

Chapter 14

Rights Of Transgenders.

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Abstract

Transgender, the newly accepted gender of the 21st century has had its fair share of struggle before even being remotely recognized or considered as a member in our society. Transgender is a biological variation, which make people to behave differently from the stereotypes of males and females. Because of this biological change, they are excluded from the society. They face many problems like discrimination, disrespect, lack of educational facilities, social exclusion etc.... They are also human beings and have every right to live like other genders as per Article 14, 15 and 21 of the Indian Constitution. In April 2014, the Supreme Court of India declared transgender to be a third gender in Indian law³. Even law cannot deny their existence; still they are denied to have their basic rights like right to education, equality, dignity, freedom of expression etc....They are also portrayed differently in movies, which creates a wrong impression among them in the society. Their very presence still makes a sense of uneasiness in the minds of general public. Equality should definitely come out of theories. Each being in this universe is indeed unique and an integral part of the nature. It would thus be wrong to judge and discriminate people who may be different from the stereotypes. Being a minority in the society, transgenders should be assisted in gaining acceptance in the important aspects of education, employment, housing and other sectors. Life cannot be contained to a binary of male or female and being a transgender is not abnormal. In the light of above analysis, this paper mainly focusses on how transgenders are alienated from the mainstream of society, their constitutional rights and the problems faced by them. The study also covers how we can convert the social exclusion of third genders into social inclusion with regards to rule and law.

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Introduction

We live in 21st century where human rights are enjoyed by every human being except the third gender i.e. “Transgender”. People who are different in their biological constructions are identified as transgender. They have a gender identity that differs from their assigned sex. Our society is always unwilling to accept or embrace them, a mindset which we have to change. They are also human beings and we do not have any right to discriminate or disrespect them for what they are. The pain and sufferings undergo by transgender community must be realized by others. Over the past few centuries, transgenders have been abused, ill-treated and disrespected. They do not possess any respect and are often ostracized by the society itself. The non-recognition of their sexual and gender identity is a violation of various Fundamental and Human Rights, which are protected and guaranteed by the Constitution of India and other International Human Rights documents. In the light of the widespread discriminations faced by transgender community, a Public Interest Litigation by the National Legal Service Authority (NALSA) was filed and as a result the Indian Supreme Court has acknowledged transgender people as a third gender and it has created a special pulse over the nation.⁴ To include third gender in our society, law and order are trying very hard from their part. But still transgender community faces high level of stigma and discrimination in almost every walk of their life. They often experience isolation and abuses from others. Basic human rights which includes Right to life and liberty with dignity, Right to privacy, and freedom of expression, Right to education, Right against exploitation, violence etc..... are denied from transgender community without any reasons. We, the society should accept and recognize Transgender as a third gender so that they can overcome from social deprivation and harassment and can lead a dignified life. Despite the positive developments that have contributed to increased awareness and recognition of transgenders, some problems are still prevalent in the society. There is a high need for a progressive environment and acceptance of third genders so that they can lead a better life.

Indian Society And Transgender

India is a vast and traditionally diverse country in the world. We can see transgender community even in Indian History. They can be seen in Hindu mythology and other puranic works. The Concept of Tritiya prakriti or napunsaka was an integral part of Vedic and puranic literatures. The word ‘napunsaka’ has been used to denote absence of procreative capability.⁵ In India, the transgender community is known as Hijras and they were seen in the society since ancient times. The Sanskrit texts of the Kama sutra is an ancient Indian Hindu text on human sexual behavior in Sanskrit literature. During the Mughal Empire in

