

LEGAL RECOGNITION OF TRANSGENDER PEOPLE GLOBALLY- A CRITICAL ANALYSIS

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Introduction

We all are proud to state that we have a son or daughter or grandchildren. Our legal system provides for equal protection of rights of both gender without any discrimination and it also takes necessary steps to provide special protection and privileges to vulnerable sections of society which includes children and women. But our legal system and we have totally forgotten and intentionally ignored to provide any kind of basic recognition as human beings to major section of society whom we come across every day but still we try to ignore that they are part of the society and they too have right to lead a dignified life. They are called as transgender. A person whose gender identity is inconsistent with the gender ascribed at the time of birth. This section of people have been in the society in every part of the world from many centuries but their number has increased drastically and their sufferings has been brought to light because of the media has highlighted the human rights violations inflicted against them in various parts of the world. They are subjected to various kinds of social and psychological issues which go unnoticed by the society and the law.

According to National Census 2011, India's population includes approximately five million transgender people. But this is not an accurate statistics as there are all possibilities that all transgender will not disclose their status openly fearing the stigma prevailing in the society.

Challenges faced by transgender

There suffer from various kinds of discrimination like they are excluded from society, political status, participation in social and cultural activities no right to form association or union. They are not a recognized person to claim insurance, gratuity benefits.

Transgender have been subjected to various kinds of harassment, discrimination, alcohol abuse, financial extortion by the local police, brutally murdered, killed as they are treated as worse than animals. Major challenges faced by them are

1. **Unemployment-** a man or a woman who are employed and earning well is removed from the job without any justification the moment the employer comes to know that the employee has change in his gender. If a transgender applies for a job though he / she are qualified for it they are not recruited fearing the stigma prevalent in the society with respect to this section of society as well as there is no provision for recruitment for employment for transgender in the law.
2. **Poverty-** there is high rate of unemployment in this section which is the root cause for severe poverty prevailing in this community. Major section of this people are homeless. Even though they volunteer to do any work offered to them the society is reluctant to accept them to be part of it. In order to overcome starvation they are forced to do illegal business, unlawful acts.
3. **Harassment-** these people are not only harassed by the society as they are not ready to accept them as they consider them as a stigma. The family members the moment they come to know that their child has changed the gender they are thrown out of the family. As there is no other means to survive they are forced to beg, commit suicide. There is high rate of suicide when compared to other sections of society. The report states that 41 percent have attempted to commit suicide when compared to other sections it is 1 percent. The rates were higher that is 55 percent in case of persons who lost their jobs, 51 percent who were harassed or bullied in schools and colleges, 61 percent who were victims of physical assault, and 64 percent in case of sexual assault.¹
4. **No legal protection-** the legal authorities also to do not recognize or provide necessary legal protection to them when they are subjected to harassment, ill- treatment, killed. There are many instances the legal authorities have failed to initiate any legal action against the accused even though there were clear evidence of violation of law.

¹ Report of National Transgender Discrimination Survey, 2016

UN Human Rights Office has documented wide range of human rights violation inflicted against the transgender which includes violent attacks, ranging from aggressive verbal abuse, psychological bullying to physical assault, beatings, torture, kidnapping and targeted killing, forced to flee from place of origin.

5. **Education-** as the law provides education rights to only two sections of society, male and female the question of providing education to the third gender is totally ignored. This section of people do not possess the required documents like birth certificate, Aadhar card, PAN Card which is required for identification has resulted in unnecessary complication in admission for schools and colleges this has resulted in high rate of illiteracy prevalent in this section of society. Those who are admitted to school are forced to discontinue due to bullying by his classmates or school students. In colleges there is another obstacle that is the hostel as they do not have any separate accommodation for them. There are hardly few achievers who have made it to the top post in spite of all kinds of obstacles and harassments.
6. **Healthcare-** The most important right of human being is right to health and life. As far as this section of society is considered they have been completely restricted/denied access to any kind of medical assistance. As the doctors are reluctant to treat this section of society. The result is though cure is there for the ailments they are allowed to die without any treatment. Insurance facilities are not provided for them are there is no specific provision in the Insurance law to insure their life as well as to access the medical facilities.
7. **Identity documents-** Entire legal system identifies only two genders. As a result all the documents issued by the government will provide for gender identity. But there is no provision for third gender in the documents. This has caused grave injustice to transgender as their existence is not recognized by law this has in turn deprived them of all the rights which they are entitled to as human beings. They have no right to vote, no right to contest for election, no driving license, cannot avail loan from bank etc. There are many instances where a person who had cleared the competitive examination was not allowed to occupy the post allotted as there was change in gender. There is no legal recognition or protection given until they knock the door of the court.

Legal Scenario

There are no specific legal provisions in International human rights treaty or national laws to protect the rights of this section of society. UN Charter, Universal Declaration of Human Rights 1948, UN Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), all these Convention emphasis on protection of human rights irrespective of gender as a result transgender are also entitled for the all the protection and privileges specified in it .On June 2011, the United Nations Human Rights Council became the first UN intergovernmental body to adopt a wide-ranging resolution on human rights, sexual orientation and gender identity.

