

“Third Gender— Accepting a New Era”

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ABSTRACT

Equality is the basic feature of the Constitution of India and any treatment of equals unequally or vice versa will be the violation of the basic structure of the Constitution of India. Kant was of the view that at the basis of all conceptions of justice, no matter which culture or religion has inspired them, lies the golden rule that you should treat others as you would want everybody to treat everybody else, including yourself. Since time immemorial, our dynamic society has universally accepted undergoing changes but this is another change we are willing to perceive because transgenders are humans just like we are, they are no different and therefore they too deserve the respect and dignity that we receive. We do not consider them under the standard definition of Special Child because they are born with all the organs that are essential for a being to execute the customary jobs of the day. Instead, they have more estrogen and testosterone than a normal being. They are neglected from the society because many of our ancestors don't consider them a part of this society but this is a time that we should start supporting them because Humanity can only let us survive a lit longer. The social acknowledgment of the third gender is not the main issue, however, the social desires from each gender of the society additionally posture troubles. The 'homo sapiens' that takes birth on this planet has a right to basic necessities of the worldly affairs, but our society does not realize the unspeakable agony and torture, the members of the transgender community undergoes. Their personal pronouns must be different, but they are humans just like we are, and they too deserve their Fundamental Rights.

Keywords: Transgender; Third Gender; Eunuch; Discrimination; Legal Status

INTRODUCTION

“Change will not come if we wait for some other person or some other time. We are the ones we’ve been waiting for. We are the change that we seek.”

– **Barack Obama**

Right to equality is guaranteed by our Constitution of India which is our basic Fundamental Right which we inherit since we become a part of our mother's womb. Everybody on this planet has a right to be treated with respect and dignity, be it male or female but in the present era we have more gender's than just male and female. Till the past, we used to consider male & female as two biological sex but now science has proven that there are more genders than just cisgender. Recently, in the case law of *National Legal Services Authority v. Union of India*¹, it was held that the transgender will be recognized as third genders.

Gender Identity is the most fundamental aspects of life which refer to a person's intrinsic value of being a female, male, transgender or transsexual. There are times when our body is not formed with all of its proper attributes, therefore genital anatomy problems may arise and many of them do not choose to undergo or do not have access to the operation. Everyone is entitled to enjoy all human rights which are a basic necessity to survive amongst our peers, without discrimination on the basis of sexual orientation or gender identity. Sexual orientation simply means to what gender we get attracted to and Gender Identity is what we prefer our gender to be including the most common genders male and female.

‘Transgender means a person who is— (A) Neither wholly female nor wholly male; or (B) A combination of female or male; or (C) Neither female nor male; and whose sense of gender does not match with the gender assigned to that person at the time of birth, and includes trans-men and trans-women, persons with intersex variations and gender-queers²,

Adding more to this definition, Eunuchs/ Hijras/ Transgender/ Third Gender is succinctly described as an umbrella term for persons who are not cisgender, whose gender identity does not conform to their biological sex. In the layman language, it means that a person who was born and described as

¹ (2014) 5 SCC 438

² THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) BILL, 2016, India (Last visited Aug. 10, 2018), http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/210_2016_LS_Eng.pdf

male at his birth but later developed the organs of female or a person who was born and described as female at his birth but later developed the organs of the male or a person who, at his birth had both the organs of male and female is described to be a transgender.

Hijras: They are natural males who dismiss their manly character at the appointed time to identify either as lady, or not-men, or in the middle of man and lady, or neither man nor lady.

Enunch: It refers to an emasculated male & intersected to a person whose genitals are ambiguously male at birth.

Aravanis: Biological Males who self-identify themselves as a woman trapped in a males body.

Kothis: Heterogeneous group of people who can be described as biological males but their attributes show varying colours of femininity.

Shiv-Shakthis: Males who are controlled by or especially near goddess and have ladylike sexual orientation articulation.

HISTORY

According to the Rig Veda, in Hindu mythology, three types of genders have been considered—The Male, that is the *Purush*, the Female, that is the *Prakriti* and the third gender that is the *Tritiya Prakriti*. Also, their contribution towards the betterment of society is clearly evident from the stories of two main epics of India that is Ramayana and Mahabharata. It is in recent times that the modern Indian society considered them as the third gender otherwise there was no such identity given to them legally. Still, all is not well, and the third gender people are struggling to constitute a part of the civil society.

