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Rights Of Transgender Under The Indian Law And Society- A Humanitarian Review

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ABSTRACT

Transgender people constitute a part of our society. This term is used to describe people who identify with a gender different from sex they were assigned at birth. This has come to be known as umbrella term which includes Gay, Lesbians, Bisexual and cross dresser within its scope. In India Transgender community is known by different names such as Hijras, Eunuchs, Kothis, Aravanis, Jogppas, Shiv-Shakti etc. They are facing legal, cultural, social and economic difficulties as well as disrespected, and discriminated in the society. But a new hope of ray to the life of the transgender was brought by Supreme Court of India by declaring them as 'Third Gender' as well as the apex court confirmed the equal application of fundamental rights on them as guaranteed by the Constitution of India. It is a major step towards gender equality in India. Moreover, it is seems that the transgender are treated as socially and economically backward classes therefore the court confirmed their reservation right in admission of an educational institution and jobs. Gender identification becomes very essential components, which is required for enjoyment of civil rights by the Transgender peoples. Indian legislature enacted a statute with an object to prohibit discrimination against transgender as well as recognizes the criminal act punishable committed against transgender. However, the judiciary and legislature have been trying to uplift the life of transgender but there is no reason, why, transgender denies of basic human rights and neglects by the society. It is a high time to prevent the prevailing discrimination under social, legal and economic for the purpose of safeguarding and enforcing appropriately their rights as guaranteed under the Constitution of India.

Key words: Transgender, disrespected, discriminated, backward classes, punishable, denies, enforcing.

Introduction:

The term transgender is generally used to describe who transgress social gender norms. Etymologically the term is derived from two words Trans and Gender, which means across or beyond. Grammatically it means across or beyond gender. This has come to be as umbrella term, which includes Lesbians Bisexual and Cross-dresser within its scope. Transgender may also takes in persons who do not identify with their sex assigned at birth and normally they are identified as 'Third Gender', popularly known as Hijras or Eunuchs. Transgender communities are not men by virtue of anatomy appearance and also psychologically are not women. Though, transgender are looking like women but like female, they have no reproduction organ and menstruation. Among Hijras, there are emasculated men, non-emasculated men and inter-sexed persons and persons who intend to undergo Sex Re- Assignment Surgery (SRS) or have undergone SRS to align their biological sex with their gender identity in order to become male or female. They are called as transsexual persons.

Objective of study: To study the status of transgender people in society and the judicial and legal response to curved out their problems.

Methodology: The present paper is based on doctrinal research methods to show the social and legal status of transgender peoples in Indian society and has been examined in four fundamental areas like social acceptance, their problems, and judicial and legal measures adopted for them under the legal system of India. The secondary data has been collected from books, journals, newspaper, internet etc.

Since time immemorial and in all cultures of society, gays, lesbians, transgender and inter-sexed people have identified, described, acknowledged and accommodated in so many occasions of society. Indian ancient literature are comprised of voluminous texts where pandita Yashodhara of 12th century adds the third sex (Tritya Prakriti) is termed as neuter (Nupumsaka). In Vedic text Nupumsaka is Sanskrit term equal to 'Kliba' and 'Sandha'. Later on Yashodhara consign it to the third natural people portrayed in the Kamasutra as homosexual.¹ While in early, British and English scholars translated this word as 'eunuch' and 'neuter' in their dictionary. On the other hand the Hindu mythology and other religious texts strongly defines the presence of Transgender group as comprises of Hijras, Eunuchs, Kuthis, Aravanis, Jogappas, Shiv- Shaktis etc.²

During Mughal empire in the 16th and 17th centuries Hijras respected and employed as royal servants and bodyguards. Hijras in India had a sanctioned role in hinder society through the practice of badhai (congratulations). In Nothern India the badhai culture is more chartists. In Southern India this community are involved in ritual roles such as Jogappas, Jogammas, Shivshakti and take part in various ritual possession.

During British rule, the situation had changed drastically and a legislation passed to supervise the functions of transgender called Criminal Tribes Act, 1871. The Act provided for the registration, surveillance and control of certain criminal tribes and eunuchs and had penalized, who were registered and appeared to be deseeded or ornamented like women and danced or played music in a public place. Such person also could be arrest without warrant and sentenced to imprisonment up to two years or fine. However, the Act been repealed in August 1949.³ Prior to that enactment, Indian Penal Code (IPC) also criminalized all penilenun- vaginal sexual acts between persons. Transgender were also typically associated with the prescribed sexual practices. However, Section 377 of IPC associated with specific sexual acts by highlighting certain identities was used as an instrument harassment and physical abuse against transgender persons. A Division Bench of Court in *Suresh Kumar Kaushal and Another Vs. Naz Foundation and Ors (2014) 1 SCC 1* has already spoken on constitutionality of Sec 377 of IPC.

