

Protection of Transgender rights in India

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Abstract

The notions of the term Justice, equality and unity should be the main agenda of every nation. This article highlights on the status of transgenders in India because these transgenders have been subject to mental and sexual harassment and cruelty throughout the ages. They are exploited by their relatives and they are unable to get the Social stigma, discrimination, boycott from the society and family, absence of supportive family, abusive environment, disowning from families and parents, no medium for education, depression amongst transgenders, no housing facilities, harassment by police and they ultimately resort to begging and sex work. The article analyses the statutory provisions that have not been sufficient to protect their rights which results in the violation of their basic fundamental rights. The intervention of the judiciary has been felt in realizing the rights of these communities and protecting them.

Key Words: equality, justice, depression, abusive, social stigma, discrimination

Introduction

Human rights are basic rights and freedoms which are guaranteed to a human by virtue of him being a human which can neither be created nor can be abrogated by any government. It includes the right to life, liberty, equality, dignity and freedom of thought and expression. The right to choose one's gender identity is an essential part to lead a life with dignity which again falls under the ambit of Article 21. Determining the right to personal freedom and self-determination, the Court observed that "the gender to which a person belongs is to be determined by the person concerned." The Court has given the people of India the right to gender identity. Transgender people are individuals of any age or sex whose appearance, personal characteristics, or behaviors differ from stereotypes about how men and women are 'supposed' to be. Transgender people have existed in every culture, race, and class since the story of human life has been recorded. Preamble to the Constitution mandates Justice social, economic, and political equality of status. Thus the first and foremost right that they are deserving of is the right to equality under Article 14. Article 15 speaks about the prohibition of discrimination on the ground of religion, race, caste, sex or

place of birth. Article 21 ensures right to privacy and personal dignity to all the citizens. Article 23 prohibits trafficking in human beings as beggars and other similar forms of forced labor and any contravention of these provisions shall be an offence punishable in accordance with law. The Constitution provides for the fundamental right to equality, and tolerates no discrimination on the grounds of sex, caste, creed or religion. The Constitution also guarantees political rights and other benefits to every citizen. But the third community (transgenders) continues to be ostracized. The Constitution affirms equality in all spheres but the moot question is whether it is being applied. As per the Constitution most of the protections under the Fundamental Rights Chapter are available to all persons with some rights being restricted to only citizens. Beyond this categorization the Constitution makes no further distinction among rights holders.

Historical Background

Transgender have a strong historical background in India as evident from the Vedic and puranic literature like Ramayana and Mahabharata and comprise of Hijras, Kothis, Aravanis, Jogappas, Shiv-Shakthisetc. There are the different kinds of transgenders in India from times immemorial. Hijras are not men, by virtue of physical appearance and psychologically, they are also not women, though they are like women with no female reproductive organ and no menstruation. Eunuch refers to an emasculated male and intersexed to a person whose genitals are ambiguously male-like at birth. Aravanis are biological males who self-identify themselves as a woman trapped in a male's body. Kothis can be described as biological males who show varying degrees of femininity which may be situational. Jogtas or Jogappas are those persons who are dedicated to and serve as a servant of goddess Renukha Devi (Yellamma) whose temples are present in Maharashtra and Karnataka. JogtiHijras is used to denote those male-to-female transgender persons who are devotees/servants of Goddess Renukha Devi and who are also in the Hijra communities. Transgender people had been an integral part of Indian Society for centuries. With the onset of the human civilization traces of transgender people is evident. Both history and mythology provides every instance of their presences, which can't be denied and neglected. there was historical evidence of recognition of "third sex" or persons not confirm to male or female gender in near the beginning writings of ancient India. In fact, there are various rituals and traditions, which are specific to the transgender community, or rather they are incomplete without the presence of these people. From the mythological text Ramayana we get to know about an incidence which can we put to support our argument about their presence, Shri Rama sanctioned them the power to confer blessings on people on auspicious occasions like child birth and marriages, and also at inaugural functions which was supposed to set the stage for the customs of badhai in which Hijra sings, dance and confer blessings. Their presences are also spelled out in the Kama Sutra and elsewhere as pumsprakritistri-prakrit (female natured), and tritiya-prakrit (thord nature).the transgender also occupied high positions in the Islamic religious institutions, especially in guarding the holy places of Mecca and Medina, they were also able to influence the state decisions and also receive large amount of money to have been closet to king and queens (Carroll,2002). During the Ottoman empires and the Mughal rule in the Medieval India

Transgender played a famous role, they rose to well-known positions as political advisors, administrators, generals as well as guardians. Transgender were considered clever, trustworthy, and fiercely loyal and had free access to all places and sections of population, thereby playing a crucial role in the politics of empire building in the Mughal era. In the beginning of the British period in Indian subcontinent Hijra used to accept protection and benefits by some Indian states through entry into the Hijra community. India was dominated by British who believed transgender were of unpleasant public decency, although British did not accept transgender people wholeheartedly, but Indian communities still accept them as respectable figures with magical powers. Transgender was not seen as strange until mid-1990s. historical evolution of transgender community in India by M. Michelraj, Ph.D Research Scholar, Public administration, Department of political Science and public administration, Annamalia university, Tamilnadu.

Legislative Provisions

Rights granted under Indian law to transgender

The rule of law is supreme and everyone is equal in the eyes of law in India. Yet, the transgender community is in a constant battle as they have to fight oppression, abuse and discrimination from every part of the society, whether it's their own family and friends or society at large. The life of transgender people is a daily battle as there is no acceptance anywhere and they are ostracized from the society and also ridiculed.

