensions and marriage for person's who have undergone sex reassignment surgery. It was held that, under Article 8 of the Convention, personal autonomy is an important principle given to the person on their personal sphere and includes right to establish their identity as individual human being.

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In *Van Kuck v. Germany* it was held that the concept of private life covers the physical and psychological integrity of a person and attributes like gender identification, name and sexual orientation and sexual life, fall within personal sphere protected by Article 8.

The above cases clearly established that the transsexual belonging physically to one sex, feel convinced that they belong to the other, seek to achieve a more integrated unambiguous identity by undergoing medical and surgical operation to adopt their physical characteristics to their psychological nature. Therefore, for determination of rights of transgender person, the test to be applied is not "biological test" but the "psychological test" because psychological factors and thinking has to be given primacy rather than binary notion of gender of that person. Further their facing discrimination in the society and their rights have to be protected irrespective of chromosomal sex, genitals, assigned birth sex or implied gender role.

1.6 Indian Approach to Transgender Person's:

In contemporary society of ours, the transgender people are associated with deep-rooted stigma and have been marginalized and denied the basic human rights. But, in Hindu mythology, Vedic and puranic literature the persons with third gender identity had played very prominent role in that society. In Mahabharata, there are references of transgender person's such as *Shikhandi*, *Brihanalla* and *Aravan* and *Mohini*. In Ramayana there is a story that Lord Ram sanctioned person of transgender to confer blessings on people in auspicious occasions like childbirth and marriage. The Kama Sutra describes the sexual lives of persons with a "third nature" in great detail (*tritiya prakriti*). The notion of *tritiya prakriti* or *napunsaka* is also found in Vedic and Puranic literature. The term *napunsaka* has been used to describe the inability to reproduce.

Transgender is also mentioned in length in Jain writings, including the idea of 'psychological sex.' Hijras were very important in the royal courts of the Islamic world, particularly in the Ottoman Empire and *Mughal* dominance in medieval India.

Section 377 of Indian Penal Code, 1860 criminalized all penile non vaginal sexual acts between persons, including anal and oral sex, at a time when the transgender persons were associated with the proscribed sexual practices. In case of *Queen Empress v. Khairat* the transgender persons was arrested and prosecuted under suspicion that he was a habitual sodomite.

During British Regime, the British enacted the Criminal Tribes Act, 1871, to control the acts of the hijras/transgender community, which declared the whole hijras group to be fundamentally 'criminal' and "addicted to the systematic conduct of non-bailable offences." The legislation required the registration, monitoring, and supervision of certain criminal tribes and eunuchs, and it fined registered eunuchs who appeared clothed or decorated as women in a public street or location, as well as those who danced or played music in a public area. Such people might potentially be arrested without a warrant and sentenced to up to two years in prison, a fine, or both.

These clans and tribes were viewed as criminal from birth, with crime being passed down from generation to generation. The Criminal Tribes Act of 1871 was revised in 1897, and under its terms,

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“a eunuch was understood to comprise of all members of the male sex who acknowledge themselves, or on medical inspection manifestly show, to be impotent.” The Act required the local government to register the name and residence of all eunuchs residing in the area, as well as their property, who were reasonably suspected of kidnapping or castrating children, committing offences under Section 377 of the Indian Penal Code (IPC), or abetting the commission of any of these offenses.

The Criminal Tribes Act of 1871, made keeping a boy under the age of sixteen in the charge of a registered eunuch an offence punishable by imprisonment of up to two years or a fine, and it also stripped registered eunuchs of their civil rights by prohibiting them from acting as guardians to minors, making a gift deed or a will, and adopting a son. In August 1949, the statute was revoked.

In *National Legal Services Authority v. Union of India* the division bench of the Supreme Court comprising of Justices K. S. Radhakrishnan and A. K. Sikri addressed the claims of the transgender community's issues for a formal declaration for their identity and rights in the country, and claims that non-recognition of their identities violates Articles 14, 15, 16, and 21 of the Indian Constitution.