the 16th and 17th centuries, castrated hijras - or - eunuchs – were respected and considered close confidants of emperors, often being employed as royal servants and bodyguards.⁶ Transgender communities in India were considered as marginalized and deprived section of the society and possessed a very low status. Due to lack of understanding of gender variance, transgender community was alienated from the mainstream society and was given only a low social status. They were even ridiculed and neglected by family members and these things made them extremely vulnerable to harassment. They were sexually exploited and violence against these community was at its peak during the past centuries. Even in films they were portrayed in a different way which created a negative vibe about them in the society. Many of them assigned themselves for singing and dancing in bars and some of them resides themselves to prostitutions. They suffer persistent inequalities and various challenges like lack of sufficient access to quality healthcare, proper education, and lack of employment opportunities and suffer discriminations. Discrimination, Abuse, Poverty, Family and Social Exclusion, Unemployment, Educational and Marriage issues, Homelessness, Lack of security etc.... were some of the major problems faced by transgender community in India. Their problems were unnoticed, unaddressed and were not give any proper attention till 2014 in India. The problem of non-recognition of identity of hijras in India ended through the landmark judgement in the case called NALSA v. UOI in 2014. However, they are still facing discrimination and harassments in many parts of the country. They have struggled a lot to enjoy the basic rights, which other Indians enjoy. Even though earlier they were excluded from the mainstream of the society, they are now getting social inclusion through certain rules and laws. To solve the problems faced by transgender in India to an extent, pioneering efforts was started by the Government of Tamil Nadu by establishing a transgender welfare board in April 2008 Kerala, the God's own country has formulated a state policy for transgender in 2015. Transgender community were given priority in Kochi Metro in order to increase their employment opportunities.

India has a varying number of castes, sects, tribes, communities and has a rich diversity of genders and sexualities that have existed in our cultures since ancient time. The Lesbian, Gay, Bisexual, Transgender (LGBT) community is one such community out of the big pool of communities present in diverse with respect to gender and sexual orientation. Transgender in India belongs to this community. This community has also undergone a whole lot of ignorance and abuses in India. There is no need of labelling them ugly or different, as they are also God's own creation. Despite of the government policies in favor of them, we should sensitize people through articles in newspaper, magazines and electronic media in favor of this community in a sensible and logical way so that there will be a change in the mindset of people about the community and they can lead a dignified life.

Constitutional Rights Of Transgenders

The basic spirit of our constitution is to provide each and every person of the nation equal opportunity to grow as a human being, irrespective of race, caste, religion, community and social status.⁷ The Constitution of India provides fundamental right of equality to every citizens and it does not tolerate any sort of discrimination on the grounds of sex, caste, creed or religion. It mandates right to equality and prohibition of discrimination through Article 14 and 15 respectively. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India⁸. Despite the right to equality being a fundamental right, transgender is not treated on an equal scale like others. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth⁹. Transgender community often faces discrimination in public places and residential areas. Article 16 and Article 19 of the Indian constitution assures equality of opportunity in matters of public employment and freedom of expression but these are not enjoyed by transgender communities.

The meaning of the term ‘person’ within Article 14 and Article 21 is gender neutral and also covers hijras/transgenders who are neither male nor female. They are entitled to legal protection of laws in all spheres of state activity, including employment, healthcare, education as well as equal civil and citizenship rights, as enjoyed by any other citizen of India.¹⁰ Article 21 of the Indian constitution, assures right to life and liberty to all the citizen of the country and as per this article transgender have every right to life and liberty. Article 21 guarantees enjoyment of life by all citizens of this country with dignity, viewing this human right in terms of human development, self-determination of gender is an integral part of personal autonomy and self-expression and force within the realm of personal liberty guaranteed under Article 21.

The rights of Transgender have almost never been discussed or taken into accordance. It has always been taken for granted. 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. The fundamental rights for this group of people was not even certain until the judgement for the landmark case of National Legal Services Authority v Union of India and Others¹² was passed. It affirmed and held in paragraph 60 of said judgement that: Transgenders have been systematically denied the rights under Article 15(2) that is not subjected to any disability, liability, restriction or condition concerning access to public places. Transgenders are also not been afforded special provisions envisaged under Article 15(4) for the advancement of the socially and economically backward classes (SEBC) of citizens which they are, and hence legally entitled and eligible to get the benefits of SEBC. No part of declaring the community as a socially and Economic Backward class is unconstitutional. Article 46 declares that – promotion of educational and economical interest of Scheduled Caste and Scheduled tribe and other weaker sections. The state shall

promote with special care of the education and economic interest of the weaker section of the people, and, in particular, of the scheduled caste and scheduled tribe, and shall protect them from social injustices and all forms of exploitation¹³. In *M.R Balaji and others v State of Mysore*¹⁴, the supreme court noted that ultimately, poverty, rather than community identity, was the real marker of social and educational backwardness. The same can be said here, the transgender community suffers from social ostracization, humiliation and acute lack of institutional support, which pushes them into poverty and to dangerous live hoods like prostitution, in this context reservation for transgender people in government jobs and education institution would be an excellent addition to progress their development. It would help to recognize the society's obligation towards the welfare of these people. It would also increase the economic impetus and ability to self-sustain their lives without resorting to beggary and attaining poverty.

