



HATE CRIMES AGAINST TRANSGENDER PERSON AND ROLE OF LAW IN PROTECTION OF TRANSGENDER PERSONS

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ABSTRACT:

Transgender Persons are the most marginalised section of society across the world. The struggle for Transgender to live a life of dignity seems to be a distant dream. The Transgender Persons have been subjected to discrimination and humiliation in all quarters of society. They have often been soft targets for abuse and violence both physically and psychologically across the globe. The growing number of instances of violence against Transgender Persons highlights the vulnerability of this community and the visible prejudice and hate towards them by the society. The brutal incidents of violence against Transgender Persons often goes unreported for wide variety of reasons. Due to their obscure identities and poor socio,eco and pol backgrounds the Transgender Community fail to protect themselves. The society and the state which has the responsibility to ensure a safe environment for all individuals also have failed to exercise strong political will in extending the same level of protection given to transgender persons. In this paper the author tries to explore the hate crimes against Transgender Person the reasons for such hate crimes and the role of law in protecting the Transgender Persons against violence and hate crimes..

KEY WORDS: Transgender Persons, Hate Crimes, Legislations, Law, Violence, Transphobia.

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INTRODUCTION:

A hate crime is a crime motivated by malice towards someone's identity, perceived identity or affiliation with a specific group. Hate crimes are often projected towards a Transgender Person's gender identity or expression but is also targeted towards his sexual orientation, race, religion, color, origin, place etc². Criminal offences which are motivated by or which manifest hate towards the victim's perceived gender identity, sexual orientation or expression are called hate crimes. They may occur at home, workplace, educational institutions, public places, online etc².

Nature of harm induced by hate crimes include killings, abuse, rape, sexual assault, physical assault, threats and property damage. Violence against Transgender Persons has always existed. Although there is some evidence to show that the Transgender Persons were accepted and respected in the ancient Hindu period and the Mughal era, their status degenerated with the establishment of the British rule. Since the advent of British rule the Transgender Persons have been criminalised and driven to oblivion. Under the Criminal Tribes Act the Transgender Persons were labelled as criminals and banished out of the mainstream society. A register was maintained whereby they were required to sign it on a daily basis. The British considered them to be morally depraved persons who would corrupt the morality of the society. They were seen by the British as a Tribe that did not fall in line with the Victorian moral policies. Thus the Transgender Community still bear the brand of criminals and social outcast bestowed to them by the British till the present times. The prejudice towards Transgender Persons have not changed even after so many years of independence. With India coming up with its own Constitution which made several provisions for the protection of weaker section like Dalits, religious minorities, women and children, drastically failed even to acknowledge the existence of the Transgender Community. Therefore with a lack of legal protection the Transgender Persons have become a soft target of violence and hate crimes and the scenario continues.

Hate motivated violence is likely to cause heightened physical, psychological and emotional trauma among the victims and it also spills over the entire community affecting them in various ways. Transgender hate crimes are mostly violent in nature with victims being subjected to more physical harm than any other kind of victimisation. Transphobic hate crimes are often physical in nature ranging from aggravated assault to murder and mutilation. The emotional impact of hate crimes are greater than ordinary crimes resulting in higher levels of anger, depression, trauma, stress and anxiety. The waves of harm that are caused by anti trans hate crimes affect other victim group members as they are in the nature of 'message crimes', transmitting a message of similar consequences, thus terrorising the entire group who share the same identities as that of the victim. This creates a climate of threat and fear to the community that they too will face such consequences³.

² Giteri Eric Mawira, Walters Mark, Hate crimes against LGBT community in the Commonwealth: A situational analysis, Human Dignity Trust, 2020, p8

³ Goodall Kay, Walters Mark, Legislating to address hate crimes against LGBT community in Commonwealth, Human Rights Dignity Trust, 2019

Methodology:

This research paper is written on the basis of a desk research. The author has relied upon various reports of the human rights and Transgender/LGBT organisation and activists. Judgements of the courts and statutes were consulted for the understanding the role of law in protection of Transgender rights. Articles in journal news newspapers were also used as secondary sources. News reports were taken as sources to explore the violences against Transgender Persons across the country and abroad. Online databases and articles were also used as sources to write this paper.

