

Rights Of Transgender/Third Gender In India

Jamshed Ansari

Advocate, Delhi High Court and Ex- Faculty, University of Delhi

Address: J- 78, Gali No. 4, Laxmi Nagar, Delhi- 110092 (India)

E-Mail- jamshedansari024@gmail.com

Mob. No. 09811365596

Abstract: Seldom, our society realizes or cares to realize the trauma, agony and pain which the members of Transgender community undergo, nor appreciates the innate feelings of the members of the Transgender community, especially of those whose mind and body disown their biological sex. Our society often ridicules and abuses the Transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are sidelined and treated as untouchables, forgetting the fact that the moral failure lies in the society's unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change. The author makes a little effort to show the situation of Transgender community under the Indian Society. There is proper law which needs to be implemented for the betterment of Transgender community. The Government does not wish to give rights to the Transgender even clear direction of the Supreme Court.

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1. Who are Transgender?

Transgender is generally described as an umbrella term for persons whose gender identity, gender expression or behaviour does not conform to their biological sex. TG may also takes in persons who do not identify with their sex assigned at birth, which include Hijras/Eunuchs who describe themselves as “third gender” and they do not identify as either male or female. Hijras are not men by virtue of anatomy appearance and psychologically, they are also not women, though they are like women with no female reproduction organ and no menstruation. Since Hijras do not have reproduction capacities as either men or women, they are neither men nor women and claim to be an institutional “third gender”. Among Hijras, there are emasculated (castrated, nirvana) men, non-emasculated men (not castrated/akva/akka) and inter-sexed persons (hermaphrodites). TG also includes persons who intend to undergo Sex Re- Assignment Surgery (SRS) or have undergone SRS to align their biological sex with their gender identity in order to become male or female. They are generally called transsexual persons. Further, there are persons who like to cross-dress in clothing of opposite gender, i.e transvestites. Resultantly, the term “transgender”, in contemporary usage, 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.

2. Historical Background of Transgender in India:

Transgender Community comprises of Hijras, eunuchs, Kothis, Aravanis, Jogappas, Shiv-Shakthis etc. and they, as a group, have got a strong historical presence in our country in the Hindu mythology and other religious texts.

The Concept of tritiya prakrti or napunsaka has also been an integral part of vedic and puranic literatures. The word ‘napunsaka’ has been used to denote absence of procreative capability.

Lord Rama, in the epic Ramayana, was leaving for 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 his followers, the hijras alone do not feel bound by this direction and decide to stay with him. Impressed with their devotion, Rama sanctions them the power to confer blessings on people on auspicious occasions like childbirth and marriage, and also at inaugural functions which, it is believed set the stage for the custom of badhai in which hijras sing, dance and confer blessings.

Jain Texts also make a detailed reference to TG which mentions the concept of ‘psychological sex’. Hijras also played a prominent role in the royal courts of the Islamic world, especially in the Ottaman empires and the Mughal rule in the Medieval India¹.

¹ Gayatri Reddy, “With Respect to Sex: Negotiating Hijra Identity in South India” – Yoda Press (2006).

During the British rule, a legislation was enacted to supervise the deeds of Hijras/TG community, called the Criminal Tribes Act, 1871, which deemed the entire community of Hijras persons as innately 'criminal' and 'addicted to the systematic commission of non-bailable offences.

Section 377 of the IPC found a place in the Indian Penal Code, 1860, prior to the enactment of Criminal Tribes Act that criminalized all penile-non-vaginal sexual acts between persons, including anal sex and oral sex, at a time when transgender persons were also typically associated with the prescribed sexual practices.

3. Transgender's life in India:

Transgender people, as a whole, face multiple forms of oppression in this country. Discrimination is so large and pronounced, especially in the field of health care, employment, education, leave aside social exclusion.

Social exclusion and discrimination on the ground of gender stating that one does not conform to the binary gender (male/female) does prevail in India. Discussion on gender identity including self-identification of gender of male/female or as transgender mostly focuses on those persons who are assigned male sex at birth, whether one talks of Hijra transgender, woman or male or male to female transgender persons, while concern voiced by those who are identified as female to male trans-sexual persons often not properly addressed. Female to male unlike Hijra/transgender persons are not quite visible in public unlike Hijra/transgender persons. Many of them, however, do experience violence and discrimination because of their sexual orientation or gender identity.

4. India to follow International Conventions:

International Conventions and norms are significant for the purpose of interpretation of gender equality. Article 1 of the Universal declaration on Human Rights, 1948, states that all human-beings are born free and equal in dignity and rights. Article 3 of the Universal Declaration of Human Rights states that everyone has a right to life, liberty and security of person. Article 6 of the International Covenant on Civil and Political Rights, 1966 affirms that every human-being has the inherent right to life, which right shall be protected by law and no one shall be arbitrarily deprived of his life. Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights provide that no one shall be subjected to torture or to cruel inhuman or degrading treatment or punishment. United Nations Convention against Torture and Other Cruel Inhuman and Degrading

Treatment or Punishment (dated 24th January, 2008) specifically deals with protection of individuals and groups made vulnerable by discrimination or marginalization. Para 21 of the Convention states that States are obliged to protect from torture or ill-treatment all persons regardless of sexual orientation or transgender identity and to prohibit, prevent and provide redress for torture and ill-treatment in all contexts of State custody or control. Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights state that no one shall be subjected to "arbitrary or unlawful interference with his privacy, family, home or correspondence".

