



TRANSGENDER & HUMAN RIGHTS: CHALLENGES AND ISSUES WITH SPECIAL REFERENCE TO THE CONSTITUTION OF INDIA *

Introduction

India is a democratic country where the rights of people are of utmost importance irrespective of the fact that whether it's a male or female the legislature always make efforts to ensure that no one should be deprived of their basic rights. Apart from that the issue of gender in India before and after independence was the area where the government finds difficulty to implement the policy to make both the genders at par with each other. But unfortunately, the same efforts were never witnessed for the Transgender community. Before analysing about the issues and challenges, we must know who are transgender? In India, Transgenders are called as Hijaras or Kinnars and are observed to be diverged from the normative gender roles i.e., they are neither male nor female and the problem started arising from here only.

The majority of the Society only recognised two genders and due to this consideration the transgender community had faced and still facing discrimination as there is identity crises because of the non-recognition of their rights either by the legislature or by the judiciary. The Transgenders life is full of inequality, discrimination, lower status in the society which is leading to social exclusion. During the Rule of Monarch's in India, there was a lot of respect for the Hijras but later on after independence not only there is a hatred for them which sometimes take the form of violence as well. The circumstances before the landmark case of *National Legal Services Authority vs. Union of India and Ors*¹. were worse and the lack of or rather to say that no initiatives from the side of state and central government has been made to ensure a dignified life including the basic necessities for the lives of transgender community. If there has been any development or improvement in the life of Transgenders they would never had been subjected to prostitution, poverty, and illiteracy. Due to no provision for education and professional skills the suffering community has no employment opportunities in any field which resulted into adding more

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¹ AIR 2014 SC 1863

vulnerability by way of earning through dancing during the family celebration events like marriages and birth of any child.

Now, the question arises that after the Supreme Court of India's decision on the legal recognition of transgender as a third gender can the empowerment of the transgender is possible? Further, are the Transgenders themselves ready for the social change which is now in their favour i.e., by the route of reservation in the backward class category? Here, the most important role is of the State as it's only the state which is obligated with the duties to protect its every citizen irrespective of the caste, class, religion, sex and race etc.

To ensure the Human Rights, most significantly the Constitutional rights (which is the Fundamental rights like Article 14: Right to Equality and Article 21: Right to Life Personal Liberty which also includes a dignified life) of all the 4.9 lakh third gender (As per Census 2011) in India the Parliament in the upper house had recently passed the Transgenders Bill, 2014 but still the nod of lower house is required.

TRANSGENDER IN INDIA: A HISTORICAL PERSPECTIVE & SOCIAL EXCLUSION

The existence of Transgender community '*third gender*' is witnessed from more than 4,000 years with the ancient myth that they have the special power to bring luck and fertility.² In the ancient religious and other Hindu mythological texts, the transsexual evidences has been witnessed in many incidences of Ardhanarishwara, Ramayana, Mahabharata³ and also their presence was prominent during the Mughal period in Royal Islamic courts where they guard the ladies and children. There are two different cultural role of hijras which can be observed in India for earning their livelihood i.e., in north India showering blessing on the occasion of marriage, child birth and on the other hand working as a sex worker in south India. Here, it can be said that gender is the psychological recognition where what one feels as an individual is primarily considered whereas sex is merely a physical differentiation or external appearance as a male or female as identified by the society.

"Transgender" is an umbrella term that is used to describe a wide range of identities, *hijras* (Eunuchs) being one. It is applied to persons whose gender identity does not conform to their

²Harvey, N. India's transgendered - the Hijras. (n.d.). Retrieved September 20, 2015, from, <http://www.newstatesman.com/world-affairs/2008/05/hijras-indian-changing-rights>

³Gupta, R., & Murarka, A. (n.d.). Treating transsexuals in India: History, prerequisites for surgery and legal issues. Retrieved September 17, 2015, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2845370/>

biological sex (assigned at birth).⁴ In India, the condition prevalent today of the Transgenders is due to the social exclusion which is dominated by factors like religion and preconceived notions in the society that Hijras are neither male nor female.

