

A comprehensive study on Transgender rights in India

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INTRODUCTION

Humans are the most fearsome creations of God, endowed with a remarkable lifestyle and the ability to think and evolve. The capacity of thinking and acting distinguishes humans from all other entities. Humans can be categorised as male and female, both with distinct characteristics. Biological functions to execute and transmit between generations. There is another group of individuals who do not conform to the categories of male or female and they referred to as transgender or transgender persons. These individuals are unable to identify comfortably with the gender assigned to them at birth and instead align with a different gender. When an individual experiences gender dysphoria and seeks comfort in the opposite gender, society categorises them as a Third gender. The society inherently accepts just that which is familiar to them. They acknowledge only the male and female categories, whereas the third category, or 'transgender individuals,' is consistently regarded as different.

The socio-legal position of transgender individuals in India is a complex topic involving legal rights, societal obstacles, and cultural attitudes. Despite notable advancements in recent years regarding the acknowledgement and safeguarding of transgender rights, members in this community still encounter substantial challenges in their daily lives. This essay examines the legal frameworks, social experiences, economic realities, and cultural representations of transgender individuals in India, emphasising both the advancements achieved and the ongoing obstacles.

Transgender people in India hold a distinct and most often marginalised status within society. Notwithstanding major legislative progress in recent years, they remain in encountering various social, economic, and cultural obstacles. Transgenders in India experience significant social exclusion,

impacting multiple aspects of their existence which also includes family acceptance and public engagement.

This article aims to address various challenges faced by the transgenders in day to day life in every aspect of their livelihood.

Research Objective

- To analyse the legal frameworks that acknowledge and safeguard the rights of transgenders in India.
- To analyse the social difficulties encountered by transgender individuals across multiple domains, including family, education, healthcare, and job.

Research Question

1. Whether the key legal provisions and protections available to transgender individuals in India are adequate?
2. How do transgender individuals experience social stigma and discrimination in their daily lives?

Understanding the Nomenclature

Transgender individuals, also referred to as trans people have diverse names that signify their gender identification and cultural background. The names may differ significantly according on language, area, and cultural customs.

Transgender

The term transgender is derived from two words that is trans and gender. Trans refers to across or beyond. So combinedly it means cross or beyond gender. It includes transsexual, bigender, crossdresser etc. The transgender community is broadly referred as LGBTQIA+ Which stands for lesbian, gay, Bisexual, transgender, Inter-sexual, Asexual etc.

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Supreme Court has explained term transgender in the case of NALSA vs. UOI, 2014² as "Transgender is generally described as an umbrella term for a person whose gender identity, gender expression or behavior does not conform to their biological sex. This identity may encompass a profound feeling of being male, female, or another gender that does not correspond with normal expectations that are connected with the sex that they have been assigned.

It is a person's own realisation of their gender that determines whether or not they are transgender. This experience may or may not coincide with the standards or expectations of society. Some transgender people can make the decision to transition, which can include a variety of personal, social, or medical procedures. These steps may include changing their name, pronouns, appearance, or having hormone therapy or surgery. It is important to note that not all transgender individuals undergo these phases, and that the experience of each individual is distinct.

It is essential to acknowledge that the term "transgender" is a broad one that can embrace a wide variety of gender identities. It is also possible for it to include those who identify as non-binary, genderqueer, or gender-fluid, amongst numerous other identities. One of the most important aspects of being transgender is the fact that one's gender identification does not correspond to the sex that they were assigned at birth.

OTHER TERMINOLOGIES

The term "Hijra" is largely utilised in South Asia, particularly in the countries of India, Pakistan, and Bangladesh, to describe those who do not conform to the conventional classifications of male or female. Individuals who identify as Hijra are frequently regarded as belonging to a unique third gender. People who use this phrase include those who may identify as transgender, intersex, or simply as individuals who do not conform to the traditional gender norms that are expected of them.

Hijras have been a part of South Asian culture for centuries, and they have a long legacy of responsibilities in society, particularly in cultural and religious festivals. Historically, Hijras have been included in South Asian culture. The Hijras are thought to possess supernatural or magical qualities

in certain cultures. As a result, they are occasionally summoned to bless weddings and childbirths of their respective communities.

It is possible for Hijras to undergo gender-affirming procedures or live in ways that are reflective of their own concept of gender. However, it is important to note that not all Hijras adhere to the same practices or identities. However, despite the fact that they are frequently subjected to prejudice and social marginalisation, they hold a special position in South Asian societies. Over the past few years, a number of nations, including India and Pakistan, have made the decision to legally recognise the third gender, thereby providing Hijras with additional rights and respect.

There are various ways in which the Hijra community occupies a special position, as it strikes a balance between aspects of social exclusion and cultural appreciation.

