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Legal System viz-à-viz Human Rights of Transgenders: An Analysis

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ABSTRACT

Transgender movements address numerous issues for gender non-conforming populations across the globe. Trans people face massive discrimination and marginalization in all social institutions, including the family, labor market, housing, health, education, and religion. Trans folk deal with great levels of hate and violence across societies, which leads some authors to suggest that a transgender genocide is taking place world-wide. The majority of countries in the world make it difficult or do not allow trans people to amend identity documents (such as birth certificates, passports, and national ID cards) to reflect their gender identities. Without proper identity documentation, trans people are denied citizenship rights. Trans people have less access to healthcare than the general population, due to discrimination and harassment by providers, inability to pay, lack of insurance, and a host of other socioeconomic barriers. It is difficult for trans people to navigate gender-segregated services, including public restrooms, homeless shelters, drug-therapy facilities and prisons. Trans people in prison face challenges not only related to gender segregation and violence, but also due to lack of access to proper clinical care and medication – especially in relation to transition-related medical care. Trans rights activists are confronted with torture, prison, and death in many parts of the world. Human rights have to be given importance over traditional norms of societies that have distracted people from the path of elevating a transgender person as an equal being. A rigid morality restrains the freedom of choice and expression of people, and especially transgender people who are very often discriminated against. So, the researcher will discuss the rights of transgender under the international instruments and thereby make an analysis by seeing the reality that does these rights are actually availed by them in the society or these are just in paper and not in practice. And the researcher will also suggest measures to resolve all these issues prevailing in the society.

Keywords: *Transgender, Transgender Rights, Standard Binary, Yogyakarta Principles, Rigid Morality.*

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I. INTRODUCTION

When a child is born, at the time of birth itself, sex is assigned to him/her. A child would be treated with that sex thereafter i.e. either a male or a female. Some persons may be born with bodies which incorporate both or certain aspects of both male or female physiology. It may also happen that though a person is born as a male, because of some genital anatomy problems his innate perception may be that of a female and all his actions would be female oriented. The position may be exactly the opposite wherein a person born as female may be have like a male person.²

Etymologically the term transgender is derived from two words, namely 'trans' and 'gender'. 'Trans' is a Latin word which means 'across' or 'beyond'. The grammatical meaning of transgender is across or beyond gender. The 'transgender' term is used for the persons whose identity, gender expression or behaviour does not match with the sex to which they were assigned at birth. Gender identity refers to a person's internal sense of being male, female or something else; gender expression refers to the way a person communicates gender identity to others through behaviour, clothing, hairstyles, voice or body characteristics.³

Transgender is a term referring to when one's gender and sex are not always or even equivalent. This is a broad term that includes transsexual (pre/non or post-operative), non-gender, bi(tri and multi) gender, androgynes, etc.⁴ Transgender is defined by Oxford Dictionary as "denoting or relating to a person whose self-identity does not conform unambiguously to conventional notions of male or female gender."⁵ The Transgender Persons (Protection of Rights) Act, 2019 defines 'transgender' 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 kinnar, hijras, aravanis and jogtas.⁶

Transgender are people whose gender assigned at birth does not match with their self-perception. They usually face apathy from the mainstream society for being different. Indian society has a certain degree of tolerance and acceptance of the Transgender community.⁷

² National Legal Service Authority v. Union of India, AIR 2014 SC 1863.

³ Answers to Your Questions About Transgender People, (January 4, 2015), www.apa.org/topics/transgender.

⁴ Urban Dictionary, (April 09, 2015), www.urbandictionary.com/define.php.

⁵ Oxford Advanced Learner's Dictionary (2001).

⁶ The Transgender Persons (Protection of Rights) Act, 2019, Section 2(k).

⁷ Nanda, S. 1985. "The Hijras of India: Cultural and individual dimensions of an institutionalised third gender role." *J Homosex*.

Despite this, the Trans community has still remained an exceptionally marginalised community. This is in respect to access to healthcare, education and job opportunities, whilst facing discrimination.

