

## **BEYOND THE GENDER BINARY: A QUEST TO ANALYSE SEXUALITY SPECTRUM LITTERED WITH LABELS**

BY NIKITA AGGARWAL AND SAKSHI GOYAL  
FROM SYMBIOSIS INTERNATIONAL UNIVERSITY PUNE

The preamble to the Constitution of India envisages “Equality of Status and of Opportunity; and to promote among them all” and this has been enshrined in the Article 14 of the Indian Constitution which states that “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.” To promote the connotations of equality and an important victory for transgender movements, the honourable Supreme Court of India recognised the Third Gender and stated that *“it is the right of every human being to choose their gender.”* Justice Radha Krishnan in the case of NALSA v. Union of India propounded that *“Hijras are not men by virtue of anatomy appearance and they are like women with no female reproductive organ and no menstruation. Since hijras don’t have reproductive capacity, they are neither men nor women”*. These words state the inability of hijras to procreate and as far as disability is concerned, The Black’s law dictionary defines disability as *“the inability to perform some functions especially the inability of one person to alter a given relation with another person”*. Broadly speaking, disability is to be deprived of the ability to function along with weakening of respective capability. This paper, therefore, aims to ascertain the fact that the condition of being in “third gender” is a form of “disability” and should be included in The Disability Act, 2014. The paper shall look into the question of how the third gender is eligible for reservation under the Article 16 of the Indian constitution and lastly, the factors which make section 377 of the Indian Penal Code, 1860 violative of the rights of the third gender. To conclude this research paper the authors would be undergoing fundamental and descriptive research and would be dealing with both primary and secondary sources. This research is not limited in nature and would be substantiated by using foreign illustrations.

**KEYWORDS:** Disability- Equality- Section 377- Sexuality- Third gender- Transgender

## INTRODUCTION

### *Glance into the real world of transgender*

Her teary eyes filled with dismay yet a broad smile on her face trying to wither away all the humiliation she had been facing all her life, still she stands straight, on a traffic signal begging for her existence in this world which has been declining her existence since ages.

Transgender is amongst that section of our society which is subjected to grave humiliation, violence, injustice, and misery from past several years. Would this harassment have taken place if the third gender was treated just like the binary of gender? Recently India in its judgement *NALSA vs. Union of India*<sup>1</sup> accepted the Trans-community as third gender. This judgement acknowledges 900 years old culture which has always been ignored by politics, education, society, law and other normative structures of the world. People around the world including people of India seem to be not so much familiar by the term “transgender”. The ignorance expands from the meaning of the terminology to biological processes they have to undergo along with increased stigma they come across at all walk of life.

The common understanding which is majorly flawed (as it can lead to larger legal and psychological questions) with respect to transgender is that, the term includes the people whose genitals are intermixed. However, Transgender is basically an umbrella term which represents a set of people whose gender expression, identity or behaviour differs from the norms expected from their birth sex. Various other identities of transgender that fall under this category include transgender male, transgender female, male-to-female (MTF) and female to male (FTM). It also includes cross-dressers<sup>2</sup>, gender-queer people<sup>3</sup> and transsexuals<sup>4</sup>.

In India, the term transgender is used to include *Hijras, Aravanis, Kothis, Jogtas/ Jogappas, Shiv Sakthis*. In the past, around 400 years back they were treated with great respect. And now in 2014 they are recognised as third gender. If we see from their lens the life is nothing but a piece of misery. Today we see gender rights or for that matter LGBT right revolves

<sup>1</sup> National Legal Services Authority v. Union of India and others, Writ Petition (Civil) No.604 Of 2013

<sup>2</sup> A cross dresser is a person who likes to wear the clothes of opposite sex. Available at : <http://transyouth.net/jtcp/info.html> Accessed on 9/10/2017 at 22:08

<sup>3</sup> Gender queer is an identity that falls anywhere between man/boy/male and woman/girl/female on the spectrum of gender identities. Available at : <http://www.urbandictionary.com/define.php?term=genderqueer> Accessed on 9/10/2017 at 22:00

