"TRANSGENDERS ARE NO WAY DIFFERENT" - PROTECTION OF THEIR RIGHTS

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ABSTRACT

We all are well aware of the marginal community which is recognized as 'Third Gender' by the apex court in the year 2014. Transgender is a term used for those persons whose gender identity is different from the sex assigned at the time of birth. It has been used as an umbrella term for those individuals identified as transvestites, transsexuals, gender queer, no gender or multiple genders. Transgenders still live in a life of discrimination and complications in society. Are they different from other sexes? Shouldn't they get treated equally? The authors of this research article with various references would like to cite out the reasons behind it. Furthermore, The authors would be substantiating the present status of transgender people in different countries and the challenges faced by them.

Keywords: Transgender, gender equality, discrimination, LGBT, hormones.

INTRODUCTION

Transgender people come from all walks of life. They are not new to the society. They exist from the beginning episodes of the human race. To trace the origin of the community we shall at least have to travel back to the period of Mahabharata and Ramayana. In one of the versions of Ramayana, when Lord Rama left Ayodhya for exile, a huge crowd of subjects who had immense devotion towards him followed him to the forest. Having concern on them, Lord Ram asked "All the men and women" to return to their houses. After the completion of the exile period and having all the adventures, Ram returned to his Kingdom. He later came to know that all the citizens who were neither men nor women were staying still in the place of his speech. Overwhelmed by their devotion, he granted them a boon. Similarly, in Mahabharata when the period of exile was nearing the end, the sons of Pandu, to avoid getting caught had changed their identity. Mighty Arjun portrayed himself as a transgender under the name 'Brihannala'. The transgender community is incredibly diverse.

One of a well-known community with regard to transgender is LGBT Community. LGBT community includes Gay, lesbian, bisexual and, transgender. On one hand, gay and lesbians are those set of people who are attracted towards same-sex (commonly known as homosexuals) while bisexuals are those people who are both homosexual and heterosexual. On the other hand, the term Transgender is used for those people whose gender identity is different from the sex assigned at the time of birth. Here, there is a minute difference between transgender and transsexual people. Transsexual people are those who undergo medical treatment into opposite sex. As the saying goes, There are always two sides to a coin. The same principle applies here too. Although, Transgenders are recognized by a community, even after many centuries they are still treated as aliens. The discrimination of the LGBT community with regard to transgender was brought to light only in the 20th century. To date, this community is seen as a threat and are being out-casted by our society.

CHALLENGES FACED BY TRANSGENDER PEOPLE

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Though the visibility of transgender people is increasing in daily life, they are still discriminated, disrespected and downtrodden. One of the main challenges faced by transgender people is how to live an authentic life in a society which maintains rigid gender norms and beliefs. In National Legal Services Authority Vs Union of India and Ors,\(^1\) The Supreme Court had not only recognized transgender as a 'third gender' but also directed the Centre and the State Governments to take necessary steps for various Social Welfare Schemes and run public awareness campaigns to erase all the social stigma. Even after certain changes people still don't behave normally in their presence which makes them feel degraded and unworthy to live. They have not only been segregated from the society but also have been ostracized from their rights and privileges. As much as our society is developing in many aspects but when it comes to transgender people the society hesitates to accept them as a part of society. Some of the major areas in which they face problems and which needs to be covered by the government are as follows:

**EDUCATION**

It is one of the biggest challenge faced by transgender people. They were denied their educational rights by not providing admissions to them. Around 1% - 2% of transgenders were only able to make it to the higher level of education. Due to the lack of education, government and private jobs were unavailable for the transgender community which leads to inequality. Their opportunities to participate in social, economic and finance sectors are curbed which puts them to the limited options to earn their livelihood.

**POVERTY**

Lack of legal protection amounted to unemployment for the sexual minorities. According to the National Transgender Discrimination Survey (NTDS), it was established that 15% of the transgender people were living in severe poverty by singing and begging in platforms and traffic signals. This was their daily life scenario. They weren't able to afford basic living necessities due to their unemployment which resulted in homelessness and lead them to engage in different illicit activities for their survival.

