

Protection of Rights of the Third Gender Persons in India

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Abstract- Transgender persons are individuals of any age, religion, faith and sex whose appearance, personal characteristics, or behaviors differ from normal about how men and women are 'supposed' to be. Transgender people have existed in every culture, race, country and class since the time immemorial. The term "transgender" arose in common parlance in the mid 1990s from the traditional society of gender-different people. In contemporary practice, transgender has become a "common and umbrella" terms which is used to describe a wide arena of identities and experiences, including but not limited to transsexual people, male and female cross-sectionals'.

In our country there are a host of socio-cultural and traditional groups of transgender people like *hijras/kinnars* and other transgender identities like *shiv-shaktis*, *jogtas*, *jogappas*, *Aradhis*, *Sakhi*, etc. However, these socio-cultural and traditional groups are not the only transgender people, but there may be those who do not belong to any of the groups but are transgender persons individually.

The Preamble to the Constitution of India mandates Justice, Social, Economic and Political Equality of Status. However, many of the Indian State's policy of recognizing only two sexes and refusing to recognize *hijras* as women, or as stroke of several rights that include the right to vote, the right to own property, the right to marry, the right to claim a formal identity through a passport and a ration card, a driving license, the right to education, employment, health so on and so forth. Such deprivation secludes *hijras* from the very fabric of Indian civil society.

The Supreme Court while recognizing the third gender category, the Court ruled that fundamental rights are available to the third gender in the same manner as they are males and females. Further, non-recognition of third gender in both criminal and civil statutes such as those relating to marriage, adoption, divorce, etc is discriminatory to the third gender.

The present paper is an effort to know the historical account of transgender people. How are they discriminated persistently and how they managed themselves protecting their rights from different developments. Does there are any eminent threats in their survival? How far the Indian laws have become instrumental to change the approach to see them in the cross-sections of the society? And the most prominent amongst all is whether the contemporary and the traditional thinkers have been playing any role in protecting, managing and conserving legal and other kinds of rights of the transgender persons?

Index Terms- Equality, Freedoms, Bill of Rights, Constitutional law of India, Gender Persons, Third gender, Transgender, Right to Personal Liberty, Dignity, Exploitation.

I. METHODOLOGY

The present study is based on doctrinal method of research. A comprehensive review of existing literature, journals, articles, reports, mixed with magazines, newspapers articles are primarily relied in order to get clear updated picture of the current position of the transgender persons in India in Constitutional law regime and its conflicts with statutory laws in rapid pace of modern legal development. Case laws of various Courts are basically referred.

II. INTRODUCTION

While discussing regarding the third gender persons and their rights in India one must start with the determination between the much sidelined or may be purposely under-played distinction between the concepts of "gender & sex". The term "gender" refers to what is recognized by the society and, which may or may not correspond with the sex assigned with at birth. Sex, on the other hand, refers to what you are born with. Both of these are immanent to one's personality and are aspects of self-determination, dignity and freedom.

Third genders are the types of gender, in which people are of any age or sex whose appearance, personal characteristics, or behaviors' differ from formulaic about how men and women are 'supposed' to be. The term "third gender" is generally used to describe those who transgress social gender norms. *National Legal Services Authority V Union of India*¹ is a landmark decision by the Supreme Court of India, which declared transgender people to be a 'third gender'. Transgender is often used as an umbrella term to third gender to signify individuals who defy rigid, binary gender constructions, and who express or present a breaking and/or blurring of culturally prevalent stereotypical gender roles. Transgender people may live full-or part-time in the gender role 'opposite' to their biological sex. In contemporary usage, "transgender" has become an umbrella term that is used to describe a wide range of identities and experiences, including but not limited to- pre-operative, post operative and non-operative transsexual people (who strongly identify with the gender opposite

to their biological sex) male and female 'cross-disorders' (sometimes referred to as "transvestites", "drag-queens", or "drag kings") and men and women, regardless of sexual orientation, whose appearance or characteristics are perceived to be gender atypical. A male-to-female transgender person is referred to as "transgender woman" and a female-to-male person as "transgender man". The terms "transgender" or "transgender people", used in this brief, while more encompassing than transgender women, are used to refer to Trans-Women given this brief's focus. Sometimes, for brevity, the abbreviation "TG" is used to denote transgender women. Transgender people have existed in every culture, race, and class since the story of human life has been recorded. That includes people who do not self-identify as transgender, but who are seen as such by others and thus are subject to the same social oppressions and physical violence as those who actually identify with any of these categories.²