<sup>4</sup> Transsexuals are people who transition from one sex to another. A person born as a male can become recognizably female through the use of hormones and/or surgical procedures; and a person born as a female can become recognizably male. Available at : <http://www.medicaldaily.com/what-difference-between-transsexual-and-transgender-facebooks-new-version-its-complicated-271389> Accessed on 9/10/2017 at 22:48

around “that basic demand for identity of their sexuality.” Just imagine a life with no specific gender and the trauma one has to face with respect to what God has given them naturally....and you know what? They can’t do anything about it. An attempt has been made below to elaborate common terms used with respect to transgender in India.

„Hijra“ is a Persian word translated as eunuch<sup>5</sup> which is used in common parlance for transgender community in India. “They are biological males who reject their „masculine“ identity in due course of time to identify either as women, or “not-men”, or “in between man and woman”, or “neither man nor woman”<sup>6</sup>.

„Aravani“ or „Thirunangi“ is a term used for male-to-female transgender who undergo genital modification through SRS (Sex Reassignment Surgery) or perform Nirwaan<sup>7</sup> which is a traditional mode of castration. Aravani is basically the Tamil translation of the word hijras and some of the Aravani activists want themselves to be called as thirunangi in media or by the public.<sup>8</sup>

Kothi is used for those who adopt a feminine role in same sex relationships and are biological males who develop all the feminine characteristics.<sup>9</sup>

Jogtas/ Jogappas found in Maharashtra and Karnataka are male to female transgender who devote themselves to the service of a particular god named Renuka devi.<sup>10</sup>

Shiv Shakthis found in Andhra Pradesh are males who are considered married to gods particularly Lord Shiva. They are usually the ones who possess the feminine gender expression<sup>11</sup>. They usually work as spiritual healers or astrologers.<sup>12</sup>

<sup>5</sup> Eunuch refers to an emasculated male and intersexed to a person whose genitals are ambiguously male-like at birth, but this is discovered the child previously assigned to the male sex, would be recategorized as intersexed – as a Hijra., supra note 1 page 55

<sup>6</sup> Supra note 1 page 56

<sup>7</sup> Serena Nanda, “Hijras: An Alternative Sex And Gender Role In India, In *Third Sex, Third Gender*” at 384 (noting that the hijras translate the operation, or nirvan, as rebirth).

<sup>8</sup> Supra note 1 at pg no. 56

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> Supra note 1 pg 56 also Available at : Serena Nanda, Wadsworth Publishing Company, Second Edition (1999) also Available at : <https://blog.ipleaders.in/legal-rights-of-transgender-india/> Accessed on 09/10/2017 at 21:50

The Supreme Court in the landmark judgement of NALSA v. UOI has recognized transgender as third gender making the trans-community legally equal but still they are socially unacceptable.<sup>13</sup>

## **BACKGROUND**

### *Understanding transgender from the historical perspective*

The existence of transgender community is deeply rooted in the Indian Culture. They have a strong historical presence in the Hindu Mythology, Vedic literatures and other religious texts. They have been described in The Ramayana and The Mahabharata wherein the references of "third gender" are made as neither male nor female, as individuals who are blessed by Lord Rama.<sup>14</sup> Hijras are also supremely devoted to the all-empowering Hindu Mother Goddess Bahuchara Mata.<sup>15</sup> Ancient stories legitimize the hijra existence and provide ample evidence of the profound spiritual connection that hijras maintain with their feminine identity.<sup>16</sup> There have been evidences of the role played by them in the royal courts of the Islamic world, especially in the Ottaman empires and the Mughal rule in the Medieval India.<sup>17</sup>

The hijras community was patronised in medieval times by Muslim and Hindu rulers of the land. They were singers and dancers and musicians often employed to serve the women's quarters. They were invited during wedding and childbirths to bless, usher in fertility and ward away malevolent spirits.<sup>18</sup>

In the social context of Hindu India, Hijras have an incredibly valuable power; one that was so deeply connected to ideas of good livelihood. They were considered able to bless families in order to procreate male child. They were also considered able to bless marriages so that those marriages could go on to produce lots of children. Hijras have such a recorded history of

<sup>13</sup> <https://yourstory.com/2017/07/transgender-activism/> Accessed on 9/10/2017 at 23:05

<sup>14</sup> Serena Nanda, "*Neither Man Nor Woman: The Hijras Of India*", 2<sup>nd</sup> E.d. ,1999 at pg 13

<sup>15</sup> Nanda, supra note 14, at 383-84. Bahuchara Mata is known not only for her association with transgenderism, but also as the goddess of fertility. Id.