In the Ancient Era, transgenders were considered special people as they were considered essential to perform certain rituals in the Hindu Mythology, Vedic and *Puranic* pieces of literature. They played a prominent role in the royal courts of the Islamic world as they were considered neither male nor female which bridged the gap between them. Therefore, they used to help the wives of the kings in getting dressed, in shopping and guarded them in the *harem*. Then came the repealed Criminal Tribes Act, 1871 which explained the inhumane manner by which they were treated at the time of the British Colonial rule and that is when we lost our culture and traditions by getting ruled by

the British. But, in the modern dynamic world, it is essential for us not to relinquish equal rights but equity to all the people who belong to this society.

NATIONAL LEGAL SERVICES AUTHORITY V. UNION OF INDIA³

Facts

The case concerns lawful acknowledgment of transgender individuals, and whether the absence of lawful measures cooked for the requirements of people not recognizing unmistakably as male or female negates the Constitution. Previous Indian law just perceived the twofold sexual orientations of the male and female and did not have any arrangement as to the privileges of transgender individuals, which is characterized as the ‘Third Gender.’ The sex of a man has been doled out during childbirth and would decide his or her rights in connection to marriage, selection, legacy, progression, tax collection, and welfare. Because of the nonattendance of enactment and absence of legislation, the community confronted separation in different everyday issues.

Article 14

‘Equality is one of the magnificent corner-stones of Indian Democracy.’⁴ ‘The doctrine of equality before law is a necessary corollary of Rule of Law which pervades the Indian Constitution.’⁵ ‘It states 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.’⁶ It also ensures equal protection amongst all by bringing in necessary social and economic changes, so that everyone including Transgenders enjoys a life of dignity by equal protection of laws and no one is denied such protection. It does not restrict to only females and males but it includes all the other persons with different personal pronouns as well. Transgender is none other than homo sapiens who fall under the category of persons, therefore they are entitled to legal protection of laws in all spheres of State activity, including employment, healthcare, education as well as equal civil and citizenship rights, as enjoyed by other groups of citizens of our Hindustan. They are facing problems because they are not easily accepted by our society which denies them equal protection of laws, whereby they are the prey of vulnerable harassment, violence, and sexual assault. On top of that, access to public restrooms is quite a

³ (2014) 5 SCC 438

⁴ Thommen J, in Indra Sawhney v UOI, AIR 1993 SC 477 : 1992 Supp (3) SCC 212.

⁵ Ashutosh Gupta v State of Rajasthan, (2002) 4 SCC 34 : AIR 2002 SC 1533

⁶ The Constitution of India, 1949

serious problem they face because don't have separate toilets. Segregation on the grounds of sexual orientation or gender identity impedes fairness under the steady gaze of the law and equivalent security of law violates Article 14 of the Indian Constitution.

Article 15

Article 15 of the Indian Constitution states that the 'State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them and No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to

(a) access to shops, public restaurants, hotels and palaces of public entertainment; or

(b) the 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 public⁷,

Expression sex is not only limited to males and females but it includes Transgenders too who are legally entitled and eligible to get benefits available to other strata of the society.

Article 16

Article 16 of the Indian Constitution states 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 or, any employment or office under the State.'⁸ It not only imposes a duty on the State to ensure that all citizens are treated equally in matters relating to employment & appointment by the State. The word sex has a wider definition which is not limited to only male and female but includes transgenders too.

Article 19

Article 19 of the Indian Constitution states that 'All citizens shall have the right

- (a) to freedom of speech and expression;
- (b) to assemble peaceably and without arms;
- (c) to form associations or unions;
- (d) to move freely throughout the territory of India;

⁷ The Constitution of India, 1949

⁸ Supra

- (e) to reside and settle in any part of the territory of India; and
(g) to practice any profession, or to carry on any occupation, trade or business⁹,

The Right to freedom of speech and expression includes the right to expression of his self-identified gender. It can be expressed through gestures, words, dress, action, behavior et cetera and no restriction can be put on one's behavioral acts. The State cannot prohibit or restrict the expression of Transgenders in any manner.

Article 21

Article 21 guarantees the protection of life and personal liberty. No person shall be deprived of his or personal liberty except according to the procedure established by law.¹⁰ Right to life is the essential Right of every citizen of our country that not even the state cannot take it away. It protects the dignity of all the persons accounted as human beings including the transgender community.