III. DISCRIMINATION IN GENERAL:

Gender based discrimination and torture are violations of human rights. In common parlance, women are the subject matter of gender based violence. However, the studies show that the transgender community stands in the list overtaking women. Quoting Ban Ki Moon³ the Secretary General of the United Nations, "*We see a pattern of violence and discrimination directed at people just because they are gay, lesbian, bisexual or transgender. There is widespread bias at jobs, schools and hospitals and appalling violent attacks, including sexual assault. People have been imprisoned, tortured, even killed. These are a monumental tragedy for those affected-and stain on our collective conscience. It is also violation of International Law*". The statement reveals widespread abuse and gross human rights violations against sexual minority including transgender at global level. When it comes to India, a country having deep rooted cultural and religious beliefs and notorious societal taboos directed against unnatural sexuality, their existence is more pathetic. It is a shocking reality that the transgender in India are not being considered even as human beings. They are being discriminated, excluded and alienated from all fields of social life. There is no proper legislative attention to recognize their existence as human beings and bring them up to the main stream. The plight of transgender is universal in nature. Even in the countries where exist strong legislative framework to recognize their grievances are not adequately addressed. In a vast country like India, where religion and morality play a vital role in shaping the criminal law, their condition is more problematic.

IV. INDIAN SCENARIO:

When speaking about the transgender with regard to India, we see there is a unique position they did not have any identity. Here is a society that has not totally accepted the third gender or transgender in society. Some people here have thought of transgender as normal and it has gone up to the extent where some

people consider them as sacred. The Indian position becomes unique as compared to the rest of the world whereby although society has partially accepted the third gender, but there was no legislation which recognized them unlike in most other cultures. So they are treated as men, so as a result they suffer lots of difficulty in document, employment etc. Due to the *Hijra* social movements which have campaigned for recognition as a third sex with the increasing demand, in 2005, Indian passport application forms were updated with three gender options: M, F, and E (for male, female, and eunuch, respectively). Furthermore, in November, 2009, with the intention of ensuring further recognition for the third gender India agreed to list eunuchs and transgender people as "others" distinct from males and females, in voting rolls and voter identity cards. These steps are some of the ways in which the Indian Government has tried to integrate the Third Gender in Indian Society but this has not been a complete success as there is still a section of society who fails to understand the third transgender which leads to discrimination. But in 2016 after the *Naz Foundation case*⁴ the transgender was recognized as third gender in India. Now there are three genders in India they are man, woman and third gender. But the situation of these people did not change but we can hope in future they are treated as normal as other person in society. Some initiative were taken by Indian States Government so they could uplift them and now a days in Government documents the option are given for these people also was named as 'other gender'. Slowly they are getting their identity in India⁵.

V. HISTORICAL ACCOUNTS:

Transgender persons had been part of Indian society for centuries. There was historical evidence of recognition of "third sex" or persons not conform to male or female gender in near the beginning writings of ancient India. The concept of "*tritiyaprakriti*" or "*napuunsaka*" had been an integral part of the Hindu mythology, folklore, epic and early *Vedic* and *Puranic* literatures. The term "*napuunsaka*" had been used to denote the absence of procreative ability, presented by signifying difference from masculine and female markers. Thus, some of the early texts extensively dealt with issues of sexuality and the idea of third gender which was an established thought therein. In fact, the Jain text even mentions the concept of "psychological sex", which emphasized the psychological makeup of an individual distinct from their sexual characteristics. Lord Rama, in the epic Ramayana, was leaving in the forest upon being banished from the kingdom for 14 years, turns around to his followers and asks all the 'men and women' to return to the city. Among the followers, the *hijras* alone did feel bound by this direction and decide to stay with him. Impressed with their loyalty, Rama sanctioned them the power to confer blessings on people on auspicious occasions like child birth and marriage, and also at inaugural functions which, it was supposed to set the stage for the custom of *badhai* in which *hijras* sing, dance and confer blessings. *Aravan*, the son of Arjuna and *Nagakanya* in Mahabharata, offer to be sacrificed to Goddess Kali to ensure the victory of the *Pandavas* in the *Kurukshetra* war,

