

TRANSGENDER EQUALITY IN INDIA: A SHALLOW CONSTITUTIONAL SIM

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I. INTRODUCTION

In the words of American political activist, Gloria Steinem –

“A gender-equal society would be one where the word ‘gender’ does not exist: where everyone can be themselves.”

As the word ‘gender’ plays a pivotal role in our society, so it becomes significant to understand that the essence of the term lies in the fact that it comprises of not only male and female but also transgender. The society we live in is so perplexed and ungenerous that on one hand it desires the shower of blessings by transgender on special occasions and on the other hand, it inflicts curse on them in the form of ignorance and humiliation. Defining transgender, it is a term used for those persons whose gender identity is different from 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. If the history is traced, it can be identified that the transgenders existed since times immemorial from Ramayana and Mahabharata period. In Ramayana, when Lord Rama was leaving for the forest in exile for fourteen years asked his followers ‘all the men and women’ to return to the city. Among his followers, the hijras did not feel bound by this direction and decided to stay with him. Impressed with their devotion, Rama handed them the power to bestow blessings on people on auspicious occasions like childbirth and marriage. 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.¹

¹ V.S. Dinesh and V.S. Krishna, “Transgenders are no way different – Protection of their Rights”, available at www.manupatra.com (last accessed on April 9, 2020).

II. CONSTITUTIONAL VISION

Article 5 of the Constitution illustrates about the citizenship of the person and as per this provision, sex or gender identity is not a pre-condition for acquiring citizenship. Thus, the “transgenders” falls within the ambit of the term “citizens”. Article 14 provides that the State shall not deny any person “equality before law”. The words “any person” used highlights the gender neutrality embedded in the law itself. Any kind of discrimination on ground of gender identity or sexual orientation impairs the concept of equality before law and thus directly violates Article 14 from the very roots itself. Article 16(2) demands equal treatment of all citizens in public employment and appointment. The third gender community is facing extreme prejudice in recognition in education and employment sector. The need for preferential treatment is fulfilled in Article 16(4) which provides that the State can make provisions for the reservation in appointments in favour of any backward class of citizens who are not adequately represented. Article 15 emphasises on non-discrimination on grounds of religion, race, caste, sex and place of birth to citizens as well as non-citizens. Transgenders have been systematically denied the rights under Article 15(2) that is not to be subjected to any disability, liability, restriction or condition in regard to access to public places.² Article 19(1)(a) enumerates the freedom of speech and expression to all its citizens which includes the right to express one’s own gender identity and sexual orientation. Personal appearance is the freedom which has no limitations even in Article 19(2) boundaries. Right to life under Article 21 is a Pandora of several basic human rights comprising right to dignified life to all the persons.

III. INTERNATIONAL ASPECT

Article 6 of the Universal Declaration of Human Rights and Article 16 of the International Covenant on Civil and Political Rights (ICCPR) states that “*Everyone shall have the right to recognition everywhere as a person before the law*”. Article 17 of the ICCPR provides protection against unlawful interference in the privacy of any person and unlawful attacks on the reputation of any person. The Yogyakarta Principles was formulated on the application of International Human Rights Law in relation to Sexual Orientation and Gender Identity. These principles include the right to universal enjoyment of human rights, right to equality and non-discrimination, right to recognition before the law, right to life and privacy, right to treatment with humanity while in detention, protection from medical abuses and freedom of opinion and expression regardless of sexual orientation and gender identity.

² National Legal Services Authority of India v. Union of India and Ors., MANU/SC0309/2014.

IV. OTHER LEGAL PROVISIONS

The status of the third gender community started degrading when the British rolled out the Criminal Tribes Act in 1871 which particularly targeted them. The Act provided for the registration, surveillance and control of certain criminal tribes and eunuchs and had penalized eunuchs, who were registered, and appeared to be dressed or ornamented like a woman, in a public street or place, as well as those who danced or played music in a public place. They were subject to arrest without warrant and imprisonment up to two years or fine or both. The Act was repealed in 1952, but the damage it caused is still visible.

Section 377 of Indian Penal Code is the very first provision of Indian Penal Code which is indirectly criminalising the transgenders as the unnatural intercourse has been declared as a punishable offence with imprisonment up to ten years or life imprisonment.