**DISCRIMINATION AND IGNORANCE**

Class and gender discrimination has been a major problem for transgender in terms of education, employment, entertainment, justice etc. Transgenders who are open about their gender identity in the workplace are more likely to face harassment from their co-workers and are bound to change jobs.\(^2\)

**DISRESPECT**

Transgenders are disrespected in all walks of their lives. People don't behave normally in their presence. They are always looked as unworthy and degraded to live. There are many cases in which their own family members fail to accept them as a member of their family. Transgenders are respected only in few occasions where there blessing are valued after the birth of a child or to a newly wedded couple.

**IDENTITY DOCUMENTS**

Lack of accurate identity documents has a great impact on every area of their lives. Without identification, one cannot essentially function in the society. Identity documents are required to gain access to many public services. Many states require identity proof for the medical transition. Such medical treatments are beyond the affordability of the Transgenders. According to NTDS, among those individuals who have already transitioned 33% had not been able to update their identity documents successfully fearing embarrassment.

**SOCIAL EXCLUSION**

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\(^1\) AIR2014SC1863

The major problem in this whole process is that Transgenders are socially excluded from society. They are excluded from participating in all social, cultural, and economic activities. They struggle a lot to even exercise their basic rights. In 1994, they were given the right to vote but were denied of their voter identity cards and were questioned based on their identity. They are not only restricted from entering into religious places but are also restricted to enter into public restrooms. Some of the barriers which lead to exclusion are:-

- a) Economy, employment and livelihood opportunities
- b) Lack of medical facility
- c) Limited access to public spaces
- d) Rights of citizenship
- e) Excluded from decision-making
- f) Lack of social security
- g) Lack of protection from violence

ACCESS TO JUSTICE

Despite India being the world's largest constitutional democracy, there are still some controversial issues with regard to undermining alternative sexualities in the heteronormative caves. In Jayalakshmi Vs State of Tamil Nadu, Pandian, a transgender, was arrested by a police officer on the charges of theft. He was sexually abused in the police station which ultimately led to immolate himself in the premises of the police station. In addition to that, A policemen arrested Narayana, a transgender, in Bangalore on suspicion of theft without providing sufficient information to him.

Such atrocities have been prevailing on a day to day basis. The laws which have to protect the people are the ones that cause great harm to the Transgender Community. Immoral Traffic Prevention Act, 1956 (ITPA) (amended in 1986) was enacted for the sole purpose of preventing the trafficking of women and children indulging into prostitution. With the 1986 amendment, the scope and ambit of the act have become applicable not only to male and female workers but also to those whose gender identity was indeterminable. Thus, both male and hijra sex workers became criminal subjects under the act and it provided the legal basis for the arrest of the transgender sex workers population.

As per The Workmen's Compensation Act, 1923, The sexual minority or the Transgenders are not recognized as a 'Person' for the purpose of insurance claims, compensation and nomination for the purpose of gratuity benefits. In reality, the Transgender Community in India is living in a precarious environment which is dominated by oppression, discrimination, and systematic exclusion.

JOURNEY FROM SOCIAL EXCLUSION TO INCLUSION

The Preamble of the Indian Constitution dictates justice, social, economic and political equality of status to all its citizens. The Constitution guarantees the fundamental right to equality and promises no discrimination on the basis of caste, religion, race, sex, and place of birth through Article 14 and 15 respectively. Article 14 of the Indian Constitution i.e., Equality before law states that 'The State shall not deny to any person equality before the law or equal protection of the laws within the territory of India'. The Constitution makers were of the opinion that no person within the territory of India should be denied of these rights. Article 14 deals with both positive and negative aspects of equality wherein the first part deal with 'Equality before Law' while the second part throws a light on 'Equal protection of laws'. Even during the time of Lord Buddha, there were many inequalities sanctioned by the public policies and were supported by many religions. It wasn't possible to remove such inequalities with the provision alone. Necessary steps were taken by the State as well as by the public to expressly abolish and prohibit such inequalities. Being a responsible citizen, we are well aware that the normal gender and transgender people share the same amount of rights as prescribed in the Indian Constitution.

