

LEGALFOXES LAW TIMES

SOCIO-LEGAL BATTLE AGAINST DISCRIMINATION OF TRANSGENDER IN INDIA

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“You know gay, lesbian, bisexual, transgender- people are people.”

By Judith Light

1. INTRODUCTION

Living in the 21st century where the gender cataloging is not only limited to the male and female but has enlarged its scope to include transgenders¹. With modernization in our thoughts, dressing and brining modern culture in our country, we have taken a long time to accept the changes around us concerning to transgender laws. Still our society have not fully accepted these people and treat them with great hatred.

Being the creations of Divinity, they have the same rights and freedoms under law as other sections of the society. They have the right of being identified and recognized as others. It was only after the landmark ruling of the Supreme Court of India, Section 377 of Indian Penal Code, 1860 was decriminalized and the government of India finally ordered to bring them in par with other minorities of the society and considering them eligible to jobs, education etc. Also, it stated that every person has the right to choose his/her gender.²

¹India court recognises transgender people as third gender, BBC News (April 15, 2014)
<https://www.bbc.com/news/world-asia-india-27031180>

² Ibid

But still these people are facing several social and economic problems as people are not able to accept them in the society. They are been forced to live in poverty, beg and dance for earning a living and also perform illegal activities like prostitution to earn their bread³.

But apart from this, there have been transgenders who have touched statures: as Jyoti Mondal become India's first Transgender Lok Adalat Judge⁴, Swati Bidhan Baruah in 2018 had become the first transgender judge in Assam and third in the country⁵. Whereas Prithika Yashini became the first transgender police officer in Tamil Nadu⁶. There are many other fields where the transgenders have also excelled but these facts are not brought into knowledge of general public by the media. These are not much emphasized or highlighted fields by the media spokespersons. As they also are part of our population educating them and giving them jobs would also help to reduce the illiteracy rate in our country.

2. LEGAL REFORMS

In India, the earliest law discriminating on the basis of gender identity was enacted during the British Era. The Law was known as the Criminal Tribes Act of 1873 and was enacted with an intent to penalize certain communities who were more inclined in *Flagrante Delicto*. An amendment to this Act was made in 1897 to take in transgender persons. Later in 1949 this Act was repealed yet there was no claim to recognize the rights of the transgender community.

The battle for transgender rights began in 2001 when a PIL was filed by Naz Foundation challenging the Constitutional validity of Section 377 of IPC. The transgender community was however, not in the frontline of this litigation. The judgment in *Naz Foundation v. Govt.*

³*Ibid*

⁴Swapna Majumdar, *Meet the First Transgender Judge in India*, Development News (Last Visited July, 2020) <https://www.developmentnews.in/meet-first-transgender-judge-india/>

⁵Prasanta Mazumdar, *Assam gets its first transgender judge, third in country*, THE INDIAN EXPRESS (July 13, 2018 04:48 PM) <https://www.newindianexpress.com/nation/2018/jul/13/assam-gets-its-first-transgender-judge-third-in-country-1842803.html>

⁶*India first transgender police officer appointed in Tamil Nadu*, INDIA TODAY (April 05, 2020 17:09) <https://www.indiatoday.in/education-today/gk-current-affairs/story/first-transgender-police-officer-of-india-969654-2017-04-05>

of *NCT of New Delhi and Others*⁷ read down Section 377 and held it to be unconstitutional. This judgment was a ray of light for the recognition of LGBT Rights in the country but was overturned by the Apex Court in *Suresh Koushal v. Union of India*⁸ holding that it is the duty of Parliament to decide on decriminalization of homosexuality. By this time the battle had raged, despite the Apex Court's verdict the societal recognition of the rights of LGBT community was aggregating. The transgender community were now active participant in the movement for recognition of LGBT rights.

A stepping stone towards the recognition of trans community was paved by the Supreme Court in the case of *National Legal Services Authority v. Union of India (NALSA)*⁹, where the court held that the transgender people have the right to self-identify their gender as male, female or transgender even without taking medical support and also the right to express the gender identity chosen by them. The Supreme Court in this case went up to holding that right to one's gender identity and sexual orientation is an integral part of right to life, dignity and independence. It was for the foremost time that court recognized the violence and discrimination trans-community had faced and pronounced indisputable entitlement to constitutional rights.¹⁰

Going by the judgement NALSA, in 2016 new petitions were filed under Article 32 before the Apex Court urging the Court to re-consider the constitutional validity of Section 377. Meanwhile the petitions were pending, the Apex Court in *Puttuswamy v. Union of India*¹¹, held that there is a constitutional right to privacy inherent in the right to life, equality and fundamental freedoms. Additionally, the Court also held that the right to privacy includes the right to have intimate relations of one's choice and includes the right to sexual orientation and gender identity. On this note, more petitions were filed on the validity of Section 377 making it difficult for Section 377 to survive. Ultimately, on 6th September, 2018 the Apex Court unanimously held in the case of *Navtej Singh Johar & Ors, v. Union of India thr Secretary Minister of Law and Justice*¹² that Section 377 is unconstitutional to the extent it

⁷ (2009) 111 DRJ 1.

⁸ (2014) 1 S.C.C. 1.

⁹ (2014) 5 S.C.C. 438.

¹⁰ JAYNA KOTHARI, HOW LIBERAL IS INDIA? 189 (Ronald Meinardus Ed. 2019).

¹¹ (2017) 10 S.C.C. 1.

