

BEGINNING OF A JOURNEY TOWARDS THE LEGAL RIGHTS OF TRANSGENDERS

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ABSTRACT

*The transgender fraternity in India has been subjected to disdain and chauvinism for the past many years. This research paper is an attempt to highlight the cruel and discriminating behaviour of the society at large towards the transgender community and the numerous **measures** taken by the various countries and organizations around the world, including the United Nations, to change this narrow minded perspective of the society. The paper specifically reflects upon the role of Indian Parliament and Judiciary towards promoting the ultimate aspiration of providing **equality** and **non discrimination** to the people belonging to different sexual orientation and **gender identity**. The Rajya Sabha has recently passed the Transgenders Right Bill, 2014, while the Indian Supreme Court and High Court, on the other hand, continuously strive to '**protect the rights**' of the transgenders in order to give them a venerable life and ensure liberty, which is enshrined as a fundamental right in the Indian Constitution. The paper further provides for certain solutions which the authors think as necessary to protect the rights of the transgenders and which might be essential for equal treatment of the said community.*

Key words- measures, equality, non-discrimination, 'gender identity' and 'protect the rights'.

INTRODUCTION

Article 1 of the Universal Declaration of Human Rights, 1948 states that "all human beings are born free and equal in dignity and rights¹". This fundamental principle includes rights of the transgender and their entitlement to enjoy equal protection provided by the human rights law with respect to right to life, security, privacy and right to be free from discrimination and right of free speech and expression². From the advent of the human race, the transgender community has been treated with oppression and discrimination. They are discriminated in schools, workplaces, and hospitals, mistreated by society, beaten, sexually assaulted and killed. There are around 77 countries, where the laws are discriminatory and transgender are prosecuted for their different sexual orientation³. There are many nations where transgender people are considered as citizens with equal rights, however in these countries also there is a requirement of recognizing and strengthening the anti discrimination practices and to ensure protection measures⁴.

Section 2 (t) of the Rights of Transgender Persons Bill, 2014 defines " 'Transgender person' to mean a person whose sense of gender does not match with the gender assigned to that person at birth and includes trans-men and trans women, gender queers and a number of socio cultural identities such as Kinnars, bijras, aravanis, jogtas etc⁵.

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United Nation has made various attempts starting from the enforcement of UDHR to U.N. Commission on Human Rights in 2003 where Brazil introduced a draft resolution titled, “Human Rights and Sexual Orientation”, which addressed the issue of equal rights for gays and lesbians⁶. In 2008, 34 countries called *Organization of American States* approved a resolution on “Human Rights, Sexual Orientation and Gender Identity”, which aims to resolve the acts of violence and other human violations related to the people of different sexual orientation⁷. On December 2008, United Nations passed a non binding Declaration for the Global Decriminalization of GLBT activities which was passed by 66 member countries, which affirmed the principles enshrined in the UDHR⁸.

In 2011 for the first time, UN Human Rights Council came out in support of the rights of LGBT people and also expressed grave concerns at the acts of violence and discrimination committed against the individuals because of their sexual orientation and gender identity. The Council took help of UDHR and stated that it has universal application and it protects the individual against violence, oppression and discrimination irrespective of their sexual orientation and gender identity⁹.

In 2006, Yogyakarta Principles were introduced for application of standards of international human rights law in relation to sexual orientation and gender identity. It includes 22 principles most essential for having a dignified life of a person, ranging from right of non discrimination and equality to right to privacy and adequate housing. It also mentions rights related to education and right to participation in cultural and social events¹⁰. These principles are basically a promise for a different future to people belonging to different sexual orientation and gender identity, wherein all people would be born free and would have equal dignity and rights¹¹.

Many countries have taken positive steps towards ensuring equal rights and protections to the transgenders community. In Canada, a private members bill (C-389) was introduced to protect the rights of freedom of gender identity, which was passed by the House of Commons on February 9, 2011¹². This bill aimed to amend the Canadian Human Rights Act so as to protect the rights of transgenders. It would also prohibit discrimination towards the transgender community in workplace and other places of public gathering¹³. The then Governor of New York in 2010 passed the first legislation to include transgender protection. Australia introduced the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, which aimed to amend the existing ‘marital status’ and also to prohibit other grounds of discrimination on the ground of sexual orientation, gender identity and intersex status¹⁴.

METHODOLOGY

The authors have used doctrinal research methodology in the present research paper. This methodology has been used to ensure that the research is conducted by analyzing all the relevant material that is available as both primary and secondary sources in this field. The recent Bill has generated much stir in the society hence it is an essential requirement to try analyze it properly along with the other judgments of the Court in this regard.

