

## **RIGHTS OF THIRD GENDER IN INDIA: PROGRESSIVE START, ENOUGH ROOM FOR CHANGE**

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*“Social morality cannot infringe any individual’s fundamental rights. Constitutional morality cannot be martyred at the altar of social morality.”*

*~ Justice Dipak Misra*

The Preamble of the Indian Constitution provides for justice- social, economic and political along with equality of status for *all*. Since ancient times there have been many disparities between urban-rural, caste, gender, class etc. However, it would not be correct to call the third gender in India, a ‘miniscule minority’. They have a voice, strong enough, to refuse to be silent while striving for equality.

Universal Declaration of Human Rights adumbrates that ‘*all human beings are born free and equal in dignity and rights*’<sup>i</sup>. The word “all” also includes transgender. However, provisions in paperwork are far different from reality. Transgender possess the notion of ‘self-feeling’, as also emphasized in Yogyakarta Principles<sup>ii</sup>, that all individuals have right to choose one’s sexual orientation since it is ‘integral to their personality’.

### **SOCIAL MILIEU: RELENTLESS BATTLE FOR EQUALITY POST RECOGNITION**

The very conception of transgender being called as ‘third gender’ is a delusion. Firstly, who has the authority to decide that they are supposed to be called as ‘third gender’? Even if they decide so, then who shall be classified as first and second gender? This vulnerable section has always been disregarded and not taken into consideration during policy making, thereby curbing diversity.

In *Jayalakshmi v State of Tamil Nadu*<sup>iii</sup>, the police officials took away the petitioner, who was sister of transgender on account of theft and had given bail on the condition that he should report station on a regular basis. Nevertheless, he was sexually abused and this affected him so much that he set himself on fire. Court provided compensation and directed the state government to take stringent actions for such circumstances. Nonetheless, no significant measure has been taken in this regard for their upliftment.

The states have failed to involve transgender in sports and military services. At present, 18 countries engage transgender' services in military, however, no such provision can be found in Indian legislations. Looking at the trends of the custodial violence and rape it is suggestive that prisons shall be allocated on the basis of requirements rather than 'genitals'. As in US, Department of Justice, Prison Rape Elimination Act abolishes torture and allocates them cell on the basis of crime, similar provisions shall be made to cater the crimes against them in prisons. Since, it is clearly a form of discrimination which injures the integrity of an individual.

Despite recognition, they still face discrimination. According to Census 2011, about 4.88 lakh transgender live in Uttar Pradesh, Andhra Pradesh, Bihar and Maharashtra. Multiple reports reflect the plight of the community which merely covers 0.04% of the population. Is this just and fair? Justice Radhakrishnan rightly asserts in *NALSA*<sup>iv</sup> judgement that though these people are insignificant in numbers, are still humans and possesses the right to enjoy every basic human right available to all.

## **IS EDUCATION POSSIBLE AMIDST PERSISTENT DISCRIMINATION?**

UN Free and Equal Campaign in its video, 'The Price of Exclusion'<sup>v</sup> sheds light on the social and economic damage caused by discrimination to the LGBT people across globe. Studies carried out in UK<sup>vi</sup>, US<sup>vii</sup>, Thailand<sup>viii</sup> shows that between half to two-third, LGBT students have always been bullied at school whereas one-third skips school to protect themselves from harassment. This is however, not otherwise in India. Also, different studies reflect that poverty, joblessness and food insecurity are main causes of low level of education. A study conducted by World Bank assesses the loss of India's economic output of about \$32 billion a year due to discrimination against LGBT community in India.

The report titled, '*The Economic Cost of Homophobia*'<sup>ix</sup> released by World Bank that reflects some preliminary statistics on harassment faced by the member of LGBT community in India. It stated that the gay men were 12 times more likely to suffer from depression along with 15 times higher prevalence of HIV compared to general population. Also, they are 14 times more open to suicidal thoughts. The main reasons for such vulnerability is due to lack of access to education and healthcare.