The term social exclusion can be understood with various instances of social stigmatisation which are as follows:

1. In 19th Century, western influence in India affected hijras when Britain took control of the country. As a result, laws (Criminal Tribes Act, 1871) were passed outlawing transgenderism, impacting the hijras traditional way of life. Transgenderism then became a crime for which hijras could be arrested without a warrant, two years imprisonment, and ordered to pay fine or both.⁵
2. Non acceptance within the unsympathetic family, friends and community (where mental and psychological support is most needed for safe space) leads to homelessness due to the unacceptable gender divisions.
3. The public space like restaurants, sanitation, police stations, prisons etc., witnessed with discrimination and violence, often of brutal nature makes this community the most disempowered group.
4. No opportunities of employment in any field due to illiteracy but if qualified the most dominant factor is their gender identity which is considered as a social stigma in the mainstream society due to which the Hijras were subjected to begging and prostitution to earn their livelihood with a risk of HIV/AIDS transmission.
5. The state as a protector of all the citizens has failed to ensure a dignified life to Transgenders (marginalized group). Hijra community is deprived of several rights under civil law because Indian law recognized only two sexes. This means that hijras do not have the right to vote, marry and own a ration card, a passport or a driving license, or claim employment and health benefits.⁶

From the overall analysis of the historical journey till the present, it can be said that once enjoyed the dignified status by the Transgenders i.e., of respect and equal treatment in the society which is now turned into discrimination, social isolation, stigma, mistreatment by sexual abuse/verbal

⁴ McCarthy, J. (n.d.). A Journey Of Pain And Beauty: On Becoming Transgender In India. Retrieved September 17, 2015, from <http://www.npr.org/sections/parallels/2014/04/18/304548675/a-journey-of-pain-and-beauty-on-becoming-transgender-in-india>

⁵ Mayhem, K. (n.d.). Kristina Mayhem: The Hijras - Transgenderism in India. Retrieved September 17, 2015, from <http://kristinamayhem.blogspot.in/p/the-hijras-transgenderism-in-india-man.html>

⁶ Singh Gohil, M. (n.d.). Indian Transgenders. Retrieved September 18, 2015, from <http://www.pmsrsg.com/2010/06/indian-transgenders.html>

abuse and inequality because the mind-set of the people rejects the very existence of transgender as a third gender. The central government had never shown its concern towards the community and hence, never took the initiative as a policy maker to protect the human rights of Eunuchs. Such kind of social behaviour at large made this community to live in darkness (self-exclusion) including worse treatment than untouchables which resulted into act of suicide. Such social exclusion only demotivates the overall growth and development (social, economical, political and cultural) of the transgender community as a whole.

HUMAN RIGHTS OF TRANSGENDER PERSONS UNDER THE CONSTITUTION OF INDIA

The curtailment of the Transgenders civil rights was witnessed during the British Era after the enactment of Criminal Tribes Act 1871.⁷ After Independence, the law was repealed in 1949, but mistrust of the transgender community has continued. This has pushed the transgender to the margin without any serious effort to mainstream. The Indian legislations have made no serious attempt to integrate this group in the mainstream population.⁸

There is no question of human rights to the Eunuchs because there is resentment against them in the society due to the reporting of cases like involvement in kidnapping of a child, misbehaving with the people around, involved in prostitution, murdering incidences, unnecessarily asking for alms from the public (not only from adults but from young children). But to critique these incidences, can't it be said that there are many incidences of aforementioned crimes done either by a male or female.

Even prisoners and under trials accused too provided with some basics rights by the state then why cannot the Transgenders? Is social outcast the only solution? Aren't they human being as well? Just because they are in minority won't give anyone a right not to give them access of basics rights and always treat them as degraded and unworthy to live. Since, the Transgender are the legally recognised citizens of India; it's the Constitution of India which ensures Hijras to lead a life of a human being with dignity and potential. Here, it can be observed that after post-Independence till 15th April 2014 until the Apex court expressly recognised their rights there was extreme margin of exclusion and no socio-political space for them.

⁷ The transgender community was categorized as "criminals" "criminal tribes" who were "addicted" to committing serious crimes. They were arrested for dressing in women's clothing or dancing or playing music in public places, and for indulging in gay sex. Accepting transgender was considered against morality and public decency.