<sup>16</sup> Sandeep Bakshi, "*A Comparative Analysis of Hijras and Drag Queens: The Subversive Possibilities and Limits of Parading Effeminacy and Negotiating Masculinity*", 2004, pg 216

<sup>17</sup> "*With Respect to Sex: Negotiating Hijra Identity in South India*", Yoda Press (2006).

<sup>18</sup> <http://devdutt.com/articles/world-mythology/the-hijra-legacy.html> Accessed on 9-10-2017 at 8:34 PM

more than 4,000 years. Yet despite this supposedly sanctioned place in Indian culture, hijras faces harassment and discrimination from every direction.<sup>19</sup>

Most transgenders suffer from gender dysphoria which is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.<sup>20</sup> This condition occurs due to the conflict between a person's physical or assigned gender and the gender with which he/she/they identify, in the way they feel and think of themselves and their physical or assigned gender.<sup>21</sup> This is covered under the Gender Identity Disorders which refers to the "strong and persistent cross-gender identification and persistent discomfort about one's assigned sex" or a sense of inappropriateness in the gender role of that sex generally experienced by transgender individuals.<sup>22</sup> Transgender are suffering from these disorders and due to this they are unable to express their true self and sexual orientation. They are subject to harassment, ridicule, stigmas and are demeaned for expressing and identifying with their own gender. There have been instances of various transgender being subject to such humiliation, one such is of Laxmi Narayan Tripathy, who highlighted the trauma undergone by her as she was born as a male and while growing up as a child, she felt different from the boys of her age and was feminine in her ways. On account of her femininity, from an early age, she faced repeated sexual harassment, molestation and sexual abuse, both within and outside the family. Due to her being different, she was isolated and had no one to talk to or express her feelings with, while she was coming to terms with her identity. She was constantly abused by everyone as a „chakka“ and „hijra“ which made her joined the Hijra community.<sup>23</sup>

When the Constitution of India provides for the liberty, equality and equal protection of laws<sup>24</sup>, it also includes the right not to be demeaned for expressing one's identity. Right to dignity is an integral part of the constitution<sup>25</sup> and it provides for the protection of human

<sup>19</sup> <https://www.newstatesman.com/world-affairs/2008/05/hijras-indian-changing-rights> Accessed on 9-10-2017 at 8:40 PM

<sup>20</sup> AM. Psychiatric Ass'n, "Gender Dysphoria, In Diagnostic & Statistical Manual Of Mental Disorders", 5<sup>th</sup> E.d. , 2013 at pg 452-453

<sup>21</sup> <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> Accessed on 9-10-2017 at 10:35 PM

<sup>22</sup> Supra note 20 at pg 576

<sup>23</sup> National Legal Services Authority v. Union of India and others ,Writ Petition (Civil) No.604 Of 2013, pg 8

<sup>24</sup> Article 14, The Constitution of India, 1950; Article 15, The Constitution of India, 1950; Article 21, The Constitution of India, 1950

<sup>25</sup> Maneka Gandhi v. Union of India, 1978 AIR 597

Dignity which requires everyone to acknowledge the value and worth of all individuals as members of society.<sup>26</sup> Transgender are being discriminated on the grounds of their gender which is a war on their right of non- discrimination.<sup>27</sup>

The present discussion is to include transgender as a disability under the Disability Act, 2016 as transgender suffers from that mental illness where they are forced to conceal their own identity,<sup>28</sup> and when they disclose their identity, they become a subject to the social stigmas of the society.