The Transgender Persons (Protection of Rights) Act, 2019 was enacted in order to provide protection of rights of transgender persons. The government also circulated the Draft Rules to the Act on April 16, 2020 for public feedback. The Draft explains the manner and process by which persons may be recognised as transgender.

V. CASELAWS

Queen Empress v. Khairati³

It is a case where a transgender person was arrested and prosecuted Under Section 377 on the suspicion that he was a 'habitual sodomite' and was later acquitted on appeal. Though Khairati was released in appeal but the point of concern is infliction of mental torture during police investigation and legal process as well as the hindrance of her right to privacy. She had to go for body examination forcefully only because her gender did not match biological sex and no one was held responsible for loss of her bodily integrity.

NAZ Foundation v. NCT of Delhi⁴

This case acted as a boon for transgender community as for the first time the judiciary stepped out of the partiality zone against third community. In this case, the Lawyers

³ Queen Empress v. Khairati, (1884) ILR 6 All 204.

⁴ Naz Foundation v. Government of NCT and Ors., MANU/DE/0869/2009.

collectively filed a petition challenging Section 377 of IPC on behalf of the Naz Foundation before the Delhi High Court in 2001. It challenged the constitutional validity of the section and made an argument for it to exclude the criminalisation of same-sex acts between consenting adults in private and limit this section to cases of child sexual abuse. It was argued that section 377 IPC infringed the constitutional validity of right to equality, privacy and expression. The judges spoke about sex without a sneer, and for the first time in the recorded judicial history of India homosexual sex was discussed within “*a context of intimacy, love, affection and longing.*” The court goes beyond the concept of spatial privacy and recognises decisional privacy and it held that the right to privacy is not merely the right to do what one wants in ‘private spaces’ like the home, but also a right to make choices about how to live one’s own life.⁵ Finally, the Court delivered the judgment that section 377 IPC with respect to criminalising consensual sexual acts is violative of Articles 21, 14 and 15 of the Constitution. The victory of this case soon turned into illusion as the next Naz_Foundation case appeared.

Suresh Kumar Kaushal v. Naz Foundation⁶

The SLP was filed before the Supreme Court challenging the decision of Delhi High Court of Naz Foundation Case. Unfortunately, justice turned into unfairness and biasness as the crux of the judgment was as follows:

“A miniscule fraction of the country’s population constitute lesbians, gays, bisexuals or transgenders and in last more than 150 years less than 200 persons have been prosecuted (as per the reported orders) for committing offence under Section 377 IPC and this cannot be made sound basis for declaring that section ultra vires the provisions of Articles 14, 15 and 21 of the Constitution.”

National Legal Services Authority v. Union of India⁷

The judiciary again took a U turn thus showing compassion and empathy towards transgenders. The judges in the very beginning of the judgment introduced the humiliation and injustice suffered by the third gender as they stated-

⁵ Siddharth Narain, “Crystallising Queer Politics – The Naz Foundation Case and its Implications for India’s Transgender Communities” available at www.manupatra.com.

⁶ Suresh Kumar Kaushal and Ors. v. Naz Foundation and Ors., MANU/SC/1278/2013.

⁷ *Id.* at 2.

“Seldom, our society realizes or cares to realize the trauma, agony and pain which the members of Transgender community undergo, nor appreciates the innate feelings of the members of the Transgender community, especially of those whose mind and body disown their biological sex. Our society often ridicules and abuses the Transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are side lined and treated as untouchables, forgetting the fact that the moral failure lies in the society's unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change.”

The judges held that the non-recognition of identity of Transgenders/Hijras in various legislations denies them equal protection of law and they face wide-spread discrimination. There is a need for recognition of transgenders as “third person”. Interpreting the law of the land, it was held that the third community gender also fits into the parameters of “persons” or “citizens” used in Constitution. Supreme Court has held that transgenders too shall have access to the rights guaranteed under Articles 14,15,16,19 and 21. Thus, there is a shift from charity or pity concerns to human rights approach. The Supreme Court also directed the Central and the State Governments to take initiatives for the reservation of third gender in educational institutions and public appointments and also to take proper measures to provide medical care to transgenders in the hospitals and also provide them separate public toilets and other facilities. The Court was cognizant of the linkage between the lack of public awareness about the gender fluidity and the issues of shame and the issues of shame experienced by transgender persons.⁸ It had also directed that the Central and state governments to create public awareness campaigns and seriously address issues of fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma, etc. faced by transgender persons.