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3 (2007) 2 SCC 1
Article 15 of the Indian Constitution i.e., Non-discrimination on the ground of religion, race, caste, sex, and, place of birth states that “The State shall not discriminate against any citizen on the grounds of race, caste, religion, sex, place of birth or any of them. The provisions of the Indian Constitution grants a fundamental right to citizens as well as noncitizens. Article 15 provides equality to all persons in case of prohibition of any sort of discrimination. In Suresh Kumar Koushal Vs NAZ Foundation, it was held that the term ‘sex’ has to be given a broader perspective than the binary norm of biological sex. Furthermore, In Christine Goodwin Vs United Kingdom, the European Court of Human Rights after giving a wider scope to the term ‘sex’ held that brain sex also comes under the purview of the term ‘sex’.

Social equality to these communities can only be provided by interpreting Article 15 (2) and Article 16 (4) of the Indian Constitution wherein the States have been given the power to make any special provision with regard to the upliftment of these vulnerable minority. At present, they are given equal opportunity and are included in socially and educationally backward classes. On one hand, Article 5 of the Indian Constitution clearly states as to who are entitled to be citizens of India. On the other hand, the conditions specified doesn’t determine sex or gender identity as a pre-condition for acquiring citizenship. This undoubtedly explains that transgender has all the right to express their feelings and personality towards the society. The State is bound to protect their rights without any restriction and consider them as one among the others.

The transgender community must have a right to dignified life as assured under Article 21 of Indian Constitution. This can be resolved only when they are identified and accepted as a gender in society. In State of Maharashtra Vs Public Concern for Governance Trust, it was held that a good reputation was an element of personal security and was protected by the Constitution, equally with the right to the enjoyment of life, liberty, and property. Therefore, Transgender has the full right to express and live their life without any fear.

Various inhuman activities such as human trafficking and beggary are declared as an offence and are punishable under law. Article 23 of the Indian Constitution should be read with a broad spectrum as it forbids any form of discrimination. The main intention of this provision is to secure the independence of an individual identity by preventing exploitation. Due to the economic status, Transgenders are exploited and tend to indulge in immoral activities such as prostitution. Ultimately, they are seen as taboo by society.

OTHER LEGAL PROVISIONS

There are certain Legal Acts that identifies the transgender community without any specific provision.

• **THE CITIZENSHIP ACT, 1955**: The act stipulates the acquisition and determination of Indian Citizenship whereas there is no clear-cut provision which expressly or impliedly determines sex or gender identity as a pre-condition to acquire citizenship. Special measures have been taken by the Election commission to enroll the transgender persons as electors.

• **THE GENERAL CLAUSES ACT, 1897**: The term ‘person’ under the act is couched with a wider ambit i.e., it includes any company or association or body of individuals, whether incorporated or not. Section 13 of the said act stipulates that the words importing the masculine gender shall be taken to
include females. This stipulation is itself conditioned by statutory direction unless there is anything contradictory in the subject or context. A harmonious reading must be given to the aforesaid provisions which would clearly state that Transgender persons would fall within the ambit of the definition of the term 'person'.

- **THE REGISTRATION OF BIRTHS AND DEATHS ACT, 1969**: The act is gender neutral. It does not specify anything about sex or gender of a person to be registered in case of birth or death. The crucial component of identification is based on sex. However, the requirement of indicating the sex or gender of a person in case of birth or death in the birth or death certificates has not been mentioned in the provisions of the act.

