

HUMAN RIGHTS OF TRANSGENDER IN INDIA: A SOCIO-LEGAL ANALYSIS

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Introduction

Transgenders or hijras are generally considered as deviants in our society. Satish Kumar Sharma describes Hijra as “a person who is born as a male or female with deformed genitals and having characteristics of both male and female.”² Transgender are those “whose gender identity or gender expression differs from the sex to which they were biologically assigned”. This has historically made them targets of prejudice, repression, and even violence, especially in traditional nations. There are several well-known transgender communities, including the Hijras, Jogappas, and Aradhis. A transgender who does not fit into one of these categories is referred to as an individual transgender. Sarena Nanda in her book, “Neither Man nor Woman” describes two kinds of hijras- *the born hijras and the made hijras*.³ Bornhijras are those who are born with deformed, underdeveloped or ambiguous genitals and others are made hijras by castration.⁴ Hijras are also referred to as transgender, third sex, eunuchs, etc. In India, over 487 thousand persons have been classified as third gender, the majority of them were from the northern state of Uttar Pradesh, according to the most recent census, which was conducted in 2011.⁵

Different Human Rights Issues faced by Hijras

Hijras face a wide spectrum of problems namely the Social, Physical, Economic, Psychological issues in the society.

(1) Social Issues

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²Sharma, S. K. (2009). *Hijras: The labelled deviants*. Gian.

³Nanda, S. (1999). *Neither man nor woman: The Hijras of India*. International Thompson.

⁴Purandare, V. (2019, July 26). *Counselling could've saved Aniket: Ashok Row Kavi*. The Asian Age. Retrieved January 12, 2023, from <https://www.asianage.com/metros/mumbai/260719/counselling-couldve-saved-aniket-ashok-row-kavi.html>

⁵Kanwal, S. (2022, December 22). *India: Number of transgender people by State*. Statista. Retrieved January 15, 2023, from <https://www.statista.com/statistics/705970/india-number-of-transgender-people-by-state/>

Hijras, due to their sexual deformity are stigmatized persons, both in the society and in their families.⁶ Strong traditional and historical constructs contribute towards this process. They thus encounter prejudice and are excluded from having a conventional social life, leaving them with little choice except to leave their homes and live with other people of a similar background. A Gera (Home), where Hijras stay would have one Guru (Leader), who will be the eldest Hijra and 8 to 10 chelar (Disciples). Most of them do not have contacts with their family and do not get their share of inheritance. The traditional occupations of Hijras are to sing and perform dance in birthday parties and marriages. But apart from these, most Hijras also go for begging and are Commercial Sex Workers (CSWs).

(2) Psychological Issues

Identity crisis is a harsh reality for Hijras. It becomes impossible for a Hijra to pass either as a male or a female in the society. They identify female behavioral tendency at puberty⁷ which compels them to adopt a different way of life in a miniature Hijra community. Most of them also experience fear, sadness, and loneliness, lack of self-esteem, anger, guilty feelings and suicidal tendencies. Major reasons for suicidal thoughts are to avoid shame to their families, discrimination and ridicule from the society, lack of counseling and sexual abuse they experience at different levels. After few years, may want to leave for varied reasons like desire to see their parents, being weary of begging and prostitution, in-fights within the Hijras and lack of peace and security but are often unable to do so and they live with pent-up frustrations.

(3) Economic Issues

Although there are Hijras from all castes and classes, the majority of them belong to 'lower' classes and Backward Castes.⁸ On an average, a Hijra earns 100 Rupees per day but they give 80 rupees to the Guru. Guru in turn takes care of their food, shelter, travel, and medical expenses. The chief sources of income are through begging, sex work and singing in festive occasions, marriages and childbirth.

⁶Sharma, S. K. (2009). *Hijras: The labelled deviants*. Gian.

⁷ There are predominantly two reasons for feminine tendency among hijras. Psychological Reasons like desire to walk, talk and dress like a woman and Physiological Reasons like feminine voice, development of female sexual organs and absence of hair in the body.

⁸Vyas, M. D., & Shingala, Y. (1987). *The life style of the eunuchs*. Anmol Publications.

