

Transgender Rights and Social Inclusion in India: Challenges, Discrimination, and Legal Protections

Jaganath. R¹

Abstract

This article examines the challenges faced by transgender individuals, focusing on discrimination, social marginalization, and legal recognition. It explores the definitions of transgender identity, gender identity, and gender expression, and highlights the various forms of discrimination transgender people encounter in employment, healthcare, education, family, and society. The paper also reviews legal protections, policies, and landmark rulings in India, including recognition of transgender people as a third gender and measures to ensure access to education, employment, healthcare, and social welfare. Emphasis is placed on the need for anti-discrimination laws, inclusive policies, social awareness, and empowerment initiatives to address historical injustices and promote equality. The article underscores the importance of implementing comprehensive strategies to protect transgender rights and improve their social and economic inclusion.

Keywords: Transgender, Gender identity, Discrimination, Legal protection, social inclusion, Employment rights.

INTRODUCTION

A transgender person is someone whose deeply held sense of gender is different from his/her physical characteristics at the time of birth. A person may be a female-to-male transgender (FTM) in that he has a gender identity that is predominantly male, even though he was born with a female body. Similarly, a person may be a male-to-female transgender (MTF) in that she has a gender identity that is predominantly female, even though she was born with a male body or physical. Transgender people are targets of discrimination in many areas of their lives; this marginalization. The term 'transgender people' is generally used to describe those who transgress social gender norms. Transgender is often used as an umbrella term to signify individuals who defy rigid, binary gender constructions, and who express or present a breaking and/or blurring of culturally prevalent stereotypical gender roles.

¹ Post-doctoral Degree Scholar, D.Litt- Political Science, Manipur International University, India. E-Mail ID: jaganathphd1518@gmail.com

Transgender people may live full- or part-time in the gender role 'opposite' to their biological sex.

Despite a pre-colonial heritage that recognized and celebrated gender diversity in temple sculptures, mythology and religious treatises transgender people in India, today, face intolerance, stigma, discrimination and violence.

In India, people with a wide range of transgender-related identities, cultures, or experiences exist - including Hijras, Aravanis, Kothis, Jogtas/Jogappas, and Shiv-Shakthis (See glossary). Often these people have been part of the broader culture and treated with great respect, at least in the past, although some are still accorded particular respect even in the present.

Transgendered people are individuals of any age or sex whose appearance, personal characteristics, or behaviours differ from stereotypes about how men and women are “supposed” to be. Transgendered people have existed in every culture, race, and class since the story of human life has been recorded. Only the term “trans- gender” and the medical technology available to transsexual people are new.

In contemporary usage, “transgender” has become an umbrella term that is used to describe a wide range of identities and experiences, including but not limited to: pre-operative, post-operative and non-operative transsexual people (who strongly identify with the gender opposite to their biological sex); male and female 'cross-dressers' (sometimes referred to as “transvestites”, “drag queens”, or “drag kings”); and men and women, regardless of sexual orientation, whose appearance or characteristics are perceived to be gender- atypical. A male-to-female transgender person is referred to as 'transgender woman' and a female-to-male transgender person, as 'transgender man'.

The terms 'transgender' or 'transgender populations/people', used in this brief, while more encompassing than transgender women, are used to refer to transwomen given this brief's focus. Sometimes, for brevity, the abbreviation 'TG' is used to denote transgender women.

In short, discrimination and unequal treatment on the job inflicts significant economic harm on gay and transgender public-sector employees and their families. This is not, however, only a problem for gay and transgender workers themselves. It also presents problems for running an efficient and effective public sector. Discrimination against gay and transgender workers introduces costly inefficiencies and thereby imposes significant financial harm on government entities. Discrimination forces out the best and the brightest employees, minimizes productivity, introduces turnover-related costs, and exposes

governments to potentially costly litigation. At a time when states are facing severe budget shortfalls, discrimination simply does not make financial sense.

Every day, transgender and gender non-conforming people bear the brunt of social and economic marginalization due to discrimination based on their gender identity or expression. Advocates confront this reality regularly working with transgender people who have lost housing, been fired from jobs, experienced mistreatment and violence, or been unable to access the health care they need. Too often, policymakers, service providers, the media and society at large have dismissed or discounted the needs of transgender and gender non-conforming people, and a lack of hard data on the scope of anti-transgender discrimination has hampered the work to make substantive policy changes to address these needs. In all regions, people experience violence and discrimination because of their sexual orientation or gender identity. In many cases, even the perception of homosexuality or transgender identity puts people at risk. Violations include – but are not limited to – killings, rape and physical attacks, torture, arbitrary detention, the denial of rights to assembly, expression and information, and discrimination in employment, health and education.