**PROTECTION UNDER INTERNATIONAL PROVISIONS**

The edifice of any democratic government rests on the three pillars i.e., the executive, the legislature and the judiciary. Despite plethora enforcements and amendments with regard to the protection of human rights, India is still facing a difficulty in the matters concerned with Transgender community. Besides the above-mentioned three pillars, there are other bodies that enhance human rights protection across the globe. The Universal Declaration of Human Rights (UDHR)\(^{13}\) and The International Covenant on Civil and Political Rights\(^{14}\) are recognized for its inherent dignity and inalienable rights to all the members of the human family.\(^{15}\) Article 6 of UDHR and Article 16 of ICCPR clearly states that every human being has the inherent right to live and this right shall be protected by law and no one shall be arbitrarily denied of that right. It also emphasizes that every single person shall not be denied of the right to recognition. Article 7 of the ICCPR states that no one shall be subject to any kind of torture or to cruel, inhuman or degrading treatment or punishment. Furthermore, Article 17 of the ICCPR refers to the right relating to the protection of law against any inference or attack.

**JUDICIARY’S STEP TO ADMINISTER EQUALITY**

Judiciary has often been a great rectifier of populist oppressions. Judicial guidelines often pioneer the causes of the downtrodden and the underprivileged.

**LEGAL RECOGNITION AS THIRD GENDER**

Transgender apart from binary gender has been recognized as the third gender by the apex court for the purpose of safeguarding their fundamental rights enshrined in Part III of The Indian Constitution. Their right to be self-identified gender such as male, female or as transgender has also been upheld. It has been ordered by the court to the central and state government to address the community’s issue deliberately and further declared that insisting a Transgender to undergo sex reassignment surgery is iniquitous and illegal. Further, it has declared that not recognizing them in the fields of marriage, divorce, and adoption will open rooms for inequality and unfairness. It has further declared that treating them unequal amounts to punishment.

**MEASURES AT STATE LEVEL**

Developmental policies were put forth by the State of Tamil Nadu and Karnataka for the Transgender people in India. As per the propositions of C.S. Dwarkanath, Karnataka State Commission of Backward Classes of 2010,\(^{16}\) it was stated that the Transgender people must be included in the category of Backward Class to enjoy Government benefits. Prithika Yashini was the first Transgender Police Officer appointed for the State of Tamil Nadu to ensure employment to the third gender without any

\(^{13}\) [http://www.themeister.co.uk/economics/udhr.htm](http://www.themeister.co.uk/economics/udhr.htm)
discrimination. Tamil Nadu Transgender Welfare Board was formed to protect the ends and rights of Transgender community including housing, employment, education etc.

MEASURES AT NATIONAL LEVEL

As per the report of Peoples' Union for Civil Liberties (PUCL), it had suggested that 'Civil Rights' under law needs to be made available regardless of the change in their gender such as the right to get a passport, ration card, make a will, inherit property and adopting children.

EXTENSION TOWARDS PROVIDING RIGHTS

The apex court ordered the Central and State Governments to provide proper medical care to the TG community and also to provide separate public toilets to the same. It has also ordered the Central and State Governments to make necessary reservations in an educational institution and in public appointments to the transgender community by considering them as socially and economically backward community as specified in Article 15 of The Indian Constitution. In addition to the that, the Central and State Governments are requested to create awareness among the public to prevent them from being treated as untouchables. Recently, the Indian Government had organized the first ever State Level Transgenders Athletic Meet in Kerala which gave an opportunity for the Transgenders to identify themselves as capable of contributing to the society.

HIGHER EDUCATIONAL INSTITUTIONS AND TRANSGENDER COMMUNITY

Apart from recognizing the Transgender people as a third gender in NALSA Vs Union of India, The University Grant Commission (UGC) on 29th October 2014 had issued a circular to all the Vice Chancellors of the Universities with regard to the inclusion of a column for Transgender Community in all the application forms. The circular also includes the affirmative actions taken by the Universities to ensure that the Transgender students get acclimatized without encountering any problems. In the MBA Maharashtra Common Entrance Test -2017, it was found that out of 3,63,413 applicants, 9000 belonged to other gender means. The column others were incorporated specifically in the form.

