



Constitutional And Social Rights Of Transgender Individuals In India

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Abstract

A society which claims to be liberal and democratic must reflect its ideals in the constitution and in the social behavior of people. It has to be inclusive. In India we discuss about weaker section of the society - women children sc and st and the policy makers show much concern about these groups. There is another group which needs our attention. They are Transgender. Life of a transgender is full of traumas and oppression. In this paper I aim to discover the constitutional and social status of transgender in India. Does our constitution discriminate transgender? What kind of treatment and thought is given to this group in Our constitution? Is there any special mention of this group? Further this paper makes an effort to explore how our society accommodates Transgender? Are we bias towards them? The present study is undertaken to describe and analyze in India recent constitutional and social status of Hijra or Transgender. It also suggests ways how to improve and develop these marginalized people by bringing new laws and making social reforms and awakening for their right. It adopts descriptive method. The paper concludes that more than constitutional aspect it is approach of the society towards transgender which needs to be amended.

Key Words: Transgender Persons (Protection of Rights) Act, 2019, Gender identity, social exclusion, Legal recognition, Discrimination, Reservation policies, Healthcare access, Education rights, Employment opportunities, Human rights.

Introduction

A society which claims to be liberal and democratic must reflect its ideals in the constitution and in the social behavior of people. It has to be inclusive. In India we discuss about weaker section of the society- women children SC and ST and the policy makers show much concern about these groups. There is another group which needs our attention. They are Transgender. life of a transgender is full of traumas and oppression. In this paper I aim to discover the constitutional and social status of transgender in India. Does our constitution discriminate transgender? What kind of treatment and thought is given to this group in our constitution? Is there any special mention of this group? Further this paper makes an effort to explore how our society accommodates Transgender? Are we bias towards them? The present study is undertaken to describe and analyze in India recent constitutional and social status of Hijra or Transgender. It also suggests ways how to improve and develop these marginalized people by bringing new laws and making social reforms and awakening for their right.

Before exploring about the status of transgender let us understand who are they? Transgender is independent of sexual orientation. Transgender is the state of one's gender identity or gender expression not matching one's assigned sex (At the time of birth as male or female). It is self-identification as woman, man, neither or both and identification by others male, female or intersex based on physical/genetic sex. Transgender people may be identified as heterosexual, homosexual, bisexual, pansexual or asexual; some may consider conventional sexual orientation labels inadequate or inapplicable to them. Correct and precise definition of term transgender keeps on changing but it always includes:

1. People who were assigned a sex usually at birth and based on their genitals but who feel that this is a false or incomplete description of themselves.
2. A person whose identity does not confirm unambiguously to conventional notions of male or female gender roles, but combines or moves between these.
3. Non presentation or non-identification as the sex and assumed gender at the time of birth of an individual.

A transgender may have characteristics that are normally associated with a particular gender identity elsewhere on the traditional gender continuum or third gender. Transgender people may also be identified as bi gender.

The concept of transgender group is not much discussed in India. The term Hijra community is very well known in this context (Specially in hindi speaking regions) as it has a significant history within Indian sub-continent countries and some parts of South Asian countries .In the Indian sub-continent ,the centuries old term "Hijra" is generally used to describe those individuals who are transvestites, inter sexual, eunuch and hermaphrodite . Irregular male sex organs are central to the group's definition. The hijras include both ceremonially emasculated males and inter sexed people whose genitals are "ambiguously male-like at birth." All hijras have a female gender identity. There are no ambiguous females who identify as males in the group.

Instead, all hijras dress and act as women even though they are not biological women. This Group of people usually live or prefer to live in opposite gender role of their biological sex.

The word Transgender was introduced more recently in the Indian sub-continent. The term Transgender is often used as a broad term to those individuals who denied binary gender construction and present a blurring of traditional and so called accepted stereotypical gender roles.

Multidimensional identities in India have been put into transgender group. In India Hijra indicates a group of gender minority populations who are either leading a certain ritual life or live an individual life but have common sexual approach beyond male and female and have common social problems.