The intention here is to emphasize that the Disability Act, 2016 exclusion of gender dysphoria from mental illness violates the dignity of transgender people, the idea is not to say that a transgender identity is a disability but their discrimination on ground of being a transgender is disability and covering them under disability law will improve their conditions of living which might in turn act as a deterrence against any future discrimination faced by them in contemporary times.

Further denying rights to the transgender is imposing special disability on them alone, as transgender are amongst those deprived sections of the society who are forbidden safeguards that others enjoy.<sup>29</sup>

Their Right to Dignity is demeaned and thus violated on the social and moral grounds by associating their behaviour as morally reprehensible<sup>30</sup> and harmful to the society and branding their activities and occupations as illegal.

<sup>26</sup> Naz Foundation v. Government of NCT and others w.p. (c)7455, 2001

<sup>27</sup> Article 1, The Universal Declaration of Human Rights, 1948

<sup>28</sup> Supra note 20

<sup>29</sup> Romer v. Evans, 517, U.S. 631 Available at : <https://supreme.justia.com/cases/federal/us/517/620/case.html>

<sup>30</sup> Katie Aber, "When Anti-Discrimination Law Discriminates: A Right to Transgender Dignity in Disability Law", 50 Colum. J.L. & Soc. Probs. 299, 342 (2017) at pg 13

## CONSTITUTIONAL PROTECTION AND SECTION 377 OF INDIAN PENAL CODE

Section 377 of the Indian Penal Code, 1860 had been an instrument of ridicule and stigmatization to the transgender community. Section 377 of the Indian Penal Code (hereafter IPC), 1860<sup>31</sup> which criminalizes unnatural offence and includes sodomy, bestiality, etc is the most criticized section against which the third gender is fighting for to be declared unconstitutional. This note emphasizes that the section 377 of IPC violates the dignity of transgender people regardless of whether one supports it or not. Indian legal system has always favoured equality and no discrimination of any kind under Article 13 of the Constitution of India<sup>32</sup> and Article 14 of the Constitution of India<sup>33</sup>.

Moreover the concept of dignity has been explicitly laid down by the honourable Supreme Court in a number of cases as an integral part of the constitution<sup>34</sup> and it provides for the protection of human dignity which requires everyone to acknowledge the value and worth of all individuals as a member of society<sup>35</sup>. Criminalizing homosexuality draws an arbitrary distinction between procreative sexual intercourse and non-procreative sexual intercourse; which is clearly against the letters and spirit of right to equality enshrined in Article 14. Further it is held violative of Right to Privacy and is discriminatory in nature.<sup>36</sup> Justice A.P. Shah stated in its judgement that *“The criminalization of homosexuality condemns in perpetuity a sizable section of society and forces them to live their lives in the shadow of harassment, exploitation, humiliation, cruel and degrading treatment at the hands of the law enforcement machinery.”*<sup>37</sup> The Supreme Court reversed the verdict of Delhi HC in December 2013. Upholding the constitutional validity of Section 377 IPC, an SC bench headed by Justice GS Singhvi gave the faith of every single member of LGBT community in the hands of parliamentarians stating that it was the desirability of the legislature to decide on

<sup>31</sup>“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.”- section 377 of the Indian penal code, 1862

<sup>32</sup> Article 13 of the Constitution of India, 1950

<sup>33</sup> Article 14 of the Constitution of India, 1950

<sup>34</sup> Maneka Gandhi v. Union of India, 1978 AIR 597

<sup>35</sup> Naz Foundation v Government of N.C.T Delhi, Available at : <https://blog.ipleaders.in/analyses-section-377-indian-penal-code> Accessed on 10/10/2017 at 01:57

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

a controversial issue.<sup>38</sup> Finally, in August 2017 they got a ray of hope wherein it was held that privacy allows each human being to be “left alone” in a core which is inviolable<sup>39</sup>

Justice A.P. Shah, who had read down Section 377 of the IPC, which criminalises “unnatural” consensual sex and has always been used to mock the minority community of LGBT as whole says that it would be a lot more difficult to defend the section constitutional after right to privacy has been considered the fundamental right.<sup>40</sup> The right to privacy judgement has opened the gates for declaring the section unconstitutional as equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the constitution.<sup>41</sup> But the community is the one which is not accepted by the society. It is the *visibly invisible* community which needs more help of people as compared to all the legal institution so that they can live peacefully and with dignity as guaranteed by the Article 21 of the Indian constitution, 1950.