⁸ Kumar, R. (2014, November 3). Inclusion Policy Vs. Exclusion Practice of Third Gender In Odisha: Observations From 2014 Polls. Retrieved September 19, 2015, from <http://ijcrss.in/admin/upload/INCLUSION POLICY VS. EXCLUSION PRACTICE OF THIRD GENDER IN ODISHA OBSERVATIONS FROM 2014 POLLS.pdf>

The Constitutional Provisions and Its Violations: An Analysis

Transgenders are the citizens of India and as a fact that they have been subjected to atrocities due to the misconception among the society that they have no legal protection either under the constitution or under any specific legislation. As a human being, the third gender has provided with the constitutional rights to ensure equality, liberty and social justice for them.

Article 14 declares that “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.” The constitution ensures the fundamental rights for the third gender by way of the expression “equality of status” which is also mentioned in the Preamble⁹ and “equal treatment in equal circumstances”. The equality before law is guaranteed to all irrespective of race, caste, sex, colour and nationality. In the case of *Maneka Gandhi v. Union of India*¹⁰, Justice Bhagwati emphasised on the new concept of equality which was “Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits.” The whole concept of Equality can become much stronger when the justice should not only be done but it must also be seen to be done for the Transgenders.

Every day in the day to day affairs of society, it's been observed that there is continual breach of Article 15 (1)¹¹ because the Police (becoming predators of their rights) and other governmental department discriminates Transgenders while they seek any help but on the contrary the government servants working on behalf of State subject them to violence, brutality and humiliation. Under Article 15 (2), There are many instances where transgender community prohibited either directly or indirectly by state and individuals to access shops, public restaurants, hotels and places of entertainment; or no access to use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

Article 16 (2) of the Constitution declares that “No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.” The violation of Constitutional safeguards shows that these are the concrete reasons by which breach of Article 16 (2) is taking place. The evidences of begging and prostitution among the Transgender due to social construct leads to unavailability of appropriate occupational opportunities which violates the fundamental goal of constitution.

⁹ Preamble to the Constitution mandates Justice - social, economic, and political equality of status.

¹⁰ AIR 1978 SC 597

¹¹ Article 15 (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, and place of birth or any of them.

Article 21 given widening approach every time by the Judiciary, the framers of our constitution had ensured that “No person shall be deprived of his life or personal liberty except according to procedure established by law.” it’s not only the duty of the judiciary to recognised the legal status of Transgenders but the legislature as well to make laws for them with effective implementation by the executive. The essence of Article 21 was denied to Transgenders even today by not according such recognition while issuing documents like birth certificate, educational certificate, passport, ration card and driving license.

In the case of *National Legal Services Authority (NALSA) v. Union of India & Ors.*,¹² It was argued by senior Advocate Mr. Anand Grover by reading Articles 14 and 15 (equality and non-discrimination), Art. 19 (fundamental freedoms) & Art. 21 i.e Right to Life together and construed that it’s the duty of State to recognise the self-identified gender of all persons and take legal and administrative steps to accord such recognition in all identity documents. Further, the constitution itself under Article 15 had recognised gender under the term ‘sex’ which implies that constitutional guarantee of equality applies to all due to which the State cannot discriminate on the ground of ‘gender identity’.

Lastly, The Societal attitude in public places ridicules them to lead a dignified life; Transgenders not get immediate help of health services from the doctors during emergency, non-access to social and legal matters, and after they die the denial of dignified and respectful funeral by the general society. The State is the guardian of its citizen but here, no attempt has been made by Government of India to ensure personal liberty by way of legal protection for the sexual minority group instead special welfare schemes (like old aged, children and women), voting rights, inheritance rights, education, citizenship and listing of a transgender as a third gender is denied to them.