the only condition that he made was to spend the last night of his life in marriage. Since no woman was willing to marry one who was doomed to be killed, Krishna assumes the form of a beautiful woman called *Mohini* and married him. The *Hijras* of Tamil Nadu considered *Aravan* Transgender persons had been part of Indian society for centuries.

Hijras also played a famous role in the royal courts of the Islamic world, particularly in the Ottoman empires and the *Mughal* rule in the Medieval India. They appointed as well known positions as political advisors, administrators, generals as well as guardians of the harems. *Hijras* were considered clever, trustworthy and fiercely loyal and had free access to all spaces and sections of population, thereby playing a crucial role in the politics of empire building in the *Mughal* era. One such example is the *Nizams* of Hyderabad who employed and honoured *hijras*. The sixth *Nizam Mahboob Ali Pasha* employed *hijras* as confidantes and advisors, domestic supervisors and menial domestics. Even the Hyderabad State had an Inspector for *hijras* in the Police Department to look after their welfare and assured that they not be harassed. *Hijras* had claims on the public revenues through grants of cash and land and in some places they possessed an official and codified right to begin in India. However many laws were introduced against *hijras* which led to their miserable situation. According to the Andhra Pradesh (Telangana Area) Eunuchs Act 1329, which is a State Statutory Law, the term eunuch was used for those who admitted to be impotent or was proved impotent after undergoing a medical inspection. Though the term eunuch was used to refer *hijras*, impotency was necessary to be eligible to be called as a eunuch. As per this Act the Government was required to keep a register to keep record of names of *hijras* and their resident details. Restriction was also placed on *hijras* engaged in *badhai* or any other kind of street entertainment activity carried out secretly. There was also restriction on self emasculation and emasculation performed on others. The Act thus had a close surveillance on the lives of *hijras*, their traditional occupation, and also on their rituals.⁶

VI. POSITION DURING BRITISH REGIME:

The situations of *hijras* started deteriorating when British colonial rulers came with their ideologies of sex/gender binaries bodies and hetero-normative sexuality perspectives. The *hijras* body was problematic because of its ambiguity and its difference with the able procreative/ homosexual body. Gradually various laws against *hijras* were introduced due to which the *hijras* community were deprived of their privileges provided by the Kings and *Mughals*. *Hijras* were classified under the list of criminal caste/tribes during the colonial rules. The Criminal Tribes Act (Act 27) of 1871 stated 'registration, surveillance and control of certain tribes and eunuchs'. This Act was applicable in all States of India. This was the Act that which was written on the bodies of the so-called criminal cases. Thus the bodies and labor of *hijras* were controlled. The lands given to *hijras* during the Kings and *Mughal* rule were also taken back by the colonial rulers. Like the

Criminal Tribes Act. Section 377 of the Indian Penal Code (IPC) was also introduced during the colonial period since 1860. The Section banned same sex relationship and is often referred to as "Anti Sodomy Law".⁷