REASONS FOR HATE CRIMES AGAINST TRANSGENDER PERSONS:

Transphobia may be cited as one of the root cause of hatred and prejudice towards Transgender Persons. Transphobia means an irrational fear, aversion, disdain, discrimination or prejudice against the Transgender Persons. It is often rooted in the archaic belief that dates back to the ancient times where homosexuality was considered to be a great sin, especially in Islamic and Christianity. Most hate crimes against Transgender Persons are transphobic in nature. Actions motivated by psychological illness as transphobia influenced by social and cultural prejudice propell the persons to commit hate crimes against Transgender Persons. The Transgender Persons gender identity, sexual orientation and expressions that does not conform to the widely accepted social norms is seen as a deviant behaviour by the perpetrators of hate crimes who believe the deviants need to be punished for depraving the morals of the society. Their failure to understand that there can be behaviours that are different from the mass of the society leads them to such acts of hate crimes. Hate crimes have a wide implications, as crime against one member can have a high impact on the entire community, terrorising them and causing a lasting fear instilled in them⁴.

Perpetrators:

Hate crimes may be committed by both state and non state actors against the Transgender Persons. Both state and non state actors contribute in their own ways to the abuse suffered by the Transgender Persons. The Laws by themselves pose a contributor to hate crimes by the state. The past Colonial laws that have effect of criminalising sexual act among consenting partners of the same sex and gender variants, sought to have standardised and brought in line with the Victorian moral values, erasing the diverse gender identities, spiritualities and culture. The criminalisation is reinforced and even at times reintroduced gender and sexual hierarchies. Old and new laws that criminalise gender non-conformity and sexual acts between same sex persons only build up a social climate that promote rigid gender norms and inequalities for the Transgender Persons who will choke in such environment⁵.

⁴ Sinha Tanmay, Gupta Deepika, 'Hate crimes: a rising menace', IJLMH, Vol1, Issue 4, 2018, pp4-5

⁵ Supra3, p15

In almost all cases the first experience of hatred and prejudice any Transgender Person encounters is from their own family. The family members find it very hard to accept the transition of the person into a different gender than the one assigned at birth. The members of the Transgender Person pressurise them with physical and verbal abuse to conform to the traditional gender and stop them violently from expressing their gender variant behaviour. This leaves the Transgender Persons with the feeling of not loneliness and not belonging and will prompt them to leave the house and join the people who are like them. Thus the violence and hate suffered at the family often renders the Transgender Persons homeless and they are forced to beg in the streets or work as sex workers for a living and they have no employment opportunities. This initial rejection from the family has a major impact of the entire life of the Transgender Persons as it results in deprivation of shelter, education, employment and right to live with dignity of a Transgender Person. Therefore it would not be an exaggeration to state that the primary perpetrators of hate crimes against Transgender Person are their own family.

The other category of perpetrators can be summed up as the people in educational institution where the Transgender Person is bullied and the abusive teachers, the people at workplace shunning and ridiculing them or the public in general who the Transgender Persons encounter and suffer violence because of their gender variant behavior and expression which is an unacceptable factor to the public in general. There are several ghore incidents that have occurred against Transgender Persons where the violence is of extreme nature such as mutilation. Such are committed by persons who have absolutely no regard for laws or rules of the society or human life. These kinds of perpetrators are mentally depraved, perverts and social deviants who are dangerous criminals targeting Transgender Community.

In many cases it is seen that personnels from law enforcement agencies have been involved in violence and abuse of Transgender Persons. There are several instances where the police who should acting as a shield to protect the vulnerable and weak, are often found to be indulged in brutal acts like sexual assault, rape, murder and exploitation of Transgender persons. The complaints of the Transgender Persons for any greveances are not registered and are not taken seriously by the police. On the other hand, when a Transgender Person tries to place a complaint with the police for any crime or violence committed against them, they are often looked upon with suspicion. The police often assume the Transgender Persons to be involved in prostitution and treat them with distrust and disrespect. They forget that even if their assumptions are true it is their duty to protect every individual coming to them seeking legal protection. On the other hand they abuse the complainant Transgender Person, thus denying the legal shelter and protection to the Transgender Persons. Such attitude of the law enforcement agencies is triggered out of prejudice and animosity and amounting to hate crimes. Therefore the state who has to be protecting Transgender against hate crimes becomes the perpetrator of hate crimes.