OBSERVATIONS

The authors in the present research study have tried to observe:

1. The General perception of the society towards the transgender community.
2. The effort on the part of Indian Parliament towards providing an equal and amicable environment for the transgender community and
3. The role of Indian Judiciary in ensuring the enforcement of the fundamental rights as enshrined under the Indian Constitution to the community.

THE RIGHTS OF TRANSGENDER PERSONS BILL, 2014: AN OVERVIEW

The Constitution of India under article 15 preserves the right of equal treatment and prohibits discrimination of any sort on basis of sex of a person. It grants equal rights and freedoms to all the 'citizens of India'. Who are the citizens of India? The question can be answered by the Citizenship Act, 1955 which determines as the question of who all can be called the citizens of India. The act again makes no negative reservation for the persons having different sexual orientation. Then why are the transgender deprived of their rights. Why don't they get the same treatment as normal people do or why aren't they allowed to take admissions in schools and work in offices. It is a sad reality of not only India but of the entire world, where atrocities and discrimination against the transgender people continue to exist. It is pertinent to know that the eunuchs were a category of tribes in the Criminal Tribes Act of 1871¹⁵.

On 25th April, 2015, the Rajya Sabha passed the Rights of Transgender Persons Bill, 2014 and it is yet to be passed by the Lok Sabha. The Preamble of the Bill explains the object of the bill to formulate and implement a comprehensive national policy which could ensure overall development of transgender persons and matters which the State can undertake for their welfare. The bill comprises of ten chapters. Chapter II deals with rights and entitlements of the transgender person, wherein the state aims to provide them equality and non discrimination. The bill gives a responsibility to the government to ensure that principle of equality enshrined under article 15 of the Constitution is duly followed. Section 5 of the bill protects the rights of transgender citizen and state that the appropriate government and local authorities are to take measures so as to ensure equal that the 'transgender children enjoy equal human rights on equal basis with other children'. This chapter aims to protect the right to life, personal liberty and integrity of the transgender person and give them a right to acquire home and have family. Section 9 and 10 of the bill, aims to protect the transgender person from torture, cruelty, violence and inhuman treatment. It mentions that a complaint/information to be given to the Executive Magistrate of the respective jurisdiction, who would then rescue the victim by authorizing the police authorities or some reliable organization working for the cause of such people and provide for protective custody and help the victim.

Chapter III of the bill ensures that the transgender children and adults are provided with equal opportunities of education and makes the government accountable to provide for an inclusive system of education for transgender students, which might lead to an overall development of

such student. Chapter IV of the bill is dedicated to skill development and employment of transgender people. It gives a responsibility to the appropriate government to formulate schemes and policies which might facilitate and support employment of transgender person. It also categorically provides that the transgender shall have a right to appear for selection and hold a post, which they are eligible for. Chapter V of the act aims at providing social security, health, rehabilitation and recreation to the transgender person. This chapter aims to provide a life of dignity to the community. It gives a responsibility to the government to ensure adequate standard of living to the community and to also guarantee that the community lives in a decent environment which hygienic and has facility of safe drinking water and no discrimination is done with come when it comes to providing health facilities.

Chapter VII of the bill concerns with establishment of National and State Commissions for the Transgender community whose basic aim would be to identify the acts and policies affecting rights of transgenders and coordinating with various governmental agencies about the same. It would also review various international conventions and treaties and conduct research on the rights of transgender along with spreading awareness about the rights of the community. Chapter VIII of the bill aims at establishing Transgender Rights Court which would be responsible for speedy disposal of suits of civil nature relating to the rights of the transgender person. Chapter IX is penal in nature and provides for punishment up to one year, where an offence has been committed in reference to a transgender.

The bill is a positive step towards providing and ensuring equal rights and opportunities to the transgender community. However, it has certain drawbacks. Firstly, the bill simply lays down the duties which the appropriate government is required to do, however does not create any body or group which might ensure that the government executes such measures. Secondly, there is no authority or no redressal mechanism established check the prejudices of the Executive Magistrate, if he fails to exercise the power given to him or voluntarily refuse to exercise his power. Thirdly, the bill aims to have provided for more stringent measures of penalties, when the natural human right of a transgender is affected. Fourthly, The bill does not have any mechanism so as to create any deterrent effect on the minds of people which treat transgender community with cruelty and violence.