### **CHALLENGING THE RIGHT OF PERSON WITH DISABILITY ACT, 2016 FROM THE INTERNATIONAL LAW PERSPECTIVE**

With several joint statement passed by General Assembly of United Nations, it is seen how other countries has accepted them and what all steps they have taken to fight the discrimination against the sexual orientation and gender identity.

The French and the Dutch solidifies the principle of non-discrimination which states that no person can be discriminated on the basis of sexual orientation or gender identity.<sup>42</sup> The joint statement also condemned that the human rights violations based on sexual orientation or gender identity wherever they occur, in particular the use of the death penalty on this ground, extrajudicial, summary or arbitrary executions, the practice of torture and other cruel,

<sup>38</sup> S.K. Kaushal vs. Union of India, Available at : <http://www.hindustantimes.com/india/sc-hearing-on-gay-sex-today-india-s-struggle-with-sec-377-explained/story-PH220grrwgs9mtNTBKXTM.html> Accessed on 10/09/2017 at 02:06

<sup>39</sup> Justice K S Puttaswamy (Retd.), Vs Union of India And Ors.

<sup>40</sup> <https://thewire.in/170810/ap-shah-377-right-to-privacy/> Accessed on 10/09/2017 at 02:21

<sup>41</sup> Supra note 35

<sup>42</sup> French-Dutch-sponsored Declaration Read in the General Assembly by Argentina (December 19, 2008)



inhuman and degrading treatment or punishment, arbitrary arrest or detention and deprivation of economic, social and cultural rights, including the right to health.<sup>43</sup>

Franco-Dutch declaration also followed The Yogyakarta Principles<sup>44</sup> on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity<sup>45</sup>. As summarized by the Yogyakarta conference chair: *“Human rights are for everyone, without reservation. Yet women, men and persons whose sexuality does not conform to dominant norms face rape, torture, murder, violence and abuse because of their sexual orientation or gender identity. These principles affirm that human rights admit no exceptions.”*<sup>46</sup>

In June 2009 president Barack Obama declared the month of “June” as the LGBT pride month and called upon the people of the United States to turn back discrimination and prejudice everywhere it exists<sup>47</sup>

The joint statement by Argentina on behalf of 66 countries condemned in the United Nations Human rights council<sup>48</sup> that any kind of discrimination and violence based on sexual orientation and gender identity would amount to non fulfilment of human rights.<sup>49</sup> Not only this, Universal Declaration of Human Rights<sup>50</sup> which India is under an obligation to follow (as it is the preemptory norm of International Law), states in Article 1 of Universal Declaration of Human Rights<sup>51</sup>.

<sup>43</sup> French-Dutch-sponsored Declaration Read in the General Assembly by Argentina (December 19, 2008)

<sup>44</sup> “In 2006, in response to well-documented patterns of abuse, a distinguished group of international human rights experts met in Yogyakarta, Indonesia to outline a set of international principles relating to sexual orientation and gender identity. The result was the Yogyakarta Principles: a universal guide to human rights which affirm binding international legal standards with which all States must comply. They promise a different future where all people born free and equal in dignity and rights can fulfil that precious birthright.” Available at : <http://www.yogyakartaprinciples.org/> Accessed on 10/10/2017 at 16:41

<sup>45</sup> [http://www.tjssl.edu/slomansonb/10.3\\_GLBT\\_UN.pdf](http://www.tjssl.edu/slomansonb/10.3_GLBT_UN.pdf) Accessed on 10/10/2017 at 15:58