SUPREME COURT OF INDIA: THE PROTECTOR OF TRANSGENDER RIGHTS IN SPECIFIC REFERENCE TO NALSA CASE

The Supreme Court of India is the guardian of Constitution and it’s obligatory on the part of the court to uphold the values enshrined in the Constitution. In the case of *NALSA vs. Union of India*,¹³ an unprecedented move by the Supreme Court on 15th April 2014, where the court for the first time formally and explicitly recognised the legal rights of transgender community as a marginalized group. The Bench said “*recognition of Transgenders as a third gender is not a social or medical issue but a human rights issue.*”

¹² [Writ Petition (Civil) No. 400 of 2012] filed in October, 2012.

¹³ AIR 2014 SC 1863, delivered by a Division Bench of Justices K.S. Radhakrishnan

Transgender are also citizens of India depriving them from basic rights will constitute inhumane treatment and violation of fundamental rights under article 14, 15, 16 and 21 of the constitution. The self-identity, personal autonomy, personal integrity, privacy and right of choice are fundamental rights and should be put on par with human rights and with this the court gave third gender all the rights under the law (like public health and proper sanitation), including the right to marry, family, succession, inheritance, adopt, divorce and can claim benefits under welfare programmes like MNREGA.

To achieve the goal of constitution, it's the responsibility of the Centre and States to take steps to erase social stigma (which sometimes leads to hate crimes) and treat them as "socially and educationally backward classes" and extend reservation for admission in educational institutions and for public appointments and frame various social welfare on skill development (vocational training) and educational schemes for achieving social justice principles. One's right to identity with respect to his gender was a feature of the basic principle of dignity and transgender people, thus, had a right to choose their gender based on self-identification of their sex and for which have a right to freely express the same and a right against exploitation based on their chosen gender. The misuse by police and other authorities of section 377 of Indian penal code which criminalizes same sex relations are still used as an instrument of harassment and physical abuse which make them extremely vulnerable to violence and sexual assault.

GOVERNMENT OF INDIA INITIATIVES FOR THE UPLIFTMENT OF TRANSGENDER'S: A MYTH OR REALITY?

Before the Supreme Court's recognition, the central government has completely failed to protect Transgenders rights. The state itself has violated their rights by dividing them under male-female category. Gender cannot be imposed since it is a social construct, and for this reason, deprivations of women are intervened under the banner of gender issues, then why is the state silent in the case of hijra? Under which gender understanding are Hijra alienated? Rather than resilience, the state is resistant in terms of mainstreaming them with health and development initiatives.¹⁴

Progress of Transgender Rights in India

It is not that India is blind towards the rights of transgender; Central Government has allowed the inclusion of 'Other' gender, in passports and voters' identity cards and they were also included in

¹⁴ Khan, S., Hussain, M., Parveen, S., Bhuiyan, M., Gourab, G., Sarker, G., Sikder, J. (2009, August 27). Living on the Extreme Margin: Social Exclusion of the Transgender Population (*Hijra*) in Bangladesh. Retrieved September 18, 2015, from <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2928103/>

the 2011 census.¹⁵ But the impact of criminalisation is still felt in many local laws even today, for instance, Section 36A was introduced in 2012 in the *Karnataka Police Act, 1964*, which provides for “registration and surveillance of Hijras who indulged in kidnapping of children, unnatural offences and offences of this nature.”¹⁶ The draconian law scrutinises the movement of Transgender in cases of child abduction from a locality and they will be arrested without bail. Such laws have their roots in the abusive colonial-era which makes transgender people vulnerable to police harassment and extortion.

In 2009, a positive step taken by the Election Commission of India where for the first time the transgender persons were able to choose their identity as “other” on their voter identification card but unfortunately, only over 28,000 voters enrolled under this category. Such less number of participation either shows lack of awareness among transgender about the election commission efforts or there is no enthusiasm among them to show their presence to the society.

The Rights for Transgender Persons Bill¹⁷, 2014 promises more hope by ensuring social inclusion and safety by envisaging transgender courts, a separate one-stop crisis helpline for transgender, pension and unemployment allowances, two percent reservation in government jobs, welfare boards at the centre and state level, prohibition of all forms of discrimination in employment and the creation of short stay homes.¹⁸ Further, it provides provisions for National Commission for transgender persons (at centre and state level both with statutory powers) and affirmative actions in education, financial and legal aid, free cost sex reassignment surgeries, skill development and Transgenders history museum. But still the Central Government feels to have a more comprehensive bill in Lok Sabha as the bill contains ‘impractical clauses’ and the synergy has to be worked out because the bill passed has aspects that concerns at least nine ministries of Central Government i.e., Health, Human Resource Development, External Affairs, Home ministry and Social Justice and Empowerment.