Ganga Kumari v. State and Ors.⁹

In this case, the appointment of transgender was rejected on the ground that she was a hermaphrodite. The Rajasthan High Court in 2017 held that the advertisement of constable post was ‘gender neutral’ and therefore she was entitled to appointment. It was also emphasized that sex determination which she had to undergo was arbitrary and violative of right to privacy guaranteed under Article 21 of the Constitution.

⁸ Dipika Jain, Gauri Pillai, et.al., “Bureaucratism of Transgender Rights: Perspective from the Ground” available at www.manupatra.com.

⁹ Ganga Kumari v. State & Ors. (2017) available at Indiankanoon.org.

Navtej Singh v. Union of India¹⁰

The court recently comprehended the agony faced by LGBT and mentioned “*History owes an apology to the members of this community and their families, for delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries.*” It is held that as insofar section 377 criminalises consensual sexual acts of adults in private, it is violative of Articles 14, 15, 19 and 21 of the Constitution.

VI. LOOPHOLES IN THE TRANSGENDER (PROTECTION OF RIGHTS) ACT

In July, 2017, the Standing Committee on Social Justice and Empowerment was constituted to analyse the Transgender Bill and the report listed various shortcomings of the final draft and submitted its suggestions. In spite of many criticisms levelled in the Standing Committee Report, the Bill has been introduced in Parliament without incorporating any of the changes and the recommendations suggested by the Committee.¹¹ The August 5, 2019, the day on which The Transgender Persons (Protection of Rights) Bill was passed by the Lok Sabha is termed as “*Gender Justice Murder Day*” by Transgender community. It is not even a toothless tiger, it is just a number of teeth scattered about with no power, reason or authority to take action on their own.¹²

The Act for the welfare of transgenders is drafted by the so called male and female members and no transgender participation was considered vital for understanding the need of the community. Thus, the laws created are more based on stereotypes rather than practical approach.

The very beginning of the Act, i.e. the definition portion of the Act is criticized by several activists as the intersex persons are included in the definition of transgender. Transsexual persons are those who undergo medical treatment to turn into opposite sex. This shows that without going into details and immense study, the provisions of the Act are drafted.

¹⁰ Navtej Singh v. Union of India, (2018) 10 SCC 1.

¹¹ Anon, Government set to re-introduce Transgender Persons’ Rights Bill, Ignoring Key Recommendations, THE WIRE (Nov. 20, 2017) available at <https://thewire.in/198486/transgender-personsrights-bill/> (last accessed on April 27, 2020).

¹² <https://feminisminindia.com/2019/08/05/critique-transgender-persons-protection-of-rights-bill-2019/> (last accessed on April 27, 2020).

It requires a transgender person to approach a District Magistrate to obtain a certificate stating their identity as transgender. The Magistrate will provide the certificate based on certain documents and it has been not mentioned as to what kind of documents are required for identification. And also it is only after obtaining government issued identification cards that they will be able to change their gender to either Male or Female.¹³This provision is a clear infringement of right to privacy and it is also an expensive procedure which all the transgenders cannot afford.

Moreover, this identity certificate will only identify people as transgender, not as male or female, unless the person has undergone sex reassignment surgery and can provide proof.¹⁴ This is almost same as forcing bodies into surgery as stated by one of transgender.

The Act says that there will be just one committee at the national level including maximum five representatives from the transgender community out of total strength of 30. This is unfair representation for the transgender population. This National Council for transgender is also devoid of independence as its all members are mandatorily required to be appointed by Central Government.

The recognition given to transgenders for the first time was in 2011 census and that data is exclusive of various other factors like their education, income, status etc. Laws are not supposed to be enacted without appropriate facts and figures data.

The Act talks about all the good measures but nothing is mentioned about the implementation of those measures such as prohibition of discrimination, education, employment, healthcare etc. Words without actions are worthless.