Sahaj International School in Kerala to provide education and vocational training to drop out adults. Even such positive notions have helped India achieve milestones. For instance, India elected its first transgender mayor in 2015. However, this should not be mistaken as a progress. A single achievement is not a panacea for all problems and cannot address the plight of the entire transgender community.

### **PARTICIPATION IN POLITICS: PARADOX BETWEEN THE REALITY AND THE JUDGEMENT**

The NALSA<sup>x</sup> judgement has emphasized on various affirmative actions to uplift their position in the society. They asserted for skill development, reservation in jobs and education and most importantly, identified their gender for the first time as a voter identity. The verdict has definitely paved a way for their participation in the political avenues. However, social morality and outlook hinders such a progress. Though, credit goes to the political activism but it is worth noting that real changes in their position can only be made by ensueing their representation in the legislative and executive wing of the society. It is still next to impossible for their community members to contest for the elections and even if few of them has contested the elections, it wouldn't have been possible without the support of the political parties. Contesting as an independent is still a dream due to insufficient funds and it is well evident that the politicians standing as an independent candidate in India have achieved victory because of involvement of gargantuan funds. Transgender community attained their right to universal franchise in 2014, however, merely 10% of transgender populations whose self-perceived notion is that of 'trans' have voted (considering 2011 census).

### **CONVERSION THERAPY: PERSONAL CHOICE AND MATTER OF RIGHTS**

Conversion therapy for LGBTQIA+ is premised on relentlessly false belief of abnormality and association with poor mental health. The therapy in reality locates the problem rather than solving the same in the socio-cultural set up of society. In order to make ‘victims’ associate with their identities, it uses methods of operant conditioning which leads to distress, depression and emergence of suicidal thoughts. A study conducted in US suggests that youth rejected by their parents for their identity are 8 times more likely to attempt suicide, 6 times more likely to report depression and 3 times more likely to drug abuse and involvement in risky sexual behaviors.<sup>xi</sup> Even, the Indian Association of Clinical Psychologists asserted that the conversion therapy is ‘painful’, ‘dangerously harmful’, ‘traumatizing practice’ and ‘discredited’ and ‘unprofessional’.<sup>xii</sup> These therapies affect the individuals negatively and hence, mental health professionals must abhor such practices and use more queer affirmative languages. It is like forcing a person to picturize themselves as someone they are not in reality. Does this not impact self-esteem and lead to depression, trauma, anxiety, self-hate, dejection? Isn’t it a violation of the principle enshrined in NALSA<sup>xiii</sup> judgment that ‘*psychological notion shall prevail over the biological one*’?

Conversion therapy contravenes the provisions of Mental Health Act, 2017<sup>xiv</sup> and violates Article 14<sup>xv</sup> and 19(1)(a)<sup>xvi</sup> of the Indian Constitution amongst others. Though no provision directly outlaws the therapy but is a clear violation of different acts. The NALSA judgment itself notes that, “no individual shall be forced to undergo any form of psychological or medical treatment, testing or procedure based on gender identity or sexual orientation.” Also, the court in 2018 judgement<sup>xvii</sup> opined that counselling practices must aim at providing support to transgender to lead a comfortable life with who they are rather than encouraging them to change their sexual orientation. The counsellors must adopt progressive thoughts instead of regressive measures by treating it as an illness or disease.

The BBC report<sup>xviii</sup> elucidates that laws in Germany bans the conversion therapy and those found violating it were charged fine €30,000 and prison upto a year. There is no need of a new legislation as the previous provisions are loud and clear enough on its legality. Still, legal experts claim for banning of such therapies.<sup>xix</sup> However, there lies a need to trace the frequency of conversion therapy in the country and its prevalence. Also, it should not be tagged as a ‘conversion therapy’ as it is not a therapy but indirect violence and abuse meted out on them.