Constitutional Rights to Transgender People: Article 14 of the Constitution ensures equality before the law and equal protection of laws within the territory of India. Hence a positive obligation lies on the state to ensure equal protection of laws by bringing in necessary social and economic changes, so that, everyone including transgender may enjoy equal protection of laws and nobody can deny such protection. Article 14 does not restrict the word person and its application only to male or female. Transgender person who is neither male/female fall within the expression person and entitled to legal protection of laws in all spheres of state activity including employment, healthcare, education and civil rights as enjoyed by any other citizen of country.⁴

On the other hand, Article 15 prohibits discrimination against any citizen on certain ground such as religion, race, caste, decent, place of birth and sex. Whereas Art. 16 provide equal opportunities for all the citizens in matters relating to employment to any office under state. Thus, Article 15& 16 sought to prohibit discrimination based on sex. In fact, both articles prohibit all forms of gender bias and gender based discrimination.

Article 19(1)(a) guarantees those natural rights inherent in the status of the citizen of a free country. Article 19 (1)(a) states that all citizens shall have the right to freedom of speech and expression which includes one's right to expression of his self- identified gender. Self-identified gender can express through the word,

¹ <http://www.historians.org>. retrieved 12/03/2020 at 9.30 pm.

² Jain, K. S. Rekh Raj, *Victimization and Vulnerability of Transgenders in Changing World*. Indian Bar Review, Vol. 45(4),2018, p.148.

³ Verma, Poonam, *Sorrows of Transgender and Judiciary, A Study*. Indian Bar Review, Vol XLII (3) 2015, pp. 139-140.

⁴ National Legal Services Authority Vs. Union of India and Ors, WPC (civil) no 400/2012 S. Judgement dt 15/07/2014 para. 54.

dress, action, behavior, or any other form and restrictions can be placed on one's personal choice of dressing, appearance subject to the restriction enumerated in Article 19 (2) of the Constitution.⁵

Article 21 is the heart and soul of the Indian Constitution, which speaks of the right to life and personal liberty. It is one of the basic fundamental rights and not even the state has the authority to violate or take away that right. Art. 21 take all those aspects of life, which go to make a person's life meaningful. It also protects the dignity of human life, one's personal autonomy, one's right to privacy etc. Right to dignity has been recognized to be an essential part of the right to life and accrues to all persons on account being human.

Recognition of one's gender identity lies at the heart of the fundamental right to dignity. Gender constitutes the core of one's sense of being as well as an integral part of a person's identity. Therefore, legal recognition of gender identity is a part of right to dignity and freedom guaranteed by the Constitution.

The legal regime of discrimination against transgender: Section 377 of IPC, a British colonial legislation criminalizes homosexual behavior of persons, which referred as unnatural offences and says whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life.

Section 292 and 294 of IPC relating to obscenity, the concept of moral turpitude as a ground for dismissal from service and the homosexuality conduct under Indian law is prohibited.⁶

Section 46 of the Army Act notes that any person subject to homosexuality is guilty of disgraceful; conduct of a cruel, indecent or unnatural kind is subject to remove from service. The homosexual relationship for the purpose of insurance claim, gratuity benefits, nomination and compensation have not recognized under the Workman's Compensation Act. These legal regimes of discriminations against the transgender in India turn out to be a structural feature of everyday living of sexually minority population.

Problems faced by Transgender: The transgender falls under the category of LGBT group (Lesbian, Gay, Bisexual and Transgender). Transgender are socially and economically backward organized sections of the society and faced legal, social, cultural and economic problem in their day-to-day life. The study identified the following major problems faced by transgender in society.

Discrimination: Despite constitutional guarantee of equality, transgender persons have been facing extreme discrimination in all spheres of the society. They are discriminated in every aspects of their life especially in the field of employment, education, healthcare etc. In fact they are facing a huge discrimination in access to public spaces like restaurants, cinema hall, shops, mall, hospital etc. Access to public toilets is also a serious problem they face quite often. Therefore, discrimination of the ground of sexual orientation or gender identity is a vital reason of impairment of equality before law and equal protection of law and Article 14 and 21 of the Constitution.

Disrespect: They are disrespected in each steps of their life except to bless a newborn baby or to newly wedded couple side-by-side neglected in the field of inheritance, custody, maintenance, adoption of child. They are mistreated so that they feel like social outcastes and may engage themselves as beggar, street dancer and sometime as sex worker for surviving.