Role of law:

The Transgender Persons in India have no greater protection as is the case elsewhere. The very existence of the Transgender Persons was acknowledged by the Supreme Court in *National Legal Services Authority v. Union of India*⁶. It was this historical judgment which recognised the identity of the Transgender Persons and paved way for a better life of dignity, protection and welfare of the Transgender Community. The Court recognised their rights to choose their identity as male, female or third gender. The court gave directions to the government to make law for the protection of the Transgender Community. In pursuance of the court directions the

Bill related to protection of rights of Transgender Persons was introduced in the Parliament in 2014, then again in 2016 with certain changes which finally saw the implementation in the form of a weak piece of legislation, The Transgender Persons (Protection of Rights Act) 2019. The current bill is a too diluted version of the Supreme Court Judgement which washed away the aspiration of the Transgender Persons. There is no provisions in the Act which exclusively deals with the violence towards protection of Transgender Persons, which is in fact a key issue faced by the Transgender Persons. The penal provisions in the Act are too general and not deterrent enough to counter hate crimes against Transgender Persons. The maximum punishment for any form of abuse or harassment against a Transgender Person is 2 years which is very negligible and may not be taken seriously by repeat offenders. The Act has failed to make specific provisions on offences relating to sexual abuse. Although IPC contains stringent provisions on rape and sexual assault, the Transgender Persons do not fit in to derive protection from this law, as it is women specific laws⁷. Since the criminal laws in India are not gender neutral in matters of rape and sexual assault and therefore the Transgender Persons are not adequately protected even under them.

Section 377 of Indian Penal Code is still constitutional as the Supreme Court re-criminalised the sexual acts between the same sex people. A paradox is thus created by upholding the constitutional validity of 377 and the implementation The Transgender Persons (Protection of Rights Act) 2019. The Act which tries to confer a life of dignity to the Transgender Persons is juxtaposed to sec 377 of IPC, which is inconsistent and stands as a major obstacle for the Transgender Persons to utilise the benefits of act to its full potential. The Transgender Persons cannot live an accomplished life unless sec 377 of IPC is decriminalised, without which the provisions of the Act cannot materialise to its full potential and this becomes a hovering sword over the head of Transgender Persons as they are still considered as criminals under sec 377 of IPC. The continued existence of such laws that criminalises same sex intimacy facilitates abuse, and because of lack of legal gender recognition, Transgender Persons fall in the category of offenders.

⁶ AIR 2014, SC 1863

⁷ <https://www.youthkiawaaz.com/2020/01/an-overview-of-the-transgender-persons-protection-of-rights-bill2019/last> visited 09-10-2020

Reforms in the criminal justice system:

The ultimate aim of the criminal justice system is to persuade members of the society to refrain from prejudice based acts because it is wrong. Criminalisation of hate crimes against Transgender Persons is a means through which state publicly condemns violent expressions of prejudice. It is a statutory means through which the state communicates support to positive norms of acceptance. This measure can bring a shift in the public attitudes which results in a

climate of tolerance and acceptance. For hate crime laws to yield full potency, they will need to be implemented in line with policies that remove barriers to equality and repeal laws that harm Transgender Persons, especially consensual sexual acts between same sex persons. A thorough revision of laws that deny Human Rights is crucial for effectively challenging and reducing hate crimes. It is ideal to implement hate crimes laws in line with the human rights laws⁸.

There must be a provision in the criminal justice system to maintain a record of offenders who repeatedly indulge in hate crimes. This will make it easy to track the offenders whenever such incidents occur. There will be a pool of data created of known offenders and it will help narrow down the investigation in the right directions and may act as a deterrent for the offenders in commission of offences of this nature in future, as they are already in the radar of suspicion. A properly maintained track record helps to trace the offenders quickly and justice is seen to be done.

