

Social justice to Transgender is a human rights issue

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“There isn’t a trans moment. ... It’s just a presence where there was an absence.

We deserve so much more.” - Hari Nef¹

Introduction

Even after thousands of year civilization in our society where we are leaving not treating every human equally. Even today people and legal system is based on stereotypical thoughts. As we know every human by virtue of his birth will possess human rights after that based on legal development different legal rights. Among all these rights gender identity is one. Traditional gender norms will give priority for male or female only even though the transgender existed in this society since ancient period. The condition of the transgender community is very bad. They have been even fighting for their basic human rights and fundamental right from the whole world. In fact going to prison is less hard than becoming a transgender in this society. They are not able to enjoy the rights which are easily enjoyed by other two genders male and female. Majority of transgenders face discrimination in their lifetime by their own family and everywhere in the society like in education or employment field ect. Society has failed to accept their gender identity due to which they have suffered from discrimination, social oppression and physical violence. There are certain socio-cultural groups of transgender people who are identified as Hijras, Jogappas, Sakhi, Aradhis etc. and there are people who do not belong to any of the groups but are regarded to as transgender person individually.

In India since ancient age even though transgenders has special place in religious matters in reality they has been suffering a lot. They were forced to be recognized either as male or female. But in the landmark judgment of National Legal service authority v union of India² the third gender gained legal recognition in the eyes of la as the Hon’ble SC ruled that the fundamental rights should be available to the third gender in the same way as they were provided to the male and females. By the division bench of Justices K.S. Radhakrishnan and A.K. Sikri held that “Recognition of Transgenders as a third gender is not a social or medical issue but a human rights issue”.

¹ <https://www.shethepeople.tv/news/20-amazing-quotes-by-transgender-people-that-will-inspire-you/>

² AIR 2014 SC 1863

Problems faced by transgenders

The problems, faced by transgenders are discrimination, lack of educational facilities, unemployment, lack of shelter, lack of medical facilities like HIV care and hygiene, depression, hormone pill abuse, tobacco, and alcohol abuse, and problems relating to marriage, property, electoral rights, adoption. Ministry of Law and Ministry of Social Justice and State Governments need to recognize the deprivation suffered by transgender people and work on much-needed reform. In India, there is a host of socio-cultural groups of transgender people like hijras/ kinnars, and other transgender identities like – shiv-shaktis, jogtas, jogappas, Aradhis, Sakhi, etc. However, these socio-cultural groups are not the only transgender people, but there may be those who do not belong to any of the groups but are transgender persons individually. Though an accurate and reliable estimate of transgender people is not available, it cannot be denied that their number is minuscule compared with the total population of the country.

Transgender people in India face a variety of issues. So far, these communities perceive that they have been excluded from effectively participating in social and cultural life; economy; and politics and decision-making processes. A primary reason (and consequence) of the exclusion is perceived to be the lack of (or ambiguity in) recognition of the gender status of hijras and other transgender people. It is a key barrier that often prevents them from exercising their civil rights in their desired gender. So far, there is no single comprehensive source on the basis of which an evidence-based advocacy action plan can be prepared by transgender activists or possible legal solutions can be arrived at by policymakers. Reports of harassment, violence, denial of services, and unfair treatment against transgender persons in the areas of employment, housing and public accommodation have been discussed in local media, from time to time.

Violation of Human Rights

They are deprived of social and cultural participation and hence they have restricted access to education, health care and public places which further deprives them of the Constitutional guarantee of equality before law and equal protection of laws. It has also been noticed that the community also faces discrimination as they are not given the right to contest election, right to vote (Article 326), employment, to get licenses, etc. and in effect, they are treated as outcast and untouchable.

The transgender community faces stigma and discrimination and therefore has fewer opportunities as compared to others. They are hardly educated as they are not accepted by the society and therefore do not receive proper schooling. Even if they are enrolled in an educational institute, they face harassment and are bullied every day and are asked to leave the school or they drop out on their own. It is because of this that they take up begging and sex work.

Seldom does a skilled individual from this community get into formal employment due to the policy of hiring only from either the male or female gender. Even if they do, they are ridiculed and ostracized and hence forced to leave their jobs.

They are forced into sex work which puts them at the highest risk of contracting HIV as they agree to unprotected sexual intercourse because they fear rejection or they want to affirm their gender through sex. They are viewed as ‘vectors’ of HIV in the society. Other sexually transmitted infections such as rectal gonorrhea, syphilis, rectal Chlamydia, etc., add to the risk of HIV.

