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**LGBT Community & their new dilemmas: A Quest for Dignity &  
Equality in modern India**

**Piyush Singh**

## ABSTRACT

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*The individuality of a person is often determined by the moral dictates and judgments of the society. However, persons who seek to challenge these with their personalities, sexual orientations and inclinations are often neglected, discarded and treated as the “other”. Discarded by families and derided by negative stigmas, they are usually left with no other option, than resorting to begging or singing in weddings, to make a living. Even with such vulnerability to provocation and violence, their agony generally remains unseen. This only shows the extent of helplessness and disregard toward this community faces. Acknowledgment of their gender and as well as conferring them with all human as well as constitutional rights was a long-awaited decision. The partial slashing of section 377 of IPC by the Supreme Court of India has provided the hope for a better tomorrow. Though the section has been slashed down by the Supreme Court but still somewhere the sufferings and dilemmas persist. Despite of certain developments and steps taken by the government for the recognition of LGBT community, still a lot of loopholes and gaps remain in the legislations which obstruct the enforcement for the rights of Transgender people. The Transgender (Right to Protection) Bill of 2016, 2018 and 2019 only provided an overview of what needs to be done and do not get to the basics. The article aims to provide a detailed information regarding LGBT community and about their rights in modern India. The article is an attempt to grapple the challenges or dilemmas which are faced by transgender while having a quest for dignity and equal rights. It also seeks to analyse the Supreme Court decisions over section 377 and also provides suggestion for their reforms and also for protecting their rights and maintaining their dignity in the society.*

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**Keywords:** Dilemma, LGBT community, rights, Transgender

## INTRODUCTION

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The LGBT community individuals are generally known as transgender have existed in every class, culture, race and religion since the origin of human life has been recorded and analysed. The transgender are individuals of any age or sex whose personality, appearance, attitude, behaviour or personal characteristics differ from stereotypes. They generally differ from the identities which are posed by men and women. These individuals are also part of our society and should be treated equally by providing all the rights to them which are available to others. Transgender people commonly fights a war which is from within, when they are unable to match their physical appearance with their behaviour and at that point of time they separate themselves from the society and on the opposite side the even society disregard them by using a term 'Hijra'. A comment made by a Hijra that "Sex is that you are born with, gender is that you recognize and sexuality is that you discover"<sup>1</sup>.

Human rights are considered to be basic rights which allow them the freedom which includes the rights to life, liberty, equality, dignity and freedom of thought and expression. These rights are neither created nor destroyed but is available to them from their birth. Article 21 guarantees a person to choose one's gender identity. A court observed that "the gender to which a person belongs is to be determined by the person concerned", while determining on the term personal freedom and self-determination. It provides the citizens of India the right to gender identity<sup>2</sup>. India has achieved significant growth in different spheres, like levels of literacy, health, education and in various other fields, but still the transgender community is one of the marginalized and susceptible communities in the country, is extremely lagging behind on the human development indices. Despite all these benefits and advancement and the LGBT Bill, the Supreme Court judgment of 2014 still the transgender persons in everyday life battle with themselves and society. They are forced to face high levels of disgrace in almost every spheres of life. Extreme social exclusion diminishes rather destroys one's self esteem and sense of social responsibilities.

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<sup>1</sup>[https://www.researchgate.net/publication/325742658\\_Transgender\\_in\\_India\\_Identified\\_by\\_Law\\_Discriminated\\_by\\_the\\_Society](https://www.researchgate.net/publication/325742658_Transgender_in_India_Identified_by_Law_Discriminated_by_the_Society)

<sup>2</sup> *Ibid*



## HISTORICAL BACKGROUND

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Transgender persons had been a vital part of Indian Society for centuries. With the beginning of the human civilization traces of transgender individuals are evident. In mythology as well as in history the traces of transgender persons are evident which cannot be neglected. There are various historical evidences present which show the presence of third sex even in the ancient times.

Gods were often considered to be represented as both male and female at different points and in various incarnations. For example, Ardhanarishvara, formed by integrating Lord Shiva and his consort, Parvati, is widely worshipped.

