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# **TRANSGENDER PERSONS AND LAW: IDENTITY AND LEGAL PROTECTION**

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## **ABSTRACT**

In recent years, the issues of sex and gender have received increased attention, especially in the effort to ensure equality and inclusion in society. Gender is not the same as biological sex. It is a social and cultural concept that shapes identity, expression, relationships, family roles, and social responsibilities. Though physical differences exist between sexes, gender roles are often shaped by culture and individual experience. Gender identity begins in early childhood but can change over time. Gender equality means that a person's rights and opportunities should not depend on whether they are male, female, or transgender.

Equality does not mean treating everyone the same, but ensuring fairness based on individual needs. Promoting gender equality involves both equal participation (quantitative) and equal recognition of different perspectives (qualitative) in policy-making and social development.

## **INTRODUCTON**

Gender identity forms an intrinsic part of human dignity and personal autonomy. In contemporary legal discourse, the recognition and protection of transgender persons have emerged as a crucial dimension of human rights, social justice, and constitutional equality. Historically, transgender individuals have been marginalized, subjected to social stigma, and excluded from mainstream legal and policy frameworks. The binary construct of gender in law—predominantly restricted to “male” and “female”—failed to acknowledge the lived realities and identities of persons who do not conform to these categories. This systemic invisibility has led to discrimination, violence, and denial of basic rights such as education, employment, healthcare, and participation in public life.

The evolving understanding of gender as a spectrum rather than a rigid binary has transformed legal and constitutional debates across the globe. In India, this paradigm shift was significantly marked by the Supreme Court’s landmark judgment in National Legal Services Authority

(NALSA) v. Union of India (2014), which affirmed the right of transgender persons to self-identify their gender and mandated the State to ensure their social, economic, and political inclusion. The judgment recognized gender identity as an integral aspect of the right to life and personal liberty under Article 21 of the Constitution, thereby situating transgender rights within the broader framework of fundamental human rights.

Following this judicial recognition, the enactment of the Transgender Persons (Protection of Rights) Act, 2019 represented a legislative attempt to institutionalize protections for transgender individuals. The Act prohibits discrimination in education, employment, healthcare, and access to public facilities, while mandating welfare measures for their empowerment. However, despite these legal advances, the Act has also been subject to critique for its bureaucratic procedures regarding gender certification and the limited role accorded to self-identification, raising concerns about its conformity with constitutional principles of autonomy and dignity.

Globally, the discourse on transgender rights has been reinforced by international human rights instruments, such as the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), and the Yogyakarta Principles (2006), all of which emphasize equality, non-discrimination, and the right to recognition before the law. These frameworks underscore the State's obligation to create inclusive legal structures that respect diverse gender identities and protect individuals from violence and exclusion.

Therefore, examining the intersection of identity and legal protection of transgender persons becomes vital not only for advancing gender justice but also for realizing the constitutional promise of equality, dignity, and freedom. This paper seeks to analyze the evolution of legal recognition of transgender identity, the adequacy of existing statutory protections, and the ongoing challenges in ensuring substantive equality for transgender persons in India within the context of international human rights norms.

## **MEANING AND DEFINITION**

The Term Transgender is of recent origin. The term 'Transgenderist' was coined by Virginia Prince, a pioneer in the cross-dresser movement in the United States in the 1970s (Valentine 2007; Stryker 2008; Bettcher 2009). In the 1990s with growing activism and scholarship in the United States, the term transgender gained popularity. In the mid-1990s the term transgender

has been widely used.<sup>2</sup> The term transgender refers to those who reject their socially assigned gender and refuse to place themselves in the men/ women gender binary (Beasley 2005). In simpler terms, transgender is an umbrella term used to group several different kinds of people who do not conform to their expected gender, and are living the gender that was not assigned to them at birth, and also those who live genders which is not the traditional conception of gender (Bettcher 2009).<sup>1</sup>