JUDICIARY AND TRANSGENDER

In spite of the struggle which continues in the various Courts of the country, major important advances have been made in the transgender rights. Though, theses rights have not created much of an uproar, they have been very successful in amounting to a silent revolution.¹⁶

In the year 1994 the transgender were given the right to participate in the elections and give vote to their choice of candidate freely. It is from here their struggle had began for the coming years.

In 2014, in the case of *National Legal Services Authority vs. UOI*¹⁷ a PIL was filed by NALSA in representation of the transgender community. In this PIL they had asked for a legal declaration about their gender identity, apart from the “male” or “female” that is given to them after birth. Basically, they wanted transgender to be declared as the community of “third gender”.

The Supreme Court held two important things. First, transgender persons apart from binary gender should be treated as the third gender so that they can protect their rights conferred under the Constitution of India and they were also given the right to choose their self-identified gender. Secondly, the Government was instructed to take appropriate steps to provide the transgender with proper facilities and social welfare schemes for their betterment.

The government was also instructed to consider their various problems faced by the community including fear, social pressure, depression, social stigma, etc. It had also directed the Centre and the state governments to treat them as socially and educationally backward classes and provide them reservation in admissions in educational institutions and government jobs. The Supreme Court in this case had also said that the Articles 14, 15, 16, 19 and 21 do not include hijras/transgender expressly. In all these articles various words have been used but ultimately all the expressions are gender neutral and evidently refer to human beings, thus the transgender community should not be deprived of being identified as the third gender.¹⁸ But, the court was very specific as to the inclusion of only transgender rights and not those of the lesbians, gays and bisexuals, thus not going in the realm of section 377. Here, transgender included both the people who want to transition from their respective genders and the ones who want to be identified with the third gender were included within the ambit of the judgment.¹⁹

The rationale behind the court giving such directions was simply to provide this community with the rights they deserve. Logically thinking also, a simple 'transgender' or 'third gender' would be more humane than an indifferent 'others'.²⁰ This case of 2014 is in stark contrast as compared to the judgement of 2013 delivered by the same court- *Koushal v Naz Foundation*²¹. In the *Koushal* case the Supreme Court had reversed the earlier judgment of the Delhi High Court and had criminalised India's LGBT minority. Though there were contrary opinions taken in both these cases, but the Supreme Court in *NALSA* was careful enough to not overrule the *Koushal* case.

In the present case the Supreme Court had made a comparative analysis of foreign legislations and judgements, which the earlier case of 2013 had rejected. The comparative study included those of countries like Pakistan and Nepal too, not just limiting to the liberal western communities. Along with this the *NALSA* case also has a very expansive interpretation of the fundamental rights. The prohibition of discrimination on the ground on sex is held to include gender identity also. Justice Radhakrishnan makes no effort to separate the two inextricably bound together issues of gender and sex, which is opposite to what was done in *Koushal* case. Moreover, article 19(a) was also said to be incorporating within it the freedom to express oneself through dress, words, action, behaviour etc. Incidentally, article 19(1)(a) was argued before the Delhi High Court in *Koushal*, but the Court felt it sufficient to decide the case on grounds of articles 14, 15 and 21. Whereas, in both the cases it can be observed that the doctrine of Separation of Powers has been blatantly refuted.

Overall, the judgment of *NALSA* was a progressive one and the judiciary's decision should be applauded. Although the decision is remarkable in its scope and justification and can potentially change the shape of various areas of law and policy making including criminal, labour and family law, the early assessments of this case suggest that this phenomenon is yet to happen. A lot of this will depend on how the broad directions issued by the Supreme Court will be implemented by governmental bodies at each and every level.²²

Taking further this decision of the Supreme Court, the Allahabad High Court has recently in a judgement of *Ashish Kumar Mishra v. Bharat Sarkar*²³ ruled that the transgender community are entitled to the status of head of a household which will allow them to avail food security benefit through ration card. The Petitioner in this case alleged that the transgender have not been shown in the new ration card beneficiaries, which is a part of the food security scheme.²⁴

The High Court reiterated what the Supreme Court had stated in its decision of *NALSA* case, that under article 21 the transgender community possess an equal right to live with dignity. And thus, they have a right of access to all facilities for development of the personality including education, social accumulation, access to public places and employment opportunities. Further, a ration card is a very important document which enables a person and his family to purchase food at a subsidized rate, which is provided by the government. This is thus equally important to a transgender and hence they should not be deprived of it.