It is believed that the presence of transgender persons is necessary to complete certain rituals and function. The presence of these community is observed in the mythological text of Ramayana where, Shri Rama authorized them the power to confer blessings on folks on auspicious instances like child birth and marriages, and also at inaugural ceremonies in which the custom of well wishings are given and is supposed to set up stages in which Hijra dance, sings and confer blessings.

Shikhandi from Mahabharata is probably the most powerful transgender figure found in the Hindu mythology. It is believed that Aravan or Iravan, son of Arjuna, is considered to be a crucial transgender character who has laid down the lineage from which the transgender persons are born. Another episode in the Mahabharata which witnesses the presence of third genders includes the time when Arjuna was sent to exile. He assumed to have taken the identity of Brihandala, a eunuch and who use to perform rituals during occasions of childbirths and weddings<sup>3</sup>.

In the Islamic religious institutions, they had occupied high positions such as guarding the holy places of Mecca and Medina, they were considered to affect the state decisions and received large amount of money from the Kings and the Queens<sup>4</sup>. During the Mughal rule and the Ottomon empires in the Medieval India Transgender persons played a eminent role, as, administrators, generals as well as guardians, political advisors. They played a crucial role in the politics of empire building in the Mughal era as they were considered to be trustworthy, fiercely loyal, and clever and had access to all sections of population and other places.

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<sup>3</sup> <http://journals.christuniversity.in/index.php/culj/article/download/995/755/>

<sup>4</sup>Carroll, L., Gilroy, P.J. (2002). Transgender issues in counsellor preparation. *Counselor Education & Supervision*, 41(3), 233–242.

## PROBLEMS OF TRANSGENDERS

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The Transgender person comes under the category of LGBT group (Lesbian, Gay, Bisexual and Transgender). They belong to the marginalized group of the society which faces cultural, social, legal and economic difficulties. Transgender persons suffer from certain problems and they are: -

- i. **Discrimination**: It is a major problem of Transgender. They are generally discriminated in terms of education, employment, entertainment, justice etc.
- ii. **Disrespect**: The transgender persons are most often disrespected every aspect of life except in cases like for their blessings after the birth of a child or to bless the newly wedded couple.
- iii. **Downtrodden**: These people are treated badly or exploited by people in power. They are prone to combat for social justice due to their identity as Transgender.
- iv. **Prostitution**: Transgender are generally compelled to enter into the profession of prostitutions by their community, friends or relatives. In certain cases even the parents are involved in it.
- v. **Compelled to leave parental home**: They are compelled and pressurize to leave their parental home by the society as they are seen as a curse and so they can't be a part of any community.
- vi. **Denial of entry**: They are denied from entering religious and public places which certainly show the amount of disrespect and social discrimination.
- vii. **Rape and verbal and physical abuse**: It is most common problem faced by transgender. They are susceptible to face rape followed by physical and verbal abuse.
- viii. **Lack of educational facilities**: Even in the field of education the LGBT community has to suffer the discrimination as they were generally hindered to have access to knowledge which is easily available to others.
- ix. **STI and HIVAIDS problems**: 'MSM' stands for Men who have sex with Men<sup>5</sup>. Due to this, transgender are likely to suffer from STI and HIVAIDS. The issue arises as most of the transgender have a lower socioeconomic status and are not literate which leads to improper health care.
- x. **Human trafficking**: Transgender belongs to the most deserted group. That's why; they are more susceptible to face the problem of human trafficking.

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<sup>5</sup><https://www.scribd.com/document/412931409/Lgbt-Paper>

**xi. Social Exclusion:** The major problem is that they are socially excluded from the society and from participating in any social, cultural and economic life. They are generally excluded from –

- Economy, employment and livelihood opportunities
- Excluded from society and family
- Lack of protection from violence
- do not have access to education, health care and personal care
- Limited access to public spaces
- Limited access to collectivization
- Rights of Citizenship
- Excluded from decision-making
- Lack of social security

## **RECOGNITION TO LGBT (TRANSGENDER) COMMUNITY**

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During the last few years India has made significant development on rights of transgender people, but still most of them remain socially marginalized and deprived from their basic rights, i.e. the right to vote, marry, own a property and to claim an identity through a passport or other administration identification. Article 14 and 21 of the Constitution provides for the right to equality before law and equal protection of law. The right to choose one's gender identity is a vital part to lead a life with dignity which falls under the realm of Article 21.