DEFINITION

The term 'transgender' has been derived from the Latin word 'trans' and the English word 'gender'. Different sorts of individuals come under this category. No particular form of sexual orientation is meant through the term transgender. The way they behave and act differs from the 'normative' gender role of men and women. Leading a life as a transgender is far from easy because such people can be neither categorized as male nor female and this deviation is "unacceptable" to society's vast majority. Trying to eke out a dignified living is even worse.

What does transgender mean?

Transgender is an umbrella term used to describe people whose gender identity (sense of themselves as male or female) or gender expression differs from that usually associated with their birth sex. Many transgender people live part-time or full-time as members of the other gender. Broadly speaking, anyone whose identity, appearance, or behaviour falls outside of conventional gender norms can be described as transgender. However, not everyone whose appearance or behaviour is gender-atypical will identify as a transgender person. “Trans” is sometimes used as shorthand for “transgender.” While transgender is generally a good term to use, not everyone whose appearance or behaviour is gender- nonconforming will identify as a transgender person. The ways in which transgender

people are talked about in popular culture, academia, and science are constantly changing, particularly as individuals' awareness, knowledge, and openness about transgender people and their experiences grow.

Who are transgender people?

Transgender people are individuals of any age or sex whose appearance, personal characteristics, or behaviours differ from stereotypes about how men and women are “supposed” to be. Transgender people have existed in every culture, race, and class since the story of human life has been recorded. Only the term “transgender” and the medical technology available to transsexual people are new. In its broadest sense, transgender encompasses anyone whose identity or behaviour falls outside of stereotypical gender norms. Transgender persons have been documented in many indigenous, Western, and Eastern cultures and societies from antiquity to the present day. However, the meaning of gender nonconformity may vary from culture to culture.

Transsexuals are transgender people who live or wish to live full time as members of the gender opposite to their birth sex. Biological females who wish to live and be recognized as men are called female-to-male (FTM) transsexuals or transsexual men. Biological males who wish to live and be recognized as women are called male-to-female (MTF) transsexuals or transsexual women. Transsexuals usually seek medical interventions, such as hormones and surgery, to make their bodies as congruent as possible with their preferred gender. The process of transitioning from one gender to the other is called sex reassignment or gender reassignment.

Transgender identities

i) A Transgender person should have the option to identify as ‘man’, ‘woman’ or ‘transgender’ as well as have the right to choose any of the options independent of surgery/hormones. Only the nomenclature ‘transgender’ should be used and nomenclatures like ‘other’ or ‘others’ should not be used.

ii) Certificate that a person is a transgender person should be issued by a state level authority duly designated or constituted by respective the State/UT on the lines of Tamil Nadu Aravanis Welfare Board, on the recommendation of a District level Screening Committee headed by the Collector/District Magistrate and comprising District Social Welfare Officer, psychologist, psychiatrist, a social worker and two representatives of transgender community and such other person or official as the State Govt/UT Administration deems appropriate.

iii) The certificate issued as at (ii) above should be recognised and acceptable to all authorities for indicating/changing the gender on official documents like ration card, passport, birth certificate, AADHAAR card, etc.

iv) The third ‘gender’ identity known as ‘transgender’ may be recognized by a government order and for the long run; it may be examined whether a separate law will be desirable for this purpose. For this purpose, Government may refer the matter to the Law Commission. Gender Identity and Gender Expression

1. Gender identity

“Gender identity” refers to a person’s internal, deeply felt sense of being either man or woman, or something other or in between. Because gender identity is internal and personally defined, it is not visible to others. In contrast, a person’s “gender expression” is external and socially perceived. A person’s internal self-awareness of being male or female, masculine or feminine, or something in-between

2. Gender expression

Gender expression refers to all of the external characteristics and behaviours that are socially defined as either masculine or feminine, such as dress, mannerisms, speech patterns and social interactions. The external behaviours and characteristics (i.e., dress, mannerisms, social interactions, speech patterns, etc.) that a person displays in order to indicate their gender identity. Gender expression is how someone presents their gender to the world.

Discrimination

Antidiscrimination laws in most cities and states do not protect transgender people from discrimination based on gender identity or gender expression. Consequently, transgender people in most cities and states can be denied housing or employment, lose custody of their children, or have difficulty achieving legal recognition of their marriages, solely because they are transgender. Many transgender people are the targets of hate crimes. The widespread nature of discrimination based on gender identity and gender expression can cause transgender people to feel unsafe or ashamed, even when they are not directly victimized

1. Discrimination in employment

Under international human rights law, States are obligated to protect individuals from any discrimination in access to and maintenance of employment. The Committee on Economic, Social and Cultural Rights has confirmed that the International Covenant on Economic, Social and Cultural Rights “prohibits discrimination in access to and maintenance of employment on grounds of ... sexual orientation” and noted concern about discrimination

directed at “disadvantaged and marginalized groups and individuals.” According to the Committee, “any discrimination in access to the labour market or to means and entitlements for obtaining employment constitutes a violation of the Covenant.”

