



HUMAN RIGHTS AND THIRD GENDER IN INDIA

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ABSTRACT:

The prohibition of discrimination including verbal abuse and physical violence against transgender persons and the protection of their human rights are important elements of the legal order in several countries. However, the scope of various provisions in the legal system is limited and does not cover social protection, healthcare, education and access to goods and services, leaving transgender people vulnerable. Transgender people have existed in every society, nation, culture and class since ancient times, the rights of the members of the transgender community have started gaining attention only in the modern world. Their rights are not protected and they face discrimination in various areas. Non-recognition of the identity of human beings belonging to the transgender community, as a third gender, denies them the right of equality before the law and equal protection of law guaranteed under Article 14 of the Constitution and violates the rights guaranteed to them under Article 21 of the Constitution of India. An important step has been taken on 15 April 2014 by the Supreme Court of India passing a landmark judgment granting constitutional recognition to transgender as the "third gender". The Supreme Court, in the National Legal Services Authority judgment has recognized the legal and constitutional rights of transgender persons, as a "third gender". This judgment focuses specifically on the legal recognition of the transgender community, relying on the definition in the Yogyakarta Principles and clarifies the distinction between gender identity and sexual orientation. The court engages with both these categories, but focusing only on the transgender subject. There are two central questions that the court addresses. The first is the recognition of a third gender category for hijabs or equivalent cultural identities in order to facilitate legal rights. The second is that transgender persons, for the purposes of the law,

should be able to identify in the gender of their choice, which could be male, female or a third gender category

Keywords: Third Gender, Human Rights, Protection ,HIJRA, Transgender

INTRODUCTION:

The transgender community has been facing a lot of problems in the society over the years. If you ask people of our country about trans people, most of them may answer that trans people are known as HIJRA and they have seen them begging near traffic signals and inside the trains. But, this is not the end, even some people complaining about their bad behaviour but at the same time they never want to find the reasons behind their bad behaviour. This is the harsh reality and the fact is – our society is most responsible for their condition because we never considered them as a part of the society.

They are being disowned by their own families and you would never found a trans person studying in the same school or same university as you are and also the harsh treatments from other people in the society leads to their so-called 'bad' behaviour. The lack of access to education and non-availability of jobs often forces them to take to begging and prostitution. For example, there was an incident in Andhra Pradesh, where a trans woman named Sharma described her feelings and said – "When I started wearing a saree and become Trans, the people started to insult and make fun of me. I had several problems with my family too. We live out of begging and we have been doing it since antiquity. Our job is not something new. During the kingdom times, here in India, there were dancers who performed dances and people gave them money. That was a way of begging too and now we would not have a miserable life. We could keep dancing like before. Now everything is under government control, so it's more complicated. With time, everything's changed. Now there are jobs like policeman, lawyer, doctor but HIJRA's job doesn't exist anymore.

These are various evidence that explain their life, the ways our society treats them, the ways our society hates them. We are the generation of the 21st century, but still, we don't free ourselves for such barbarism.

OBJECTIVES OF THE STUDY:

The participant will be able to:

1. Understand the concept of Third Gender
2. Understand the challenges faced by Third Gender persons in India from a Human Rights view
3. Identify ways to become agents of change

METHODOLOGY:

Present study is general and preliminary overview of social science research in India, based on secondary data. To achieve objectives of the study, various periodical publishes, E-books, current news and Journals is taken as major data source. Further data has been extracted from the annual report of National Human Rights Commission of India. Various reports, web links and commentaries on Human Rights have been reviewed to support the study. Necessary interpretations have been analyzed by compiling; recording and tabulating the mandatory information by incorporating database into excel spreadsheets.