Though India is in the race of powerful nations she has all the characteristics of developing nation. India is a nation with very large population which causes multiple problems and challenges. She often faces diverse political social and economic problems. Poverty, malnutrition, illiteracy, unemployment, violence against women and depressed class etc. are some problems which people of this region face in their day-to-day life. In such background Hijra community is extremely marginalized and their situation has been ignored by the policy makers, compared to other oppressed classes. The government has largely overlooked the discrimination against hijra community and only few NGOs have been working to develop the quality of life of this community focusing on constitutional, social, health and sexual rights.

Constitutional Rights of Transgender in India

A reading of Indian constitution reveals following facts.

Preamble to the Indian constitution mandates justice –social, economic and political, equality of status for all citizens. This provision certainly should be applied to Hijras or Transgender also.

They have right to equality under Article 14 of the constitution.

They cannot be discriminated on the ground of religion, race, caste, sex or place of birth under Article 15.

Article 21 speaks right to privacy and personal dignity to all the citizens and that applies to transgender also.

Article 23 ensures prohibition of trafficking in human beings as beggars and similar forms of forced labour.

Violations of these rights are punishable by law. The constitution also provides political rights and other benefits to all citizens the constitution guarantees fundamental rights to every citizen. But Hijra/transgender group in India continues to be excluded. The question for discussion is whether fundamental rights apply to third sex (other than male female) also in India. There is no reason why transgender should not get their rights like liberty, dignity, freedom of expression, right to education and empowerment, right against discrimination and exploitation and other rights as the constitution guarantees. The constitution does not discriminate any person including transgender. There is no mention of the term transgender or any other term

which refers to this group in our constitution but it is very obvious that all rights and duties mentioned in the constitution extend to transgender community also.

But Indian state defines civil personhood as basis of sexual identity or gender. Identification within male and female on the basis of sex is a crucial part of civil identity as required by Indian state. As per Indian state most of the protection comes under fundamental rights. The constitution of India recognizes only two sexes male and female, there is no mention of third sex or other sex i.e. transgender. One must not conclude that the framers of Indian constitution have purposely excluded this group. Mostly constitutions are written in precise form and develop through legislations and judicial judgments. Now the question is not about the intention of the constitution framers it is about how the interpretation is done by the state? This situation deprives them several rights that other citizens enjoy. Transgender are deprived of these rights are due to apathy of state policy.

Right to vote as other gender (In 2012 election commission allowed them to enroll as Transgender. Since then, nearly 28000 transgenders have been included in voter list) right to own property, the right to education, right to employment right to health and so on are not reaching to this group. But non accessibility is not due to the constitutional provisions but due to lack of clarity on certain technical and legal issues.

Legal recognition of the gender status of Transgender people is also critical for the right to contest and right to vote in the elections. The Election Commission has introduced the option of 'other' in the voter's identity card and indicated that 'hijras' can vote or contest as 'other'. However, the legal validity of this executive order on the right to contest is not clear. Hijras had contested elections in the past. It has been documented that the victory of a transgender woman who contested in an election was overturned since that person contested in a seat reserved for women and according to the judgment of the Madhya Pradesh High Court the person was not a woman but a "hijra". However, there have been other documented cases of transgender persons contesting elections as women. Since none of these candidates had won, there has been no cause for any other court to pronounce on the question of whether hijras are 'women' for the purposes of contesting from women-only constituencies.

The Tamil Nadu state government's 'Aravani (male-to-female transgender people) Welfare Board has given identity card for Aravanis – in which both their male and female names are given. This identity card may, however, have limited value and may not be useful for accessing a broader series of rights. For example, these cards (voter identity card or Aravani welfare board card) might not be enabled hijras want to access other civil rights such as marriage, as legally marriage is seen as only between a man and a woman and there is no recognition of a third gender category in the marriage laws.