2. Discrimination in health care

Article 12 (1) of the International Covenant on Economic, Social and Cultural Rights provides that States parties to the Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The Committee on Economic, Social and Cultural Rights has indicated that the Covenant proscribes any discrimination in access to health care and the underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of sexual orientation and gender identity. Suicide attempt rates were higher among those who had a doctor that refused to treat them because of their gender identity

3. Discrimination in family

While families and communities are often an important source of support, discriminatory attitudes within families and communities can also inhibit the ability of LGBT people to enjoy the full range of human rights. Such discrimination manifests itself in various ways, including through individuals being excluded from family homes, disinherited, prevented from going to school, sent to psychiatric institutions, forced to marry, forced to relinquish children, punished for activist work and subjected to attacks on personal reputation. In many cases, lesbians, bisexual women and transgender people are especially at risk owing to entrenched gender inequalities that restrict autonomy in decision-making about sexuality, reproduction and family life. The suicide attempt rates among those whose families supported them after coming out as Trans was 33 percent, while those who experienced rejection from friends or family faced higher rates.

4. Discrimination in education

Some education authorities and schools discriminate against young people because of their sexual orientation or gender expression, sometimes leading to their being refused admission or being expelled.¹⁰⁷ LGBT youth frequently experience violence and harassment, including bullying, in school from classmates and teachers.¹⁰⁸ Confronting this kind of prejudice and intimidation requires concerted efforts from school and education authorities and integration of principles of non-discrimination and diversity in school curricula and discourse. The media also have a role to play by eliminating negative stereotyping of LGBT people, including in television programmes popular among young people. Trans individuals who had more education were less likely to have attempted suicide,

particularly those who completed college degrees. Those with a graduate degree reported a suicide attempt rate of 31 percent and those with a bachelor's degree reported a rate of 33 percent. For those who had only graduated high school, the rate was 49 percent.

5. Discrimination in work place

Discrimination is still a pernicious problem for gay and transgender workers employed by state and local governments. Far too many of these public servants go to work in hostile environments where they are discriminated against and harassed based on their sexual orientation or gender identity. This is certainly a problem for gay and transgender public workers, who all too often are forced out of a job and into the ranks of the unemployed due to discrimination. In consultation with community groups and human resource professionals experienced in the area of Diversity and Inclusion, workplaces in public and private sector need to sensitize employers and employees on issues of transgender persons. Anti-discrimination policies must be instituted and meaningfully applied to the processes of hiring, retention, promotion, and employee benefits. Workplace sexual harassment policies should be made transgender-inclusive.

Protection

In April 2014, India's highest court decided on a case aimed at drawing attention to the discrimination faced by the transgendered community in the South Asian nation. After hearing the case, the judges ruled that transgender people should be recognized as a third gender and not only enjoy all fundamental rights, but also receive special benefits in education and jobs. The Supreme Court judgment was a historic one, finally recognizing the rights of transgender people and treating them as equal to other Indians. While this has helped in terms of their identity, Indian authorities now need to implement court directives aimed at mainstreaming the transgender community, ending discrimination against them, and addressing their social protection needs.

India has a policy of setting aside a certain percentage of seats in public jobs and education for marginalized and underprivileged communities. Recognizing the transgender community as a vulnerable group, one that faces socio-economic marginalization and exclusion, the Supreme Court has directed the authorities to treat them as socially and educationally backward classes of citizens and extend these benefits in public employment and educational institutions to them as well.

The government should take steps to prioritize the enforcement of the ruling and implement the recommendations of an expert committee formed by the Ministry of Social

Justice and Empowerment to ensure the inclusion of transgender people and empower them by providing government support for education, housing and access to healthcare, skill development, and employment opportunities.

Meanwhile, state governments can take their own initiatives to address the rights of transgender people. For instance, the Tamil Nadu state government has shown the way by forming a Transgender Welfare Board which allows transgender people access to existing government schemes in housing, education and employment, and also designs and implements welfare schemes exclusively for transgender people based on their needs. More and more, schools are protecting transgender students from harassment or discrimination. In 2013, California became the first state to pass a law that requires students in public schools to be permitted to access sex-segregated spaces, programs, and activities consistent with their gender identity. Transgender persons must be properly documented in census. There is need for statutory reservation in education, elections and employment both in the public and private sectors. They need to be empowered and uplifted by facilities for higher education and vocational training to upgrade their earnings and status in society so as to promote their acceptability in society. Since transgenders are prone to health risks and setbacks, they need to be provided proper medical facilities, including health insurance and clinics, where free or subsidized treatment should be made available.