VII. POSITION IN POST INDEPENDENCE INDIA:

After Independence, the Prime Minister in 1952 repealed the Criminal Tribes Act 1871 calling it 'a blot on the law book of free India'. However, the same year the Government of India passed the Habitual Offenders Act, which preserved most of the provisions of the CTA except for the premise that an entire community can be born criminal. The focus now shifted from criminalizing a tribe to criminalizing an individual. Immoral Traffic Prevention Act of 1956 which was amended in 1996 has become gender neutral legislation. The domain of the Act now applies to both male and female sex workers along with those whose gender identity was indeterminate. With the amendment both the male and *hijra* sex workers became criminal subjects as this gives the police the legal basis for arrest and intimidation of the transgender sex workers. The transgender community lives a life of exclusion-socially, culturally, economically and politically. The India Government's Census process which is the most authentic source of information on demography, literacy and housing amongst other data points did not include transgender for the first 64 years after Independence in its exercise. In the year 2009 consensual same sex-acts between adults in private was decriminalized by the Delhi High Court. When the community was given the option of identifying themselves as transgender in the statistical exercise for the first time in 2011 half a million persons (amongst a 1.2 billion populace) identified themselves as transgender. The top three states with highest concentration of self identified transgender in India are Uttar Pradesh, Bihar and Maharashtra. Only 46% of transgender are literate as compared to 74% literacy rate amongst the general population. Those who continue to be part of the education system often report harassment, bullying, physical and sexual abuse at the hands of older classmates and peer. In a landmark judgment in April 2014⁸ the Supreme Court of India observed that "*the transgender communities, generally known as "Hijras", are a section of Indian citizens who are treated by the society as unnatural and generally as objects of ridicule and even for on account of superstition.* In its judgment the Supreme Court passed the ruling that "*in view of the constitutional guarantee, the transgender community is entitled to basic rights i.e. Right to Personal Liberty, Dignity, Freedom of Expression, Right to Education and Empowerment, Right against Violence, Discrimination and Exploitation and Right to Work*". Moreover, every person must have the right to decide his/her gender expression and identity, including transsexuals, transgender, *hijras* and should have right to freely express their gender identity and be considered as a third sex. Thus, today the transgender people in India are considered to be the Third Gender.⁹

Studies reveal that State is one of the most powerful institutions which discriminate against the transgender community in India. There are a number of legislations which apparently discriminate against their rights. Section 377 of the Indian Penal Code, 1860 which penalizes unnatural offences, plays the major role. Similarly, certain offences under the Indian Penal Code and also some statutory enactments impliedly penalize the sexual acts of transgender community in a tacit manner. Another notable example is Section 45 of the Army Act, 1950, which penalizes indecent acts which would possibly include the acts of transgender community. It is also to be noted that in India sexual minorities have no freedom to form association/union. The sexual minority is not a recognized Person for the purpose of insurance claims, compensation under Employees Compensation Act, and nomination for the purpose of gratuity benefits. The reality is that, the transgender community in India lives in a precarious environment dominated by oppression, discrimination and systemic exclusion. Paradoxically, India is a signatory to a number of international human rights treaties, which impose certain international obligations upon India to protect and respect the rights of transgender community as well. Conversely, at the international level, no sincere effort has ever been adopted to address their plight through law making treaties.

VIII. COURTS ON CONTROVERSIAL SECTION:

The validity of Section 377 of the Indian Penal Code was challenged in *Naz Foundation Vs Government of National Capital Territory of Delhi*¹⁰, since it penalizes consensual sexual intercourse between two adults in private. The challenge against the Section was founded on the ground that it violates Articles 14, 15, 19 and 21 of the Constitution of India. They argued that their works were impugned by the discriminatory actions of the State against the sexual minorities. The basis of their argument was that the sexual minorities have a vested interest in not being identified because they would be harassed and subject to inhuman treatments which would eventually hamper the petitioner's efforts to prevent the aforesaid diseases. The petitioner also submitted that the scope and ambit of Section-377 should be confined only to non-consensual penal, non-vaginal carnal penetrative acts against the children. It was further observed that by introducing the Sexual Offences Act, 1967, England decriminalized the acts of homosexuality so as to ensure equality and precious human rights of sexual minority. It is pertinent to note in this juncture that there were two contradicting affidavits filed by the two different wings of Union of India. The first affidavit is on behalf of Ministry of Home Affairs, Government of India which argued for the retention of the impugned provision. But the more sensible submission appeared from the Ministry of Health & Family Welfare that existence of the impugned Section has hampered the efforts of prevention of HIV/AIDS. The Ministry of Home Affairs founded their argument on the ground that the retention of Section 377 of Indian Penal Code is very essential since it not only penalizes homosexual acts, but also acts as a shield against child sexual abuse and complimenting lacunae in the rape laws. The arguments