This notion must be changed worldwide for the recognition of their equal rights. Yogyakarta principles⁸ have laid out a blue print for addressing issues faced by the Trans community. Our research sheds light upon the travesty of the Trans community. We analyse numerous statistics available worldwide regarding common people's perception of Transgenders.

II. TRANSSEXUALISM : CAUSES

In this regard there is no consensus even among medical, psychological, psychiatry, genetical and the other scientific communities. A cursory reading of the subject would reveal that there are a number of theories about the cause for transsexualism. Biologists claim that it is because of the chromosomal aberrations. It is well known that if an individual has XX chromosomes, she is a female and if an individual has got XY chromosomes, he is a male. However, there are also persons with XXY and YXY chromosomes. These are chromosomal aberrations. Some people by physical characteristics maybe females though they may have XY chromosomes indicating male characters.

Similarly, there are people who are males by physical characteristics, but they have XX chromosomes indicating female characters. According to the medical community, these biological differences cause transsexualism. There are other theories which say that imbalances or fluctuations in hormones or use of certain medications during pregnancy may cause transsexualism. There are also theories to say that transsexualism is, pure and simple, a psychological disorder. The Brain Bank in Netherlands Studies say that there is a "brain sex" difference between men and women and transsexual people have the brain sex of the gender to which they identify themselves. Thus, it is manifest that there is no consensus among various theories as to how the transsexualism happens in human beings. Similarly, there is no recognised or universally accepted mode of drawing a line differentiating transsexuals from the other sexes.⁹

The right to be recognised as a person with dignity before law has been clearly spoken out in INDIAN Constitution¹⁰ as well as under many treatise on Human rights. In order to make such

⁸ Commission of Jurists (ICJ). 2017. "Yogyakarta Principles - Principles on the application of International Human Rights Law in relation to Sexual Orientation and Gender Identity." Geneva.

⁹ I. Jackuline Mary v. Superintendent of Police, available at: Indiakanon.org/doc/144523857 (Visited on 18th May, 2021).

¹⁰ Article 21 – Right to Life and Personal Liberty

recognition fruitful, statutes have boldly pointed out on dignified recognition i.e., each one of us has a dignified existence.

In 2013, American Psychiatric Association relabelled “gender identity disorder” as “gender dysphoria” in their Diagnostic and Statistical Manual, which humanised Trans identity by not considering it as a mental illness.¹¹ Spain (64%) is amongst those countries which believe Transgender is “a natural occurrence.”¹²

For legal recognition, many countries promote intrusive surgeries and necessary medical profiling to place people in the standard binary. Doctors stick to the notion that “biology is not bigotry.” In protection of Transgender rights, Spain (81) has set benchmark score while Russia fails in protection and security of Transgender and secured last position among countries that participated.¹³

These statistics are quite clear to show that humanitarian approach in terms of judicial sense has maintained its legacy to protect the interest of Transgenders. But when we draw our eyes to our civilised society yet there is existence of dual opinion for Transgenders, which needed to be rationalised.

III. CLASSIFICATION OF TRANSGENDER

(A) Hijras

Hijras are biological males who reject their 'masculine' identity in due course of time to identify either as women, or 'not-men', or 'in-between man and woman', or 'neither man nor woman'. Hijras can be considered as the western equivalent of transgender/transsexual (male-to-female) persons but hijras have a long tradition/culture and have strong social ties formalised through ritual called “reet” (becoming a member of hijra community). There are regional variations in the use of terms referred to Hijras.

(B) Eunuch

Eunuch refers to an emasculated male and intersexed to a person whose genitals are ambiguously male-like at birth, but this is discovered that the child previously assigned to the male sex, would be recategorized as an intersexed as a hijra.¹⁴

¹¹ Epps, Garrett. 2018. *The Atlantic*. 8 June. <https://www.theatlantic.com/ideas/archive/2018/06/how-birth-certificates-are-being-weaponized-once-again/562361/>.

¹² IPSOS. 2018. *Global Attitudes toward Transgender People*. 29 1. <https://www.ipsos.com/en/global-attitudes-toward-transgender-people>.