## DEFINITION

- THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019  
Section 2 (k) “transgender person” means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta.<sup>2</sup>
- BHARATIYA NYAYA SANHITA, 2023  
The pronoun “he” and its derivatives are used of any person, whether male, female or transgender.<sup>3</sup>
- According to Stryker “Transgender” is a word that “encompasses the whole spectrum” of gender diversity, that lumps together rather than splits apart the many subgroups within a large, heterogeneous set of communities.” Some of the categories under transgender umbrella are transsexuals, transvestites, crossdressers, drag queens and drag kings, butch and femme lesbians, feminine gay men, intersex people, bigendered people and others who ‘challenge the boundaries of sex and gender’ (Minter 2006)<sup>4</sup>
- According to the definition of the Commissioner for Human Rights “Transgender persons include persons who have a gender identity which is different from the gender assigned to them at birth and those people who wish to portray their gender identity in a different way from the gender assigned at birth. It includes those people who feel they have to, prefer to, or choose to, whether by clothing, accessories, mannerism, speech patterns, cosmetics or body modification, present themselves differently from the

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<sup>1</sup> <https://shodhganga.inflivnet.in>

<sup>2</sup> The Transgender persons (Protection of Rights) Act, 2019

<sup>3</sup> Bharatiya Nyaya Sanhita, 2023

<sup>4</sup> Susan Stryker (2008) “Transgender History” revised edition 2017, Seal Press Publication, U.S. p. 123.

expectations of the gender role assigned to them at birth. This includes, among many others, persons who do not identify with the labels ‘male’ and ‘female’, transsexuals, transvestites and cross-dressers.”

In contemporary usage, "transgender" 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; male and female cross-dressers (sometimes referred to as "transvestites", "drag queens", or "drag kings"); intersexed individuals; and men and women, regardless of sexual orientation, whose appearance or characteristics are perceived to be gender atypical. The term transgender does not imply any specific form of sexual orientation; transgender people may identify as heterosexual, homosexual or as bisexual.<sup>5</sup>

## **HISTORICAL BACKGROUND AND RECENT DEVELOPMENT**

The existence of transgender persons is neither a recent phenomenon nor a product of modern social movements. Across cultures and centuries, gender variance has been documented in diverse forms, reflecting the complex interplay between biology, identity, and societal norms. Historical records demonstrate that non-conforming gender identities have always been part of human society, even if their recognition, acceptance, and legal treatment have varied widely. Existing legal frameworks in India do not negate the long and storied history of transgender people's acceptance in Indian culture. Contemporary legislative changes, like the Transgender Persons (Protection of Rights) Act, 2019 (Hinchy, J. 2019). Require an understanding of their historical context for a full appreciation of their importance. This historical background is essential to understand not only the legal challenges faced by transgender persons today but also the enduring cultural resilience that has enabled them to survive and assert their identity across time.<sup>6</sup>

### ➤ Ancient period

The quote from Ramcharitamanas (Balkand) when Sri Ram was on the way to proceed to exile for fourteen years the people of Ayodhya out of love and affection accompanied him and returned to Ayodhya only when Sri Ram asked all of the men and women to return to Ayodhya. But Hijras stayed there because they were neither men nor women. On returning from exile, Sri Ram found Hijras meditating and waiting for him. He

<sup>5</sup> Susan Stryker (2008) "Transgender History" revised edition 2017, Seal Press Publication, U.S. p. 123.

<sup>6</sup> <https://shodhganga.inflivnet.in>

honoured their dedication with a boon that their blessings would be sought on every auspicious occasion (Saxena, P. 2011) Ardhanarishvara form represents the combination of Shiva with Shakti and Purusha with Prakriti.<sup>7</sup>

Lord Vishnu also transforms into Mohini (beautiful women) to take back the sacred nectar from the Pandavas, which was collected during samudra manthan. There is an episode in Mahabharata where Arjuna during Agyatwas of Pandavas disguised himself as a hijra named Brihannala, inside the royal palace of king Virat. In another episode from the Mahabharata War at Kurukshetra, Bhishmapitamah was the senapati of Kaurava's army and there appeared to be a hard task for Pandavas to win the war. Lord Krishna recalled the past events of Shikhandi (Amba) and proposed that Shikhandi (Hijra) should battle against Bhishmapitamah. As Bhishmapitamah took a vow to not to fight with a woman, so Lord Krishna used Shikhandi as a shield; hence, Arjuna was able to kill Bhishma (Lal, 1999). In 'Mahabharata' on the advice of Lord Krishna Arjuna uses Shikhandi (a hijra) as a shield in front of him in order to defeat his guru Dronacharya in Kurukshetra war. Again in Mahabharata itself, before the Kurukshetra war, Ahiravan offers his life blood to Kali to ensure the victory of the Pandavas and Kali grants him power. Ahiravan known by names Travant', Travat', 'Aravan' and Travant' is the son of Pandava prince Arjuna and the Naga princess Ulupi. Lord Krishna grants 'Aravan' three boons in honour of his self sacrifice. On the night before the battle, Aravan expresses a desire to get married before he dies. As no woman was willing to marry him, who is doomed to die in a few hours, Krishna assumes the form of Mohini and marries him. In South India, hijras regarded him as their progenitor and call themselves as "Aravanis".