Transgender status at international level can be observed by United Nations sponsored human rights treaties and European Conventions on Human Rights. The development of this sexual orientation and gender identity related human rights are based on mainly (a) Protection of Privacy Rights (b) Non-discrimination (c) Ensuring of General Human Rights regardless of sexual orientation or gender identity.

Transgender persons got voting rights in 1994 in India but while issuing the voter identity card, they faced the question of being male or female and many of them were denied voter identity cards with sexual category of their choice.

Section 377 of Indian Penal Code and Immoral Traffic Prevention Act, 1986 is against the interests of Transgender. Lord Macaulay drafted Section 377 of 1860 which comes under the chapter “Offences affecting the Human Body”. This section provides the sanction for the prosecution of certain kinds of unnatural sexual acts. To be a transgender or homosexual is to draw the presumption that the homosexual or transgender is involving in “carnal intercourse against the order of nature”.

Police also misuse the above said section in many ways. Pandian, a transgender was arrested by Police on charges of theft. He was sexually abused in the Police Station, which ultimately led him to immolate himself in the premises of the Police Station (Jayalakshmi Vs State of Tamilnadu).

Narayana, a transgender was arrested in Bangalore by Police on the suspicion of theft. Police didn't cite any reason for his arrest and confiscated his diary and threatened for dire consequences, if he didn't help in identifying the other transgender known to him.

Chief instrument of Indian Constitution's regulation of prostitution which mandates to prevent the traffic of women and children into prostitution is laid in Immoral Traffic Prevention Act of 1956 and amended in 1986. The 1986 amendment became gender neutral and title was modified as “Immoral Traffic Prevention Act”. The ambit of Act is now male, female and gender indeterminate. Male and hijra sex workers became criminal in subjects of Immoral Traffic Prevention Act with 1986 amendment. This Act provides legal basis for arrest and intimidation of transgender sex workers.

The oppressive nature of Section 377 was growing exponentially in India and on July 2nd 2009, finally for the first time, the Delhi High Court pronounced that the oppression meted out to the transgender community and the homosexuals in India is violation of Right to Equality under Article 14, Right against Discrimination under Article 15, and Right to Privacy and Personal Dignity under Article 21 of the Constitution of India. Section 377 is a repressive measure in its criminalization of homosexual activity on fundamental rights of the transgender community.

The 2018 Supreme Court judgment on Section 377 is a landmark in the Indian legal landscape, ensuring the protection and recognition of LGBTQ+ rights and setting a precedent for further legal and social reforms in favor of sexual minorities.

Thus, it is very important that judicial officers and police officers should not become means to enforce discrimination.

Social Status of Transgenders in India

There are many evidences about the transgender in ancient India. Ramayana and Mahabharata also have mentioned about them. In Mughal rule also hijras were appointed as guards in Harams. The historical changes have put Hijra/Transgender from prestigious position to present vulnerable situation in the society. During British rule we find that Hijras were treated as criminals and anti-social elements. In Present Indian society the place and role of this group has changed completely. The cultural roles of community have changed today and for survival in society the transgender have found more occupations such as begging, collecting money from markets, from shopkeepers, from passengers in trains and buses and prostitution. They are also involved in criminal activities. Poverty and lack of alternative livelihoods lead many of them to work as sex workers and few as beggars.

The hate and detachment towards transgender group is mostly due to their occupational choices (rather choices by compulsion). Sometimes their behavior is very aggressive which causes fear among common people. Choosing to work as sex workers also causes many difficulties and troubles in the lives of transgender. It involves criminal charges as well as health problems. They are exposed to HIV AIDS and other diseases which are caused by unhealthy sex practices.

In some parts of India Hijaras collect money by blessing new born babies by singing and dancing called "Baccha Nachano". Usually, hijra wear feminine dress and to earn money through dance, they claim that they are deprived of conceiving children, their blessing for children has more importance, in the eyes of the divine. Another traditional work is collecting money from the shops in the markets called Bazar Lola.