However, the Supreme Court of India in its pioneering judgment by the division bench of *Justices K.S. Radhakrishnan and A.K. Sikri* in *National Legal Services Authority v. Union of India & Ors.* [Writ Petition (Civil) No.400 of 2012(NALSA)] recognized the third gender along with the male and female. By recognizing diverse gender identities, the Court has busted the dual gender structure of 'man' and 'woman' which is recognized by the society.

"Recognition of Transgenders as a third gender is not a social or medical issue but a human rights issue," *Justice K.S. Radhakrishnan* told the Supreme Court while handing down the ruling.

The right of equality before law and equal protection of law is guaranteed under Article 14 and 21 of the Constitution. The right to choose one's gender identity is an essential part to lead a life with dignity which again falls under the ambit of Article 21. Determining the right to personal freedom and self-determination, the Court observed that "the gender to which a person belongs is to be determined by the person concerned." The Court has given the people of India the right to gender identity.

Further, they cannot be discriminated against on the ground of gender as it is violative of Articles 14, 15, 16 and 21.

The Court also protects one's gender expression invoked by Article 19 (1) (a) and held that "no restriction can be placed on one's personal appearance or choice of dressing subject to the restrictions contained in article 19(2) of the Constitution".

The Court recognized the right to as to how a person choose to behave in private, personhood and the free thought process of the human being, which are necessary for the fullest development of the personality of the individual. The Court further noted that a person will not realize his dignity if he is forced to mature in a gender to which he does not belong to or he cannot relate to which will again hinder in his development.

The Supreme Court has given certain directions for the protection of the rights of the transgender persons by including of a third category in documents like the election card, passport, driving license and ration card, and for admission in educational institutions, hospitals, amongst others.

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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*, 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.

Research Methodology

Here as a researcher I have used the qualitative and secondary sources from the books, supreme court judgement, Govt. bills and other sources. I made a review on this topic.

Discussions and findings

Directions to the central and state government

The court 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 feel 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 and 2016

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 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.

Problems faced by transgender

There are so many problems which are faced by the transgender in India are as:

- They are shunned by family and society alike.

- They have restricted access to education, health services and public spaces.
- Recently, they were excluded from effectively participating in social and cultural life.
- Politics and decision-making processes have been out of their reach.
- They do not have their fundamental right.
- Reports of harassment, violence, denial of services, and unfair treatment against transgender persons have come to light.

The other problems that are being faced by the transgender community are of discrimination, unemployment, lack of educational facilities, homelessness, and lack of medical facilities: like HIV care and hygiene, depression, hormone pill abuse, tobacco and alcohol abuse, penectomy, and problems related to marriage and adoption. In 1994, transgender persons got the voting right but the task of issuing them voter identity cards got caught up in the male or female question. Several of them were denied cards with sexual category of their choice. The other fields where this community feels neglected are inheritance of property or adoption of a child. They are often pushed to the periphery as a social outcaste and many may end up begging and dancing. This is by all means human trafficking. Sometimes running out of all options to feed themselves, they even engage themselves as sex workers for survival. Transgenders have very limited employment opportunities. Transgenders have no access to bathrooms/toilets and public spaces. The lack of access to bathrooms and public spaces access is illustrative of discrimination faced by transgenders in availing each facilities and amenities. They face similar problems in prisons, hospitals and schools.

Educational Status:

No formal education for transgender is popular in Indian context. They are deprived from family and school environment, transgender discontinue their education and risk their future career opportunities. A close analysis of various reports and discussion with community and stakeholders suggest that transgender are most uneducated or undereducated, become reluctant to continue schooling. The average qualification is secondary (Matric) or senior secondary level. The enrolment is significantly low and dropout rate at the primary and secondary level is still very high. They are hardly educated as they are nor 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. It is mandatory for the Government to provide inclusive education for transgender students and provide adult education to them.

Social Status:

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. 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 gonorrhoea, syphilis, rectal Chlamydia, etc., add to the risk of HIV

Conclusion

"The biggest lacuna in the system is that nobody knows the real definition of a transgender. Sensitization will not help until people are ready to accept change and acceptance can come only through education." Each being in this Universe is indeed unique, and an integral part of Nature. It would thus be wrong to judge and discriminate people who may be different from the stereotype, which again is man-made. It is time that India realised that every individual in this country has equal rights and privileges, and follow the policy of "live and let live." Thus the first and the foremost right transgender are deserving of is the Right to Equality under Article 14. Article 15 speaks about the prohibition of discrimination on the ground of religion, caste, sex or place of birth. Article 21, ensures right to privacy and personal dignity to all the citizens and article 21 (A) ensures education is a fundamental right to every Indian. The constitution provides for the fundamental rights to the equality and tolerates no discrimination on the grounds of sex, caste, creed or religion. The constitution also guarantees political rights and other benefits to every citizen. Despite such laws in the constitution of India, the other sex (transgender) continues to be ostracized. Transgender people faced discrimination and harassment at family, school and community forces them to move to the other places. The nature of the harassment includes verbal, physical and sexual abuse which has serious impact on the mental health as well. In a democratic country like India Transgender has no access to the social and political rights. They are not the part of any welfare scheme. Keeping in view the above findings it can be concluded that there is an immense need to intervene at individual, community and policy level to safeguard the rights of transgender.

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