The Vedas (1500–500 BC) classify people into three categories based on their nature (*prakriti*): *Pums-prakriti* (male nature), *Stree-prakriti* (female nature), and *Tritiya-prakriti* (third nature), as also described in Vatsyayana's *Kama Sutra*. Ancient and medieval Indian texts mention that individuals of the third sex were well recognized and included male-bodied females, female-bodied males, and intersex persons, often identifiable from childhood. References to a third sex can also be found in Hindu law, medicine, linguistics, and astrology, with the *Manu Smriti* even describing their

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<sup>7</sup> <https://shodhganga.inflivnet.in>

biological origins. The earliest Tamil grammar, *Tolkappiyam* (3rd century BC), speaks of hermaphrodites as a third, 'neuter' gender. Similarly, the *Puranas* refer to three categories of celestial beings connected with music and dance—Apsaras (female), Gandharvas (male), and Kinnars (neuter).<sup>8</sup>

The Indian philosopher Vatsyayana's book 'Kamasutra' also has references of Tritiyaprakriti (hijra). The vedic astrology also revealed that Saturn, Mercury and Ketu related with third gender/tritiyaprakriti. The literature of Puranas has referenced about the three kinds of Devatas of dance and music i.e. Ghandharvas as males, Apsaras as females and Kinnars as neuter (Wilhelm, A.D.2004). There were three distinct perspectives on how individuals could be classified as *purusha*, *stri*, or *napumsaka*. In both Brahmanical and Buddhist traditions, gender was identified through the presence or absence of specific primary and secondary physical traits. Additionally, Buddhists emphasized reproductive ability as a criterion, regarding infertility as the basis for categorizing someone as the third gender (*napumsaka*).

Jainism, however, offered a unique distinction by separating biological sex (*dravyalinga*, the physical marker) from psychological gender (*bhavalinga*, the mental marker). Unlike the Brahmanical and Buddhist view, Jainism rejected the idea of procreative capacity as a defining factor of gender. For example, women before puberty or after menopause, though unable to conceive, were still recognized as belonging to the female gender.

According to the Buddhist Vinaya (2nd century BC), there are four main sex or gender categories: males, females, ubhatobyanjanakas (people of dual sexual nature) and pandaka (people of various non - normative sexual natures). As the Vinaya tradition developed the term pandaka came to refer to a broad third sex category which encompassed inter sex, male and female bodied people with physical attributes and behaviour that were inconsistent with the sexual ideal of man and woman. This mythology mainly emphasised on the sexual behaviour or the act (may be penetrative /receptive) followed during sexual act. Approximately from the 5th century CE a new gender appeared as the fourth sex i.e. masculine napumsaka or purusanapumsaka. The

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<sup>8</sup> <https://shodhganga.inflivnet.in>

role during sexual act differentiates the feminine *napumsaka* (only receptive partners in sexual act) from the masculine *napumsaka* (both penetrative and receptive), masculinity was characterised by the penetrating performance.<sup>9</sup>

➤ Medieval Period

In the sixteenth century, with the arrival of the Mughals, the term *khwajasara* (eunuch) became more common than *third sex* or *napumsaka*. Eunuchs held important positions as political advisors, vakils, faujdars of jagirs, and as trusted guardians of the Mughal harems (*janankhana*). They were valued for their honesty and loyalty, as they had no families or children of their own. Kings believed that, because of their asexuality, Hijras were more faithful to them and their queens. However, this also reflected their status as slaves during the medieval period.<sup>10</sup>

The presence of hijra communities at the Prophet Muhammad's tomb in Medina and at the Ka'ba in Mecca highlights their religious importance in Islam. Their duty was not to guard the mosque's wealth but to protect the women visiting these holy places (Marmon, 1995). In India, some hijras also held high positions. For example, under Sultan Muzaffar Shah-II of Gujarat, a hijra named Muhit-ul-Mulk became the *kotwal*. During Alauddin Khilji's rule, Malik Kafur, a hijra, rose to such power that he removed the rightful heir Khizr Khan. In Akbar's reign, the town of Firozabad was named after a eunuch called Firoz Khan (Sharma, 1989).