Forced to leave parental home: Transgender peoples are neglected in their family and society as well. Most families' do not accept of their male child who starts behaving in ways that are considered feminine or inappropriate to expected role. Once their identity is identified, they are forced and pressurized to leave parental home either by family or society to save their family from infamousness. Consequently family members may threaten scolded or even assault their so sibling for behaving or dressing up like a girl or woman. Sometime the child or teenagers may decide to run away from the family because of intolerance discrimination. On the other

⁵⁵ *Ibid.* para. 67.

⁶ Singh. Chandreshwari, and Bhatt, D.K., *A Humanist Exposition of Rights of Transgender and the Indian Law*, Indian Bar Review. Vol. 44(4) 2017, p. 14.

hand, they are forced and pressurized to leave parental home by family or society, as they cannot be a part of normal community or class.

Sexual Assault: Within the LGBT community, transgender people face the most alarming rates of sexual violence. Majority of sexual assault against transgender is committed by known assailants. Sexual assault including molestation, rape, forced and oral sex and stripping is being committed against them.

Transgender women experienced sexual assault more often than their transgender male persons. Sex work is often the most viable form of income available to transgender people. Sexual assault is not only the only threat to the lives of transgender people, high rates of unprotected anal sex among transgender women carries a high risk of HIV transmission, which continues to be a major death crisis.

Rejection of Entry: They are prevented to get entry in religious public places like hotels, restaurants, theaters, park, hospitals, schools, mall or have very limited opportunity to travelling by public carrier.

Lack of Educational Facilities: Transgender people are not entitled to take admission in educational institution like other normal people. Though in 21st century limited educational facilities have been provided to them but they are treated differently.⁷

Transgender people face multiple forms of depression only because of the various problems faced by them as well as the using of social exclusion framework and vulnerability of HIV and other health risk.

Judicial and Legislative response to the problems of Transgender: Transgender people in India have always had to define themselves in government form as either a 'Male' or 'Female'. In 2005, Indian bureaucracy took a small step with 'eunuchs' being given the option to enter their sex as 'E' instead of 'M' or 'F' in passport application forms on the internet. In 2009, India's Election Commission has given transgender an independent identity by letting them state their gender as 'other' on ballot forms. Again, in 2012 the Election Commission added 'other' as new category to the electoral roll.⁸

Finally, transgender got legal recognition in 2014. A fresh ray of hope has aroused by Supreme Court of India in the judgement of National Legal Services Authority (NALSA) Vs. Union of India and Ors⁹ decided on 15th April, 2014, where the apex court demonstrates emerging judicial concern for the rights of transgender in India. In this landmark decision the apex court declared transgender people to be a 'Third Gender' and affirmed that fundamental rights guaranteed under Constitution of India will be equally applicable to transgender people. The court also held that determination of gender to which a person belonged was left to the decision of the person concerned. Moreover court also decided that transgender peoples are treated as socially or economically backward classes so that they will be granted reservations in admissions in educational institution and jobs, which is a major step taken by apex court towards gender equality in India.

Along with these, apex court also directed the centre and state government to take steps to create public awareness to stop discrimination and for their social recognition for which transgender will feel that, they are a part of social life and not treated as untouchables. It is also the responsibility of the governments to take proper measures to provide medical care and other facilities to regain their respect and place in the society, which once they enjoyed in our culture and social life.

Again in *Naj Foundation Vs. Government of NCT of Delhi*,¹⁰ the High Court of Delhi declared that Sec 377 of IPC insofar it criminalizes consensual sexual acts of adults in private is violation of Art. 21, 14 and 15 of the Constitution. In that case the court located the right to dignity and privacy within the right to life and liberty guaranteed by Art. 21 of the Constitution and held that criminalization of consensual sex violated these rights. The Court also held that Sec. 377 offends the guarantee of equality enshrined in Art. 14 because it creates an unreasonable classification and targets homosexual as a class. On the other hand Art. 14 forbids discrimination

⁷ Behra. Avimanya, *Protection Human Rights of Transgender*, Indian Bar Review. Vol. 45(2), 2018 p.26.

⁸ Jain. K. S Rekh Raj, *Victimization and Vulnerability of Transgender in Changing World*. Indian Bar Review. Vol. 45(4) 2018.p .148-149.

⁹ WP(civil) No. 604, 2013.

¹⁰ 160, Delhi Law Times, 277, 2009.

based on certain characteristics including sex and the court held the word sex includes both only biological sex but also sexual orientation and therefore discrimination of the ground of sex is not permissible under Art. 15 of the Constitution.¹¹

The verdict resulted in the decriminalization of homosexual acts involving consenting adults throughout India. But this was later overturned by Supreme Court of India in *Suresh Kumar Kaushal vs. Union of India*¹² in which the court reinstated Sec 377 of IPC and declared that Sec 377 does not violate the Constitution and is therefore valid.