REVIEW OF LITERATURE:

Mainstream gender related literature throws more light on various types of violations of human rights of transgender people in various countries. UNDP's review (2018) examine existing documents on third gender's human rights. bochenek and Knights (2012) presented Nepal as a case study for the introduction of third gender category in legal and political system. Sanders (2010) in his papers presented general picture on legal and policy regarding transgender in Asia and west. Mitchell ad Hotwarth (2009), In their Trans Research review included a wide range of evidence surrounding the inequalities and discrimination faced by trans people in the UK. It has identified significant gaps in knowledge about trans people and highlighted diversity within the trans population. Gender literature has discussed various issues of transgender people in India. UNDP India (2010)discusses transgender communities have been excluded from effectively participating in social, economical and cultural life and

decision-making processes. In this study, the health related issues are discussed with a special reference to HIV. Lack of live hood options is key reasons for significant proportion of transgender people to choose or continue to be in sex work – with its associated HIV and health related risks. It highlights the fact that HIJARS women require understanding and support of government, health care professionals, general public as well as their family members. Sharma(2012) in her contextual contribution presented the historical background and legal status of third genders in Indian society. The paper highlights that the Constitution, while its contains certain prohibited grounds of discriminations such as race, caste, creed, sex, etc, does not specifically include sexual orientation neither the hindu marriage act nor Special marriage act mention third gender. its note that trans gender or third gender in India are not adequately provided for their existence is evident in our country.

FINDINGS:

In 2009, the Election Committee decided that the transgender as a third will go ahead to vote for the election, which means they can acknowledge themselves neither as a male or a female but as a third gender during the election, but this was only for election. Centre and State Governments have been directed to take proper measures to provide medical care to transgender in hospitals and provide those separate public toilets and other facilities. Further, they have been directed to operate separate HIV/Sero-surveillance measures for transgender. These are the broadest directions- Centre and State Governments were asked to take steps to create public awareness to better help incorporate transgender into society and end treatment as untouchables; take measures to regain their respect and place in society, and seriously address the problems such as fear, shame, gender dysphoria, social pleasure, depression, suicidal tendencies and social stigma. "It is the right of every human being to choose their gender," it said in granting rights to those who identify themselves as neither male nor female. It ordered the government to provide transgender people with quotas in jobs and education in line with other minorities, as well as key amenities. According to one estimate, India has about two million

transgender people. In India, a common term used to describe transgender people, transsexuals, cross-dressers, eunuchs and transvestites is hijra. Campaigners say they live on the fringes of society, often in poverty, ostracised because of their gender identity. Most make a living by singing and dancing or by begging and prostitution. Rights groups say they often face huge discrimination and that sometimes hospitals refuse to admit them. They have been forced to choose either male or female as their gender in most public spheres.

Under the Indian Constitution, any international conventions, including human rights treaties, which are not inconsistent with the Constitution's fundamental rights and which are in harmony with its spirit must be read into the relevant Constitutional provisions. The question before the Court was: what protections and recognition does international human rights law afford to transgender persons and how should they be read into the relevant Constitutional provisions?

The Court found that international human rights jurisprudence, under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, protects individuals from discrimination and affords equality before the law on the basis of sexual orientation and gender identity. The views of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights have also been incorporated into the jurisprudence on the Convention on the Elimination of All Forms of Discrimination against Women and the Convention against Torture. These views have found their way into the laws and case law of a number of countries around the world.

Finding, therefore, that international human rights includes protection for transgender persons, the Court then turned to incorporating these concepts into the various articles of the Constitution. In each case the Court held that the Constitution required the State to protect and recognise the rights of transgender persons in India:

- Article 14: the Court found that the article, in referring to "persons", is not restricted to only males and females. Transgender persons who are neither

male nor female fall within the expression “person” and so are entitled to legal protection, including equal civil and citizenship rights. Non-recognition of the identity of transgender persons denies them equal protection of the law, thereby leaving them extremely vulnerable to harassment, violence and sexual assault in public spaces, as well as to extreme discrimination in all spheres of society. The Court therefore held that article 14 outlaws discrimination on the basis of sexual orientation or gender identity.