5. Position under Indian Law:

Article 14 of the Constitution of India and Transgender:

Article 14 of the Constitution of India states that the State shall not deny to "any person" equality before the law or the equal protection of the laws within the territory of India. Equality includes the full and equal enjoyment of all rights and freedom. Right to equality has been declared as the basic feature of the Constitution and treatment of equals as unequals or unequals as equals will be violative of the basic structure of the Constitution. Article 14 of the Constitution also ensures equal protection and hence a positive obligation on the State to ensure equal protection of laws by bringing in necessary social and economic changes, so that everyone including TGs may enjoy equal protection of laws and nobody is denied such protection. Article 14 does not restrict the word 'person' and its application only to male or female. Hijras/transgender persons who are neither male/female fall within the expression 'person' and, hence, entitled to legal protection of laws in all spheres of State activity, including employment, healthcare, education as well as equal civil and citizenship rights, as enjoyed by any other citizen of this country.

Articles 15 & 16 and Transgender:

Article 16 states that there shall be equality of opportunities or all the citizens in matters relating to employment or appointment to any office under the State. Article 16 not only prohibits discrimination on the ground of sex in public employment, but also imposes a duty on the State to ensure that all citizens are treated equally in matters relating to employment and appointment by the State.

Articles 15 and 16 sought to prohibit discrimination on the basis of sex, recognizing that sex discrimination is a historical fact and needs to be addressed. Constitution makers, it can be gathered, gave emphasis to the fundamental right against sex discrimination so as to prevent the direct or indirect

attitude to treat people differently, for the reason of not being in conformity with stereotypical generalizations of binary genders. Both gender and biological attributes constitute distinct components of sex. Biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes include one's self image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of 'sex' under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity. The expression 'sex' used in Articles 15 and 16 is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male or female.

Articles 15(2) to (4) and Article 16(4) read with the Directive Principles of State Policy and various international instruments to which India is a party, call for social equality, which the TGs could realize, only if facilities and opportunities are extended to them so that they can also live with dignity and equal status with other genders.

Article 19(1) (a) and Transgender:

Article 19(1) (a) of the Constitution states that all citizens shall have the right to freedom of speech and expression, which includes one's right to expression of his self-identified gender. Self-identified gender can be expressed through dress, words, action or behavior or any other form. No restriction can be placed on one's personal appearance or choice of dressing, subject to the restrictions contained in Article 19(2) of the Constitution.

Article 21 and the Transgender:

Article 21 is the heart and soul of the Indian Constitution, which speaks of the rights to life and personal liberty. Right to life is one of the basic fundamental rights and not even the State has the authority to violate or take away that right. Article 21 takes all those aspects of life which go to make a person's life meaningful. Article 21 protects the dignity of human life, one's personal autonomy, one's right to privacy, etc. Right to dignity has been recognized to be an essential part of the right to life and accrues to all persons on account of being humans.

Recognition of one's gender identity lies at the heart of the fundamental right to dignity. Gender, as already indicated, constitutes the core of one's sense of being as well as an integral part of a person's identity. Legal recognition of gender identity is, therefore, part of right to dignity and freedom guaranteed under our Constitution.

6. Legal Recognition of Third/Transgender Identity in India:

Self-identified gender can be either male or female or a third gender. Hijras are identified as persons of third gender and are not identified either as male or female. Gender identity, as already indicated, refers to a person's internal sense of being male, female or a transgender, for example Hijras do not identify as female because of their lack of female genitalia or lack of reproductive capability. This distinction makes them separate from both male and female genders and they consider themselves neither man nor woman, but a "third gender". Hijras, therefore, belong to a distinct socio-religious and cultural group and have, therefore, to be considered as a "third gender", apart from male and female. State of Punjab has treated all TGs as male which is not legally sustainable. State of Tamil Nadu has taken lot of welfare measures to safeguard the rights of TGs, which we have to acknowledge. Few States like Kerala, Tripura, Bihar have referred TGs as "third gender or sex". Certain States recognize them as "third category". Few benefits have also been extended by certain other States. Our neighbouring countries have also upheld their fundamental rights and right to live with dignity.

Articles 14, 15, 16, 19 and 21, above discussion, would indicate, do not exclude Hijras/Transgenders from its ambit, but Indian law on the whole recognize the paradigm of binary genders of male and female, based on one's biological sex. As already indicated, we cannot accept the Corbett principle of "Biological Test", rather we prefer to follow the psyche of the person in determining sex and gender and prefer the "Psychological Test" instead of "Biological Test". Binary notion of gender reflects in the Indian Penal Code, for example, Section 8, 10, etc. and also in the laws related to marriage, adoption, divorce, inheritance, succession and other welfare legislations like NAREGA, 2005, etc. Nonrecognition of the identity of Hijras/Transgenders in the various legislations denies them equal protection of law and they face wide-spread discrimination.

Article 14 has used the expression "person" and the Article 15 has used the expression "citizen" and "sex" so also Article 16. Article 19 has also used the expression "citizen". Article 21 has used the expression "person". All these expressions, which are "gender neutral" evidently refer to human-beings. Hence, they take within their sweep Hijras/Transgenders and are not as such limited to male or female gender. Gender identity as already indicated forms the core of one's personal self, based on self identification, not on surgical or medical procedure. Gender identity, in our view, is an integral part of sex and no citizen can be discriminated on the ground of gender identity, including those who identify as third gender.

Conclusion:

It is, therefore, concluded that discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution, and hence the Court was inclined to give various directions to safeguard the constitutional rights of the members of the TG community.

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