by the Ministry of Home Affairs were left uninterrupted since the very purpose of maintaining the criminal justice system is to provide punishment to the law breakers. Union of India argued that Indian Society is impatient to homosexuality. But in reality we have learned to tolerate the acts of sexual minorities for centuries. The reflections of such tolerance can be found in religious texts, Hindu mythologies and ancient arts of stone carvings etc. It is to be noted that transgender had been given a respectable position in Indian society before the arrival of British. Section 377 of the Indian Penal Code was actually the result of British efforts to impose their Biblical values upon their colonies. It is worth mentioning here that they had always tried to regulate the activities of transgender people by enacting specific legislations. In this case, the Court observed that there is a growing jurisprudence relating to the human rights of person with sexual deviancy which would be seen in United Nations sponsored human rights treaties. The Court identified and categorized this human rights legal doctrine under three heads, viz: "*non-discrimination, protection of private rights; and ensuring of special general human rights protection to all, regardless of sexual orientation or gender identity.*" Accepting the arguments of petitioners in this case, the Court held that "*so far as it penalizes consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution. The provisions of Section 377 IPC will continue to govern non-consensual penile non-vaginal sex involving minors...*"

However, in *Suresh Kumar Koushal & Ors Vs Naz Foundation & Ors*,¹¹ the decision in *Naz Foundation Vs The Government of National Capital Territory of Delhi*¹² has been put in to severe legal scrutiny. The appellant in this case founded their argument on the ground that the Honorable High Court committed a serious error since the Writ Petition did not contain any fundamental facts to decide on constitutionality of a statutory provision. It was further submitted that Section 377 of the Indian Penal Code was being used for prosecuting homosexuals as a class and not for discriminating against transgender. The basis of their argument was that Section 377 of the Indian Penal Code is a gender neutral provision which is extensively used for penalizing homosexual acts regardless of gender. Another argument put forward by the appellant was that carnal sexual acts between two homosexuals increase the risk of HIV/AIDS and it is even dangerous when the female partner of a homosexual is unaware regarding the conditions of her partner. One of the major contentions levelled by the appellants is that there is no proper evidence to show that the existence of Section 377 of the Indian Penal Code hampers the efforts of preventing HIV/AIDS. The Court observed in this case that, while striking down a provision as unconstitutional, the courts must be guided by the presumption of constitutionality of the impugned provision. The Court also observed that the deletion of Section 377 of the Indian Penal Code was recommended by the Law Commission of India in its 172nd Report, which was not taken into consideration by the Indian Parliament and it shows that the legislature, undoubtedly the representatives of the people has thought it improper to delete the provision. So unless and until a clear violation of the Constitution is proved, the Court is not empowered to strike down a statutory

provision. By observing that a mere chance of abuse is insufficient to strike down a statutory provision, the Court allowed the appeal undermining the rays of hope in the life of transgender community.

In *National Legal Services Authority vs. Union of India and Ors.*¹³ the petitioner was the National Legal Services Authority, constituted under the Legal Services Authority Act, 1987 to provide the legal services to the weaker and marginalized sections in the society, approached the Honorable Supreme Court with a common cause for the transgender community. The petitioner argued that every person of transgender community has a legal right to determine their sex orientation and identity. It was also submitted that non-recognition of transgender as a third gender would offend Articles 14, 16 and 21 of the Constitution of India. It was also submitted that by not recognizing them as a third gender, they are being deprived of many rights which other persons enjoy as the citizens of India. It was further submitted that, due to this discrimination, they are denied their right to contest in elections, cast vote, access to education, get license and also public employment. Another submission made on behalf of the petitioner was that the transgender have to be declared as socially, educationally and economically backward class and all benefits of that class are to be extended to them. The Court was reluctant to deal with the constitutionality of Section 377 of the Indian Penal Code in this case since it was decided by Division Bench of the Honorable Supreme Court in *Suresh Koushal's*¹⁴ case and the rights of transgender is altogether a separate issue.