The International Bill of Gender Rights

The International Bill of Gender Rights also establishes the right to self-determination of one’s gender identity and to medical care that allows individuals to realise this. The Right To Free Expression Of Gender Identity is the right to define one’s own gender identity, all human beings have the corresponding right to free expression of their self-defined gender identity. Therefore, all human beings have the right to free expression of their self-defined gender identity; and further, no individual shall be denied Human or Civil Rights by virtue of the expression of self-defined gender identity. The Right To Control And Change One's Own Body is that all human beings have the right to control their bodies, which includes the right to change their bodies cosmetically, chemically, or surgically, so as to express self-defined gender identity. Therefore, individuals shall not be denied the right to change their bodies as a means of expressing a self-defined gender identity; and further, individuals shall not be denied Human or Civil Rights on the basis that they have changed their bodies cosmetically, chemically, or surgically, or desire to do so as a means of expressing self-defined gender identity. The Right To Competent Medical And Professional Care is given to the individual's right to define one's own gender identity, and the right to change one's own body as a means of expressing a self-defined gender identity, no individual should be denied access to competent medical or other professional care on the basis of the individual's chromosomal sex, genitalia, assigned birth sex, or initial gender role. Therefore, individuals shall not be denied the right to competent medical or other professional care when changing their bodies cosmetically, chemically, or surgically, on the basis of chromosomal sex, genitalia, assigned birth sex, or initial gender role.

Rights under Indian Constitution

The preamble to the constitution mandates every citizen Justice: – social, economic, political equality of status. The Indian state policy that earlier recognized only two sex i.e. only male and female has deprived the third gender from their several rights as being an Indian citizens, which includes right to vote, the right to own property, the right to marry, the right to claim a formal identity through a passport etc. and more importantly their the right to education, employment, health so on. The basic rights which they were deprived from are their fundamental rights under Article 14, 15, 16 and 21. The rights of transgender where for the first time considered under the 2014 NALSA Judgment³ where the supreme court laid emphasis on protecting and safeguarding the rights of the transgender person under the principles of Indian Constitution laid down in Article 14, 15,16 and 21.

³ AIR 2014 SC 1863

Article 14, 15 and 16 provides right to equality and Article 21 which provides right to freedom for each and every Indian citizen but transgender person where deprived from their basic right to freedom and equality.

Article 14 deals with Equality before the law or equal protection before the law within the territory of India. Article 14 clearly falls within the expression “person” which includes the male, female and third gender within its ambit so the transgender are also entitled to legal protection under Indian constitution in all the spheres of state activity.

Article 15 which deals with the prohibition of discrimination on the ground of religion, race, caste and sex includes the third gender under its ambit as being the citizens they have the right to not to be discriminated on the ground of their religion, caste race and sex. They have the right to protect their gender expression which is majorly reflected through their dresses, action and behavior.

Article 16 deals with equality of opportunity in the matters of public employment as this article is used to broaden the concept of sex which includes “Psychological Sex” and gender identity within its ambit. The transgender being the citizens of India has the right to employment and equal opportunity in the matters of employment and they should not be discriminated on the basis of their sexual orientation.

Article 21 which deals with the protection of life and personal liberty states that no person shall be deprived of his life and personal liberty except according to the procedure of law. For ages transgender have been deprived of their life and personal liberty. The transgender being the citizen of India should have full right to protect their right and personal liberty. The Supreme Court has also recognized the right to dignity by recognizing gender identity within the ambit of Article 21.

The case *Navtej Singh Johar v. the Union of India*⁴ deals with the Decriminalization of Section 377 of the Indian Penal Code as the central issue of the case was the constitutional validity of the of Section 377 as it stated that “voluntarily carnal intercourse against the order of nature with any man, woman or animal shall be with punished with imprisonment for life, or with imprisonment which may extend to ten years with a fine.” The petition was filed stating that Section 377 of the Indian penal code is in violation of right to privacy, equality, freedom of expression and protection against discrimination. The petitioner in the present case filed the writ petition to seek the recognition of right to sexuality, right to sexual autonomy and right to choose a sexual partner to be a part of right to which is guaranteed under Art 21 of the Constitution of India. The petitioner in the present case argued that Section 377 was violative of Article 14 as it was vague in the sense that it did not define “carnal intercourse against the order of nature” and there was no intelligible differentia between natural and unnatural consensual sex. Section 377 was further violative of Article 15 as it discriminates on the basis of the sex of a person’s sexual partner and it was further violative of Article 19 as it denied the right to express one’s sexual identity.