TRANSGENDER PERSONS (PROTECTION OF RIGHTS) BILL, 2016

The Transgender Persons (protection of rights) bill, 2016 was approved by the Cabinet headed by the Prime Minister. The Government, through this bill planned to administer social justice and equality. The law defines 'Transgender' as a person who is neither male nor female (or) partly male and partly female (or) combination of male and female. It also prohibits discrimination against them. It further confers the right to be self-identified upon them. It also issues a certificate of identity to transgender persons. After the law has been enforced, it punishes the person who compels or entices a transgender person to indulge in the act of begging or similar other forms of labor, (or) forces a transgender person to leave the household, village or any other place of residence (or) causing physical abuse, sexual abuse, verbal or economic abuse (or) endangers the physical or mental health of the transgender person, (or) denies or obstructs their right to access public places shall be punished with rigorous imprisonment for the term not less than 6 months which can be extended to 2 years and with fine.

DEFECTS AND SUGGESTIONS IN TRANSGENDER BILL, 2016

The bill completely eliminates the right to choose the gender as either male or female. At the very beginning of the definition clause, a transgender person is defined as a person who is neither male nor female (or) partly male and partly female (or) combination of male and female. Even though the NALSA Judgment has remained far from being ideally implemented, the principle of self-identification 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. According to chapter III of the bill, a transgender person has to make an application to the district magistrate officer for obtaining the certificate of identity. The district magistrate officer shall refer the application with a district screening committee that comprises of a chief medical officer, district social welfare officer, a psychiatrist, a representative of the transgender community and an officer appointed by the appropriate government. On recommendations made by the above-referred committee, the District magistrate officer shall issue a certificate of identity to a transgender which later shall serve as a record in all official documents. This provision is based on the recommendation made by the committee constituted by the Ministry of Social Justice 2013. The issue now is providing for such an exhaustive procedure stands in violation of self-identification principle and hits the heart of NALSA Judgment. The single section chapter in the bill restricts itself by defining discrimination which automatically opens room out for arbitrariness. Such an understanding will help to effectively interpret the duties against the discrimination. Similarly, the bill has failed to incorporate reservation policies for the upliftment of the Transgender community, which has been promised in NALSA Judgment.

Transgenders come across derogatory comments and criticisms and are often excluded from their family. Stringent provisions must be enforced or amended for such violation of rights of Transgenders. It is necessary to amend other laws such as Indian Penal Code and introduce sexual assault of transgender as an offence. Substitution of the word 'any person' in place of 'women' plays a pivotal role in protecting the rights of the Transgenders. Section 354 of the Indian Penal Code should be amended as Assault, Criminal force to any person with intent to outrage his modesty. Also, Section 375 of the Indian Penal Code should be amended as gender neutral.

**COMPARATIVE GLOBAL STUDY**

Since Transgenders are not given equal status in the society with regard to marriage rights in India, they should be given the right to marry and live with the person of their choice. In United States of America, a marriage is held to be valid even when one of the spouses changes their gender. However, in India, unnatural sex and marriage among transgenders are held as illegal. Countries like California, Colorado, Connecticut, Columbia, Illinois etc have been following second parenting technique for the adoption of children by transgender. Such a technique can be followed in India which would eventually increase the acceptability rate of Transgenders in the society and reduce discrimination. The Transgender Bill, 2016 has failed to specify or include gender identity in the prisons i.e., Transgenders must not be allotted cells based on their genitals, instead they should be searched by the same gender. In United States, Prison Rape Elimination Act, 2003 was brought to force with an intent to ban torture on Transgenders and provide cells based on their requirements by ignoring their genitals. To date, 18 countries pave the way for allowing the Transgenders to serve openly in the military. Some of the countries are Denmark, UK, Germany, France, Finland etc. However, no such provisions are stated for the intake in the military in India.

**CONCLUSION**

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21 https://indiankanoon.org/doc/203036/
22 https://indiankanoon.org/doc/623254/
23 https://www.courtlistener.com/opinion/2585478/sharon-s-v-superior-court/
The authors of this research article would like to conclude by stating that there must be an immediate progress in propagation about the Transgenders rights and the Transgender Bill. Although there are prodigious changes brought to light, it's the attitude of the society that needs to be changed. As rightly said by John F. Kennedy, "If we cannot now end our differences, at least we can help make the world safe for diversity". Appropriate steps need to be taken to remedy such deplorable situation through strong legal as well as social angles.