

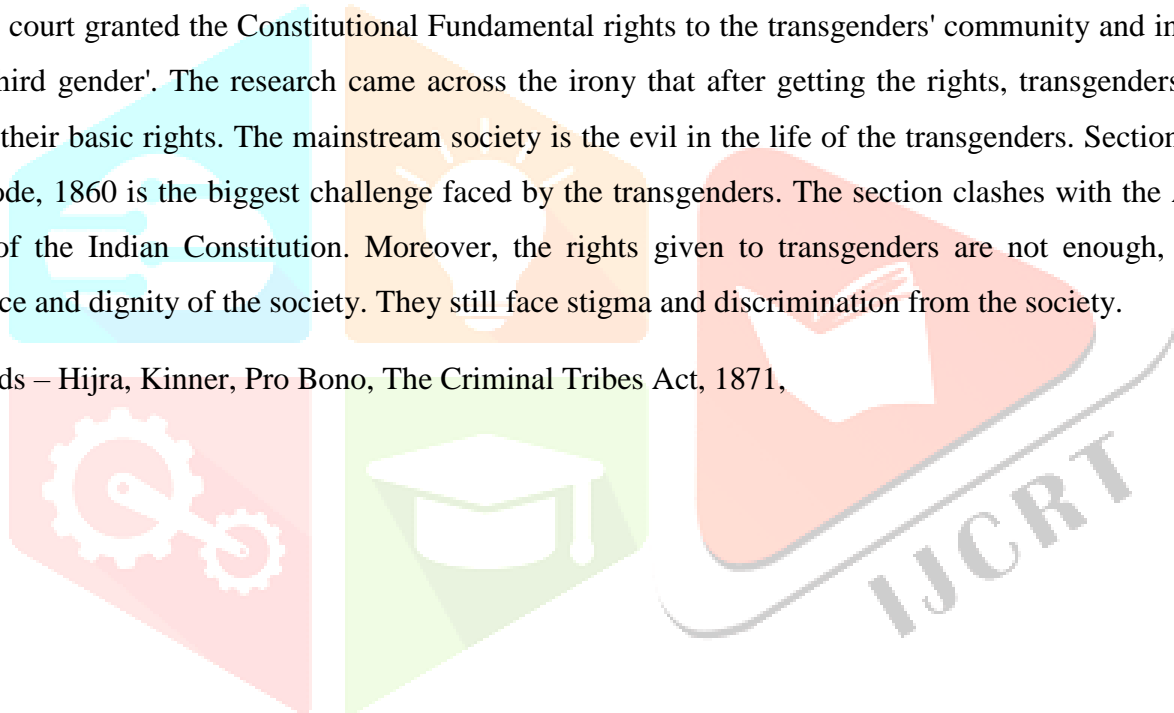
ANALYSIS OF THE EXISTENCE OF TRANSGENDERS RIGHTS

Garima Singh

ABSTRACT

The article explores the historical evolution of transgenders community in different periods. After the Colonisation the condition of transgenders became worst. They have no rights to show their existence. Lakshmi Narayan Tripathi, a transgender activist fought for the Fundamental rights for the transgenders. The landmark judgment held in National Legal Service Authority vs. Union of India was the ray of light for the transgenders. In this case, Supreme court granted the Constitutional Fundamental rights to the transgenders' community and introduced them as the 'third gender'. The research came across the irony that after getting the rights, transgenders are unable to exercise their basic rights. The mainstream society is the evil in the life of the transgenders. Section 377 of Indian Penal Code, 1860 is the biggest challenge faced by the transgenders. The section clashes with the Articles 14, 15 and 21 of the Indian Constitution. Moreover, the rights given to transgenders are not enough, they want the acceptance and dignity of the society. They still face stigma and discrimination from the society.

Key words – Hijra, Kinner, Pro Bono, The Criminal Tribes Act, 1871,



INTRODUCTION

“Bhagvadgeeta teaches about the soul and every person has the right to live in their own way without any discrimination against him or her. The soul does not have any gender”.

Transgender is the umbrella term for persons whose gender identity, gender expression, appearance or behavior does not match to that typically associated with the sex to which they were assigned at birth. In India transgender is addressed as ‘Hijra’ or ‘Kinner’.