The Court observed that “the gender to which a person belongs is to be determined by the concerned person” and provided the gender identity to the people in our country. So, that no individual can be discriminated against on the ground of gender as it is violation of Articles 14, 15, 16 and 21. Under Article 19 (1) (a) the court safeguards one's gender identity and held that “no restriction should be placed on one's personal appearance or choice of dressing subject to the limitations mentioned in article 19(2) of the Constitution”<sup>6</sup>. In spite of such fundamental rights still the people belonging to transgender community have to suffer from difficulties to live a better and a dignified life in our society.

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<sup>6</sup> <https://indianlegalsolution.com/rights-of-transgender-in-india-article/>

## NALSA JUDGEMENT AND SECTION 377

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The judgment given by the Supreme Court should be commended for criticising the discrimination on the basis of gender and for bringing hope and assurance to a community which has always been far outside the realm of legal framework. With colossal faith and vision, the judgement has been given to provide a legal identity to all those individuals whose bodies which do not match up with the acknowledged gender standards at birth. In the judgment, a revolutionary aspect came up as major implication for the existing laws related to adoption, labour laws, marriage and inheritance which was a major step to move away from the binary system of male and female in order to aid the legal rights of transgender persons. Moreover, the irony is that the judgment was delivered only after few months of the case of ***Suresh Kumar Koushal and another v. NAZ Foundation and Others***<sup>7</sup> which upheld the constitutionality of Section 377 of the Indian Penal Code. The Court, accepted that Section 377 is prejudiced against the transgender persons, clarified that the judgment leaves the Koushal case uninterrupted and mainly focused on the legal recognition of the trans-sexual community.

One of the most innovative turn in the judgment was the involvement of fundamental rights directly from the Constitution, especially the application of Article 19, thus, acting as a bold motive in acknowledging the rights of a transgender being. The remedies provided by the Court are also remarkably fascinating. Three mandates have been mentioned: that Hijras should be perceived as the third sex, they should have the privilege to pick between being male, female or having a place with the third gender, and also that the trans persons should be given benefits that are accordingly offered under governmental policies to the minorities, since they would qualify as a socially disadvantaged, backward class. The Court steps forward to give a large number of different bearings, which included certain particular orders (like medical treatment for HIV affected trans-persons, direction to supply them with medical care, to provide a framework for different social welfare plans for their progress, and to find a method to create public awareness to ensure their social consideration); and some uncertain ones (like the direction to actually address issues which are faced by them and to take measures to guarantee a respectful place for them in social and cultural life).

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<sup>7</sup> Civil Appeal No.10972 of 2013 (Supreme Court, 11/12/2013).

## POST JUDGMENT CONSEQUENCE: THE TWO-SIDED COIN

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The judgment was absolutely a constructive step towards eradicating the injustice which was done to almost five million people who were running from one place to another without any identity. The Supreme Court ruling on this matter acted as the conformity to basic human rights and people's dignity, which conveyed the true meaning of Right to life and human dignity which is provided under Article 21 of the Constitution of India.

An Expert Committee was made after ruling of judgement which was informed to have the thorough study of all the difficulties faced by the transgender community and moreover, to suggest measures to alleviate their problems and finally submit the report along with the suggestions and recommendations within three months of its establishment<sup>8</sup>. First step towards inclusion of transgender persons as a third gender category was taken by the state of Tamil Nadu by giving them the ratio cards. Moreover, government orders were issued declaring access to education and counselling services. More recently, the state's social welfare department announced the constitution of a separate welfare board for transgender people<sup>9</sup>. Other states should take steps for set up of a welfare board for transgender persons which has been setup by states like Tamil Nadu and Maharashtra and also took an initiative to set up the cultural institute dedicated to their community.

## THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS BILL), 2019: A STEP TOWARD PROVIDING EQUAL RIGHTS TO LGBT COMMUNITY

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A unique judgment in April 2014 was delivered by Supreme Court expressing that sexual orientation of a person is an integral part of personality, dignity, and freedom and identified transgender as a third gender. The apex court in case of *National Legal Services Authority (NALSA) v. Union of India*<sup>10</sup>, provided a legal identity to the transgender (Hijras and Eunuchs) along with seven other directions. After the NALSA judgment; various other courts passed favourable orders for the transgender community.