Constitution of India under Article 14 and 21 provides the right to choose one's gender identity, Article 15, 16 emphasis that no one can be discriminated on the ground of gender. *Immoral Traffic Prevention Act, 1956*, which was amended in 1986, has become gender neutral legislation. It provides punishment for offence committed like trafficking, running brothel , prostitution etc, the transgender as they have no means to survive they are forced into prostitution. They are also have been treated as criminals and police can arrest and they can be prosecuted. Transgender are to be considered as victims and not an accused as they do not opt this profession by choice but as they are ostracized from society they are forced into it. As far as Karnataka is concerned in order to eradicate the menace of begging it has come out with a legislation known as *Karnataka Prohibition of Beggary Act, 1975*. This Act provides for imprisonment if any person is found begging but the transgender have been deprived of education, employment and identity the only means left for them to live is by begging if that option is also closed the state will be liable for mass suicide , increase in crime rate, unlawful activities etc. Only few states like Tamil Nadu, Kerala and Odisha has given them the recognition as third gender and provided them with opportunities to education, employment, political representation. From this marginalized section of people only handful of them have succeeded in achieving their goal in spite of all kinds of hurdles and humiliation. Transgender have been appointed as Sub-Inspector of Police, elected as Madhya Pradesh State Legislative member, Principal of Women's College, Judge, Radio Jockey, Advocate, and Soldier in Naval Command.

Role of Judiciary

In *NALSA v. Union of India*,² The Supreme Court had given a landmark decision by recognizing certain rights of transgender which includes civil rights for this section was recognized and stated that every person has a right to choose one's gender and it is part of their right to life and to live with dignity assured by the Constitution. Directions were given to the governments to include 'third gender' in all official documents/ forms. A person was given the option to choose from any of the three genders. Further they should be provided 2% reservation in government jobs, under the category of OBC. The court also gave a suggestion to constitute a Commission to protect the rights of this section of society as they are subjected to various kinds of human rights violations.

In *Ram Singh v. Union of India*³ this case is also famously known as *Jat Reservation* case. In this case Supreme Court heavily came down on the policy of reservation for only one set of caste which had discriminated or denied other weaker section of society from enjoying the benefits provided by the government.

In *Jayalakshmi v. State of Tamil Nadu*⁴ a transgender who was arrested on the charges of theft was subjected to sexual assault in the police station which had led to self-immolation of the victim. Hon'ble Court directed the State Government to pay a compensation of Rupees Five Lakh to the Petitioner for harassing her brother and which has resulted in his committing suicide.

*Navtej Singh Johar v. Union of India*⁵ Supreme Court consisting of five judge bench unanimously held that Section 377 was unconstitutional. It also has held that the very existence of Section 377 of IPC criminalizes transgender and casts a stigma on them who are already oppressed, discriminated and leading an isolated life fearing threat from the society.

Legislative measures taken by the government

Parliament has come out with a Bill in order to protect this section of society from all kinds of harassment, torture and cruel treatment. In 2014 Rajya Sabha had passed a bill called as *Transgender Persons Bill, 2014*. This Bill has been modified and is renamed as the *Transgender Persons (Protection of Rights) Bill, 2016*. On December 17, 2018, the Lok Sabha

² 2014 SC

³ 2015 SC

⁴ 2007 Mad HC

⁵ 2016 SC

passed the Bill with 27 amendments. There are lot of loopholes in the Bill and the directions given by the Supreme Court in NALSA's case is not strictly complied while drafting this Bill. The option of choosing the gender is not provided in the Bill, there is no specification as to reservation in the entire Bill, The District Screening Committees has to scrutinize and certify only then they are considered as transgender this is a clear case of human rights violations and this direction has not be specified by the Supreme Court in its judgment. There are all possibilities of abuse. This marginalized section of society are harassed, tortured, killed, many of them who had escaped from such kind of humiliation commit suicide. When they attempt to commit suicide due to mental and physical torture they should be treated as victims and not subjected to punishment but this has not been considered in the Bill. Need of the hour is to integrate them within the triangle of Article 14, 19 and 21 of the Constitution and automatically all the benefits will be conferred on them.

Changes to be made in the existing laws

In spite of Supreme Court directions in 2014 only Tamil Nadu and Kerala state has introduced the welfare scheme policy which includes free housing, employment opportunity, free access to sex reassignment surgery (SRS) , free scholarship for higher studies, income generation programs and skill development training

As third gender they also should be provided with the right to marry, adopt, and own property. As a result there is a need to make necessary changes in the already existing laws relating to above subject. Transgender deserted by their parents should be compelled to give the share they are entitled to from ancestral and parents property. If they are minor's they should be given the right to claim maintenance from their parents. Deserting parents or the public who are subjecting transgender to any kind of human rights violation should be punished with imprisonment and fine. In educational institutions gender neutral toilets to be provided, in order to avoid any kind of embarrassment to them. NALSA judgment had clearly specified that this section of people should be provided reservation under OBC category but it would be appreciable if a separate reservation category is created for them.

Conclusion

This vulnerable section of society have not voluntarily opted to be transgender but due to various hormonal changes they are forced be called so. This section of society do not require

any new law to be enacted for their protection but they request that the basic rights as human beings should not to be taken away, permit them to enjoy their fundamental rights like other human beings and not to treat them as criminals or unwanted objects in the society. The mentality of human beings has to be changed and this section of society to be allowed to lead their life peacefully and with dignity. They are ready to accept any challenges and prove they are better than others but it is up to us to provide them that opportunity.

Suggestions

- ▶ There is a dearth of empirical research as to the problems faced by this people
- ▶ Number of role models available is limited only few of the transgender have achieved the top most position.
- ▶ Magazines to include articles on the issues of transgender and create awareness as to atrocities meted out to this section of marginalized society.
- ▶ Parents and family members require proper counseling
- ▶ Media to be more accountable for the information it dispenses as wrong information or depicting in indecent manner may have a negative impact.
- ▶ Health care being one of the biggest struggles for the transgender community it should be compulsory for doctors to treat them failing which stringent punishment should be imposed
- ▶ Proper training and sensitization programme should be given to police officials, prison staff, social workers as well as school teachers as to how to treat transgender and also prevent anti-bullying.