On the behalf of transgender community following concerns were brought to notice of the Court:

- (i) “Hijras, Eunuchs, Kothis, Aravanis, Jogappas, Shiv-Shakthis, and other members of the TG community experience several issues and abuses because of their gender, and they are classified as untouchables. As a result, there is a need to alter people's minds and embrace this group as citizens of our nation, with similar protection of rights granted by the constitution as other genders such as male and female.
- (ii) The transgender community 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 claimed that non-recognition of their gender identity was causing them distress.’
- (iii) The petitioner emphasized the painful experiences of members of the transgender community and argued that every member of that group has a legal right to choose their sexual orientation as well as to advocate for and choose their identity.
- (iv) It was argued that because transgender persons are not regarded as male or female and are not accorded the status of a third gender, they are denied many of the rights and advantages that other residents of India enjoy.
- (v) Transgender persons are denied social and cultural involvement, as well as access to school, healthcare, and public areas, robbing them of the constitutional promise of equality before the law.
- (vi) Furthermore, it was said that members of the community endure discrimination in terms of election candidacy, voting rights, employment, acquiring licenses, and so on, and are effectively viewed as outcasts and untouchables”.

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The main issues before the Court were as follows: (a) Whether a person born as a man with a largely feminine inclination (or vice versa) has the right to be recognized as a female of his choosing, especially when such a person, after undergoing operative procedure, changes his/her sex as well?

(b) Whether the transgender people, who are neither males nor females, have the right to be recognized and classified as a "third gender"?

The Supreme Court acknowledged that transgender individuals endure numerous types of persecution in India. Discrimination is so pervasive, particularly in the domains of healthcare, work, and education, that it leads to social exclusion. The Division Bench of the Supreme Court laid down the following postulates:

- (i) "Article 21 was incorporated to protect those rights, and that a Constitutional Court cannot be a mute spectator when those rights are violated, but is expected to protect those rights as it takes the pulse and understands the feelings of that community, even if it is a minority, especially when their rights have gained universal recognition and acceptance".
- (ii) "Article 14 of the Indian Constitution states that the state must not deny equality before the law or equal protection under the law to "any individual" within the territory of India. Article 14 does not limit the term "person" and its application to men or women. Hijras/transgender people who are neither male nor female fall under the definition of 'person' and are thus entitled to legal protection under the law in all areas of state activity, including employment, healthcare, and education, as well as equal civil and citizenship rights as any other citizen of the country".
- (iii) "Non-recognition of hijra/transgender people's identities results in significant discrimination in all aspects of society, including access to public venues such as restaurants, movies, stores, malls, and so on".
- (iv) "Furthermore, access to public restrooms is a severe issue they frequently face because there are no separate bathroom facilities for hijras/transgender individuals they must use male restrooms, where they are vulnerable to sexual assault and harassment. Discrimination based on sexual orientation or gender identity so undermines equality before the law and equal protection under the law, and therefore violates Article 14 of the Indian Constitution".
- (v) "Articles 15 and 16 aimed to outlaw sex discrimination, noting that sex discrimination is a historical phenomenon that must be addressed. Legislators emphasized the basic right against sex discrimination in the Constitution in order to prohibit direct or indirect activities by certain individuals to treat other individuals differently because they do not adhere to traditional assumptions of binary genders".
- (vi) "Gender and biological characteristics are both different components of sex. Discrimination based on 'sex,' encompasses discrimination based on gender identity. The term 'sex' is

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meant to cover those who do not believe themselves to be either male or female biologically, but who believe themselves to be neither male nor female.”