<sup>46</sup> [http://www.tjssl.edu/slomansonb/10.3\\_GLBT\\_UN.pdf](http://www.tjssl.edu/slomansonb/10.3_GLBT_UN.pdf) Accessed on 10/10/2017 at 15:58

<sup>47</sup> Lesbian, Gay, Bisexual, And Transgender Pride Month, 2009 By The President Of The United States Of America A Proclamation Available at : also [http://www.tjssl.edu/slomansonb/10.3\\_GLBT\\_UN.pdf](http://www.tjssl.edu/slomansonb/10.3_GLBT_UN.pdf) Accessed on 10/10/2017 at 15:58

<sup>48</sup> India being one amongst all other signatory Available at: <http://www.ohchr.org/EN/HRBodies/HRC/Pages/CurrentMembers.aspx> Accessed on 10/10/2017 at 16:54

<sup>49</sup> <http://arc-international.net/global-advocacy/sogi-statements/2006-joint-statement/> Accessed at 10/10/2017 at 16:56

<sup>50</sup> UDHR was adopted by the United Nations General Assembly at its 3rd session on 10 December 1948 as Resolution 217 at the Palais de Chaillot in Paris, France. Of the then 58 members of the United Nations, 48 voted in favour india being one of them, none against, eight abstained, and two didn't vote. Available at : [https://en.wikipedia.org/wiki/Universal\\_Declaration\\_of\\_Human\\_Rights](https://en.wikipedia.org/wiki/Universal_Declaration_of_Human_Rights) Accessed on 10/10/2017 at 17:01

<sup>51</sup> Article 1: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood” Available at: <http://www.un.org/en/universal-declaration-human-rights/> Accessed on 10/10/2017 at 17:05

Article 2 of Universal Declaration of Human Rights<sup>52</sup> and Article 2 of the International Covenants on Civil and Political, Economic, Social and Cultural Rights, as well as in Article 26 of the International Covenant on Civil and Political Rights that no such discrimination should take place. Everybody is born free with equal rights and dignity.

On the other hand, the Right of Persons with Disability Act, 2016 clearly seems to be violative of these articles as it has not addressed the question with respect of gender dysphoria<sup>53</sup> which violates the right to dignity enshrined under Article 21 of the Indian constitution. A denial of the rights of transgender imposes the special disability on these persons.<sup>54</sup> The focus here is to provide equal rights and protection and not demeaning the right to live with dignity by excluding them on the of moral and social grounds. If in case the transgender would have been termed disabled, the impact it would have will be much more effective and the third gender will more easily be accepted (socially) as the Transgender.<sup>55</sup>

## **PROPOSITIONS**

### *Improvement and Initiatives needed in Indian Legislations*

The Parliament of India passed The Transgender Persons (Protection of Rights) Bill, 2016, which is a great initiative for protecting and providing the rights of transgender. The bill gave broad directives to the central and state governments on affirmative action, public health, social welfare and other services to be made available for transgender people. But the bill is criticized heavily by the transgender community and civil society for being disconnected with the ground reality of the problems faced by the community. This fracture need to be addressed.

Firstly, the definition of Transgender in the bill which has been questioned as this definition states that:

<sup>52</sup> Article 2: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.” Available at : <http://www.un.org/en/universal-declaration-human-rights/> Accessed on 10/10/2017 at 17:07

<sup>53</sup> “Gender dysphoria involves a conflict between a person's physical or assigned gender and the gender with which he/she/they identify. People with gender dysphoria may be very uncomfortable with the gender they were assigned, sometimes described as being uncomfortable with their body (particularly developments during puberty) or being uncomfortable with the expected roles of their assigned gender”. Available at : <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> Accessed on 10/10/2017 at 17:14

<sup>54</sup> Romer v. Evans, 517,U.S. 631 Available at : <https://supreme.justia.com/cases/federal/us/517/620/case.html>

<sup>55</sup> <https://thewire.in/56299/failures-of-the-new-transgender-bill/> Accessed on 10/10/2017 at 17:43

A transgender person is one who is:

- (a) Neither wholly female nor wholly male; or
- (b) A combination of female or male or
- (c) Neither female nor male.<sup>56</sup>