Again it was overturned in *Navtej Singh Johar vs Union of India* in 2018, where the apex court declared that all consensual sex among adults including homosexual are decriminalized¹³ The judgement also pronounced that LGBT community is entitled to equal citizenship and protection under law without discrimination.

Thus the recognition given by the court for treating transgender as 'Third Gender' and discrimination of 377 are for the purposes of safeguarding and enforcing appropriately their rights guaranteed under the Constitution.

Legislative measures: The Government of India enacted the Transgender persons (Protection of Rights) Act, 2019 with the objectives to provide protection of rights of transgender persons, their welfare and other related matters. The act provides punishment for crimes committed against transgender which stands as an imprisonment for a term not less than 6 months and may extend to two years and fine and also provide for the constitution of a National Council for Transgender persons for ensuring overall development and for their welfare. Though there is a welfare board for the community but by providing ration card and voting cards the board cannot make transgender to give-up begging and not enough to meet their ends.

Social Acceptance: To change the attitude of people and responsibility of our generation Justice K.S. Radhakrishnan said that the progress of any nation depends upon the economic and human development of the nation. According to *The Hindu*, a daily newspaper¹⁴ Sabnam Mousi is the first transgender MLA in India, from Suhagpur seat, Madhya Pradesh assembly election. It proves that with a positive mindset our society has started to recognize the right of transgender visibly invisible for their better future.

Findings: Sex is an immutable characteristic of any organism, everyone expresses a particulate gender, and for some of them gender expression may not match the biological sex but they are integral part of nature.

2. It would thus be wrong to judge and discriminate people because of sex.
3. Seldom, our society realizes, cares the pain and feelings of the members of transgender.
4. Transgender is prone to vulnerable due to their gender identity. Discrimination because of sexual orientation not only affects their physical, mental health but also create a disturbance to survive their life as human being.
5. The transgender people have to face multiple forms of oppression in their daily lives. It is due to continuous discrimination they face in a hostile social environment at all levels of life for which they lose their confidence level to make them equal with other.
6. Even they are not being treated with respect by the society, law enforcement, and social service agencies. Their odd jobs like badgering for money from families function, public place, and projects make their image as greedy, quarrelsome and coercive.
7. They are harassed or forced to leave their homes or local area by their family or society.

¹¹ *Ibid.* p. 91.

¹² (2014)1 SCC(1).

¹³ <http://en.m.wikipedia.org> retrieved 14/03/2022 at 6.38 pm.

¹⁴ Article on 'Kinnars taking the lead in M.P. polls' by Anup Dutta, *The Hindu*, Bhopal, Madhya Pradesh, October, 22, 2018

8. Lacking awareness of Sexually Transmitted Disease (STD's) makes the more vulnerable to vulnerable diseases.
9. The low socio economic status and low education level are the major obstacles of their healthy life.
10. Lack of awareness, these people do not know about their rights facilities available for them.

Suggestions: 1. The judgement of apex court given in National Legal Services Authority (NALSA) Vs. Union of India and Ors. should be followed strictly by the government.

2. The laws of the land should ensure not only their dignity but also provide protection to their vulnerability.
3. At the grass root level, implementation level a strict protocol should be followed. As well as proper awareness and advocacy and infrastructure should be there.
4. The society, the family and the law should provide social support to enhance their self-esteem identity.

Conclusion: Gender identity and sexual orientation are fundamental to the right of self-determination dignity and freedom. These freedoms lie at the heart of personal autonomy and freedom of individual. Despite the guaranteed fundamental rights in the Constitution of India and established statute, the transgender peoples continue to be ostracized socially, economically merely on the basis of sexual orientation. The Indian judiciary has shown the beckon light in recognizing transgender as equal citizen and directed the government to protect the civil, political and educational rights as guaranteed to citizen by the Constitution. The recognition of apex court on the rights of transgender peoples is a progressive step towards their inclusion and equalization in legal system. They have given same rights as men and women like right to life, liberty with dignity, right to privacy and freedom of expression, right to education and empowerment, right against violence and exploitation and discrimination. The Constitution has fulfilled its duty of providing rights to transgender. However, changing the mindset of people and sensitizing each department of the government, like education and health, employment is very important for the humanitarian progress of transgender. Just because of the judgment of the Supreme Court, not everything can be solved. A strict protocol needs to be follow-up at the grass root level and implementation of administrative level. Now it's time to recognize this very practically and to extend and interpret the Constitution in such a manner to ensure a dignified life of transgender.