In India, during the Mughal period eunuchs were frequently employed in imperial palaces as servants for female royalty and often attained high status positions in society. Eunuchs were highly valued for their strength, ability to provide protection for ladies' palaces and trustworthiness, allowing eunuchs to live amongst women with fewer worries. As a result of the number of high status job openings available for eunuchs, poor families often converted one of their sons into a eunuch and had him work in the imperial palace to create a steady source of revenue for the family and ensure a comfortable life style for the son.<sup>11</sup>

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<sup>9</sup> <https://shodhganga.inflivnet.in>

<sup>10</sup> *ibid*

<sup>11</sup> <https://shodhganga.inflivnet.in>

➤ Colonial Period

In the beginning of the British Period the hijra got protection and benefits from some Indian States. But from the eighteenth century onwards, the status of hijras drastically became pitiable and vulnerable. In 1860 an anti sodomy law i.e. Section 377 of the Indian Penal Code (IPC) was introduced by Britishers to ban the same sex sexual relationships. The British administration grouped and recorded the hijras/eunuchs along with other Criminal Castes/Tribes (a new category developed by Britishers). The Criminal Tribes Act (Act 27) of 1871 declared that there should be registration, surveillance and control of certain tribes and eunuchs.<sup>12</sup>

The *inami* lands that earlier rulers had granted to hijras were taken away by the British because hijras could not prove legal inheritance (UNDP, 2010). Writings on hijras in the post-colonial period mainly focus on three points:

1. The British built an image of themselves as strong, superior men in contrast to what they saw as weak and “effeminate” Indian men and women.
2. In response, Indian nationalism promoted new models of masculinity – one based on the ascetic ideal of renouncing material and sexual desires (inspired by Swami Vivekananda), and another on the idea of the androgynous figure who embodied both male and female qualities (inspired by Mahatma Gandhi).
3. The British also studied hijras as a separate community outside the male-female binary, trying to understand whether they entered the group naturally (due to genetic or physical conditions) or through castration/artificial means (Reddy, 2006).<sup>13</sup>

## RECENT DEVELOPMENT OR CONTEMPORARY PERIOD

The path for the legal recognition of transsexual rights has been laid in modern India by substantial judicial and legislative actions. This journey has come a long way. Among the most notable developments are:

❖ ***NALSA V. Union of India (2014) 5 SCC 438***

The Supreme Court’s judgment in *NALSA v. Union of India (2014)*<sup>14</sup> was a historic milestone

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<sup>12</sup> <https://shodhganga.inflivnet.in>

<sup>13</sup> Sapna sugeet pathakji and shilpi sharma, Transgender persons ( protection of Right) Act, 2019: A critical evaluation of right access and Implementation for the transgender community in India, November 2024.

<sup>14</sup> (2014) 5 SCC 438

for transgender rights in India. In this case, the Court recognized that transgender persons are entitled to fundamental rights under the Indian Constitution (Hakim, 2023). Judge Verification: he autonomy of transgender individuals to select their preferred gender expression.

- The responsibility of the state to provide people the opportunity to get official acknowledgment of their gender identity.
- Transgender persons are classified as “socially and educationally backward classes of citizens.”
- It is the government’s responsibility to combat discrimination against transgender individuals
- he autonomy of transgender individuals to select their preferred gender expression.
- The responsibility of the state to provide people the opportunity to get official acknowledgment of their gender identity.
- Transgender persons are classified as “socially and educationally backward classes of citizens.”
- It is the government’s responsibility to combat discrimination against transgender individuals
- he autonomy of transgender individuals to select their preferred gender expression.
- The responsibility of the state to provide people the opportunity to get official acknowledgment of their gender identity.
- Transgender persons are classified as “socially and educationally backward classes of citizens.”
- It is the government’s responsibility to combat discrimination against transgender individuals
  - The autonomy of transgender individuals to select their preferred gender expression.
  - The responsibility of the state to provide people the opportunity to get official acknowledgment of their gender identity.
  - Transgender persons are classified as “socially and educationally backward classes of citizens.”