This bill completely eliminates the option of identification of Transgender as either male or female. This confuses the whole scenarios both for the policy implementers and the doctors. On top of it, the Bill reinforces injurious stereotypes about transgender persons as being part male and part female.<sup>57</sup> It has shaken the judgement of NALSA v. UOI<sup>58</sup> to the core as the principle of self-identification described in the judgement is violated. Self-identification forms the basis of this judgment, giving the transgender community autonomy over their identity, granting the dignity that has been previously deprived<sup>59</sup> and its broad understanding of gender has opened a space for transgender persons to obtain documents that identify them by the gender of their choice. With this provision, that space stands to be firmly shut. Further, this bill has been framed by the experts without extensive consultations with the transgender community and this top-down approach of the legislature is flawed. The policy makers must understand that macro solutions can't deal with micro problems.

The definition of the transgender in the bill has to be broad enough to include all forms of transgenders like hijras, eunuchs, jogtas, aravani, kothis, shivshaktis, transsexuals, cross dressers, gender queer people, etc.

They should be provided with the right to choose their own identity as the transgender know what they are. Policy should look ensure to give them those things what they actually want. For instance, if a Transgender chooses to be a female she has to be given all rights of female and this bill should not act as an obstacle in her way.

Secondly, this bill is a toothless legislation as it lacks the mechanism for implementation of the provisions specified in the transgender bill, 2016. It lacks the mechanism for

<sup>56</sup> Section 2 (i), The Transgender Persons (Protection of Rights) Bill, 2016

<sup>57</sup> <https://thewire.in/56299/failures-of-the-new-transgender-bill/> Accessed on 10-10-2017 at 1:56 AM

<sup>58</sup> National Legal Services Authority v. Union of India and others WRIT PETITION (CIVIL) NO.604 OF 2013

<sup>59</sup> <http://www.lawyerscollective.org/the-invisible-lawyer/take-transgender-persons-protection-rights-bill-2016-standing-committee-report> Accessed on 10-10-2017 at 1:56 AM

representation of the transgender. We do not have any commission for representation of the transgender as we have for women i.e., the National Commission for Women.

Thirdly, the punishment provided in the bill<sup>60</sup> is not sufficient keeping in mind the discrimination and stigmatization which the transgender community has to undergo at every second of their lives. The punishment prescribed in the bill is of maximum 2 years which is not sufficient taking into consideration the plight of transgender. The scope of punishment needs to be expanded and along with it, there should be some provisions for compensating those people who are victims of this gender-based discrimination. The punishment should be in tune with other legislations like those dealing with domestic violence, etc.

Fourthly, Transgender community lack access to adequate healthcare facilities. There are wards for males and females but we never came across any ward for transgender. Even the people who have to give services to transgender lack knowledge about them and their bodies. 50% of transgender patients have had to educate their health care providers on their identities. About 1 in 4 trans individuals say they delay medical care in fear of discrimination and that fear is warranted, as almost 20% of trans patients have been refused care by medical professionals.<sup>61</sup> They have a unique set of mental and physical health needs. These needs are compounded by prejudices against transgender people within both the medical system and society at large. These prejudices create barriers to accessing timely, culturally competent, medically appropriate, and respectful care.<sup>62</sup> The cost of gender change is around 2-3lk which seem to be very high considering the job opportunities for transgender. The government should formulate schemes for subsidized medical expenditures with respect to these surgeries.

These societal and medical barriers are associated with increased risk of violence, suicide, and sexually transmitted infections<sup>63</sup>. Additionally, transgender people may have health needs related to gender transition, including hormonal therapy and surgery, that can create an undesired and unavoidable dependency on the medical system for basic identity expression.