Our Constitution has provided the fundamental rights to every citizen of India but still, the transgenders are deprived of their rights. They are discriminated by the society in every field whether it is education, medical facilities or others. Stigma prevents the transgender people from accessing the HIV and health services they need. Everyone has the right to live his or her life with dignity. Article 14 of the Indian Constitution tells about the equality. All the people are equal in the eye of law. Here the expression ‘the people’ means every male or female or third gender all are equal in the eye of the supreme law, nowhere it is written then only males or females have the right to exercise their fundamental rights then why the transgenders are not granted to exercise their rights. Due to the impoverishment of rights, they are being assaulted, raped, brutally murdered and extorted by the people of society. Article 21 of the Indian Constitution provides the right to live and the right to privacy but transgenders are not enjoying such rights rather they are treated badly.

Our system of law is described in the ‘Manusmriti’ where Manu was the king during ancient time. That time the kinnars live with dignity and they were treated as the human i.e creation of God. No one is supreme from almighty if the disrespect the kinnars that means they disrespect the God. In Vedas, there was space for the transgender. “The Man Mahadev get inspired with Pushpadanta who himself was the Kinner and he was a great scholar and a poet”. This shows that the condition of kinnars in past was good as compared to the present scenario. The transgenders are also the children of God. If God has not discriminated them then who are we to stop them from exercising their rights. To earn their livelihood they do illegal work such as prostitution but there also they are beaten brutally. They are not safe anywhere because society does not treat them humanely. The society does not consider the transgenders right as the human right.

The landmark judgement in National Legal Services Authority vs. Union of India held where Supreme court declared the transgender people as the ‘third gender’ and granted them Constitutional Fundamental rights. This case was the major step towards the gender equality in India but still, the transgenders' rights are neglected by the society. Manabi Banerjee appointed as the head of women's college in the eastern state of West Bengal is landmark step for transgender rights but she resigned because of the humiliation and exploitation against her. This demonstrates that the relationship between mainstream society and the world of trans people is very fragile.

HISTORICAL EVOLUTION OF TRANSGENDER COMMUNITY IN INDIA

Ancient Period

Transgender had been a part of Indian Society for centuries and were considered as demigods. The historical evidence for the recognition of the third gender can be seen in the epic, Vedic literature and Puranas. Valmiki mentioned about the transgender in Ramayana where they share special status in the society. Lord Ram granted them a boon: The Hijras give blessings to the people during auspicious and inaugural occasions, such as childbirth and marriage. Moreover, another form of Lord Shiva where he merges with Parvati and the resultant form half Shiva –half Parvati knew as Ardhanari.

Medieval Period

Hijras played a vital role in the royal courts of the Mughal rule, particularly in the Ottoman empire. They were well known as the guardian of harems. They were considered as dexterous, trustworthy and fiercely loyal. They also occupied the high positions in the Islamic institutions especially in guarding the holy places of Mecca and Medina the person of trust. Last but not the least, they too received a large amount of money to have been closest to kings. This shows they have a special status in the medieval period.

Colonial Period

Through the onslaught of colonial rule from the 18th century onwards, the situation and position of transgenders changed drastically. The European travelers could not comprehend that why the hijras were given so much respect in the royal courts. In the second half of the 19th century, the British administration criminalizes the hijra community and denied to provide the civil rights. They were considered separate tribes. The Criminal Tribes Act, 1871, this included all hijra who were involved in kidnapping, castrating children and dressed like women who dance in public places. The punishment for such activities was up to two years imprisonment and a fine or both.¹

The Karnataka Police Act was amended in 2012 to provide the registration and surveillance for transgenders who were indulged in the abduction of children, unnatural offences and offences of this nature and power to regulate eunuchs (Section 36A), in a similar vein to the Criminals Tribes Act, 1871.

Contemporary Period

In India, transgenders are recognized as the third gender and they are subjected in the weaker sections of the society. In the contemporary period government launched many policies and schemes for the welfare of the transgender such as census, documentation, issuing passports, ID cards of citizenship. The Transgender Bill passed by the government for the transgender so that they can enjoy their constitutional fundamental rights. The Mahatma

¹M. Michelraj, *Historical Evolution of Transgender Community in Indi*, (June 10, 2018, 10:30 AM), <http://www.trp.org.in/wp-content/uploads/2015/10/ARSS-Vol.4-No.1-Jan-June-2015-pp.17-19.pdf>

Gandhi National Rural Employment Guarantee Act (MGNREGA) was the major initiative of the 11th Five Year Plan which brought the employment opportunities for the transgender. The Supreme court held in National Legal Service v. Union of India that transgenders have the right to exercise their constitutional fundamental rights.