There is a necessity of accurately labelling hate based offences. Hate crimes should be created as substantive offences with specific definition. Otherwise it becomes very difficult for the investigators to identify it as hate crime. Without proper classification and defining of crimes as hate crimes it will not be possible to identify them and can be just passed off as general crimes. For example: an assault will become a hate crime if actuated with hate and prejudice, otherwise it can just be punishable as assault. Creating hate crime offences that enhance criminal sanctions, where crime is motivated by hate or demonstrates prejudice, helps to ensure meaningful focus on combating hate crimes⁹.

Sentence enhancements for crimes actuated with hate or prejudice may help reduce hate crimes. This may be done by revising the existing criminal laws by adding a clause where the sanctions are enhanced, if the offence was motivated with hate or manifests prejudice. Without such elements the sentence would be normal but where such elements are found the sentence may be enhanced as these elements aggravates the crime.

Another important reforms to be considered is to extend the protection under all women specific laws to the Transgender Persons. Even the Indian Constitution expressly provides for only the traditional gender of man and women. It is high time drastic changes are made in the Constitution to make it gender neutral and include Transgender Persons wherever necessary along with the traditionally accepted genders. This will raise the

⁸ Supra note 3, pp15-17

⁹ Supra note 3, pp 29- 30

status of Transgender Persons drastically. It is also time to revise all family laws and other laws having significance and reference to gender to include Transgender Persons or to make it gender neutral as the case maybe.

High proportions of hate crimes against Transgender Persons go unreported. This is because of the lack of confidence on part of the Transgender Persons on the system of justice and law enforcement agencies. Therefore drastic reforms are called in the procedure of investigation. It is very much necessary to educate and create awareness among the law enforcement personals in their dealing with Transgender Person. They have to be sensitised to the different nature of the Transgender Person and learn to be compassionate in their approach towards them. Guidelines and training to this effect have to be given to the officials. These measures will help the Transgender Persons to regain confidence in the system and approach the law enforcement agencies, police for any injustice or violence meted out to them. This will open the gates of justice where the Transgender Persons can walk in without any fear of being humiliated or suspected to register their complaints. There is no proper official statistics of hate crimes and violence against transgender persons in India except for those maintained by some NGO and Activists, and the situation is same across the world. It is ridiculous and alarming at the same time to note that National Crime Records Bureau has no statistics on crime against Transgender Persons. Unlike men women and children government does not publish annual statistics on crimes against Transgender Persons in India which reveals the apathy of the government against the Transgender Persons¹⁰. It is the responsibility of the state to create and maintain a proper record and statistics of crime against Transgender Persons, to understand the gravity of the situation and also to understand the alarming rate of danger the Transgender Person faces just for the fact of their gender variance. This will help the state to take up the matter seriously. It would show the nation in good light of being responsible and accountable to the vulnerable sections. It will enable the state to keep track of the atrocities against the Transgender Persons and help take up appropriate preventive measures. It will enable the international organisations to know about the prevailing conditions and build up pressure on the nation to improve the situation. However sadly there is no proper mechanism to record statistics of hate crimes against Transgender Persons globally. So this has to be done on different levels, like local, national and international.

CONCLUSION:

Transgender people till live with constant fear of hate crimes and violence. Even though armed with legislation specifically enacted for their benefit, little has helped to imbibe confidence among them to live a fearless life and with dignity. Most of them hesitate to reveal their identity and live a life of oblivion with a fear of being attacked or being criminalised. The half hearted legislation has done very little to secure a life of Transgender Persons as there are several lacunes in the law and it simply not in line with the judgement of the Supreme

¹⁰ <https://www.scmp.com/week-asia/society/article/2154077/india-no-country-transgender-women>, last visted on 10-10-2020

Court in *NALSA*¹¹ case. There is a humongous work to be done in challenging and addressing the issues of hate crimes against Transgender Persons. Drastic law reforms, measures for attitudinal changes and sensitisation of law enforcement personnels and the public in general, steps to understand behavioural pattern of the perpetrators and reformative measures, strict directions to educational institutions to have in place Anti Transgender Harassment Cell on the lines of anti ragging law resulting in strict actions against the perpetrators may help to bring in al climate of tolerance and acceptance.

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¹¹ Supra note 7