IX. PRESENT POSITION:

After these many judgments of the Supreme Court for paving the way for enshrining the rights of transgender in law, the first 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 Bill in the *Rajya Sabha* by **Mr.Siva**. It was unanimously passed in the Upper House but was never debated in the **Lok-Sabha**.

The Bill passed in the *Rajya Sabha* had many progressive clauses including the creation of institutions like the National and State Commission for transgender, as well as transgender rights courts. The remedial measures to prevent sexual discrimination were done away with when the Government drafted a new The Rights of Transgender Persons Bill 2015, which was vehemently criticized by the NGOs workings for the community.

However, the Supreme Court rulings on August 24, 2017¹⁵, that the Right to Privacy was a fundamental right, and was thereby applicable to the protection of sexual orientation of citizens gave a reprieve to the LGBTQ community. Once again a new and re-modeled Bill i.e. The Transgender Persons (Protection of Rights) Bill, 2017 was drafted and placed and is subsequently sent to the standing committee on social justice and empowerment for

consultation & slated to be re-introduced in next session of the Parliament.

In January 2018, the Supreme Court agreed to hear petition to revisit the 2013 *Naz Foundation*¹⁶ judgment. On 06th September, 2018, the Court ruled unanimously in *Neveej Singh Johar V Union of India*¹⁷ that Section 377 was unconstitutional in so far as it criminalizes consensual sexual conduct between adults of the same sex. The judgment was given by a five judge's bench comprising the then Chief Justice of India Dipak Mishra, Justices R. F. Nariman, D. Y. Chandrachud, A.M. Khanwilkar and Indu Malhotra. The Section 377 was partially struck down by the Constitution Bench and will no longer apply to consensual same sex acts between homosexuals, heterosexuals and lesbians but will continue to apply to bestiality and sexual acts without consent by one of them.

After the above judicial developments the Lok Sabha tabled and passed a new version of the bill in December, 2018. In the light of lapse of the Transgender Persons (Protection of Rights) Bill 2018 which was preceded by a 2016 version, were both met protests and criticisms by Trans- groups, lawyers and activists in India. The Minister of Social Justice and Empowerment, Thawar Chand Gehlot now proposed an Act of the Parliament of India on 19th July 2019 The Transgender Persons (Protection of Rights) Bill 2019¹⁸ with the objective to provide for protection of rights of transgender persons, their welfare and other related matters. The Bill did away with few of the severely criticized provisions of the 2018 Bill, such as criminalization of begging and the establishment of a District Screening Committee to process applications for issuance of transgender person certificates. The 2019 Bill was passed by the Lok Sabha on 05 August 2019 by a voice vote, amidst chaos in the house over the Revocation of the Special Status of Jammu and Kashmir on the same day¹⁹.

X. CONCLUSION:

The Judgments of Courts are all for affirmative action in education, primary health care, and that transgender is identified as beneficiaries of social welfare schemes. The blueprint for transgender rights legislation draws from the court's directives. Some of the recommendations that find a place in the final draft include the rescue, protection, and rehabilitation of transgender. Educational institutions have been directed to adopt an inclusive approach that is gender-neutral. The Government has also formulated welfare schemes especially targeted at transgender such as basic medical facilities including sex reassignment surgery. Vocational training programmes are also in the pipeline. With these much developments of rights of the transgender the legal process of integration has been halted for some time. However, transgender community in India still occupies a distinct position. Now, here is a society which is very slowly accepting the transgender community. People of society still have thoughts of transgender as normal sometimes and somewhere it has gone up

to the extent where some people consider them as scary and undesirable.

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