Transgenders lives the life of shame and indignity due to the pessimistic attitude of society towards them. By observing such discrimination, the transgenders raised their voice for the basic fundamental rights. Lakshmi Narayan Tripathi the first transgender who stepped forward for the rights of the transgenders' community. In an interview, she quotes, "A hijra ... is someone who is feminine but not a woman, masculine but not a man, a person beyond the boxes of man and woman. The person follows the rules and regulations of the community, has a guru, lives in feminine attire, may or may not be castrated."²

NATIONAL LEGAL AUTHORITY V. UNION OF INDIA [(2014) 5 SCC 438]: SHAFT OF LIGHT FOR THE LGBT COMMUNITY.

The landmark judgment was given by the Supreme Court in favor of the transgenders' rights.

FACTS OF THE CASE

The National Legal Authority, an Indian based organization that provides pro bono legal services for the marginalized and weaker communities, filed a writ petition with the Supreme court of India on the behalf of the transgender community. The petition was joined by the non-governmental organization representing the transgender community.

The term 'Hijra' usually described the transgender community in South Asia. It includes hermaphrodites and castrated men as well as non castrated men. The transgender community in South Asia, however, is used to describe a wider range of gender conformity.

The case concerns the recognition of rights for transgender people. The atrocities faced by the transgender community from the instrumentality of the state and society, in turn, is a violation of their fundamental rights including Article 14 and Article 21. The community also prayed for legal protection as a backward community and as well as the right to express their self-identified gender in government forms.

ISSUES

The issue was made that the recognition of only binary genders of male and female under Indian law and the lack of measures to oblige for the needs of represented groups contradicted for the constitutional rights including the

²AnithaChettiar, *Problems Faced by Hijras (Male to Female Transgenders) in Mumbai with Reference to Their Health and Harassment by the Police*, International Journal of Social Science and Humanity, (June 15, 2018, 11:22 AM), file:///C:/Users/DELL/Desktop/551-W10007.pdf

rights to a dignified life Article 21, equality before law Article 14, non discrimination and freedom of expression Article 15.

The state government came across that an “Expert Committee on issues relating to Transgender” had been set up and the petitioner’s views would be sought as part of the process. Various states and territories argued that they had taken the steps to improve the status of the transgenders.

Judgment

The court was constituted of two judges. The leading judgment was held by K.S. Radhakrishnan and his judgment was endorsed by judge A.K. Sikri. The Supreme court held that transgender will be considered as a third gender. Under Article 21 the right to choose one's gender identity and the right to live with dignity comes within the scope of the right to life. With regard to the right to equality before the law under Article 14, the court granted the equal rights to transgenders. The right to express one’s gender identity through words, dress, action or behavior is included in the right to freedom of expression under Article 19. Articles 15 and 16 prohibit the discrimination in certain areas including sex so, transgender is not supposed to be discriminated on the basis of sex according to constitutional law.

Thus, the Articles 14, 19 and 21 are the golden triangle of the Indian Constitution. The Supreme court provide the rights to transgenders under above mention Articles. This case brought the tremendous change in the life of the transgenders.

TRANSGENDER PERSONS BILL, 2016: STEP FOR THE ACCEPTANCE OF TRANSGENDER

In India

Mr. Triuchi Siva introduced the bill as a Private Member’s Bill in the Rajya Sabha. The bill passed in the Rajya Sabha but it was not discussed and debated in the Lok Sabha. It had many progressive clauses including the creation of national institutions for transgenders rights. To prevent the sexual discrimination various remedial measures were done away with when the government drafted the Rights of Transgender Persons Bill, 2015. Notwithstanding these notable omissions, the skeleton framework of draft bill borrowed heavily from its predecessor. After the proper consultation with legal experts and transgender activists, a 2015 bill was sent to the Law Ministry. It was introduced in the Lok Sabha in August 2016 after the revision of the draft bill of 2015.

AIM OF THE BILL

The aim of the bill was to provide social and civil rights to the transgenders in order to eradicate discrimination against them.