Laws and policies

1. In view of the constitutional guarantee, the transgender community is entitled to basic rights i.e. Right to Personal Liberty, dignity, Freedom of expression, Right to Education and Empowerment, right against violence, Discrimination and exploitation and right to work. Moreover, every person must have the right to decide his/her gender expression and identity, including transsexuals, transgenders, hijras and should have right to freely express their gender identity and be considered as a third sex.

2. Transgender persons must be properly documented in census. There is need for statutory reservation in education, elections and employment both in the public and private sectors. They need to be empowered and uplifted by facilities for higher education and vocational training to upgrade their earnings and status in society so as to promote their acceptability in society.

3. Taking action against parents who neglect or abuse their gender- nonconforming or transgender children and against doctors who practice electro-shock or other kinds of unethical “conversion” therapy.

4. Criminal and disciplinary action against delinquent police official in cases of violations of human rights of transgender persons.

5. Where transgender individuals need to be incarcerated, care must be taken to ensure they are not in circumstances where they are vulnerable to sexual assault.

6. Sexual assault, sexual harassment and domestic violence laws must be made transgender-inclusive. Presently, Section 375 of IPC, as amended doesn't cover the transgender persons as victims of sexual assault (only cis women can be the victims of sexual assault). Alongside Section 375, another section should be included to cover the cases of sexual assault on transgender persons.

7. Slurs based on real or perceived gender identity may be included in Section 153A of the Indian Penal Code.

8. Bureau of Police Research & Training (BPR&D) may undertake a study on crime against transgender persons, including alleged excesses by Police, with a view to investigate their causes and suggest preventive measures.

9. National Crime Records Bureau may, from now on, collect and compile statistics of crime against transgender persons, as also about cases registered against them as accused.

10. Making free legal aid available to transgender individuals seeking redress against discrimination and violence.

Taking into account of the difficulties faced by transgender people in securing their legal right to live with dignity, NALSA²² has taken steps to provide legal services to such persons by way of an innovative and diversified programme. NALSA felt that the first step in this regard is to create awareness amongst the other people about the rights of transgenders to live with dignity as human beings and citizens. As a first step in this direction a Conference was organised in Chennai on 14th August, 2010. Honble Executive Chairman, NALSA has directed the State Authorities to organize similar awareness programmes

throughout the country. The State of Haryana and many others have included transgender people as persons eligible for free legal services, in their Rules.

CONCLUSION

A Transgender person should have the option to identify as ‘man’, ‘woman’ or ‘transgender’ as well as have the right to choose any of the options independent of surgery/ hormones. Only the nomenclature ‘transgender’ should be used and nomenclatures like ‘other’ or ‘others’ should not be used. The third ‘gender’ identity known as ‘transgender’ may be recognized by a government order and for the long run; it may be examined whether a separate law will be desirable for this purpose. Government may refer the matter to the Law Commission. The Constitution provides for the fundamental right to equality, and tolerates no discrimination on the grounds of sex, caste, creed or religion. The Constitution also guarantees political rights and other benefits to every citizen. But the third community (transgenders) continues to be ostracized. The Constitution affirms equality in all spheres but the moot question is whether it is being applied.

The main problems that are being faced by the transgender community are of discrimination, unemployment, lack of educational facilities, homelessness, lack of medical facilities like HIV care and hygiene, depression, hormone pill abuse, tobacco and alcohol abuse, and problems related to marriage and adoption. Discrimination in the workplace is not only unfair and unjust to the gay and trans- gender workers, it is also unfair to taxpayers. In a time when our economy is just beginning to recover from the Great Recession and when state and local governments are in the red, taxpayer dollars should be used with the utmost diligence. By reinforcing discriminatory practices that cost the government extra money, tax dollars are going to waste. State and local governments should put into place policies and practices that treat all workers the same, regardless of sexual orientation or gender identity. These policies are good for gay and transgender workers. They are good for efficient and effective government.

All the laws of the land should be applied to them like any other person. They should be treated equally, respectfully and without any discrimination. They should not be discriminated against in exercising their right to apply for a job, access to a public place, right to property or their right to access to justice. The transgender persons must be properly documented in census. They need to be considered for statutory reservation in educational institutions and job opportunities in public and private sectors. They need to be empowered

with high degree of educational and vocational trainings to up- grade their earning and status in the society. Since they are prone to health setbacks, they need proper medical facilities including insurance in the health sector. In western countries, the transgenders are very much part of the society, then why not in India they will be given recognition and respect like others. We need to take a look either into their past or into the future to stop vast discrimination against such a large portion of the population and to help them to divert their way from sex workers to good Citizens. States have committed to promote, protect and fulfil the rights of all people to receive the highest standard of sexual and reproductive health of transgender people. Hence, States are required to create and implement laws, policies and programs that facilitate transgender people's access to education, health, housing, work and an adequate standard of living, and eliminate discrimination and other forms of violence faced by transgender people at the hands of society, police and the judiciary.

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