(4) Physical Issues

Three things need to be dealt here- the ambiguities related to Castration, Risk of HIV/AIDS and Old age. Firstly, with regard to castration, most of the times it is not done in a scientific way but by quack doctors or elder hijras and can be fatal. Secondly, with regard to sex work, clients who come to Hijras range from heterosexuals who cannot afford a female prostitute to homosexuals. The risk of HIV/AIDS is too big a reality to be overlooked. Thirdly, during the time of sickness and old age, a Hijra will be taken care by his chelas. Most of the candidates we met were not worried about the old age or death.⁹ But all of them expressed their desire to be back to their homes with their families,

A Survey done by NavanirmanSamajVikas Kendra¹⁰ in Mumbai reveals that 90% of the Hijras have no access to rate cards, though 80% of them are staying in Mumbai for over five to ten years. About 95% do not know their status in the electoral list and have never voted in their lifetime. Major problems faced by the Hijras are lack of acceptance, lack of land and housing facilities, lack of employment, lack of voting rights and poverty. Therefore the Hijras insist on having their right to vote, to count them as Hijras (not male or female) in the census and governments to take welfare schemes like providing employment schemes, educational and skill-training opportunities for them to integrate them into the mainstream of the society.¹¹

⁹Here a word must mentioned about death and funerals among Hijras for interested reader. Probably no one has seen the funeral of hijras except that of hijras themselves. Dead is taken out of the house at midnight when no one is there to watch. Three or four of his companions take out the dead in standing position. They take the dead to the jungle and dig a dead in a standing position. If the Hijra dies at the age of eighty and above, his pyre is taken out at midnight with musicians playing music. All the rituals and ceremonies are performed so that the dead does not have rebirths as Hijras, Post-dead ceremony is marked with rejoicing rather than mourning. There are also mentions about Hijras having death rites performed similar to their own religious traditions. See Sharma, S. K. (2009). *Hijras: The labelled deviants*. Gian.andVyas, M. D., &Shingala, Y. (1987). *The life style of the eunuchs*.Anmol Publications. All the Hijras we interviewed believed in the existence of God but none showed any interest in rituals or visiting religious places.

¹⁰ NSVK works for the Hijras in four areas: (i) Providing free HIV/AIDS tests; (ii) Fighting for housing and ration rights: religious places.(iii) Creating educational and job opportunities and (iv) ConscientizingHijras about the use of condoms.

¹¹Sharma, S. K. (2009). *Hijras: The labelled deviants*. Gian.

However, all is not dark and hopeless. 6th March, 2006 was a red-letter day for the Hijras in India. ShabnamMausi, aged 40, became the first Indian Hijra Member of Parliament (MP). She won the by-election in Sohagpur from Maharashtra as an Independent Candidate.¹² And another hopeful sign is that this year the application forms for an Indian passport have a separate Hijracategory. Many films, documentaries¹³ and books are also being written on the plight of Hijras, which is an encouraging sign.

4. Sociological Perspective

As noted earlier, Hijras are generally considered as deviants in our society. According to Emile Durkheim, "Deviant behavior connotes that action of human being which is anti- normative and essentially goes against the welfare of the members of the society. Being harmful it becomes an object of social concern." The job of a Hijra does not have this quality of damage in connection to either members of the society because of this connotation of the deviant. Alex, as wit from the role of Hijras is not anti-society. Rather, right from ancient times onward, they have been playing significant roles in the society. Despite being exposed, they continued to serve the royal families, the princess, and the royal women with the highest dedication and duty. They serve two extremely important roles even in modern Indian society. First, by visiting people's houses on special occasions and showering blessings on them; second, by removing the stigma associated with families by removing children who have damaged genitalia or are asexual.

Many questions need to be thought about at this point. First, why are the Hijras and their role demonised, treated as outsiders, and deemed unworthy to remain inside the family of their origin if they are not anti-social? Second, why are they welcomed on specific celebrated occasions? With regard to the first question, the cultural expectations of the society seem to be significantly decisive. Any individual not capable of reproduction is therefore considered as

¹²Hijras we met were highly politically conscious and argued for a separate electorate for Hijras. They have faith in political participation and believe that if they get political power they can change their destiny. They were excited to tell about their acquaintance with: ShabnamMausi and told an interesting anecdote, a slogan Mausui used in her campaign, "You don't need genitals for politics. You need brains."

¹³ The one that needs special mention is a documentary film, *Between the Lines India's Third Gender* by Wartmann, a German filmmaker in 2004.

abnormal. But one needs to realize that it being a biological condition is also an inevitable phenomenon. It can occur in any family and with any individual.