The two judge bench, consisting of the Chief Justice held that though the section 13 of the National Food Security Act, 2013 only mentions "woman" but it cannot be interpreted to exclude transgender from its purview. To support their reasoning, the Court mentioned of the form which is used by the state government for accepting applications, serial number 12 of the form mentions gender and in parenthesis it also mentions "other". Hence, the transgender are to be construed to come within this. It was also suggested by the Court that the parliament should clearly provide for such a suitable provision so that there is no further confusion regarding the rights of the transgender community in the various fields. Thus, this was another praise worthy decision of the Indian judiciary in the direction of upliftment of the transgender community.

Lastly, the issue of transgender toilets will be examined by the authors. Recently, in the state of Colorado of the United States of America, a six year old transgender child's rights were being violated by her school authorities. She was faced with discrimination at such a young age.

Coy Mathis was a typical a six-year-old girl she wore dresses, played with stereotypically girls' toys, and had predominately female friends. The one thing about her which could not be observed was that Coy was born a boy. But, from an early age Coy disliked when treated as a boy and refused to put on traditional boy clothing. Coy identified as a female and had hence changed her appearance to that of a female too; completely living her life as a girl. But this was only until Coy was in first grade and the Fountain Fort Carson School District informed her that she could no longer use the girls' restroom- she would be required to use a staff or boys' restroom. The school believed that other students may become uncomfortable with Coy using the girls' restroom, especially as she grew older and developed physically.²⁵

Too our relief, under the decision by the civil rights division of the Colorado Department of Regulatory Agencies in the case of *Coy Mathis v. Fountain Fort Carson School District*²⁶, the school district was slashed for subjecting a six year old to discrimination. Sending out a clear message that the transgender students should not be targeted for discrimination and that they must be treated equally in school.²⁷ Further, the school and Coy's family were required to "attempt amicable resolution" in accordance with the discrimination finding. According to a study, gender-nonconforming youth reported that school was the location of their first experience of

physical victimization more than any other context, thus in such cases the judiciary plays a very important role.²⁸

Regarding this concept of transgender toilet discrimination there can be two different views. One, which states that the transgender would want separate toilets. Here, privacy would mean that, as a transgender, a person has right to assert their distinct identity in public without fear. Whereas, the other would be that they do not want to openly go into separate toilets made for them like they are not allowed to use the male/female toilets. This conception of privacy is as anonymity – their right not to be compelled to make a political statement in the course of going about their daily lives.²⁹

However, this issue of privacy with respect of using toilets is not much of an issue with the Indian transgender society, as it is in the West the reason could be the role played by our courts. Like, in the above mentioned *NALSA* case, the Supreme Court had provided directions for separate public transgender toilets also.

Thus, it is just the implementation of the various pronouncements and the directions given is to be awaited, as the judiciary in India has played its part pretty well, ensuring equality for all, male/female/others.

CONCLUDING REMARKS

After analyzing the legislative and judicial pronouncements the authors observe that the transgender community has been given various rights over a period of time. These rights have helped the community immensely in establishing themselves as equals amongst the people and create a better atmosphere for themselves. Though, India has not reached so far where a transgender would be accepted by his family or society without any hassles, but it is moving towards this mentality.

The government through its legislations and the judiciary through its judgments try and make the life of such people easier so that they do not face any more discrimination from their peers, family and the society at large. Major steps towards this have been the Bill which was passed in the Rajya Sabha in 2015 and the judgement of the Supreme Court recognizing the transgender as the third gender.

To rectify certain errors as pointed out above in the Bill would be, establishing proper redressal mechanism to take action against the non performance of state authorities, like the executive magistrate. Also, there should be strict penal provisions in the Act against the families who disown their transgender relatives. It is very important for a person to have the support of his family and friends for their overall development.

Also, there should be specific schemes launched only for transgender so that their upliftment can be taken care of. The scheme should ensure employment for them. Along with this, reservation should be given to transgender in government jobs.

Transgender children deserve to attend public schools that are free from stress related to their gender identity; this can be provided by the government by ensuring that the school environment is free from worries regarding which restroom to use etc. It is also recommended that all the schools should accept a student's declaration of his/her/their own gender identity. A student who says he is a boy and wishes to be referred to in that way throughout the school day should be accepted and treated like any and every other boy. Doing this will not only remove the discrimination from the grass root level but will also create a healthy impact on the transgender child's life.

Further, the authors suggest that amendments should be made in Indian laws if the so as to provide for the "third gender", like in the Indian Penal Code section 10, Criminal Procedure Code section 125 and various other personal laws like the Hindu Adoption Act, Succession Act etc.

Lastly, NGOs should form a city wise team and ensure that the implementation of the directions of the Supreme Court are made properly as ultimately, the change will only happen if the implementation is done in reality.

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