1. The Bill defines a transgender person as one who is partly male or female; or a combination of male and female; or neither male nor female. In addition, the person's gender must not match with the gender assigned at birth, which includes trans-men, trans-women, persons with intersex variations and gender-queries.
2. To invoke rights transgender must obtain a certificate of identity as proof of recognition of identity as a transgender person.
3. Such a certificate would be assigned by District Magistrate on the recommendation of Screening Committee. The Committee would constitute a medical officer, a psychologist or psychiatrist, a district officer, government official and a transgender person.
4. The Bill prohibits discrimination against transgender in fields such as education, employment, and medical care.
5. The offences against transgender such as compelling a transgender to beg, denial of access to public places, physical harassment and sexual abuse etc. would take up to two years' imprisonment and a fine.

ISSUES

1. The Supreme court held that the right to self-identification is a part of the right to dignity which comes under Article 21 of the constitution but the Bill states that a person recognized as a transgender would have the right to 'self-perceived' gender identity. Hence, this was the major issue.
2. The definition of transgenders framed by the bill makers differs from the definitions recognized by international bodies and experts in India. Thus, it was wrong based on the concept of Ardhanari in the Hindu mythology.
3. The certain criminal laws and personal laws were introduced but they only recognize the gender of 'man' and 'woman'. There nowhere was mentioned about the laws which would apply to transgender persons who may not identify with either of the two genders.
4. The Bill only talks about the rights of the transgenders from male to female, it does not include the rights of transgenders from female to male.
5. A Chennai-based technologist and Dalit transgender activist named Grace Banu said that the Bill is silent on several aspects outlined in the Supreme Court judgment and House panel report. "This consists reservation in government jobs and educational institutions, recognizing intersex as different from transgender persons, stress on healthcare, decriminalization of sex work and begging and provision of livelihoods."³

³Transgender Community terms govt's Bill as 'regressive', launches nationwide protest movement, The Indian Express, (June 21, 2018, 9:46 PM), <https://indianexpress.com/article/india/transgender-persons-bill-ministry-of-social-justice-4974281/>

6. The bill does not give the right to marriage, adoption or alternate family structure and also failed to give punishment for sexual violence.

TRANSGENDER RIGHTS: ARE THEY ANY?

Isn't it ironic that though the transgenders got their constitutional fundamental rights after facing many obstacles still they are unable to exercise their rights? Though they are considered as the third gender after the landmark judgment by the Supreme court but are not accepted by the society. The reality behind the rights of transgenders is different from what we observe. They live the life of shame and indignity due to the pessimistic attitude of the society towards them.

If we talk about the present scenario, the condition of transgender is still poor. The major challenges faced by them follow-

Section 377 of Indian Penal Code, 1860, the first and foremost challenge faced by the transgenders. This section criminalizes sexual activities against the law of nature and which includes unnatural offence. It criminalizes homosexuality, not heterosexuality. This is a colonial epoch law which makes the Transgender community vulnerable to police harassment, extortion, and abuse. In *Jayalakshmi vs. State of Tamil Nadu*, Pandian, a transgender who was arrested on charges of theft by the police. He was sexually assaulted by the police officers in the police station which eventually led him to immolate himself.⁴ Section 377 clashes with the Articles of Constitution and affects the rights of the transgenders because it was violative of Articles 14, 15 and 21 of the Constitution as it criminalized the consensual sexual acts of adults in private. Article 14 states equality before law and equal protection of law. Equality includes full enjoyment of rights and freedom. Article 15 and 16 of the Constitution prohibit discrimination against any citizen of the state on certain grounds including sex. These Articles prohibit all forms of gender-based discrimination. Even after such protection, transgenders face discrimination and indirect violence in the society due to which they are unable to compete at par with others. Ultimately they have to resort in begging and sex work.⁵ The right to choose one's gender identity falls within the ambit of Article 21. The court provided the right to gender equality to every citizen of India but the transgenders are still deprived of this right. In *National Legal Authority vs. Union of India*, Supreme court held that transgenders are third gender and granted them constitutional fundamental rights but there was no decision on the homosexuality. Under section 377, still their fundamental rights are violated.