- (vii) Article 19(1)(a) of the Indian Constitution states that all people have the right to free speech and expression, which includes the right to express one's self-identified gender. Gender identity can be conveyed by clothing, words, actions, or behavior, or in any other way. Subject to the limitations set forth in Article 19(2) of the Constitution, no limits can be imposed on one's personal appearance or choice of clothing.
- (viii) “The personality of a transgender person can be exhibited via that individual's behavior and presentation. The State cannot forbid, limit, or interfere with that person's manifestation of such personality, which represents that person's essential nature”.
- (ix) As a result, the Supreme Court ruled that values such as privacy, self-identity, autonomy, and personal integrity are fundamental rights guaranteed to members of the transgender community under Article 19(1)(a) of the Indian Constitution, and that the state is obligated to protect and recognize those rights.
- (x) The Supreme Court further remarked that, Article 21 is the heart and spirit of the Indian Constitution. It is also known as seminal Clause since the right to life is one of the fundamental rights, and no one, even the State, has the power to violate or take away that right. It also safeguards the dignity of human life, personal autonomy, and the right to privacy. Recognizing one's gender identity is central to the fundamental right to dignity.
- (xi) “Gender is at the heart of one's sense of self and is an essential component of one's identity. As a result, legal recognition of gender identity is part of the right to dignity and independence given by the Constitution of India.”
- (xii) Sex/Gender Determination on the Basis of the ‘Psychological Test’ and not the ‘Biological Test’
- (xiii) Thus, Articles 14, 15, 16, 19, and 21 “do not exclude hijras/Transgenders from its scope, but Indian law on the whole recognizes the paradigm of binary genders of male and female, depending on one's biological sex.”
- (xiv) The Court then boldly said that they could not accept the Corbett premise of the 'biological test'; rather, the Court wanted to follow the psychology of the individual in identifying sex and gender and favored the 'Psychological Test' over the 'Biological Test.' The binary concept of gender is reflected in the Indian Penal Code, for example, “Sections 8, 10, and so on, as well as laws governing marriage, adoption, divorce, inheritance, succession, and other welfare legislation there are failure of various legislations to recognize the identity of hijras/transgenders, denies them equal legal protection and exposes them to widespread discrimination”.

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Finally, the Supreme Court laid down the following guidelines to address the immediate concern as well as long term approach to ensure realization of rights of transgender communities:

- (i) "Hijras, eunuchs, apart from binary genders, be treated as "third gender" for safeguarding their fundamental rights as well as laws made by the legislature.
- (ii) Transgender persons have right to decide their self-defined gender and the government is required to grant recognition of their gender identity as male, female or as third gender.
- (iii) Transgender to be treated as socially and educationally backward classes of citizens and they are entitled to reservation benefits in educational institutions as well as in public employment.
- (iv) The government should seriously address the problems of fear, shame, gender dysphoria, social pressure, suicidal tendencies, social stigma faced by hijras or transgenders and any insistence for sex reassignment surgery for declaring one's gender to be treated as immoral and illegal.
- (v) The governments should take adequate measures to provide medical care to transgenders in the hospital and to provide them separate public toilets and other facilities.
- (vi) The government should adopt welfare measures for the transgenders and create public awareness so that the transgender feels part and parcel of social life and not be treated as untouchable. The government should take measures to regain their respect and place in the society which they once enjoyed in our cultural and social life".

1.8 Conclusion and Suggestion:

Gender Identity is one of the most important attributes of being human. The person of transgender community across the globe has been deprived of their rights to participate in social and cultural life of the society. The non-recognition of their gender identity has led to their systematic marginalization and they have been deprived of an opportunity to avail right to education, employment, health etc. The world communities are still entangled in issues as to whether transgender community is to be recognized on the basis of their self determination of gender identity or they are to be recognized on the basis of biological or physical features. In liberal democracies, significant measures have been taken to recognize their gender identity but most of the Islamic countries have refused to recognize them on basis of religious consideration.

Conclusion

In India, after National Legal Service Authority case of 2014, the person of transgender community have been given the status of 'third gender' and government is required to safeguard their constitutional and legal rights. The Government has been put under obligation to recognize their self-identified gender and they have been given the status of socially and educationally backward classes of citizen. The government is also required to take positive measures for medical care and addressing the issues of fear, shame, gender dysphoria and social stigma. But for recognizing them as part and parcel of our society, the solution lies in changing the mindset of the people and assimilating them in

mainstream of our social life and recognizing the role they played from ancient times in our social and cultural life.

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ENDNOTES:

National Legal Service Authority v. Union of India (2014) 5SCC 438 at p.462 (Para 13).

Ibid.

Transgender means a person whose gender identity, behaviour or expression does not correspond or conform to that sex which is assigned to that person at birth.