- It is the government's responsibility to combat discrimination against transgender individuals.<sup>15</sup>

### **Previous attempt for Legislation**

After the NALSA judgment, steps were taken to give legal recognition to transgender rights. One such step was the Rights of Transgender Persons Bill, 2014, introduced in the Rajya Sabha by a private member. However, this bill did not become law, leaving transgender persons without legal rights and protections. Later, the government brought in the Transgender Persons (Protection of Rights) Bill, 2016, but it excluded affirmative action measures and was opposed by activists and the transgender community for its inaccurate definition of transgender persons.

Provisions of the Transgender Persons

(Protection of Rights) Act, 2019

Provisions of the Transgender Persons

(Protection of Rights) Act, 2019

### **Provision of the Transgender persons (Protection of Rights) Act,2019**

The Transgender Persons (Protection of Rights) Act, 2019 was enacted to safeguard the rights of transgender individuals in India by providing a comprehensive legal framework. While the Act contains several provisions, some of the most notable ones are outlined below.

#### **❖ Definition of “Transgender Person”**

As per the Transgender Persons (Protection of Rights) Act, 2019, an individual is recognized as transgender when their self-identified gender does not align with the gender assigned at birth. Section 2(k) of the Act further includes within its scope persons identifying as transgender, intersex, genderqueer, as well as those with socio-cultural identities such as kinnar, hijra, aravani, or jogta.

#### **❖ Right to Self-Perceived Gender Identity**

A key feature of the Act is its recognition of every individual's right to determine their own gender identity. It affirms the right of self-identification as male, female, or transgender. As laid down in Sections 4 - 7 of the Transgender Persons (Protection of Rights) Act, 2019,

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<sup>15</sup> Sapna sugeet pathakji ans shilpi sharma, Transgender persons (protection of Right) Act,2019: A critical evaluation of right access and Implementation for the transgender community in India,November 2024.

individuals may obtain a certificate of identity as transgender by submitting an application to the District Magistrate.<sup>16</sup>

#### ❖ National Council for Transgender Persons

Under the Act, the National Council for Transgender Persons is to be constituted. The central government has assigned this council the responsibility of advising on policy formulation concerning transgender individuals, monitoring and reviewing the implementation of laws and policies, addressing matters related to the welfare of transgender persons, and performing any additional duties entrusted to it by the government.

According to Section 16 of the Transgender Persons (Protection of Rights) Act, 2019, the primary aim of the council is to serve as a central body for addressing national-level issues concerning transgender persons. The subsequent sections will examine these matters in greater detail, highlighting the debates and criticisms surrounding their practical effectiveness and limitations. While these legislations mark a significant step toward acknowledging and safeguarding transgender rights in India, they have also generated considerable controversy and discussion.

#### ❖ Achievements and Advancements

The **Transgender Persons (Protection of Rights) Act, 2019** represents a potentially landmark statute in India, as it formally recognizes the rights of transgender individuals. Enacted in 2019, the legislation lays down several important safeguards. Under **Section 3**, it expressly prohibits discrimination against transgender persons in multiple spheres, including healthcare, education, and employment one of its most significant contributions. In line with international human rights standards, the Act also underscores the necessity of ensuring equal opportunities for transgender individuals, thereby marking an important step forward. Further, **Section 4** affirms the right of individuals to self-identify their gender, reflecting the principles established in the landmark **NALSA judgment** of 2014. Additionally, **Section 8** obliges the government to introduce welfare measures such as healthcare facilities tailored for transgender persons, inclusive education, and vocational training. If effectively implemented, these provisions hold the potential to address some of the systemic challenges historically faced by the transgender community.<sup>17</sup>

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<sup>16</sup> <https://shodhganga.inflivnet.in>

<sup>17</sup> <https://shodhganga.inflivnet.in>

## CASUSES FOR TRANSGENDERISM

The precise causes of gender dysphoria remain uncertain, though multiple factors are believed to contribute. Genetic influences, hormonal changes during prenatal development, and broader environmental conditions may all play a role. Research indicates that exposure to certain chemicals before birth can interfere with typical processes of sex determination. In many cases, gender dysphoria emerges in early childhood. Although the biological mechanisms are not yet fully understood, it is established that new borns are assigned a sex at birth based on visible anatomical characteristics.