Conclusion

The Justice was duly served through this Judgement as the transgender class was now recognized as the Third Gender but the problem still remains there itself because the 2014 judgment made impact on our society but not our legislation as till now, our legislation has not passed any law on the protection of rights of the so called third category. Giving them a different name is not enough because they are still struggling to prove their identity in various fields. They do require reservations in the educational institutions of India because just like us they are human too and they deserve to be treated alike. The condition of the third gender across the world varies as different parts of the world practice different cultures and to follow different norms and traditions. 'The present scenario of the lives of the people of this community is unacceptable and in some cases pitiable but again there are a few countries that are moving towards providing them with equal status and recognition in the society for proper and dignified survival.'¹¹

⁹ Supra

¹⁰ The Constitution of India, 1949

¹¹ Srikanth Bhaskar & Swetha Vadarevu, Current Scenario and the Third Gender (Last visited Aug. 10, 2018), <https://www.lawctopus.com/academike/current-scenario-third-gender/>.

THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) BILL, 2016**Introduction**

The aforementioned Bill deals with the people who are recognized as the third gender in our society. It is expected to bring social, educational and economic empowerment to the transgender community. A community that has been ostracised and discriminated against since time immemorial, this Bill could mean a chance to get a life back which would be full of dignity and equality.

Rights mentioned within the Bill

The Bill makes it illegal to force a transgender person to leave his or her place of living or livelihood, remove their clothes and parade them naked, force them into begging or any kind of bonded labor. These Acts will be punishable with up to two years of imprisonment, along with a fine. The Bill also criminalizes denying a transgender person access to any public place and causing them any physical or mental harm within and outside the home or place of work. It guarantees Other Backward Class (OBC) status to all transgenders who are not born as Scheduled Caste or Scheduled Tribe and entitles them to the reservation under the respective categories. The Bill identifies 'Transgender' as the 'Third Gender' and gives them the freedom to identify as 'Transgender', independent of surgery/ hormones. They can only be referred to as transgenders and not be referred to as the 'other' gender or as 'others.' A certificate of identity shall be given to every transgender by a state level authority and this certificate should be acceptable as gender identity for any official document like passport, aadhar card, et cetera. It also ensures that transgender persons or children shall enjoy all the fundamental rights given in the Constitution of India and will live a life of dignity and integrity. 'All government institution shall provide inclusive education and shall not discriminate against any transgender student and also provide transgender students with scholarship/ entitlements, free-waiver, textbooks, hostel accommodations, other facilities and subsidized rates. Additionally, all educational institutions need to have an anti-discrimination cell to monitor discrimination against transgender students.¹² The government shall set up rehabilitation and welfare programmes, information centers, sensitization programmes, et cetera, for transgender persons and provide them necessary orientations to sensitize people in educational institutions and elsewhere.

¹² 10 THINGS YOU NEED TO KNOW ABOUT THE TRANSGENDER BILL 2016(Last visited Aug. 22, 2018), <https://www.jaagore.com/simplify/10-things-you-need-to-know-about-the-transgender-bill-2016>

The Bill also instructs the police to provide every assistance under the law to an aggrieved transgender person, and also to put the person in touch with the nearest organization for rehabilitation of aggrieved transgender persons. The Bill instructs the legislature to help and encourage work of the transgender people, particularly for vocational training and self-employment, give credits, and to guarantee that there is no victimisation against the transgender person at working surrounding. Under the arrangements in this Bill, transgender people will likewise have equal rights and access to a social life, relaxation and recreational activities. The Bill aims at ensuring that transgender persons enjoy a life of dignity and equality as an Indian citizen and guarantees a basic human right that had been denied to them for so long—right to identify as a member of our community and as equals. ‘The Bill also instructs state mechanisms to include all possible provisions to ensure that no transgender person faces discrimination in India because of their gender identity.’¹³

Status of the Bill

In February 2014, the Hon’ble Supreme Court passed a landmark judgment of National Legal Services Authority v. Union of India¹⁴ giving the status of the third gender to the transgender community. The Apex court believed that they too had a right to be treated as equals and self-identification of their sexual orientation. The Court in its final verdict pleaded our legislation system to make laws so to protect this class of our humanity. The initial effort at framing legislation for the same was made in December 2014 by Tiruchi Siva, a Dravida Munnetra Kazhagam (DMK) Rajya Sabha MP. ‘The Rights of Transgender Persons Bill, 2014, was introduced as a Private Member’s Bill in the Rajya Sabha.’¹⁵ It was unanimously passed in the Upper House but was not debated in the Lok Sabha. The Bill that was passed in the Rajya Sabha had numerous dynamic provisions including the formation of institutions like the national and State commissions for transgenders, and also transgender rights courts. These therapeutic measures to anticipate sexual discrimination was done away when the legislature drafted The Rights of Transgender Persons Bill, 2015. After a profound consultation with legal professionals and transgender activists, the 2015 draft Bill was sent to the Law Ministry where it was presented in the Lok Sabha in August 2016 after considerable correction to the 2015 draft. The present scenario is that the Bill is set to be

¹³ Supra

¹⁴ (2014) 5 SCC 438

¹⁵ All you need to know about the Transgender Persons Bill, 2016, (Last visited Aug. 23, 2018), <https://www.thehindu.com/news/national/all-you-need-to-know-about-the-transgender-persons-bill-2016/article21226710.ece>.

re-introduced in the winter session of Parliament as the Bill was subsequently sent to the standing committee on social justice and empowerment for consultation. The initial version of the bill is to be re-introduced without any change in the draft provisions.