<sup>60</sup> Section 19, The Transgender Persons (Protection of Rights) Bill, 2016

<sup>61</sup> <http://mashable.com/2015/08/05/transgender-health-care/#yTP2n3A015qi> Accessed on 10-10-2017 at 8:33PM

<sup>62</sup> *World Professional Association For Transgender Health. Standards Of Care For The Health Of Transsexual, Transgender, And Gender Nonconforming People. 2012.* Available at: <http://www.wpath.org/documents/SOC%20V7%2003-17-12.pdf> Accessed 10-10-2017 At 8: 30 PM

<sup>63</sup> Grant JM, Mottet LA, Tanis J, Harrison J, Herman JL, Keisling M. Injustice at Every Turn: A Report of the National Transgender Discrimination Survey. Washington, DC: National Center for Transgender Equality and National Gay and Lesbian Task Force; 2011. Available at: [http://www.thetaskforce.org/downloads/reports/reports/ntds\\_full.pdf](http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf). Accessed on 10-10-2017 at 08: 28 PM

This combination of high medical needs and barriers to accessing appropriate care may give rise to a self-perpetuating cycle of risk exposure, stigmatization, prejudice, and eventually poor health outcomes.

## **CONCLUSION**

*A long way ahead...*

Having talked about in detail the current debates on transgender rights and the response of Supreme Court and Legislature, the debate shall remain fractured if behavioural and societal change with respect to transgenders is not talked about. A change in mindset of society along with larger social acceptance and education is need of the hour. A channel should be created to incentivize the socio-politico-economic acceptance for the “Trans” in the Indian society. The government should take proactive role to improve the conditions of transgender by creating employment opportunities for them.

No one asks to be a transgender but these real life heroes have proved it to be a blessing. Gauri Sawant, that transgender hero who is an active LGBT rights activist and the first transgender to adopt a girl child Gayatri - a child whom she saved from being sold. Born as Ganesh Suresh Sawant and raised in Pune, Gauri realised early on that something set her apart from the rest. Having identified more closely with the female gender since the beginning. Now, Gauri is a proud transgender woman and an avid social activist in Mumbai for more than 20 years and has now set up her own NGO, Sakhi Char Chowghi in Malad, Mumbai and has dedicated her life to provide transgenders, *hijras*, homosexual men, and female sex workers among other groups, a space of freedom and safety.<sup>64</sup>

Another hero who took the transgender to an international platform is Laxmi Narayan Tripathi, who has tried to change the on lookers mindset about her community and has made it her mission to bring out the revolution. As India began to grapple with HIV in the 1990s, she was one of the early activists to demand that the government’s anti-AIDS program should include hijras as a distinct category.

She was the first transgender person to represent Asia Pacific at the United Nations and has represented her community and India on several international platforms including the World AIDS conference in Toronto. Her non-profit organisation, Astitva, aims to support and

<sup>64</sup> <https://mumbaimirror.indiatimes.com/mumbai/other/gauri-sawant-how-i-became-a-mother/articleshow/57995471.cms> Accessed on 10-10-2017 at 06:08 PM

Empower hijras in her home city Thane, just outside Mumbai. She became part of Asia's first community based HIV program, the Dai Welfare Society. In 2012, Laxmi attended a Maharashtra ministerial meeting and eventually became part of the drafting committee of women's policy.<sup>65</sup>

Laxmi Narayan Tripathi also played a key role in the movement in India to recognize transgender people as members of a third gender on official government documents. In 2014, India's Supreme Court has recognized transgender people as a third gender, in a landmark ruling<sup>66</sup>. In India's most recent federal elections, hijras and other transgender people were permitted to publicly declare their gender identities when voting.

After this prolonged journey of hatred and ridicule, if they can make themselves recognised then why not make them an asset by socially accepting them and bringing them to the mainstream. There is still a long way to go, the long struggle for equal rights for all has only just begun. It will take a lot of efforts; a lot of advocacy to be done, the mindset of the people needs to be changed.

*More power to these unsung heroes like Gauri Sawant and Laxmi Narayan Tripathi, the proud transgender of India because we need a match for skills not gender.*

<sup>65</sup> <http://achhikhabre.com/laxmi-narayan-tripathi/> Accessed on 10-10-2017 at 06:22 PM

<sup>66</sup> National Legal Services Authority v. Union of India and others ,Writ Petition (Civil) No.604 Of 2013