The sex a new born is assigned usually dictates their upbringing and how society interacts with them. Over time, however, some individuals experience a disconnect between their gender identity and this assigned sex, often resulting in gender dysphoria. Growing scientific evidence suggests that such differences stem more from biological development than from early life experiences. Research highlights that Brain Structures in the Hypothalamus, especially the BSTc region, are established prenatally and underpin gender identity. When hormonal influences on the fetal brain are disrupted during pregnancy, the brain may develop with a gender identity that does not align with the body's physical sex. Because these babies look typical at birth, they are raised in a way that conflicts with their brain-based gender, which can cause intense psychological discomfort later in life.<sup>18</sup>

Earlier theories suggested that gender was something learned rather than innate. Transgender identity was often seen as a personal lifestyle decision, which contributed to the stigma surrounding it. Some psychological explanations connected to transgender experiences have included parental rejection, growing up without a father, having an emotionally unavailable father, peer pressure, striving for perfection, influence from media portrayals, struggles with self-acceptance, and low self-esteem that may be worsened by negative treatment from society.<sup>19</sup>

Recent developmental explorations of transgender identities suggest that trans people typically go through a process of dissonance, exploration, and disclosures that, when successful, leads to identity resolution. (Pardo, 2008). Following initial feelings of gender dissonance, transgender individuals typically experience a period of identity confusion and exploration.

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<sup>18</sup> <https://shodhganga.inflivnet.in>

<sup>19</sup> *ibid*

This may be a time of excitement and struggle as the person seeks to develop a sense of true self while balancing feelings of guilt and shame, pressures to conform, and the need for secrecy. Individuals may adopt social modifications such as using cross gender pronouns or gender-neutral names; other strategies include immersion in transgender communities and disclosures about being transgender (Grossman & D'Augelli, 2006; Pardo, 2008).

Physicians who perform sex-reassignment surgery (SRS) require the patient to live as the opposite gender in all possible ways for at least a year (this is termed "cross-living") prior to the start of surgery. SRS consists of processes transsexual women and men take in order to match their anatomical sex to their gender identity. Not all transgenders undergo sexual reassignment surgery (either because of the high cost of such surgery, medical reasons, or other reasons), although they live constantly in their chosen gender role; these people are often called non-operative.

## FACTORS RELATED TO TRANSGENDER PERSONS

Some cultures look at people and see six genders, while others see two. Some cultures have created specific ways for people to live in roles that are different from that assigned to them at birth. In addition, different cultures also vary in their definitions of masculine and feminine. Transgender person depends on the cultural lenses we are looking through as well as how people identify themselves.<sup>20</sup>

- Biological Factor

Biologists reveal that sex is a complicated matter, much more complex than what everyone knows. A person has XX chromosomes is generally considered female, while a person with XY chromosomes is generally considered male. However, there are also people who have XXY, XYY, and other variations of chromosomes; these genetic differences may or may not be visibly apparent or known to the person. Some people are born with XY chromosomes, but are unable to respond to testosterone and therefore develop bodies with a vagina and breasts, rather than a penis and testes. A variation in gender may just be part of the natural order and there are more varieties than we generally realize. People with biological differences in gender may be considered intersex; they may or may not identify as transgender person.<sup>21</sup>

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<sup>20</sup> <https://shodhganga.inflivnet.in>

<sup>21</sup> <https://shodhganga.inflivnet.in>

- **Medical Factor**

There are medical theories related to transgender person. Some speculate that fluctuations or imbalances in hormones or the use of certain medications during pregnancy may cause intersex or transgender conditions. Other research indicates that there are links between transgender identity and brain structure.<sup>22</sup>

- **Psychological Factor**

Some people argue that psychological influences explain why transgender individuals exist. However, many transgender people know their identity from their earliest memories and experience their gender as an essential and natural part of who they are. For others, the focus lies on personal freedom—the belief that everyone should be able to present their gender in the way that feels most authentic to them. Since sex and gender are deeply complex, shaped by multiple overlapping factors, there is no single explanation for being transgender. Instead, transgender people reflect the diversity that naturally exists within the human community.