Rajya Sabha passed the Rights of Transgender Bill, 2014 based upon the judgement. However, the government then passed another Bill, Rights for Transgender Persons Bill, 2015, altering

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<sup>8</sup>*National Legal Services Authority v. Union of India & Ors*, (2014) 5 SCC 438.

<sup>9</sup>Tamil Nadu Pioneers in Transgender Inclusion, <http://infochangeindia.org/agenda/social-exclusion/tamil-nadupioneers-transgender-inclusion.html>, (Last visited on Jan. 12, 2016).

<sup>10</sup> (2014) 5 SCC 438.

on the 2014 bill by eradicating the provisions involving Transgender Rights Court as well as the National and State Commissions. The 2015. Bill underwent further alterations and another bill was introduced in the Lok Sabha in 2016 — the transgender persons (Protection of Rights Bill), which highly criticised by the transgender and activists.[5 Though after such criticism the legislature passed the Transgender Persons’ (Protection of Rights) Bill 2019 which contains certain key points:

**1. Prohibition against discrimination**

The bill grants prohibition on discrimination against the transgender individuals in government establishments, educational institution and while receiving healthcare, renting or purchasing property, and using public services.

But the legislation does not openly define what constitutes discrimination in the context of the transgender community. The bill is not able to specify the punishment to those who discriminate against the transgender persons.

**2. Recognition of identity**

It is mentioned in the bill that transgender persons will have the right to “self-perceived” gender identity. Though the dilemma persists as in the same section it says that a transgender person has to make an application to the district magistrate for obtaining an identity certificate. The certificate shall confer with their rights and will be proof of their identification as transgender person.

If a person undergoes a sex reassignment surgery, then they need to apply for another certificate to change their gender identity. The district magistrate will be responsible for analysing the “correctness” of the medical certificate which might be either issued by a medical superintendent or a chief medical officer, according to the bill.

**3. Penalties**

Any kind of harm which is caused to a transgender person that includes physical or sexual abuse could attract punishment for imprisonment of six months and may extend up to two years.

**4. National Council for Transgender Persons**

It has been provided in the bill for the setup of National Council for Transgender which will recommend the government over making of the policies, its implementation process and to address the grievances faced by transgender persons. But the bill does not mention any kind of reservation to transgender community in field of education and employment.

The legislation also recommends that the court may decide to send or keep the transgender person in the rehabilitation centre if the family of the individual are not being able to take care. It also provides that the Centre will deliver healthcare services, including hormonal therapy and sex reassignment surgery. However, the bill does not specifically provide the guidelines on whether these services would be free or subsidised by the government.

The provision relating to providing of medical expenses by a comprehensive insurance scheme for hormonal therapy, laser therapy, sex reassignment surgery or any other health issues to transgender persons has been mentioned in the bill.

## **DILEMMAS OF LGBT COMMUNITY AND THE TRANSGENDER PERSONS' (PROTECTION OF RIGHTS) BILL 2019**

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The bill was passed in the year 2019 after going through various amendments from the year 2014 to 2018 as the bill has been continuously criticised by the community members and several activists across the country. Though the bill has been passed by the legislature but there are certain dilemmas which the LGBT community still goes through and the lacunas which the bill poses are as follows: -

- The Bill was drafted and passed out without approaching anyone from the community. They were not asked about their needs and requirements though the bill was protection of their rights. Due to which assumptions were made based on stereotypes.
- Transgender person is required to approach a District Magistrate to obtain a certificate stating that they are transgender. They will be able to change their gender to either Female or Male on government-issued identification cards only after the above-mentioned criteria is fulfilled<sup>11</sup>.

To obtain such certificate they need to show proof of sex reassignment surgery, which

A) Is not something all transgender people want?

B) Many transgender people might not afford as it is expensive

C) No clear definition is provided regarding how the District Magistrate will actually inspect the person or their documents

D) It is a violation of privacy and it also does not specify the particular surgery as they are of many types. It opposes the NALSA judgement,2014 of the Supreme Court, which ensured transgender persons the right to self-identify, and did not mandate surgery.

