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Beyond Recognition: Gender Equality, Human Dignity and the Treatment of Transgender Persons During Arrest and Custody in India

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Beyond Recognition: Gender Equality, Human Dignity and the Treatment of Transgender Persons During Arrest and Custody in India

ABSTRACT

The recognition of transgender persons as rights-bearing individuals under constitutional and international human rights law represents one of the most significant developments in contemporary equality jurisprudence. In India, the landmark decision of the Supreme Court in National Legal Services Authority v. Union of India transformed the legal understanding of gender identity by recognizing the right of every individual to self-identify and express their gender. The enactment of the Transgender Persons (Protection of Rights) Act, 2019 further strengthened statutory protection against discrimination. Despite these developments, transgender persons continue to face significant challenges within the criminal justice system, particularly during arrest, search, detention, and imprisonment. This article argues that the formal recognition of transgender rights has not translated into effective custodial protection. The Bharatiya Nagarik Suraksha Sanhita, 2023 retains a predominantly binary structure and does not provide comprehensive procedural safeguards for transgender persons. Consequently, transgender individuals often face misgendering, invasive searches, arbitrary custodial placement, and heightened risks of violence and humiliation. Drawing upon constitutional principles, judicial precedents, statutory frameworks, international human rights standards, and comparative legal experiences, this article examines the gap between legal recognition and lived reality. It contends that genuine gender equality requires the transformation of custodial institutions from binary administrative structures into rights-based systems that respect dignity, autonomy, privacy, and self-identification.

KEYWORDS

*Gender Equality, Transgender Rights, Human Dignity,
Custodial Justice, BNSS 2023, Human Rights, Arrest and
Detention, Criminal Justice System.*

INTRODUCTION

The relationship between state authority and individual liberty is most

visible during arrest and detention. Arrest places a citizen under the direct control of state institutions and simultaneously imposes a heightened obligation upon public authorities to respect constitutional rights, bodily integrity, and human dignity. For transgender persons, however, interaction with law enforcement agencies frequently becomes a source of vulnerability rather than protection.

The struggle for transgender equality has gained significant constitutional recognition in India during the last decade. Courts have increasingly acknowledged that gender identity forms an integral component of personal autonomy, dignity, and liberty. Legislative reforms have sought to prohibit discrimination and facilitate social inclusion. Yet the experiences of transgender persons within police stations, lockups, detention centres, and prisons reveal a reality that is often inconsistent with constitutional promises. The criminal justice system continues to operate primarily through binary categories that recognize only male and female identities, leaving transgender persons in a procedural vacuum.

This contradiction raises a fundamental question for contemporary equality jurisprudence: can a legal system genuinely claim to uphold gender equality when it fails to protect transgender persons at the precise moment when state authority is exercised most coercively?

The issue extends beyond administrative inconvenience. Custodial decisions determine who conducts searches, where detainees are housed, how official records are maintained, and whether individuals are protected from abuse. These decisions directly affect the rights to dignity, privacy, equality, bodily integrity, and personal security. For transgender persons, the absence of clear procedural standards often transforms routine custodial procedures into experiences of humiliation, exclusion, and discrimination.

The significance of this issue is heightened by the constitutional principle that arrest does not extinguish fundamental rights. The Supreme Court of India has repeatedly emphasized that even individuals accused of crimes retain their inherent dignity. In *Prem Shankar Shukla v. Delhi Administration*, the Court held that routine handcuffing violates human dignity and should only be employed in exceptional circumstances. Similarly, in *Citizens for Democracy v. State of Assam*, the Court reaffirmed that restraints such as handcuffs may be used only when justified by necessity and security considerations. These decisions reflect a broader constitutional philosophy that treats dignity as an inseparable attribute of every human being, irrespective of guilt or innocence.

The relevance of these principles becomes particularly pronounced in

relation to transgender detainees. If constitutional jurisprudence recognizes that even an accused person cannot be subjected to unnecessary humiliation through indiscriminate handcuffing, it logically follows that transgender persons should be protected against custodial practices that deny their identity, compromise their safety, or expose them to degrading treatment. Yet such protections remain largely absent from India's procedural criminal law.

The Bharatiya Nagarik Suraksha Sanhita, 2023, which replaced the Code of Criminal Procedure, continues to operate within a predominantly binary framework. While the legislation provides certain safeguards for women and children, it remains largely silent regarding the treatment of transgender persons during arrest, search, detention, and imprisonment. This legislative omission creates uncertainty regarding the conduct of searches, the allocation of custodial accommodation, and the recognition of self-identified gender.

The consequences of this legal silence are evident in practice. Reports by human rights organizations, legal scholars, and civil society groups indicate that transgender persons frequently experience misgendering during arrest and detention. Many are subjected to invasive examinations intended to determine their "biological sex," while others are placed in custodial facilities inconsistent with their gender identity. Such practices not only undermine dignity but also expose individuals to significant risks of harassment, physical violence, and sexual abuse.