Regarding the second query, it is reasonable to assume that Hijras are recognised due to their practical value. In essence, it relates to Hijra's assertion that he will abduct any infant with malformed or undeveloped genitalia, eliminating the cause of shame. At this juncture, it is also crucial to make the case that cultural customs and individual almsgiving beliefs influence how Hijras are accepted on celebratory occasions. Additionally, most people see them with the hope of blessing and the fear of curse. The investigation of Hijras' life reveals the fundamental paradox in human nature, which is that individuals adopt a pragmatic approach by accepting and rejecting the same item at two separate moments.¹⁴

Legal Perspective

(1) Constitutional provisions for Transgender

The State shall not refuse to “any individual” within the territory of India, equality before the law or the equal protection of the laws, according to Article 14 of the Indian Constitution. The term “person” and its use under Article 14 are not gender-specific. Hijras and transgender who identify as neither male nor female fall under the definition of “person” and are thus eligible for legal protection under the law in all areas of state action. Discrimination against any citizen is prohibited under Articles 15 and 16, including on the basis of “sex” among other stated grounds. This Article further stipulates the necessity of adopting affirmative action to advance any socially and educationally underprivileged segments of citizens.

Article 21 of the Constitution of India reads: “No person shall be deprived of his life or personal liberty except according to procedure established by law.”The Indian Constitution's Article 21, which discusses the rights to life and personal liberty, is its heart and soul. The core of the basic right to dignity is the acceptance of one's gender identity. Gender self-determination is an essential component of individual autonomy and self-expression and is covered by the personal freedoms granted by Article 21 of the Indian Constitution.

¹⁴Sharma, S. K. (1984). *Eunuchs: Past and Present*. The Eastern Anthropologist

(2) Directions of the Supreme Court

The NALSA petitioned in the Indian Supreme Court using a writ. In the aforementioned writ petition, members of the transgender community expressed their grievances regarding the lack of legal recognition of their gender identity, which differs from the gender assigned to them at birth, whether they were male or female. They argued that this was a violation of Articles 14 and 21 of the Indian Constitution. In the matter of National Legal Services Authority v. Union of India¹⁵, the Hon. Supreme Court of India ruled that:

(1) For the sake of protecting their rights under Part III of our Constitution and the regulations passed by the Parliament and the State Legislature, Hijras and Eunuchs, who do not identify as binary gender, should be recognised as belonging to the “third gender”.

(2) The right of transgender to choose their own gender is also respected, and the federal and state governments are required to recognise transgender’s gender identities, whether they identify as male, female, or as a third gender.

(3) The court ordered the central and the state governments to take action to treat these groups of people as socially and educationally disadvantaged citizens and to apply all forms of racial and ethnic discrimination to their entrance to educational institutions and to public employment.

(4) Since transgender have a variety of sexual health difficulties, the Centre and State Governments are mandated to run independent HIV Centers.

(5) The challenges that transgender encounter, such as fear, embarrassment, gender dysphoria, societal pressure, depression, suicide thoughts, and social stigma, should be taken seriously by the central and state governments.

(6) The central and state governments should take the necessary steps to ensure that transgender patients receive adequate medical attention in hospitals as well as those separate public restrooms and other amenities.

(7) The Central and state governments should also take action to improve different social assistance programmes.

¹⁵AIR 2014 SC 1863

(8) The central and state governments should take action to raise public understanding so that transgender feel accepted in society and are not viewed as outcasts.

(9) The central government and state governments should also take action to earn back the respect and status they formerly held in our social and cultural life.

Further, the Apex Court of India in the case of Navtej Singh Johar vs. Union of India¹⁶ declared that “Part of Section 377 of Indian Penal Code 1860 as unconstitutional and decriminalized consensual sex between adults of the same gender.”

Long Way Forward

As we have seen, the Supreme Court ruled in National Legal Services Authority v. Union of India (2014) that transgender individuals are a third gender and should be afforded the same basic rights as everyone else under the Indian Constitution. They were also granted the ability to self-identify as male, female, or third-gender under the verdict. The Court further ruled that because members of the transgender community were a socially and economically underprivileged group, they should be given preference in hiring and admittance to educational institutions. The fundamental flaw in the current Transgender Persons (Protection of Rights) Act, 2019 is that it does nothing to carry out the Supreme Court's directive to grant transgender individuals preferences when applying for jobs in government and for admission to educational institutions. The Act's National Council for Transgender Persons is insufficient for defending transgender's rights. A national commission for transgender is necessary, similar to the national commissions for women's rights, children's rights, and the rights of the SC and ST communities. Such a Commission needs to be a civil court-like institution that represents the transgender community. In conclusion, one believes that the work done for transgender is like a stone and that more has to be done. This Act has left many problems unanswered leading to a nationwide outcry and criticism by the transgender community.

¹⁶AIR 2014 SC 1863.