The national commission for backward classes (NCBC) has recommended after the passing of the judgement for the inclusion of transgender in the central list of OBCs. The commission had unanimously passed a resolution to accept the verdict of the Supreme Court and decided to recommend to the Centre to include transgender in the OBC list. Irrespective of their community backward, all transgender can avail benefits under the OBC list.

Transgender Community

The first and foremost problem faced by transgender community is discrimination. They have even considered as “untouchables” by some people and are deprived of social and cultural

participation. They face many problems like poverty, depression and low self-esteem, sexual abuse, health issues, homelessness, marriage issues, educational problems, denial of medical treatment, shame, fear, psychological issues, less societal acceptance, family issues and social exclusion unemployment, zero level acceptance, illiteracy, lack of empathy, disrespect, prostitution, ignorance etc....

They also face many social, medical and legal issues.

SOCIAL ISSUES: Violence ,Chronic Unemployment Denial of housing ,Denial of education Lack of livelihood ,Denial of access to public accommodation such as shops, restaurants, and public transportation, Less security, Lack of proper livelihood Poverty, Educational issues Social pressure

MEDICAL ISSUES: Denial of medical treatment, Ridicule and mistreatment, Inability to obtain ongoing, routine medical care, Inability to obtain or pay for hormone therapy and sex reassignment surgeries

LEGAL ISSUES: Legal status as a man or a woman, Marriage, Inheritance, wills and trusts, Immigration status, Employment discrimination, Other major problems faced by transgender community involves:

DISCRIMINATION: Transgender community is always discriminated and alienated from the mainstream society. In schools, due to lack of proper knowledge about transgender, fellow students often treat them in disrespectful ways and isolate them. This rejection and isolation by other students serve as a deterrent to education. Transgenders might have the capacity to excel in studies, but due to the isolation and discrimination from classmates, they undergo severe mental stress and they rarely apply themselves fully to their studies. They are verbally abused using derogatory labels by co-workers and superiors in the workplace. They are discriminated from every sphere of society in terms of education, employment etc....Transgender find it extremely difficult to get suitable employment of their choice. Most of them are forced into sex work, as there is social discrimination towards this community to a large extent.

ISOLATION IN FAMILY: Transgender are often looked down by their family members and relatives and have not been adequately recognized by their family members. Non-transgender family members lack the knowledge that the emotions and feelings of transgender is natural and hence they criticize or often pressure them to change their mannerisms. Family members sometimes abuse them using derogatory labels. Some people see transgender as a sign of shame and the parents of transgender often isolate them without giving equal importance among all the children.

SEXUAL HARASSMENT: Transgender also become victims of teasing and harassment. Sexual harassment from fellow students due to their feminine mannerism is a common problem of many transgender while studying in school. Then often face sexual harassment in public places, trains, and in work places.

LACK OF LIVELIHOOD: Most employers deny employment for even qualified and skilled transgender people and this leads to lack of livelihood. Lack of livelihood options is a key reason for a significant proportion of transgender people to go for sex work and beggary. In this reason, they are associated HIV and health-related issues. Recently, there have been isolated initiatives that offer mainstream jobs to qualified transgender such as agents for life Insurance Corporation of India.

LACK OF ACCESS TO LIFE AND HEALTH INSURANCE SCHEMES: Due to lack of knowledge, inability to pay premiums regularly and inability to be enrolled in various schemes, many of the transgender community are not under any life or health insurance schemes. The Social Welfare departments provide a variety of social welfare schemes for socially and economically disadvantaged group but no specific schemes are available for the Transgender Community.

DEPRESSION AND LOW SELF ESTEEM: Because of their difficult childhood and adolescents, many transgender people have a low self-esteem and self-worth. Many of

them had been run away or flee from their homes in teens and early twenties. These people are mistreated in the major sphere of society. The abuse, insults, constant threat and danger from others, discrimination in all spheres of life, sexual harassments make them depressed. Due to these sorts of depression, loneliness and insecurities, they get addicted to drugs and alcohol. The constant hurt and humiliation experienced from the young age leads to mental depression. Being alienated from the natural family bondage, they often feel unwanted and less fortunate. Suicidal tendencies, lack of social support, violence related stress, shame, fear etc... are some of the other mental issues faced by them.