## **THEORIES RELATED TO TRANSGENDER PERSONS**

There are a number of theories about why transgender people exist although there is not yet scientific consensus. There are many theories about how gender identities are formed, including ideas based on biological processes as well as those based on upbringing and developmental psychology. But the truth is that no one really knows what causes us to feel the way we do about our genders. Different forms of cross-gender and gender-diverse behaviours and identities have been documented across cultures and throughout history. In certain societies, individuals who went beyond traditional gender roles were accepted and even respected within their communities. The term “transgender person,” however, is a comparatively modern expression. Regardless of its origins, gender diversity can be understood as a natural part of the broader complexity and variation found in human existence.<sup>23</sup>

- **Essentialist Theory**

This Theory highlights biological factors and views gender as an inherent and unchanging trait, rather than a social construct. It suggests that gender remains largely consistent across time, place, and individuals within society. In essentialism, transgendered individuals might view themselves as always having felt that they were actually members of the sex category opposite

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<sup>22</sup> ibid

<sup>23</sup> <https://shodhganga.inflivnet.in>

their biological sex at birth. Some argue that they were born transgender person; for example, they state that they were born male but have felt for as long as they can remember that they were supposed to be female.

Some people may be biologically male but identify as female in terms of gender. This reflects the **essentialist view of transgender identity**, which suggests that gender identity is something a person is born with rather than something shaped by life experiences. For example, many transsexual individuals feel a strong need to change their physical sex to match their inner sense of gender. They often describe this as being “born in the wrong body” and seek to alter their bodies so that their physical sex aligns with their true gender identity.

➤ Performance Theory

This theory is different from essentialist views, which focus on fixed gender identity, and from social constructionist views, which separate sex and gender. Thinkers like Candace West, Don Zimmerman, and Judith Butler explain gender as something people “do” every day. It is not always linked to sex or identity. Since it becomes routine, most people don’t notice it as a performance but just see it as normal daily behaviour. A person’s display of gender may shift based on the people they are engaging with. For transgender individuals, gender can sometimes be understood more as a form of expression or performance rather than a fixed identity or a reflection of biological sex. The idea of a drag queen illustrates this well—men who present themselves as women in staged performances. While this is a literal example, if we view daily life and social interactions as a kind of stage, it becomes easier to see gender as something that is performed.<sup>24</sup>

➤ Social Constructionism

This theory argues that sex and gender are separate and both are socially created. Sex is defined by the medical system, where doctors decide who is male or female. Gender is also shaped by society, since it changes across cultures and time. While gender is often linked to sex, people can also resist or break these social rules. Transgender people, for example, may see sex and gender as completely different, and believe their gender does not need to match their biological sex. This can lead them to reject traditional gender norms and create their own identity. Gender identity here is understood as something a person develops over time and may change in the future, not something fixed at birth. For example, a T Transgenderist - someone who lives fully

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<sup>24</sup> <https://shodhganga.inflivnet.in>

as the opposite sex but does not want sex reassignment surgery - fits into this view. Their gender does not match their biological sex, but they do not see it as a medical problem.

## **CONCLUSION**

The legal recognition and protection of transgender persons mark a critical advancement in the pursuit of substantive equality and human dignity. The evolving jurisprudence and legislative measures in India, particularly the Transgender Persons (Protection of Rights) Act, 2019, signify an institutional acknowledgment of gender identity as an intrinsic part of personal autonomy guaranteed under Article 21 of the Constitution. Judicial pronouncements such as *National Legal Services Authority v. Union of India* (2014) have further reinforced the constitutional commitment to inclusivity, recognizing the right to self-identify one's gender as fundamental to life and liberty.

However, the journey toward full equality remains unfinished. Persistent gaps in implementation, social stigma, and lack of awareness continue to undermine the transformative potential of legal protections. True justice for transgender persons requires not merely formal recognition but effective realization through sensitization, affirmative policies, and access to socio-economic opportunities. The law must evolve from a framework of token inclusion to one of empowerment ensuring that the rights of transgender persons are protected not only in principle but in practice.

In conclusion, the intersection of transgender identity and law reflects the broader struggle for human rights in a pluralistic democracy. The future of transgender jurisprudence must aim toward an inclusive legal order—one that transcends binary notions of gender and affirms the inherent dignity, equality, and autonomy of every individual.