Supra Note 1 at Pp 480-481 (Para 47).

Stryker, Susan, Transgender History, (2008) Seal Press, New York at p.8.

National Legal Service Authority v. Union of India (2014) 5SCC 438 at p.465(para 21).

Ibid 3 at p.8.

Ibid 4 at p 465 (Para 22).

Stryker, Susan, Transgender History, (2008) Seal Press, New York at p.8.

www.ohchr.org/en/UDHR/Documents/UDHR_Translations/eng.pdf.

www.ohchr.org/en/UDHR/Documents/UDHR_Translations/eng.pdf.

Article 17 of ICCPR, 1966 provides that: 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Supra Notes 1 at p 466 (Para 24).

Yogyakartaprinciples.org – [The Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity](http://Yogyakartaprinciples.org).

Yogyakarta Principle 1.

Yogyakarta Principle 2.

Yogyakarta Principle 3.

Yogyakarta Principle 4.

Yogyakarta Principle 6.

Yogyakarta Principle 9.

Yogyakarta Principle 18.

Yogyakarta Principle19.

Yogyakarta Principle 11.

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Yogyakarta Principle 14.

Yogyakarta Principle 21.

Yogyakarta Principle 23.

Yogyakarta Principle 24.

Yogyakarta Principle 25 & 26.

Yogyakarta Principle 28.

[Hijras/Transgender Women in India: HIV, Human Rights and Social Exclusion.](#)

Section 153(1) Jordan Penal Code; Saudi Arabia Sharia Law; Section 359 UAE; Malaysia's Islamic Laws.

Supra Note 1 at P. 477 (Para 38).

Ibid.

Id at p. 479 (Para 42).

Ibid.

Ibid.

Supra Note 1 at p. 480 (Para 43).

Ibid at 480 (Para 44).

Ibid at 480 (Para 45).

(1970) 2 All ER 33; (1970) 2 WLR 1306.

Supra Note 1 at 472 (Para 28).

1983 QB 1053; (1983) 3WLR 361.

(1995) 1 NZLR 603

Supra Note 1 at P.473 (Para 29).

2001 Fam CA 1074 (Aust).

Supra Note 1 at p.473 (Para 29).

(1993) 118 ALR 467; (1993) 43 FCR 299 (Aust.).

Supra Note 1 at p. 473 (Para 30).

(1993) 43 FCR 299 (Aust)

(2003) 2 AC 467

Supra Note 1 at 474 (Para 32).

(2006) 1MLJ 90 (Malaysia).

Supra Note 1 at 474 (Para 33).

(2002) 35 EHRR 18, Application No. 28957/95, decided on 11-7-2002

2003 ECHR Application No 35968/97.

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UNDP (United Nations Development Programme), India, a report on “Hijras/Transgender Women in India: HIV, Human Rights and Social Exclusion” (Dec. 2010).

Supra, note 1 at Para 21.

Gayatri Reddy, “With Respect to Sex: Negotiating Hijra Identity in South India”, Yoda Press, 2006.

ILR (1884) 6 ALL 204.

UNDP (United Nations Development Programme), India, a report on “Hijras/Transgender Women in India: HIV, Human Rights and Social Exclusion” (Dec. 2010).

Indian Penal Code: § 377 – “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.

(2014) 5SCC 438.

Supra Note 1 at p. 487 (Para 62).

Supra, note 1 at Para 21.

Id. at Para 54.

Supra Note 1 at p.487 (Para 62).

Ibid.

Id at p.488 (Para 66).

Id. At p.488 (Para 66).

Constitution of India, Article 19(2) – “nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevent the state from making any law relating to, libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the state.”

Supra Note 1 at p. 489 (Para 67).

The Supreme Court of India relied upon a number of US judgments (City of Chicago v. Wilson et al., 75 iii.2d 525(1978) and Doe v. Yunits et al., 2000 WI33162199).

Id., at Para 72.

Id at Para 74.

Id., at Para.67, 68.

Id., at Para 75.

Id. at Para. 75.

Supra Note 1 at p. 508 (Para 135).