Therapy, literally means some kind of treatment of an illness or physical problem. Being a gay, trans, lesbian or bisexual is definitely not a physical problem.

### **COVID AND TRANSGENDER: LOST SPOTLIGHT?**

With sudden and unexpected announcement of lockdown, the situation of vulnerable groups like migrant workers, daily workers inclusive of sex workers, third gender etc. worsened. Social and cultural implications of COVID need to be addressed. Self-employment acts a counter to social distancing. The primary sources of earning of these transgender was begging, performing at weddings, engagement in sex work etc. which got hampered. The issue gets compounded with problem of presenting identity authorized by Indian Government to avail benefits of public distribution of food. Majority of them do not have such documents as they do not have addresses since they migrated amongst other reasons. Many belonging to the community depend on antiretroviral drugs and hormonal medication which they find it inaccessible due to halt in public transport facilities. Those found breaking the norms were lathi-charged by the police officials. No attention is paid to the essential needs of the community from government's end and are just sidelined for increasing fake news as well as transphobic misinformation, thereby breeding ground for hatred. The same is evident of the fact that a poster was pasted near Hyderabad Metro Station inciting violence by addressing them as 'Corona Virus Hizrars'.<sup>xx</sup> Amnesty International India<sup>xxi</sup> had released notification to help them. Pursuant of this, many state governments, organizations and activists have taken necessary step to provide basic amenities that an individual is entitled to owing one's human rights.

### **TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019: A BLOT ON THE JUDGMENT?**

NALSA judgement has recognised the self-perceived identity over the biological notion as a fundamental right under Article 19<sup>xxii</sup> and 21<sup>xxiii</sup> of the Indian Constitution. This was done in order to bring cis-gender and transgender identities on the equal pedestal. But Section 4(2) of the Act<sup>xxiv</sup>, provides for granting self-perceived gender identity only after the identification, i.e. recognizing under the concerned provision. Hence, it directly contravenes with the granting of such identification on the basis of gender identity as asserted by the Supreme Court in the judgment. Also, it does not throw light on the powers of Magistrate, whether he is empowered to reject application and if so, then the ambit of such discretion.

Section 3<sup>xxv</sup> of the Act prohibits discrimination against transgender in different domains like education, housing, healthcare, services, etc. However, it fails to provide for penalty in case of violation of such provision. Section 7<sup>xxvi</sup> elucidates that in order to change the gender after certificate of identity has been issued, the individual must produce the certificate by Chief Medical Officer of institution where applicant has undergone surgery before District Magistrate. Thus, this introduces a requirement of certificate specifically upon surgeries of 'gender-affirming'. The very idea of certification defies the right of 'self-determination' as asserted by the Apex Court. Section 15<sup>xxvii</sup> talks about the insurance scheme, nonetheless, it is insufficient for guarantying right to health to an individual. Are the beneficial provisions made just for the sake of it?

The Apex Court in the judgment recognized the third gender as 'socially and educationally backward' class. Hence, this calls for affirmative action from government's end in light of Article 15<sup>xxviii</sup> and 16<sup>xxix</sup> of Indian Constitution to uplift this vulnerable section for the injustice and inhumane treatment suffered by them throughout history. However, the legislation fails to provide for any such reservation. Also, it fails to provide equal protection in case of sexual offences, thereby violating Article 14 of the Constitution. Section 18(d)<sup>xxx</sup> of the Act treats sexual offences against transgender as a 'petty offence' and less grave in comparison to similar offences against women. This in turn contravenes the very 'constitutional spirit' calling for an urgent need to cater the injustice.