¹³ IPSOS. 2018. *Global Attitudes toward Transgender People*. 29 1. <https://www.ipsos.com/en/global-attitudes-toward-transgender-people>.

¹⁴ I. Jackuline Mary v. Superintendent of Police, available at: Indiakanon.org/doc/144523857 (Visited on 18th

(C) Aravanis and Thirunangi

Hijras in Tamil Nadu identify as Aravani. Tamil Nadu Aravanigal Welfare Board, a state government's initiative under the Department of Social Welfare defines Aravanis as biological males who self-identify themselves as a woman trapped in a male's body. Some Aravani activists want the public and media to use the term 'Thirunangi' to refer to Aravanis.¹⁵

(D) Kothi

Kothis are a heterogeneous group. Kothis can be described as biological males who show varying degrees of 'femininity' — which may be situational. Some proportion of Kothis have bisexual behaviour and get married to a woman. Kothis are generally of lower socio-economic status, and some engage in sex work for survival. Some proportion of hijra-identified people may also identify themselves as Kothis. But not all Kothi people identify themselves as transgender or hijras.¹⁶

(E) Jogtas/Jogappas

Jogtas or Jogappas are those persons who are dedicated to and serve as a servant of goddess Renukha Devi (Yellamma) whose temples are present in Maharashtra and Karnataka. Jogta refers to male servant of that Goddess and Jogti refers to female servant.¹⁷

One can become a Jogta (or Jogti) if it is part of their family tradition or if one finds a Guru (or Pujari) who accepts him/her as a chela or shishya (disciple). This term is used to differentiate them from Jogtas who are heterosexuals and who may or may not dress in woman's attire when they worship the Goddess.

(F) Shiv-Shakthis

Shiv-Shakthis are considered as males who are possessed by or particularly close to a goddess and who have feminine gender expression. Usually, Shiv Shakthis are inducted into the Shiv-Shakti community by senior gurus, who teach them the norms, customs, and rituals to be observed by them.

In a ceremony, Shiv-Shakthis are married to a sword that represents male power or Shiva. Shiv-Shakthis thus become the bride of the sword. Occasionally, Shiv-Shakthis cross-dress and use accessories and ornaments that are generally/socially meant for women. Most people in this community belong to lower socio-economic status and earn for their living as astrologers,

May, 2021).

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

soothsayers, and spiritual healers; some also seek alms.¹⁸

IV. RIGHTS OF TRANSGENDER IN OTHER COUNTRIES AROUND THE WORLD

The trans community suffers from social stigma attached with fluidity of gender roles. Being effeminate or masculine contrary to gender assigned at birth is considered an abnormality. People must become adaptable to the changing dynamics from the perspective of human rights and then only will the Trans community feel safe.

The transgender community has shown enough resilience, the onus is upon the society and the governments to welcome their new identities. Those countries which gave Transgenders legal recognition in one or other manner as per the data available by “Trans Legal Mapping Report” in September 2020.

(A) In Asia

There is no specific law in any of the Asian countries. Transgenders have to face discrimination in their social and daily life, at school and at work place. In Asia, the society distinguishes between male and female, the lack of clear-cut gender puts great limitation on a person's social space. China, Nepal, Pakistan, India, and other Asian countries have no specific law for the transgenders.

China acknowledges the right of individuals to undergo gender reassignment surgery, but has never enacted formal laws to protect the rights of transgender people, it only allows gender alternation in documents like birth certification, student rolls or academic records etc. There is no law regarding the ability of transgender persons to marry, nor does it place any articulated restrictions on this right. These countries do not allow same sex marriage.

Due to this many transgender people get themselves engage in sex-industry and they work as sex workers. Their vulnerabilities to HIV and other infections increases. In 2017, it was confirmed that Pakistan, Nepal, Vietnam, and Kyrgyzstan were amongst those countries which moved themselves forward in discussing Bills which were related to Trans persons regarding change of gender in the legal sense.