Infrastructure deficits further compound these challenges. Most police stations across India continue to operate with only male and female lockups. Separate detention facilities for transgender persons are largely absent. As a result, transgender women are frequently confined in male lockups, exposing them to environments that may be unsafe and degrading. Although some states have initiated measures to establish separate facilities or transgender wards within correctional institutions, these efforts remain limited and unevenly implemented.

From an international human rights perspective, such practices raise serious concerns regarding compliance with principles of equality and non-discrimination. Contemporary human rights law increasingly recognizes gender identity as a protected characteristic and requires states to ensure that all persons deprived of liberty are treated with humanity and respect for their inherent dignity. Consequently, the treatment of transgender persons during arrest and detention has emerged as an important measure of a state's commitment to substantive equality.

This article argues that India's custodial framework reflects a significant

gap between legal recognition and institutional implementation. While constitutional jurisprudence has moved beyond binary understandings of gender, criminal procedure and custodial administration have not evolved at the same pace. Achieving genuine gender equality requires more than symbolic recognition; it requires the creation of clear procedural safeguards capable of protecting dignity, privacy, security, and autonomy at every stage of the criminal justice process.

INTERNATIONAL HUMAN RIGHTS FRAMEWORK

The protection of transgender persons during arrest and detention is not merely a domestic constitutional issue but also a matter of international human rights law. Contemporary human rights instruments increasingly recognize that equality and non-discrimination extend beyond traditional binary understandings of gender.

The Universal Declaration of Human Rights (UDHR) proclaims that all human beings are born free and equal in dignity and rights. Articles 1, 2, 3, 5, and 7 collectively guarantee equality before the law, protection from discrimination, personal liberty, and freedom from degrading treatment. Although the UDHR does not explicitly refer to gender identity, its broad language provides a foundation for the protection of transgender persons.

Similarly, the International Covenant on Civil and Political Rights (ICCPR) requires states to respect the dignity of all individuals deprived of liberty. Article 9 protects against arbitrary arrest and detention, while Article 10 mandates that all persons deprived of liberty shall be treated with humanity and respect for their inherent dignity. These obligations apply equally to transgender persons and require states to ensure that detention conditions do not expose individuals to discrimination or abuse.

The Yogyakarta Principles represent one of the most influential international frameworks concerning sexual orientation and gender identity. Although not legally binding, these principles provide authoritative guidance regarding the application of international human rights law to transgender persons. The principles recognize the right to legal recognition, freedom from discrimination, protection against violence, and humane treatment during detention. They further emphasize that detention facilities must respect an individual's self-identified gender and protect detainees from abuse.

The United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) also reinforce the principle that all prisoners must be treated with respect for their inherent dignity and value as human beings. These standards require prison authorities to

protect vulnerable detainees and ensure safe custodial conditions.

Taken together, these international instruments establish a clear principle: states cannot claim compliance with human rights obligations if transgender persons continue to face discrimination, violence, or degrading treatment during arrest and detention.

COMPARATIVE PERSPECTIVES: GLOBAL APPROACHES TO TRANSGENDER CUSTODIAL RIGHTS

Argentina

Argentina is widely regarded as one of the most progressive jurisdictions concerning transgender rights. The Gender Identity Law of 2012 allows individuals to determine their legal gender without requiring surgery, psychiatric diagnosis, or judicial authorization. Law enforcement agencies are required to respect self-identified gender during arrest, detention, and custodial procedures. This approach reflects a rights-based understanding of personal autonomy and human dignity.

Brazil

Brazil has also adopted significant reforms regarding transgender rights. Judicial decisions and administrative guidelines increasingly require state authorities to recognize self-identified gender. Courts have emphasized that custodial placement decisions must consider both safety and gender identity. These measures have contributed to greater recognition of transgender rights within correctional institutions.

Nepal

Nepal occupies a unique position within South Asia. Following the landmark decision in *Sunil Babu Pant v. Nepal Government*, transgender persons received constitutional and legal recognition. Nepal officially recognizes a third gender category and has taken steps to incorporate gender diversity into public administration. Although implementation challenges remain, Nepal demonstrates that legal recognition can be integrated into state institutions.

United Kingdom

The United Kingdom has developed detailed custodial guidance for transgender detainees. Prison authorities conduct individualized risk assessments and consider factors such as self-identified gender, safety concerns, and personal circumstances. While debates continue regarding implementation, the existence of clear procedures provides greater certainty and accountability.

Malaysia and Brunei

In contrast, Malaysia and Brunei continue to maintain legal restrictions that adversely affect transgender persons. Laws criminalizing gender expression have resulted in arrests and prosecutions of transgender individuals. Human rights organizations have criticized these practices as inconsistent with international principles of equality and non-discrimination.

Kuwait and Nigeria

Kuwait and Nigeria have similarly faced criticism for laws targeting cross-dressing and gender non-conforming behaviour. Such provisions grant broad discretionary powers to law enforcement authorities and contribute to discriminatory treatment of transgender persons.