Social Exclusion

Even though not all transgender people feel themselves to be socially excluded or oppressed, many transgender people experience social exclusion in various ways. The problems and issues faced by the transgender community can be seen as the reason for social exclusion of this community. They are excluded from family, schools, workplaces and even from the entire society. India has a wide variety of cultures, religions, castes, languages, customs etc... but in the case of third gender, the society is reluctant to accept and encourage them. No family accepts a male child behaving in a feminine manner or inappropriate to the expected gender role. The family does not tolerate the male child dressing up as a girl and will discriminate that particular child from other children. These factors alone make the transgenders frustrated and depressed and they move out of the house. Most transgenders are not educated or uneducated and consequently find it difficult to get jobs. Moreover, it is hard to find people who employ transgender people. For being “different” some members of the society satires and ridicule gender –variant people. Transgender people face unique barriers when accessing public or private health services. Many providers treat Trans people only with great reluctance, sometimes harassing and embarrassing them and therefore they avoid seeking medical assistance. They are also excluded from social and cultural participation, and faces exclusion from economy,

Employment, and livelihood opportunities. Proper measures must be taken in order to assure the social inclusion of transgender community.

Reforms And Recommendations

Several Organizations have initiated many programs and movements in favor of transgender community. But transgender community do not enjoy a legal recognition in India, though some states like Tamil Nadu and Kerala recognize transgender as third gender. In April 2008, a transgender welfare board was established by the Government of

Tamil Nadu. The government started issuing separate food ration cards for transgender people. In addition to this, Tamil Nadu government also issued an order on May 2008, to create a third gender for admissions to government colleges. In Kerala transgenders were given priority for employment in Kochi Metro so that they can have more employment opportunities. Kerala is the first state to have a transgender policy. More states should adopt the policies of Tamil Nadu and Kerala and transgenders should be included in the mainstream of society. Equality and security should be assured to third genders. They should enjoy all the rights guaranteed to them under Indian Constitution. There must be proper rules and regulations for the welfare of transgender community. Though Lok Sabha passed the Transgender Persons (Protection of Rights) Bill, their protection still remains as a question and the provisions remain silent just in the paper. This Bill weaken the position of transgender community instead of empowering them. The Bill fails to extend protection to transgender persons who might be victims of sexual assault or rape, as the Indian Penal Code recognizes rape in strict terms of men and women as perpetrator and victim, respectively. The respective authorities should address these drawbacks of the bill properly. Awareness classes must be conducted in schools, colleges, panchayats etc.... so that the people will get familiar to transgender community. There is no proper sex education in place. A proper sex education must be given to students from school levels. Reservations must be made for them in educational institutions and priority should be given to them in government services.

A separate public toilet facility must be given for transgender community. As women commission and women cell are in existence for the protection and welfare of women, a separate commission and cell for transgender people can be instituted. And also, a separate civil rights legislation should be enacted for the welfare and protection of their rights. We should consider them as sexual minorities and should give special preferences and priorities. More credit facilities and financial supports should be given to them. And above all, there should be a change in society's outlook.

Conclusion

The term transgender is often considered as an offensive or abusive term. There is no need to discriminate them as they are also human beings and have every right to lead a dignified life. It is not something that just need a legal acknowledgement or attention but a social one too. We should understand the mental frustrations and pain of these people and we should try to socially include them in our society. They are not aliening or some different creatures in the society, they are also humans with a variation in sexual orientation. They are one among the most marginalized and vulnerable communities in India. It is the duty of the state to protect the transgenders through any means and mode as required. For years, they have been shunned by the society due to age-old beliefs, now it is high time that they

should be given the necessary reservation for their community to develop and flourish and help the nation develop as a whole. It is not only the responsibility of the state but also the obligation of each and every one of us to treat them with respect and love. Equality should come out of theories so that everyone can live in peace and harmony. Just think God created three kinds: Male, Female and Transgender and each category possess equal rights and responsibilities.