The punishment prescribed for any kind of crime inflicted upon transgenders including sexual abuse and injury to life is maximum of two years. In comparison to Indian Penal Code, the trivial degree of sentences are sanctioned for the grave offences to offenders.

Another grievance of the Act is that it is the court who will decide whether the trans person will reside with biological family or trans community family. If any parent is unable to take care of such child, she will be transferred to rehabilitation centre only if directed by the court. Equal treatment of trans child with normal child is at present a mere paper work

¹³ Trans Bill 2019: Why India's transgender community is opposing a Bill which is supposed to protect their rights available at: <https://yourstory.com/socialstory/2019/11/stoptransbill2019-india-transgender-community-rights> (last visited on April 28, 2020).

¹⁴ A bill meant to protect India's transgender community instead leaves them angry and aggrieved available at https://www.washingtonpost.com/world/asia-pacific/a-bill-meant-to-protect-indias-transgender-community-instead-leaves-them-angry-and-aggrieved/2019/11/29/6c2c7b7e-116b-11ea-924c-b34d09bbc948_story.html (last visited on April 28, 2020).

and such discrimination will not vanish in real life instantly. In case, such child suffers partiality or avoidance by the parents, it should be discretion of the minor with the assistance of court to join their community.

Unfortunately, there are no provisions in the Act regarding reservation of trans community in education and employment sectors and no programmes for creating public awareness regarding equal treatment of all.

It also made no attempt to dismantle or modify the heterosexual structure of family laws, adoptions laws and property law to facilitate the inclusion of third gender identities in the social sphere.¹⁵

With respect to health issues, there is not even a single protocol for guiding the medical community as to how to deal with the medical cases of this community. Rights of a trans person with regard to their fertility is critical, and inclusion in both artificial fertilisation and surrogacy and these areas still follow critically heteronormative understandings of the ability of a person to be a parent.¹⁶ The mental health issues such as depression, dysphoria, and anxiety disorders due to disdainful attitude of society has been completely set aside in the Act. No separate department for them is kept in government hospitals.

Thus, the present Act is lacking in punitive, remedial and enforcement measures. Even the Draft Rules has been vehemently criticized because of serious setbacks such as need of psychologists' report to apply for a certificate of identity and requirement of applicant to be resident of the area for one year before submitting application etc.

VII. SUGGESTIONS

1. Need of gender-neutral laws

The term "gender neutral" means irrespective of gender i.e. male, female and transgender. Gender neutral laws, therefore, are those which seek to grant equal sanction and opportunity to both genders, without negative discrimination.¹⁷

The need of an hour is gender neutral criminal laws in India so that everyone receives the fair and equal treatment. "Even the Justice Verma Committee had recommended gender neutral

¹⁵ Akshita Pandit, "(Trans)Gressing the Binary : Coalition self – determination for the 'third gender' framework", available at www.manupatra.com (last visited on April 29, 2020).

¹⁶ "A Critique of Transgender Persons Protection of Rights Bill, 2019" available at <https://feminisminindia.com/2019/08/05/critique-transgender-persons-protection-of-rights-bill-2019/> (last accessed on April 30, 2020)

¹⁷ Dimitrina Petrova, *Laws for Indian Women* 477 (University of London Press, Institute of Commonwealth Studies, 2013).

rape and sexual assault laws. However, such recommendations were kept in cold storage by the government, due to pressure by activists.” (F- gender neutral law lgbt1). The punishment sanctioned for sexual assault is only two years while for women cases it is up to life imprisonment and this partiality is itself the evidence of the biggest loophole in the laws. The gender-neutral laws is also required for decriminalising of homosexuality.

2. Inclusion of third community in basic laws

Transgenders should also be included in marriage, adoption and inheritance laws. There might be criticism that the basic purpose of marriage is procreation of children and this might lead to religious chaos. The theme of marriage is happiness in togetherness, so if two individuals desires to be in wedlock and adopt the children, law should not prohibit them.