India is a country of diverse culture so is the transgender have different identities and recognition in different part and culture. Some of the cultural and legal regional references of transgenders are Aravanis or Thirunangi .These terms are basically used in Tamil Nadu whereas the term kinner is used in the northern part of India. Maichiya or Ranga is popularly used in Odisha, Jogappas or Jogta is used in Maharashtra and Karnataka respectively.

Different texts have tried to define the word transgender. According to Oxford Living Dictionary Transgender means denoting or relating to a person who sense to a personal identity and gender does not correspond with their birth sex.

The Hon'ble Supreme Court in NALSA vs. Union of India,2014³ Defined transgender as an umbrella term for whose gender identity gender expression or behaviour doesn't conform to their biological sex.

Section 2 (k)of the Transgender person (protection of rights)act,2019 defines as "transgender person" means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations,

² (2014) 5 SCC 438

³ ibid

genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta.

SOCIAL ISSUES FACED BY TRANSGENDERS

The transgenders are even deprived of employment and livelihood. Having faced great marginalization, cheap and humiliating tags such as cursed, untouchable, diseased, and ignominious have been associated to the transgenders in our society since ages. Transgenders in our country face discrimination and pervasive stigma in every phase of their lives. This rebuking begins straight from the childhood from the family which leads to social rejection and exclusion. This very discrimination greatly affects their education as they are being harassed and bullied that mostly result in their discontinuation of attainment of education. The social exclusion and continuous disgrace suffered by the transgenders affect their mental health and very often it is found that they suffer from anxiety depression self harming thoughts. Even before the nalsa case they did not purchase any legal recognition of their gender identity.

The transgenders are even deprived of employment or a basic legal earning. Having faced great marginalization in the society even to earn a livelihood it eventually leads to their economic insecurity or rather poverty hence it is evident that the transgenders engage themselves in different illegal and antisocial work like begging prostitution trafficking etc the irony is when it comes to spiritual belief people invite the transgenders to shower their blessings on the occasion of babies shower, annaprasanna, marriages and other ceremonies.

LEGAL FRAMEWORK

Article 21 of the Constitution of India states that “No person shall be deprived of right to life and personal liberty except according to procedure established by law”. This right is one of the basic fundamental rights which makes a persons life meaningful justice KS Radhakrishnan in Nalsa vs Union of India opined that recognition of one’s gender identity lies at the heart of the fundamental right to dignity. When it comes to legal right to self identity for the very first time in 2014 the transgenders witnessed a new dawn dispelling the darkness that had shrouded their longtime struggle. In NALSA vs Union of India⁴ the Honourable

Supreme Court of India recognized the right of transgender as 3rd gender separate from conventional male or female and stated that “recognition of transgenders as a third gender is not a social or medical issue but a human right issue”. Again, the Supreme Court has specifically distinguished between two prevailing concepts that is gender identity and sexual orientation.

This historic judgment of the Supreme Court of India not only affirmed the fundamental rights but also directed the government to take the initiative to uplift the welfare of transgender and Ensure other rights such as education employment, health care and moreover the right to live with dignity. The honourable Supreme Court while addressing the challenges and discrimination faced by transgender again directed the government to emphasize on recognition of 3rd gender, the right to self-identification, Ensuring equal protection under the law, Limiting all forms of discrimination on the ground of gender and aware the society to accept the transgender community as an Important part of society. It also guaranteed fundamental rights specially right to Equality under Article 14, the prohibition of discrimination under Article 15, Equal opportunities in public employment under Article 16, Try to live and personal liberty under Article 21 etc. In this landmark judgment, the court declared that each and every individual of the country has the equal right to identify their gender as male female or transgender. This will help to uphold the self respect and dignity of the third gender. For this purpose the government was being directed to make necessary changes allow the 3rd gender to identify themselves in all documents like voter ID ,passport etc as 3rd gender.

Another landmark judgment in protecting the individuality of transgenders had come in Navtej Singh Johar vs Union of India⁵. 5 judges bench unanimously held that section 377 of Indian Penal Code, 1860(unnatural offenses) unconstitutional in so far as it criminalizes consensual sexual conduct between adult of the same sex.

Salient features of the Transgender Person (Protection of rights) Act, 2019

On 2nd August 2016 the then minister for social justice in the empowerment Mr Thawar Chand Gellot introduced the transgender person protection

⁴ (2014) 5 SCC 438 or AIR 2014 SC 1863

⁵ AIR 2018 SC 4321 and (2018) 10 SCC 1

of right bill 2016. Eventually on 5th August 2019 the Bill got passed in the lower house and on 26 November 2019 in the upper house of the parliament. 5th December 2019 is one of the historic days in the lives of the transgenders as the bill got the assent of the President. The transgender person (protection of rights) Act 2019 came into force on January 10th 2020. It was presumed that the act would help the transgender to get a dignified and a life without any form of discrimination.