- Articles 15 and 16: the Court held that discrimination on the grounds of sex includes discrimination on the ground of gender identity. “Sex” is not limited to biological sex, but rather gender identity, and is intended to include people who consider themselves to be neither male nor female. Articles 15 and 16 also require the State to take affirmative action to assist the more socially and educationally marginalized groups in society. The Court found that transgender persons had systematically been denied their rights and had been discriminated against and that the State has an obligation to take affirmative action to assist them to achieve equality.
- Article 19(1)(a): the court held that freedom of expression includes one’s right to expression of self-identified gender, which could include expression through dress, words, action or behaviour or any other form. No restriction should therefore be placed on a person’s appearance or choice of dressing.
- Article 21: the Court has interpreted the protection of life and personal liberty as including all those aspects of life which make a person’s life meaningful, protecting dignity, personal autonomy and privacy. The Court noted that gender constitutes the core of one’s sense of being as well as forming an integral part of a person’s identity. Legal recognition of gender identity is, therefore, part of the right to dignity and freedom under the Constitution. In addition, the court noted that self-determination of gender is an integral part of personal autonomy and self-expression and so falls within the realm of personal liberty. As psychological identity is paramount, the State should not require a person to undergo medical procedures, serialization or hormonal therapy in order to have their gender identity legally recognized.

In regards to recognizing Hijras as belonging to a third gender, the Court noted that under article 21 gender should be self determined. As Hijras have identified as being neither male nor female, they have to be considered as belonging to a third gender, over and above binary concepts of genders. There are currently laws which only recognize a binary understanding of gender and such laws deny those who identify as a third gender equal protection of the law.

The Court made a number of orders and declarations:

- Hijras and Eunuchs should be treated as third gender for the purpose of safeguarding their rights under the Constitution and the laws made by Parliament;
- Transgender persons' right to decide their self identified gender is upheld and Centre and State Governments must grant legal recognition of their gender identity such as male, female or as third gender;
- The Government must afford transgender persons affirmative action and positive discrimination regarding educational admissions and public appointments and provide social welfare schemes.
- The Government must operate separate HIV clinics for Hijra/transgender persons and ensure medical care is provided to transgender persons and ensure separate toilet facilities.
- The Government must take serious action to respond to problems faced by Hijras/transgender persons such as fear, shame, social pressure etc, including public awareness campaigns.
- Any insistence on surgery for declaring one's gender is illegal.

CONCLUSION:

There is a need for a reliable population data of transgender people. It is important to identify and enumerate transgender population to have an authenticate data. The reliable transgender population data can be used for planning , implementation and monitoring welfare schemes. The age pattern clearly indicates the dominance of youth and working aged among transgender population. The single largest size -18 % is the group of 31-35 years. Most of transgender people are illiterate and less educated .There is an urgent need for

creating a strong mechanism and introduction schemes to challenge the stigmas attached with the transgender peoples and hence the following points are important:

- 1) Sanitization of parents and society
- 2) Sanitization of Police
- 3) Access to gender Segregated space for Transgender
- 4) ICT Based Campaigns and Awareness Programmes

Legally transgender cannot enter into a marriage , having spouse and setting up of own family in India. Right of sexual orientation has been recognized without protecting the right to marry. Though there are several cases of living-in-relation among transgender people, right to marry a fundamental right, is now denied to transgender people . Transgender people should be given legal recognition of right to marry , right to have family and Children.

REFERENCES:

1. Bornstein,K (1995); Gender outlaw: On Men,Women And the Rest of Us. Vintage Publication 2015.
2. Boyd,H (2003); My Husband Betty: Love,Sex and Life with A Cross Dresser, (Berkeley California, Seal Press)
3. Chakrapani V (2010) ; Hijras/transgender women in India: HIV, Human rights and Social exclusion.
4. Dipak Giri (2019) ; Transgender in Indian Context: Rights and Activism,AABS Publishing House
5. Serena Nanda (2008):Neither Man Nor Woman The Hijras of India Wadsworth Publishing Company
6. <https://blog.ipleaders.in/human-rights-recognition-transgender-persons-third-gender-nalsa-v-uoil/>
7. <https://www.ibanet.org/article/0F3AE21B-0170-4BF7-95DD-45B07EF1CAF6>
8. <https://nhrc.nic.in/publications/annual-reports>
9. <https://www.hrlc.org.au/human-rights-case-summaries/indian-supreme-court-recognises-third-gender>