Analysis

The rough draft of the Bill is made but still, there are endless changes that should be done to it because many aspects of the problems are still looking for solutions.

‘1. The Bill significantly deviates from the NALSA judgment in the four following ways:

- (i) It distorts the definition of ‘transgender’ laid out in the judgment.
- (ii) It does not adopt a rights-based approach.
- (iii) It does not include provisions on reservations, and.
- (iv) It does not identify specific duties for different actors.¹⁶

2. The anti-discrimination provisions in the Bill are weak. The Bill is still left with ambiguity in describing words. For example, the Bill fails to define the key term “discrimination.”

3. The Bill lacks adequate accountability mechanisms. The obligations of various actors are drafted in vague language, there are no timelines prescribed for implementation, no penalties are prescribed for non-implementation, the National Council is rendered a toothless body and there is complete silence on the enforcement mechanism.

4. The Bill sets up a Screening Committee to certify transgender persons, which runs against the right to self-identification recognized in NALSA which is against the moral ethics.

5. The duties imposed on appropriate governments to ensure the welfare of transgender persons is full of ambiguity. There has to be a clear-cut answer to the solution. Further, the welfare provisions on health, education, and social security fail to address many identified concerns of transgender persons.

¹⁶ COMMENTS ON THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) BILL, 2016, (Last visited Aug. 22,2018), <https://static1.squarespace.com/static/551ea026e4b0adba21a8f9df/t/58204319579fb3dc45130399/1478509429564/Submissions+on+the+Transgender+Bill+2016.pdf>

6. The list of defined offenses is incomplete and arbitrary, but offenses and penalties have not been graded.

The Bill should be refrained from using gender specific-pronouns. When referring to themselves in English, transgender persons do not necessarily use the pronouns “he” or “his” or even “she” or “her;” they might prefer “they” or different words altogether. Since it is impossible to include an exhaustive list of possible pronouns, each time a pronoun is used in the Bill, we recommend refraining from singular pronouns and repeating the noun “transgender individual(s)/ person(s)” or “trans individual(s)/ person(s)” wherever necessary. Further, Section 377 of the Indian Penal Code should be repealed as it is often used by the police to harass transgender persons especially the ones who are involved in sex work.

The Bill should be redrafted and brought in line with the directions of NALSA, further because the recommendations of the professional Committee Report, it might imply changes within the definition of ‘transgender’, use of rights-based language, a provision on reservations, clear delineation of obligations of various governments and relevant stakeholders, introduction of a good National Council, a robust social control mechanism, and crafting of comprehensive welfare measures, together with measures for making awareness and sensitizing stakeholders concerning considerations of transgender persons. It will keep with the rights-based approach. It is also suggested that the sections on anti-discrimination, and offences and penalties, be reinforced, in order that effective remedies are obtainable whenever rights are profaned. It is conjointly suggested that the supply on the screening be fastidiously scrutinized, so as to help implementation. The Bill ought to be additionally supported by acclimatizing best practices on the security of transgender rights from worldwide purviews, for example, UK, Malta, Argentina, and Norway. Above all, the procedure of redrafting must be in conjunction with broad counsels with transgender people including underestimated voices, for example, transmen and intersex people.

CONCLUSION

There is a thin layer refinement amongst sex, and sex of a 'homo sapiens.' Sex is portrayed as a biological concept, namely chromosomes inside the human body. Sexual orientation manages individual, societal and social impression of how society sees them. The scaffold is yet to be done on the grounds that we have given the status of the Third Gender to the Transgender however it will take quite a long journey to maintain the execution of the same. In the consistently evolving world, eve-

ry one of the nations are working well ordered to adjust the value among each individual who takes birth on the planet. We do discuss sexual equity and we do believe that gender is a fluid concept and possibly we have given them another classification named as transgender however they are still struggling to be acknowledged in our male centric culture and they are as yet defeating the desolation and agony their precursors have experienced regardless they have no rights to carry on to live a life of respect and dignity.