Mostly, Hijra live and work under a Guru who is senior hijra, called 'Mother' of group of hijra. Other hijra are called chela mean child of Guru. Guru and chela hijra follow their relationship as Guru and Chela and follow some disciplines and rules in their community. Usually Guru does not earn money, but, the Chela handover their earning to Guru. In return, the Guru takes care of Chela Hijra. Now a days, many hijra live independently apart from Guru but have consistent relationship with their community.

Majority of transgender in India are deprived of education. Due to social hatred and non-acceptance by other members of society they do not go to school to receive formal education.

Transgender lives in isolation. They are the victim of discrimination in all spheres of life. While travelling they are not allowed to sit with female or male passengers. Society laughs at them or hates them. Wherever they go they have to face this disrespect and hate.

Conclusion

The hijra transgender community has existed for more than 4000 years and is currently believed to number half a million. The term translates as eunuch or hermaphrodite transgender community needs reforms in existing laws for realization of equal rights and respect in society. The reforms for transgender community should take place in the implementation of such laws because they bear social stigma from long ages.

The state of Tamil Nadu has set an example for the above statement to the entire world. This is the first state to constitute a Welfare Board for the transgender community known as Aravanis. The Transgender persons have been provided with educational assistance of Rs.15,300/- A proposal has been sent for making a documentary film on Transgender incurring an amount of Rs.1,05,000/-, which has been approved by the Government. Likewise, Rs.13,380/- has been approved for starting a tailoring training by a NGO for the transgender in Chennai. Rs.2.25 Lakhs has been distributed by the District Social Welfare Officer, Chennai to start a Beautician course for the transgender. Aravanis has official working staff along being the members of transgender community taking affirmative action to achieve equality by reassuring seats for third gender students in Government owned Arts and Science colleges. Aravnis are provided with ration cards. The state government offers subsidy to transgender who wish to undergo surgical treatment for change of their sex. Since 2012, voter identity cards and electoral roll for transgender bears 'others' distinct from male and female and this identity for them is a major step ahead in their struggle for political rights.

First step of reform must begin at home. In Most of the cases it is found that harassments begin in the family. Parents and siblings refuse to accept transgender identity. Most transgender in India are disowned by their families. The government must make policies to secure their positions at the family level first. No parents should be allowed to disown or exile their transgender child. This cannot be done through legal force only. There is an urgent need of sensitizing people towards the hardship of this group. If the families of these transgender accept them and allow their comeback half of the problems will be solved automatically.

Education is the best tool of inclusion. Right to compulsory education should be utilized by transgender children. There are many cases where transgender children leave schools because of ill treatment and mockery made by fellow students and even by teachers. To encourage education among transgender Government may think of starting separate schools for third gender as there are schools for boys and girls separately. There must be reservation for them in education sector.

Employment is another instrument which can improve their status of transgender. Government must promote employment among them. Vocational training can be extended freely to them so that they can choose other occupations like driving, tailoring, electrical works (electricians) and so on. There are thousands of ways to earn livelihood. I must mention here that in seminars and other public forums whenever transgender argue for their rights, most of them demand right to work as sex workers. They even can't think of any other occupation. The reservation in jobs can be extended to this group also.

Welfare and protective measures need to be implemented in all spheres of life. Another factor that can be taken into account for welfare measure is the child sexual orientation which juvenile justice system does not protect. Adolescence for transgender is a confusing period when the children learn skills required to become healthy adults. These children are often rejected, neglected or abused by their guardians and select a life on the streets rather than denied in hostile environments. Juvenile Justice System must support transgender in gender identity and exploration and expression of their sexual orientation.

A separate gender identity of transgender beyond male and female within the legal framework, the inclusion in the mainstream economic field could make transgender socially acceptable. Transgender community is excluded and secluded for their different gender approach and culture from all the economic, social and civil life. The present study reveals the challenges for the government and mainstream society for equal social status to transgender. The services by the social workers are also significant and important for these marginalized people.

This study concludes that social work activist should involve with transgender community to put more effort to convince mainstream people for their equal rights and dignity and the Government should approve the legal support, gender rights and social inclusion.

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