⁴Riki Wilchin S, *Transgender Rights Protection In India – An Analysis*, (June 23, 2018, 9:30 AM), <http://www.imrfjournals.in/pdf/MATHS/AEIRJ-Volume%204-Issue-2/4.pdf>

⁵ Manasi Bhushan, *Analysis on Transgender Persons (Protection of Rights) Bill, 2016*, (June 24, 2018, 12:17 AM), <http://www.indialawjournal.org/analysis-on-transgender-persons.php>

Manabi Bandopadhyaya, India's first transgender college principal of West Bengal at Krishnagar women's college in Nadia district. She became the hope for the transgender community. After touching the heights of success she was dented by the mainstream society. She resigned from the job because she was not accepted by the staff and students. She faced humiliation which made her weak and forced her to resign from the job. In her interview, she said, "Everything is a drama. In reality, I am always the outsider. After a point, their masks fall off. One can see their dark and prejudiced mindset. I am a victim of mainstream politics."⁶ She faced many obstacles in her life. She was not accepted by her parents then how we can expect that the society will accept her. This depicts that transgenders are victimized by the mainstream society. They have rights but they don't have acceptance from society.

If the law has recognized transgenders as 'third gender', doesn't it have an equal responsibility of protecting their rights? They are being raped and harassed in a heinous manner but no one step to give them justice rather they are humiliated by the people. After acquiring education still, the transgenders had to cry for accommodation and livelihood. Zara Sheikha, the first transgender in India who got the job of a human resources executive at a multinational company in Kerala. She knocked at least eight doors for a proper shelter even though she had a decent job and money. So, for accommodation, she brought her friend and his wife as a guarantor with their documents. This shows that they are still lacking behind even after getting rights.⁷

The transgenders are eliminated not only from the society but also from their family. The family denies to accept them due to which they escape from the house and to earn livelihood they get involved in prostitution and begging. They are put into sex work which brings 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 or communicable diseases such as rectal gonorrhoea, syphilis, rectal Chlamydia, etc., add to the risk of HIV. A transgender woman named Madhu who was 22 years old from Madurai explains what why she no longer gets tested for the disease. She shares that "I no longer have the courage. What if they say that I have HIV and AIDS? Where will I go? And how will I learn? I hope to die if I ever get detected with HIV."⁸

After getting such rights and reserved quotas, transgenders are being discriminated. The transgenders have the right to vote under Article 326 of the Constitution but when they go for voting, they are being humiliated by the public saying that in which line you will stand; male or female. This reflects that they are the source of amusement.

⁶ Priyanka Dasgupta, *My resignation should make mainstream society introspect*, THE TIMES OF INDIA (June 26, 2018, 11:27 PM), <https://timesofindia.indiatimes.com/city/kolkata/my-resignation-should-make-the-mainstream-society-introspect/articleshow/56242903.cms>

⁷ Rejimon K, *Transgenders in Kerala continue to face discrimination as the poor grasp of issues negate govt efforts*, (June 27, 2018, 10:30 PM), <https://www.firstpost.com/india/watch-transgenders-in-kerala-continue-to-face-discrimination-as-poor-understanding-of-issues-negate-govt-efforts-3965517.htm>

⁸ Saumya Agarwal, *What are the Rights of Transgenders*, iPLEADERS (June 27, 2018, 10:33 PM), <https://blog.ipleaders.in/legal-rights-of-transgender-india/>

CONCLUSION

Though the transgender's community has been given the Fundamental Constitutional rights the satire is after having the rights they are unable to exercise their rights. The mainstream society is the evil in the life of transgenders because they are not ready to accept them. Not only society but their parents also share an equal part in exploiting them, they beat and tortured so badly that themselves leave the house and get indulge in sex work and begging. The transgenders are also human beings, they also have their life to enjoy with dignity. They are also the creation of God if God is not discriminating on any grounds to them then who are we to discriminate them. The Indian Constitution ensures the right to equality in Article 14, Prohibits discrimination on the basis of caste, sex, religion, race or place of birth in Article 15, Right to live and right to privacy in Article 21 whether these rights are actually enjoyed by transgenders?. They are also the citizens of the state. The category of the third gender is not a new a concept. They occupy a special place with dignity in Ramayana, Mahabharata, and Vedas. In the present scenario, transgenders have they are full of rights. They touch the sky with their rights but again society play a vital role to suppress and bring them from sky to earth. Today transgenders are being addressed by the third gender and belong to the LGBT Community. They have different community only because of stigma and discriminated against which they are facing by the society.

“Trans people deserve something vital. They deserve your respect. And from that respect comes a more Compassionate Community, A more Empathetic Society, And a better world for all of us.”

- Caitlyn Jenner