Army, Navy and Air Force laws pertaining to conduct of personnel bars homosexuality. People are split in the opinion for possible implications.<sup>xxxi</sup> However, Parliament under Article 33<sup>xxxii</sup> of the Indian Constitution possess the powers to modify laws relating to defence personnel. Amendment for revocation of such bar was likely to be introduced by Defence Ministry, however, defence forces are apprehensive of the same and does not extend their support. It is contended that soldiers stay away from their families for months and fellow soldiers are only their support during such times. Hence, many nations see legalization of homosexuality as a threat to their military service. Centre for Strategic Studies, the think tank of Hague found Indian military amongst the least friendly to gays by more than 100 armed forces.<sup>xxxiii</sup>

## **DRAFT TRANSGENDER PERSONS (PROTECTION OF RIGHTS) RULES, 2020: BEACON OF HOPE BUT NOT SUNSHINE**

The draft rules were published by the Ministry of Social Justice and Empowerment in April 2020. However, the draft was as usual prepared without the consultation of the members of transgender community. The time frame for receiving comments was just 12 days which was a shorter time to read, interpret and analyze the rules meant for the community members. Is it even possible for them to critically analyze the provisions in such short span of time being most educationally and economically disadvantaged? Also, how much is it feasible to consult activists or lawyers during lockdown? Last, but not the least, what was the need for such a haste in process which requires to be done meticulously with due deliberations?

Clause 4(1)<sup>xxxiv</sup> of the Rules specifies for 'residence' to be verified by the District Magistrate. Nonetheless, it is ambiguous as they mainly live in slums and ghettos. Majority of them do not have an address proof. The further clause of requirement for residing atleast one year in the area of the jurisdiction of the magistrate adds fuel to fire and likely to be brutal on them. Clause 6<sup>xxxv</sup> does not clearly spell if it is mandatory to have certificate of sex reassignment surgery. In case if it is mandatory, then it would lead to multiplicity as undertaken under Rule 5 for obtaining documents including identity cards with changed gender and name. The certificate should not be compulsory and hence, made optional according to person's choice.

The struggle seems futile when one reads Clause 7(1)<sup>xxxvi</sup> which promotes bi-genderism by reflecting that the certificate post sex-reassignment surgery would mark them either as male or female. The very idea ignores the sentiment of transgender and strictly calls them to choose fixed boxes of males and females. Even after, they undergo sex reassignment surgery, they must be free to identify themselves as transgender rather than male or female. This also forces one to think if the governmental benefits for such transgender would be available for them or not, since the identity cards would mark them as either male or female. This ambiguity makes the situation of this vulnerable section more vulnerable. Moreover, the unfettered powers to the district magistrate under Section 8 to reject the application on his discretion. This would render them harassed at the hands of District Magistrate. Clause 10(5)<sup>xxxvii</sup> accentuate about the rehabilitation centres for transgender. Nonetheless, it is equivocal as who and on what basis it shall be established. The method to approach and identification process for the same is unsettled.

## **SAME SEX MARRIAGE: UNFINISHED CHALLENGES**

Inter-caste marriages in India continues to face the social stigma despite the fact that they are legalized. The judgement<sup>xxxviii</sup> elucidates that bulwark of social culture, i.e. the family system will be a mare's nest if Section 377 has been declared unconstitutional. It further highlighted that the institution of marriage shall be affected detrimentally along with a rise in homosexual activities for money. This would tempt young delicate minds of future generations to delve in this trade. This argument fails miserably on the notion that any such classification which discriminates between individuals on the basis of innate nature shall be violative of their fundamental right and would not stand the test of constitutional morality. With the change in the social mores, the constitution of family has begun to change.

Corbett v. Corbett<sup>xxxix</sup> was the first case to shed light on the marriage involving sex change. The court opined that even after a sex change, the respondent was a male and hence, marriage with another male would be void. Same principle was upheld in R v. Tan<sup>xl</sup>. In India, neither the Hindu Marriage Act nor the Special Marriage Act considers Transgender. Not only this, but Eunuchs are not protected by National Commission for Women as they lack fairer sex.<sup>xli</sup>

The judgment itself oscillates between broad and narrow interpretations of term 'transgender' and between biological requirements and self-perceived determination of the identity. Justice Sikri narrowed down the broader interpretation of Justice Radhakrishnan by excluding Lesbian, Gay and Bisexual people from transgender's ambit. The judgement muddles between Hijra and Transgender and ensured recognition for them by excluding other gender variants.