3. Freedom of right to choose gender

As already discussed, freedom of expression also comprises of freedom of sexual orientation or expression of gender identity. India should take examples from other countries which have enacted legislation pertaining to right to choose gender. Such as Argentina broke ground in 2012 with a law that is considered the gold standard for legal gender recognition: anyone over the age of 18 can choose their gender identity, undergo gender reassignment, and revise official documents without any prior judicial or medical approval, and children can do so with the consent of their legal representatives or through summary proceedings before a judge.¹⁸

In last few years, many countries like Australia, Canada, Denmark, Germany, New Zealand and Netherlands has recognised “indeterminate” sex or has displayed the option “X” indicating that the gender is unspecified in birth certificates, health cards, passports, driving licenses etc.

Recently, in June, Icelandic Parliament voted 45–0 on a bill to implement a progressive "self-determination gender change model law", similar to numerous European and South American countries. The bill includes a third gender option known as "X" on official documents. The law went into effect on 1 January 2020.¹⁹

¹⁸ Human Rights Watch, *World Report 2016* 21 (Briston University Press, Policy Press,2016).

¹⁹“Legal Recognition of non-binary gender” available at https://en.wikipedia.org/wiki/Legal_recognition_of_non-binary_gender (last accessed on May 2, 2019).

4. Embodiment of Yogyakarta Principles in legislative framework

Yogyakarta Principles should be incorporated in different spheres of legislative framework to eradicate the gender discrimination at grassroot level. The legislation should try that these basic human rights and freedom principles should be embedded in various policies meant for social welfare.

5. Provision for gender affirmative healthcare services

The gender affirmative healthcare services are recommended. Gender affirmative healthcare services in the context of health include processes and interventions, both surgical and non-surgical in nature that allows a person to assert their internally felt gender identity.²⁰ The concept of medical necessity was first recognised by Harry Benjamin International Gender Dysphoria Association (HBIDGA) in 1979. HBIDGA is now known as World Professional Association for Transgender Health (WPATH). WPATH Guidelines deals with the treatment of gender dysphoria, which refers to distress or discomfort caused by the discrepancy between an individual's gender identity and sex assigned at birth.²¹

6. Participation of transgender in their law-making process

The transgender laws should be reframed and the creators of law should not only be cisgender but at least 50% of participation should be from transgender community as the sufferers can better acknowledge their issues and thus meaningful and purposeful legal provisions can be enacted. The author further suggests that even the Committee framed at national level should comprise 50% of third gender. The separate department should be established for addressing the grief and torture complaints against transgender.

7. Reservation for third community

As the TG community exists in minority, so reservation should be provided to them. If we compare this community with other communities already privileged with reservation, it is crystal clear that at present, they are the most deprived section of the society in need of reservation.

²⁰ Diksha D Sanyal, "Locating a Moral Justification for State Funded Gender Affirmative Healthcare" 10 *NUJS Law Review* 3 (2017).

²¹ Harry Benjamin International Gender Dysphoria Association, *Standards of Care: Fifth Version*, February 2001, available at <http://www.cpath.ca/wp-content/uploads/2009/12/WPATHsocv6.pdf> (last accessed May 9, 2020).

8. Residence of transgender child at her discretion

It should be at the discretion of transgender child to reside with biological family or in their community. The Court cannot force them to remain with their family or to join rehabilitation centre. Moreover, the Court must first ensure that these rehabilitation centres are no more a hub of crimes.

9. Simpler procedure for issue of gender identification certificate

The procedure for obtaining certificate in respect of gender identification should be made simple and there should be a separate department for dealing with these issues. It is recommended that the department itself should consist of transgender employees so that they could manage their problems and any complaint regarding registration can be directly heard.

VIII. CONCLUSION

NALSA judgment guidelines has been not followed in the new Act and the Draft of Rules. When there is conflict between judgment and legislation, the legislation is always the winner until the law itself is challenged and that particular law is struck down for being unconstitutional or any other reason. The empowerment of transgender community is not a matter of a single day transformation but it is a herculean task in the current situation of the society. The very beginning has to be the identification and acceptance of this community and non-discriminatory attitude towards them by the cisgender. No progress can be done without educating the society of the evils of such discrimination and the need to spread realization of gender equality and thus providing every individual the opportunity to recognize their potential for growth.