Some of the major features of the Act are as follows:

For the very first time they said under section 2 (k) defines transgender person as “a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta.”

- Chapter two of this act provides provisions for the prohibition of discrimination. Section 3 provides that no persons or establishment, shall discriminate against the transgender person on any ground including unfair treatment denial or discontinuation of Education or services. It also prohibits unfair treatment or discrimination in relation to employment.
- After the nalsa judgement the transgender person got a new identity as the 3rd gender but chapter three of tpa provides procedure for the recognition of identity of transgender person. A transgender person have a right to self perceived gender identity under section 4 and under section 5.. H for this provision a transgender person may make an application to the district magistrate for a certificate of identity is a transgender person and get a certificate from the district mystery under section 6 of the act. Moreover this chapter directs the appropriate government to take steps for the welfare and inclusion of transgender person in society.
- Chapter five of this act states obligation of establishment and other persons towards transgender persons which includes non discrimination in employment, Wedding facilities to the transgender persons, Introduce Jeevan's redressal mechanism to deal with the complaint by transgender person etc.

- Chapter 6 ensures education Social Security and healthcare of transgender person. Section 13 aims in providing inclusive education without discrimination on the basis of gender. Section 15 directs the appropriate government to take initiatives to facilitate health care to transgender person. Most importantly separate surveillance centre for HIV, sex reassignment surgery etc and provides a comprehensive insurance scheme for different health issues of transgender person.
- It was the need of the movement to constitute a committee or council fully dedicated to address the issues relating to transgender person in India. Chapter 6 of the Act fulfilled the requirement as it provides for the Constitution of National Council for transgender person. Section 16 directs the central government to constitution a NCTP and empower it to exercise power conferred thereto. The main function of the NCTP is to advise the government to make policies, organise different programmes, laws for the upliftment of transgender persons and to monitor the overall impact of the programme and policy on the targeted community or group.
- It is quite evident that transgender persons are an easy target so far as sexual offences are concerned. Chapter 8 deals with offences against transgender and its penal provisions. It includes offences like forced or bonded labour, obstructing transgender person rights of passage in public places, forceful removal of transgender person from house, village or other place of residence, physical abuse, sexual or mental abuse, economical and verbal abuse etc. The offender of the above offences shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years and fine.
- Last but not least chapter nine of the act provides provisions and empower the appropriate government to take all necessary steps for the inclusion of transgender persons into the mainstream of society

CHALLENGES AND CRITICISMS

Despite the legislation for transgender person ,still the transgender community in India is facing numerous challenges in their day to day life. Though the makers of the Act tried their best to address all the issues but only texts cannot change the mentality of the society. The transgender persons are facing

harassment, abuses and social exclusion due to the societal prejudices which impacts their life. The lack of awareness amongst the transgender person regarding their right often keeps them away from their rights and they become a mute spectator and victim. The transgender person Act however tried through different provision to give equal rights and opportunity in the field of Education, healthcare, employment but practically the transgenders are still facing discrimination and transphobic attitudes in various sphere of life. Somehow it is possible to address the problem faced by the transgender relating to physical abuse but the constant mental harassment caused due to the conservative mentality of the people and society is highly essential to address.

Though in NALSA vs UOI, for the very first time a new identity is given as 3rd gender but it contradicts under the Act as it violates the right to self-identification because to get a certificate of identity a person needs to go for a screening process. This Act also lacks proper provisions for the social inclusion of transgenders as it has no provision for reservation in employment or public services.

SUGGESTIONS AND CONCLUSION

After taking into consideration the present situation of transgender persons and the prevailing law in India I must suggest the following amendments and initiatives to be taken by the government

- Self identification is a basic right of human being so the Legislation should recognise self identification of gender.
- The government should make special and dedicated committees which would monitor the proper execution of the laws.
- More strict panel provisions should be introduced for the offence against transgender persons.

Transgender persons afford an invincible place so far as our culture and mythology is concerned the references of transgenders in Ramayan Sikhhandi and Brianna in Mahabharat speaks about the significance of transgender or Tritya Prakriti in our society. Gradually they became a Throne in the side. Education and awareness relating to transgenders would help to change the perception of the society and will help in the social inclusion. The transgender protection Act and judicial decisions will definitely play a crucial role in overcoming this socio-legal

issue. Policies and amendments should be made as per the requirement to meet equality and dignity of the transgenders that would pave the path for our society for an inclusive future.