There is a strong need to literate the third gender because of the low literacy level of forty six percent. The drop out in school is more because of the everyday harassment and discrimination

¹⁵ Soman, A. (2013). Penal Laws and Rights of transgender: International Perspective with Special Reference to Section 377 of the Indian Penal Code, 1860,. In K. Jaishankar & N. Ronel (Eds.), *Second International Conference of the South Asian Society of Criminology and Victimology, SASCV 2013, Proceedings* (p. 278). Kanyakumari, Tamil Nadu: South Asian Society of Criminology and Victimology (SASCV) & Department of Criminology and Criminal Justice Manonmaniam Sundaranar University Abhishekapatti, Tirunelveli.

¹⁶ Supreme Court reserves decision on the recognition of gender identity of transgender persons in India. (2013, October 31). Retrieved September 16, 2015, from <http://www.lawyerscollective.org/updates/supreme-court-reserves-decision-recognition-gender-identity-transgender-persons-india.html>

¹⁷ A private bill unanimously passed first time in over three decades by the Rajya Sabha on 24th April, 2015 but still pending in Lok Sabha.

¹⁸ Singh, K. (2015, July 18). Transgenders Step Up Demand for Law in Monsoon Session. Retrieved September 18, 2015, from <http://thewire.in/2015/07/18/transgenders-step-up-demand-for-law-in-monsoon-session-6691/>

they face from the peers and teachers. The State Government of Tamil Nadu has shown the way by creating a Transgender Welfare Board which allows transgender people access to existing government schemes in housing, employment and education, and also designs and implements welfare schemes exclusively for transgender people based on their needs.¹⁹ While the state of Tamil Nadu is taking progressive measures for ensuring them civil and political rights, other states like Delhi has introduced pension scheme and Karnataka is setting up special wards for the transgender people in government Hospitals.

CONCLUSION

The centuries of injustice, persecution and downfall faced by the transgender in the Indian society due to its non-acceptance attitude made them socially disadvantaged, economically deprived and politically disenfranchised by getting limited participatory rights in decision making process. Social acceptance by change in mindset is the best way to recognise the rights of transgender people for this judicial sensitisation, political sensibility and social sensitivity is necessary. The biggest problem hijras face is that since they are visible that makes them vulnerable. The Apex Court's directives to provide the basic amenities of life and equal opportunity to the socially and economically deprived transgender population, including health care are still remains an issue due to the slow implementation by the Central Government. Specific mentioning of transgender is required in all the laws which is made in respect of transgender in India which only recognise two genders. The only way empowerment of Transgender persons is possible when they will start considering themselves as a part of human community with high confidence level and start participating in the decision making forums to implement progressive laws for them.

The upcoming legislation on the Transgender persons will remove fundamental barriers for the realization of their basic rights though there is a need to take strict actions against the police who arrest hijras on false allegations and under the threat of law either extort money from them or rape them. There is an urgent need to aware the Medical officers of the hospitals to overcome from apathy and negative attitude in providing health services to the transgender especially in cases of HIV which is highly prevalent within the Hijra community (around 17 to 41 percent as per UNDP report). The Hijra community still feels that the bill should have stable pro-transgender policy which should not change with the ruling party and the law should not lead to further the religious agenda by putting them into the traditional role or mythological narratives of Kinnars and hijras.

¹⁹ Bajoria, J. (2015, February 10). Enforcement of transgender people's rights in India 'stalled' Retrieved September 7, 2015.

And finally, as the fourth pillar of democracy, it's the responsibility of the Media to bring into limelight the violence against the Hijras and spread awareness in the society i.e., not to jeopardise their rights instead help them in coming into mainstream community. This way the media not only help transgender to raise their voice in public sphere but also can analyse the initiatives of the government to ensure human rights for transgender.