There are compelling reasons for recognition of same sex marriage. The legal benefits like maintenance, succession, pension, insurance etc. are unavailable for same-sex couple. Benefits under Employment Provident Fund Scheme<sup>xlii</sup>, Workmen's Compensation Act<sup>xliii</sup> etc. are given to those with blood relations or after marriage. Central Adoption Resource Authority has made it difficult for single and unmarried couples.<sup>xliv</sup> Not all same-sex couple are looking for radical changes as they are politically more conservative.<sup>xlv</sup> Some of them merely wants to opt for legally recognized partnership.<sup>xlvi</sup>

An alternative seeks for civil union instead of marriage as in US, Latin American countries, Australia, European Union with different models. Supreme Courts of Vermont<sup>xlvii</sup> and New Jersey<sup>xlviii</sup> held that same-sex couples should not be excluded from benefits of marriage, however, the state has to decide if these can be conferred within the existing statutory

framework or domestic partnership is to be preferred. This 'separate but equal' institutions should confer same benefits as given to a normal couple. This form faces less opposition from religious ends and wipes out debate of marriage being necessarily heterosexual. But it would be discriminatory as it provides a class of people an option of a low status than marriage.

In *Loving v. Virginia*<sup>xlix</sup>, court gave a landmark decision by allowing inter-racial marriage. Progressive steps have been taken to recognise inter-caste, inter-faith and inter-racial marriages across globe and India. Recently, Guruswamy and Katju has launched 'The Marriage Project'<sup>1</sup> to legalize the same-sex marriage. They asserted that India is a marriage country and has legal and social aspects attached to it. From lease and life insurance to inheritance, everything is governed by the law. They also contended that people belonging to any strata like lower or upper class, majority or minority, Hindu or Muslim, straight or gay, needs a secured life with long term relationship and commitments.

Same-sex marriage can be recognized under Hindu personal law by permitting such marriages. It must be amended to incorporate LGBT community. There is a need to overhaul the definition of bride and groom. Also, the community can agree on some common marriage practices and seek recognition of the same under the Act. Another approach could be followed by judiciary wherein it reads down the provisions of Hindu and Christian marriage act on the grounds that they are constitutionally discriminatory as it does not take into consideration the same-sex marriage. The traditional laws did not provide for such marriages even though instances can be found in traditional literature.

Special Marriage Act is a secular framework and can be amended to include same-sex marriage. It would be easier to accommodate such marriages in the act as it merely requires amendment of Section 4(c)<sup>li</sup>. Again, the act can be read down as being unconstitutional by excluding same-sex marriage. It can be noted that SC has strike down Defence of Marriage Act, 1996<sup>lii</sup> not on the ground that same-sex marriages were a constitutional right but that the government has authority over definition of marriage. In the dissenting opinion, Justice Scalia rightly pointed out that the majority view in reality paves a way for recognizing same-sex marriage as a constitutional right. The international precedents can be cited to turn this hot burning issue as a constitutional challenge to give weight to it.

## **GENDER NEUTRAL LAWS: RAISING THE BAR, RECOGNIZING THE RIGHTS**

Gender-neutrality for statutes of rape believes that along with women, men and transgender can also be a rape perpetrator and victim.<sup>liii</sup> This assures modern understanding of dynamics of non-penetrative and non-consensual penetrative sex acts. Section 375<sup>liv</sup> of IPC presupposes that rape can be committed merely by men upon a female. However, it conflicts the notion of equality under Article 14<sup>lv</sup> of Indian Constitution. The issue has been catered to for the first time by the honorable Delhi High Court in *Sudhesh Jhaku v. KC Jhaku*<sup>lvi</sup>, wherein it was of the opinion that protection of law can be extended to men in case of sexual assault. The Criminal Law (Amendment) Bill, 2012<sup>lvii</sup> proposed for a gender-neutral definition of rape, however, could not be sanctioned due to socio-political pandemonium engendered by infamous Nirbhaya Case<sup>lviii</sup>.