The effort of Bangladesh is also remarkable. In January 2019, hijras were given Right to Vote under third gender category. In Japan, the requirement for sterilisation was confirmed through a superior court decision

(B) In Europe

¹⁸ I. Jackuline Mary v. Superintendent of Police, available at: Indiakanon.org/doc/144523857 (Visited on 18th May, 2021).

In United Kingdom, name change for identification purpose is possible under shelter of Gender Recognition Act 2004 (2004, Chapter 7). A full gender recognition certificate is issued to a person. But the condition for the gender marker change is that the applicant must be “living in other gender” or have been granted legal gender recognition by other state.

In Denmark, it is an administrative procedure and a new social security number is issued on the basis of self-determination.¹⁹ In France, adult and an emancipated minor can make an application of gender correction. What is seen is that they are living in their aspired gender and known to their peers as having that identity.²⁰

Belgium, Portugal, Greece and Luxembourg have relaxed the requirements for gender change while Bulgaria and Hungary have taken steps for de-recognition. In Turkey, Azerbaijan and Serbia, ill treatment is meted out to the trans community. Europe is therefore a mixed plain when rights of transgenders are considered.

(C) In United States of America

In United States of America some of the laws enacted by the states are inconsistent with each other. The Federal Law which provides protection to transgenders is the Hate Crimes Prevention Act, 2009, which expands the scope of the 1969 United States Federal Hate-Crime Law by including offences motivated by actual or perceived gender identity. The federal government recognises all same-sex marriages legally authorised under state law.

Transgender people have all the legal rights e.g., rights to life, right to work, right to health, right to marry, right of equality, right to social security etc. Around 15 States and District of Columbia in the United State have legislations which prohibit discrimination on grounds of gender identity and expression. Few States have issued executive orders prohibiting discrimination.

(D) In Australia

In Australia, there are two Acts dealing with the gender identity :-

- (i) Sex Discrimination Act, 1984; and
- (ii) Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act, 2013.

Act of 2013 amends the Sex Discrimination Act, 1984. Act of 2013 defines gender identity as the appearance or mannerisms or other gender-related characteristics of a person (whether by

¹⁹ Navnelov 524/2005, Article 13.2/13.3.

²⁰ Civil Code, Arts. 60 and 61.

way of medical intervention or not) with or without regard to the person's designated sex at birth.

It prohibits discrimination on the ground of sexual orientation,²¹ Discrimination on the ground of gender identity²² and discrimination on the ground of intersex status.²³

(E) In Africa

The African Commission has included gender identity and sexual orientation within its mandate²⁴ and all the articles collectively point towards equality for everyone.

Most African countries propound a criminal approach towards transgenders but the continent is clearly witnessing waves of transgender activism. Much support has arisen out from judicial victories.²⁵

V. CONCLUSION

With the available data discussed above, we came to a conclusion that there is an increase in the number of countries which are on track to amalgamate transgenders into the mainstream society. But there are still miles to go between promise and delivery, as people have not been appreciative of social reforms. It depends on adaptability and tolerance of the people towards another person's rights and support of the government for social welfare measures.

More than making laws and rules, we need to work on educating people and let them come out of their conservative thinking. Laws must be such that they not only protect the community on the face of it, but also in practice.

Laws are to be made dignified in character, and unnecessary hurdles for their well-being are to be removed. Self-determination, access to social welfare programmes and protection from discrimination are the key to their existence. Apart from these measures, social development programs, seminars and workshops are the best way to educate people and let them realise that transgenders are not distinct from us.

The paper would end with a note of hope:

***"We need a world where our families no longer disown us,
where society treats us as equal, and***

²¹ Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act, 2013, Section 5A.

²² *Ibid.*, Section 5B.

²³ Section 5C.

²⁴ African Commission on Peoples' and Human Rights, <https://www.achpr.org/sessions/resolutions?id=322>.

²⁵ September v Subramoney NO and Others [2019] 4 All SA 927 (WCC) (23 September 2019).

***where governments guarantee our rights;
a world that understands the transgender identity."***