The Hon’ble Supreme court in the present case held that Section 377 should be decriminalized and affirmed that homosexuality is not an aberration but a variation of sexuality. The Court further held that discrimination on the basis of sexual orientation is violative of right to equality and right to privacy as sexual orientation forms an

⁴ AIR 2018 SC 4321

inherent part of self identity and denying the following rights is violative of right to life and fundamental right cannot be denied.

Prohibition against discrimination

Transgender people have suffered from discrimination for ages in the matters of housing, health, education and employment. The discrimination suffered by them emanates from the social stigma and isolation that they suffer from lack of resource which were provided for Transgender people. To safeguard the rights of transgender people and to protect them from the discrimination, The Transgender Person (Protection of Rights) Act, 2019 includes the prohibition against discrimination which most importantly includes important sectors like employment, education and health care sectors.

Education

The education of transgender person is equally important like other male or female gender but the social stigma that transgender person faces breaks their interest and focus towards their learning and they develop a feeling of being avoided, ignored and disgraced and the transgender students are often denied to be admitted in educational institution as the educational institution does not recognize their gender identities. To protect their right, The Transgender Person (Protection of Rights) Act, 2019 provides that the educational institution that are funded or recognized by government shall provide education, recreational facilities and sports for transgender person without discrimination.

Employment

The transgender persons have suffered workplace discrimination and discrimination in the matters of employment. They suffer discrimination mainly in the form of privacy violation, refusal to hire and harassment which leads to unemployment and poverty. To prevent the discrimination suffered by them the transgender person protection act states that no government or even the private entities can discriminate against transgender person in the matters of employment which includes recruitment and promotions and every establishment should designate a person to be a complaint officer to deal with the complaints in relation to the act.

In the case of Nangai v the Superintendent of Police⁵, the petitioner in the present case had applied for the post of a woman police constable. The Tamil Nadu Uniformed Services Recruitment Board, Chennai conducted the application tests. Petitioner's application was successful and she received an order of appointment from the Superintendent of Police at Karur district. During the course of her training at the Police Recruit School in Vellore, she underwent a medical examination. The examination declared that she was "transgender" on the basis of chromosomal pattern and genitalia. The result of the medical examination contradicted her birth certificate, medical records, and educational certificates. Later on The Superintendent ordered her termination from the post of woman constable. The Hon'ble High Court upheld that the petitioner has liberty to chose a different gender identity as a third gender in future based on the medical declaration and the impugned order of

⁵ (2014) 4 MLJ 12

termination from service issued by the Superintendent of Police, was set aside by the Hon'ble court to protect her right as a transgender person.

Health care

The health care services for the transgender person does only refers to the medical procedure involved in transition but health refers to a overall state of complete physical, mental and social wellbeing. Health care also refers to a range of primary and other health care services which includes employment, housing and public acceptance of the transgender people. As the transgender person have suffered from substantial health disparities and barrier to appropriate health care services for ages had made them to suffer depression, attempted suicide, violence and harassment and even the HIV. To provide them protection and help them to lead a happy life The Transgender Person (Protection of Rights) Act, 2019 states that government should take proper steps to provide health care facilities to transgender person and it should include separate HIV surveillance centers and sex reassignment surgeries and Transgender persons should be provided with a comprehensive medical insurance.

Welfare measures

Transgender persons have been discriminated and neglected by the society for a long time but to bring them back to the mainstream of the society several welfare measures have been taken for the transgender person as in Tamil Nadu there was an instance where land was provided for Aravanis and in Andhra Pradesh, the State government had ordered the Minority Welfare Department to consider "Hijras" as a minority group and to develop welfare schemes for Transgender. The department of social welfare board in Tamil Nadu established 'Aravanigal/Transgender Women Welfare Board to address the social welfare issues of Transgender person. The transgender person Protection Act, 2019 has provided that relevant government should take measure and ensure full participation of transgender person in society and to formulate certain welfare schemes and measures to protect the right of the transgender person.

Immoral Traffic Prevention Act of 1956 which was amended in 1986 has become a gender neutral legislation. The domain of the Act now applies to both male and female sex workers along with those whose gender identity was indeterminate. With the amendment both the male and hijra sex workers became criminal subjects as this gives the police the legal basis for arrest and intimidation of the transgender sex workers.