Indonesia

Reports from Indonesia indicate that transgender individuals are frequently targeted through public-order regulations and anti-prostitution laws. Human rights organizations have documented instances of arbitrary detention, public humiliation, and coercive treatment. These practices highlight the risks associated with vague legal frameworks and inadequate safeguards.

The comparative experience demonstrates that legal recognition alone is insufficient. Jurisdictions that provide clear custodial procedures, individualized assessments, and institutional accountability are more successful in protecting transgender rights than those relying solely on symbolic recognition.

RECOMMENDATIONS AND REFORM AGENDA

The realization of substantive gender equality requires structural reforms capable of addressing both legislative and institutional shortcomings.

First, the Bharatiya Nagarik Suraksha Sanhita, 2023 should be amended to explicitly recognize transgender persons within arrest, search, and detention procedures. The legislation should clearly state that gender identity must be respected throughout the criminal justice process.

Second, transgender persons should possess the right to choose the gender of the officer conducting searches and personal examinations. Such a safeguard would protect privacy, dignity, and bodily autonomy while reducing the risk of abuse.

Third, comprehensive custodial guidelines should be introduced across

all states. These guidelines must establish clear procedures concerning documentation, accommodation, healthcare, searches, and grievance redressal mechanisms.

Fourth, police stations and correctional facilities should develop transgender-sensitive infrastructure, including separate detention spaces, washrooms, and healthcare facilities where necessary. These measures should be implemented in a manner that promotes safety without reinforcing segregation or stigma.

Fifth, mandatory sensitization programmes should be incorporated into police academies and correctional training institutions. Effective implementation requires not only legal reform but also institutional awareness and cultural change.

Sixth, independent oversight mechanisms should monitor compliance with constitutional and human rights standards. Human rights commissions, prison visiting committees, and judicial authorities should play a proactive role in addressing custodial discrimination.

Finally, governments must collect reliable data regarding transgender persons within the criminal justice system. Evidence-based policymaking is essential for identifying systemic deficiencies and designing effective reforms.

CONCLUSION

The recognition of transgender persons under constitutional and international human rights law represents a significant achievement in the global struggle for equality. In India, judicial decisions such as *National Legal Services Authority v. Union of India* and legislative measures such as the *Transgender Persons (Protection of Rights) Act, 2019* have contributed substantially to the advancement of transgender rights. These developments affirm that gender identity forms an essential component of dignity, autonomy, and liberty.

Yet legal recognition alone does not guarantee substantive equality. The experiences of transgender persons within police stations, detention centres, and prisons reveal a persistent gap between constitutional ideals and institutional realities. The *Bharatiya Nagarik Suraksha Sanhita, 2023* continues to operate within a predominantly binary framework and provides limited guidance regarding the treatment of transgender detainees. As a result, transgender persons remain vulnerable to misgendering, invasive searches, inappropriate custodial placement, and various forms of discrimination.

The challenge confronting India is therefore not merely one of implementation but also one of legal design. Constitutional jurisprudence has evolved beyond binary understandings of gender, yet procedural criminal law has not kept pace with this transformation. Bridging this gap requires comprehensive reform capable of integrating principles of dignity, equality, privacy, and self-identification into every stage of the criminal justice process.

A democratic society committed to human rights cannot permit constitutional protections to end at the gates of a police station or prison. The true measure of gender equality lies not only in judicial declarations or legislative enactments but in the everyday experiences of individuals who encounter state power in its most direct form. Ensuring dignity and safety for transgender persons during arrest and detention is therefore not merely a legal obligation – it is a test of the constitutional promise of justice itself.

ENDNOTES

- National Legal Services Authority v Union of India (2014) 5 SCC 438.
- The Constitution of India, arts 14, 15, 16, 19 and 21.
- Prem Shankar Shukla v Delhi Administration (1980) 3 SCC 526.
- Citizens for Democracy v State of Assam (1995) 3 SCC 743.
- Justice K.S. Puttaswamy v Union of India (2017) 10 SCC 1.
- Navtej Singh Johar v Union of India (2018) 10 SCC 1.
- The Transgender Persons (Protection of Rights) Act, 2019.
- The Bharatiya Nagarik Suraksha Sanhita, 2023.
- Universal Declaration of Human Rights, 1948.
- International Covenant on Civil and Political Rights, 1966.
- Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, 2006.
- United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), 2015.
- Ministry of Home Affairs, Advisory on Treatment and Care of Transgender Persons in Prisons (2022).
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Legislation

- Constitution of India.
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- Bharatiya Nagarik Suraksha Sanhita, 2023.

International Instruments

- Universal Declaration of Human Rights, 1948.
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- Yogyakarta Principles, 2006.
- Nelson Mandela Rules, 2015.

Government Documents

- Ministry of Home Affairs, Advisory on Treatment and Care of Transgender Persons in Prisons (2022).