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<sup>11</sup> <https://yourstory.com/socialstory/2019/11/stoptransbill2019-india-transgender-community-rights>

- The Bill defines a transgender person as one whose gender does not match with the gender they were assigned at birth, including trans men and trans women, or belongs to communities like kinner, hijra, aravani, and jogta. The bill states that a transgender possess certain kind of intersex variation but not all persons who are transgender should be considered as intersex nor every intersex person are transgender.
- The bill also states that is not necessary for a person to have undergone sex reassignment surgery for proving the identity as a transgender but it contradicts the statement related to obtaining of certificate from the District Magistrate only after which their identity will be recognised.
- It deals with the crime related to sexual abuse and is made punishable. However, it fails to determine what constitutes sexual abuse. Any such sexual abuse if done to the cisgender women, then the person committing such will be punished or sentenced to a jail for minimum of seven years, which may extend to a life sentence. However, the minimum sentence of six months which may extend to two years are granted in case of a transgender person.
- The bill does not specify the manner in which government aid related to education and healthcare will be provided to the transgender community. Will the fees will be subsidised or will be free, no clarity has been provided regarding these aspects.
- The bill did not provide for any kind of reservation to the transgender community as belong to the minor section of the society. By providing them reservation in certain workplaces will only help them to have bare minimum survival and does not affect the other sects of the society.
- If the families are unable to take care of the transgender person, then they required to be send to the rehabilitation centre with orders of the court. It abandons the possibilities of joining their community.
- The Bill does not have any provisions to apprehend those who assault, harass or discriminate transgender people at educational institutes, workplaces or anywhere else. The bill also do not mention anything regarding the marriage rights, adoption rights, property rights, social security, or pension. This deprivation of some of the most fundamental rights of the transgender community.



## RECOMMENDATIONS AND SUGGESTION

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It is necessary that certain reforms are required to be made so as to ensure that the LGBT community could live with dignity and equality without any restrictions. The following suggestions are given below: -

1. The policies planned should have an inclusive approach towards the transgender people and must be properly implemented.
2. It is necessary that the legal system must be empowered regarding the issues related to transgender people.
3. Criminal and disciplinary action must be taken against the person who commits violence against Transgender.
4. Strict action must be taken on those families or any individual who assaults or forces the child to leave the particular place or parental home
5. The transgender community must be provided with the free legal aid at ground level.
6. A supportive and encouraging role is required to be played by the educational institutions for providing education and value-system to Transgender.
7. The governments and other organisation must establish helplines for career guidance, career opportunities and planning's and also for placement in the workplaces.
8. Credit facilities and financial assistance must be guaranteed to start up their career as an entrepreneur or businessman.
9. It is necessary to frame the policies related to providing of medical facilities to the transgender persons in public and private hospitals.
10. Organisation of awareness programmes at mass level to outreach public and this community.
11. It is necessary that the comprehensive-sex education must be included in the school and college curriculum so as to make them aware at the ground level.

Moreover, the societal reforms are necessary as if the society support, respect and value the transgender, they will not feel ashamed of their identity and will live freely with dignity and equality. The individuals are the creation of the almighty and possess certain characteristics which may be due biological circumstances or any other reasons. Hence, it is a moral wrong to discriminate someone on the basis of their gender as it not only raises question on the individuality but also violates the constitutional provision Article 21 which deals with Right to Life.

## CONCLUSION

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In the present scenario, government has taken a stance and has introduced several welfare schemes and policies for the transgender persons. It includes documentation, issuing passports, issuing citizenship ID cards along with social reforms, political transformation, economic reforms, housing, police reforms, legal and constitutional safeguards to prevent human rights violations of the transgender community and organized mechanisms to report specific concerns of transgender people.

Even after the Supreme Court judgement of 2014, steps taken by government and passing of transgender persons (Protection of Rights) Bill, 2019 for the benefit and upliftment of them but still the dilemma of transgender community people remains the same even after the passage of years. In the ancient times the transgender persons had enjoyed various privileges and were given equal rights to them. Though the rights have been granted by slashing down the section 377 of IPC but it is most crucial that the society must recognize them and treat them equally as its vital part. Moreover, it is required that each person should understand that even transgender persons are human though their sexual orientation differ from others but they should be respected and treated equally which will certainly help in decreasing their dilemma and their quest for equality and dignity in modern India.