Section 377 of IPC criminalizes same sex relations among consenting adults. This is a colonial era law which makes the Transgender community vulnerable to police harassment, extortion and abuse. In *Jayalakshmi v. State of Tamil Nadu*⁶, Pandian, a transgender, was arrested on charges of theft by the police. He was sexually assaulted in the police station which ultimately led him to immolate himself.

⁶ (2007) 4 MLJ 849

Directions to the central and state government

The court⁷ as issued certain directions to the central and state government which are:

- Hijras, eunuchs should be treated as third gender for the purpose of safeguarding their fundamental rights,
- Recognize the persons' need to identify his own gender,
- Providing reservations in public education and employment as socially and educationally backward class of citizens,
- Making special provisions regarding HIV sero-surveillance for transgender persons and provide appropriate health facilities,
- Tackle their problems such as fear, gender dysphoria, shame, depression, suicidal tendencies, etc.
- Measures should be taken to provide health care to transgender people in hospitals such as making separate wards and also provide them separate public toilets,
- Frame social welfare schemes for their all round development,
- To create public awareness so that the transgenders feels that they are part of the society and are not to be treated as untouchables.

The judgment has marked a break from otherwise paternalistic and charitable approach of the state towards the transgender community by framing their concerns as a matter of rights.

Right of Transgender Persons Bill, 2014

The Bill was introduced in Rajya Sabha on 12th December, 2014 which is passed on 24th April, 2015 unanimously, with cross-party support. This was a private member's bill introduced by the MP from Tamil Nadu, Tiruchi Siva. 24th April is celebrated as Transgender day following the passage of the Bill in the Rajya Sabha.

The rights guaranteed under the Bill are mostly **substantive rights** such as the right to equality and non-discrimination, life and personal liberty, free speech, to live in a community, integrity, along with protection from torture or cruelty and abuse, violence and exploitation. There is a separate clause for transgender children.

Education, employment and social security and health are also covered under the Bill. The chapter on education makes it mandatory for the Government to provide inclusive education for transgender students and provide adult education to them.

With the employment chapter, there are two separate clauses dealing with formulation of schemes for vocational training and self-employment of transgender persons by the Government. There's a separate clause for non-discrimination against transgender persons in any establishment – public or private.

In the social security and health chapter, the Government is asked to propagate social security and health care facilities which are to be provided in the form of separate HIV clinics and free SRS. They should be given the

⁷ AIR 2014 SC 1863

right to leisure, culture and recreation. Basic rights like access to safe drinking water and sanitation must be provided by the government.

The Bill envisages setting up a number of authorities and forums – **National and State Commissions for Transgender Persons**. The Commissions work will be mostly in the nature of inquiry or recommendations in the inconsistencies in the application of the law or violations of right of transgender persons. The Commissions can issue summons to witnesses, receive evidence, etc. There is penalty by way of imprisonment for upto a year for hate speech against transgender people.

Transgender Persons (Protection of Rights) Bill, 2016

After the judgment in the case of *National Legal Service Authority v. Union of India*⁸ the Transgender Persons (Protection of Rights) Bill was introduced in Lok Sabha in the year 2016. The Bill has been divided into various chapters dealing with various rights that are to be granted to transgender against the prevailing discrimination faced by them. Section 13 of the Chapter deals with the transgender's right of residence. Section 13(1) clearly states that a transgender person should not be separated from their family and immediate family on the ground of their gender identity. Section 13(2) provides them with the right to enjoy the household and use all facilities available in the house. This provides them with the right to maintenance as other members of the family irrespective of their gender. The bill introduced by the Lok Sabha though talks about the transgender right of residence but does not talk about their inheritance rights. They are not given the status of coparcener in the Joint Hindu Family with their gender identity nor as a legal heir of their parents separate property. The bill needs a lot of correction as transgender are citizens of India and should be recognized in every law concerned with their Human and Legal Rights as third gender.

Conclusion

Transgender rights are part of human rights. It is natural right of every person whether that person is of any gender enjoy freedom to learn, love, work and play. We know that gender is not in our hand it depends on genes, hormones or environmental factor but after that we discriminate the transgender community. In recent years the law, policies and attitudes of social change and allow more transgender people to live safer and healthier life. It is the duty of Government to engage with transgender to easily understand their concerns and support them whenever their human right violate. It is the duty of every educated person, media, government, NGOs to sensitize society about basic human rights of the third gender.

⁸ AIR 2014 SC 1863