The foremost opposition for such gender-neutral laws arises due to existing patriarchal norms which accepts it as a 'gendered crime'. The rationale for the same lies on the notion that rape committed on a women's body that harms her dignity and integrity. They fear that embracing such definition would be perilous for women instead of protecting her. But, it must be comprehensible that it would just widen the scope to protect others just like women, as anyone can be a victim just like a perpetrator and the guilty must be punished with a deterrence effect.

Section 18<sup>lix</sup> of the 2019 Act, undervalues the 'graveness' of sexual act merely because it was committed against a transgender. It is worth noting that punishment prescribed for rape of women is imprisonment extendable upto lifetime, however, in case of transgender it is treated as a 'petty offence'. This reflects the heartless and thick-skinned approach of law towards this vulnerable section. In July 2019, KTS Tulsi introduced a private member's bill<sup>lx</sup> to amend the provisions of criminal law and make the sex offences a gender neutral one. The Statement of Objects and Reasons of the Bill emphasized to be empathetic towards all including male and transgender rape victims. However, the bill met the same fate as other private members bill. It calls for urgent attention and rectification as even NALSA judgment sheds light on sexual violence meted out on transgender. Non-consensual penetration against any individual must be categorized as rape in order to safeguard their constitutional rights irrespective of their gender or sex.

The policy of Sexual Harassment at Workplace is also gender biased protecting just the women. Improvement in participation of transgender on such platforms calls for a safer environment for them to work. Not only women, but male and transgender can also be sexually harassed. The Apex Court in *Hiral P. Harsora v. Kusum Narottamdas Harsora*<sup>lxi</sup> opined that the term 'respondent' under Section 2(m) of POSH Act<sup>lxiii</sup> includes all gender. The court in *Navtej Singh Johar v. Union of India* asserted that, "the societal biasness has to be rooted out of weed and it shall be duty of everyone to stand and speak against the minimalist form of discrimination against transgender. In their walk of freedom and journey to constitutional ethos, liberty, equality and freedom shall be fulfilled."

### **CONCLUSION: ROAD AHEAD**

The entire conundrum leads us to a question, 'What is next for the community?'. Is it adoption laws or legalization of same sex marriage? Is government mending its ways in order to educate the community and achieve basic literacy level? will government find ways to enforce anti-discriminatory laws? Can it ensure basic life of dignity and integrity to such individuals along with due recognition? Does the judgement promise a better future and equal rights for the community and how long will it hold true?

This all seems to make an attempt directly or indirectly for equal rights despite recognition from judiciary's end. The Act itself seems to a great fallacy when it fails to consider the basic ideas and rights enshrined in the judgement. The Draft made in haste adds to the confusion with ambiguous provisions. The situation worsened with the rise in pandemic as they are the most ignored section during lockdown due to the crisis of COVID. The personal family laws do not have space to accommodate this community and hence, this calls for fresh legislations on family laws, albeit amendments might work. But something has to be done in order to provide them with family and adoption laws. With the rise in crimes against this vulnerable section, now is the time, when legislation wing must provide for gender neutral laws rather than specific gendered laws to protect only women. Just like transgender can be perpetrator, they can be a victim also! More affirmative action like reservation in educational institutions and jobs along with political representation must be taken in tune with NALSA's judgement to bring them to an equal pedestal. After all, Preamble and International provisions of Universal Declaration of Human Rights and Yogyakarta Principles assert that everyone shall be treated

equal and this ‘everyone’ includes transgender too who possess the right to self-perceived identity rather than the biological one imposed by the society with respect to the social morality. Now is the time, when social morality must pave way for constitutional morality.

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