¹² WP (Civil) No. 400 of 2012.

criminalizes consensual sexual relationships of any kind between adults. The Apex Court's far-flung contribution was on right against discrimination on the basis of sex which is guaranteed under Article 15 of the Constitution of India. The Court stated that 'sex' under Article 15 includes discrimination on the ground of gender identity and sexual orientation thereby bringing discrimination on the ground of sexual orientation or sex stereotypes under the ambit of Article 15. J. Chandrachud affirmed that Section 377 was disparaging the identities of LGBTs and that they are qualified for all constitutional rights including the freedoms secured by the Constitution of India. This included the freedom to accomplice and discover satisfaction in sexual affection with a person of their choice and the right not to be exposed to biased conduct.

3. CHALLENGES- INCOMPETENT LAWS

On the way ahead in this path, a number of Bills were introduced in the House of Parliament but fell short of becoming the law. Finally, in 2019, The Transgender Persons (Protection of Rights) Act¹³ was passed. This Act, however, falls short of its objective to protect the rights of the transgender persons and to welfare of the trans community. The Act was passed in a haste and the Parliament failed to consider the concerns raised by the trans community. The NALSA judgment provided for self-identification of trans person on the contrary also propounded that for the trans persons to exercise their identity rights have to be registered with the Board and the Board will determine whether the concerned persons are real trans persons or not. On the contrary, no tests have been laid for the Board to determine their gender. Furthermore, it can also be implied from the bare reading of the Act that in case of non-registration, the trans person will have no rights.

The severe flaw in the new law is the procedure for legal gender identity- which requires an individual to obtain a 'transgender certificate' from the District Magistrate. Only after this the certificate holder can apply for 'change in gender certificate' for which he has to produce proof of surgery to the District Magistrate. This is contrary to the judgement in NALSA wherein the court held that trans-people deserve recognition on their own footings without any snooping or hurdle. The right to recognition is the fundamental law falling under the

¹³ Act No. 40 of 2019.

right to dignity and worth of each person under Article 21 of the Constitution. While granting the right to recognition other fundamental rights such as right to privacy, to freedom of expression and right to equality cannot be neglected. This law is a clear case of violation of golden triangle of the Indian Constitution. By not separating the medical and legal processes, this law is also violating the International standards set for legal gender recognition. The manner for recognition before the law and control over one's own body should not be melded with medical interventions however, giving medical support to an individual for personal identity or transition process should be kept out of this.

Other reasons which make the Law incompetent is that although it has brought intersex under the ambit of transgender but raises ambiguity when it comes to the its definition as 'persons with intersex variations' are defined under Clause (i) of the Section 2 and has also been included in the definition of transgender under clause (k) of Section 2. Moreover, the NALSA judgment directed trans-community members to be treated as Socially and Economically Backward Class under the National Commission for Backward Classes Act, 1993 however, there is no clarity on this point in the Act concerned. Moreover, the Act is also silent on right to enter into sexual relationship with person of their choice. As a result, it can be said that it is a vague law as it grants certain rights by taking away the most elementary rights of survival.



4. SOCIAL CHALLENGES FOR TRANSGENDER AND ITS IMPACT ON THEIR LEGAL AND SOCIAL STATUS

Barriers still exist in the path of the third category persons; to be still accepted by the society. Changing the thoughts of people takes time. But this non-acceptance by the people have created barriers for them both socially and legally.

One of the major social challenge faced by the transgenders is "Acceptance". Social challenges exist because of the difference in the opinion of every person. These social barriers occur in form of poverty, denying of health facilities and even violence. Apart from the social challenges tackled by the transgender of the commodity, there also exist

some legal barriers which exist in form of challenge for them. As there are some basic rights which are entitled to every citizen irrespective of any discrimination based on caste, gender, color etc. These challenges have created its impact on their social and legal status. Some of these are stated below¹⁴:

4.1. Accessing Hospital Facilities

Availing health services by these people have become a challenge because of the discrimination of being a third gender. Not only the transgenders face a problem in availing health services, it's the doctors who on points have no idea of ways to cure their problems. They are majorly seen having diseases such as HIV, rectal gonorrhea etc. Therefore, it is a matter of anxiety for all the Health Care Departments to gain knowledge in these fields as they also form an important sector of our societies.

4.2. Harassment and Violence

Some people also have to face harassment both physical and mental harassment just because of being a transgender. Apart from this they also face assaults and other physical attacks.

4.3. Poverty

Lack of acceptance in the society have worsened the living situations of the transgenders. They are being forced to live in poverty apart from the hidden talents prevailing in them. They are been forced to beg, dance and even perform illegal activities like prostitution in order to survive. Being a serious concern of the hour, they need to be protected and promoted so that they are not compelled to live in such scenario.

4.4. Identity Documents

Identity Documents are obligatory for every citizen. These documents enable us in forming our basic HumanRights conferred under the Constitution of India like the

¹⁴The Challenges faced by Transgenders in India (Last Visited June 13, 2020) <https://medium.com/one-future/the-challenges-faced-by-transpersons-in-india-fa46575ca14d>

Right to Vote, Right to Education, Health and Public Services etc. But these people often face the challenge of obtaining an identity certificate and get recognition.

4.5.Hiring Biases

Accepting the transgender at work place is often seen as a challenge for all. Apart from this there exist some basic challenges they face after being hired at the workplace i.e. they face harassment at their workplace, even the wages or salaries paid to these people are seen to be less as compared to others working in the same sector at the same position. Also, the increment benefits and work-environment for them seems to be bit different as acceptance by the society seems to lack.

4.6.Schooling

Right of Education is one guaranteed to every citizen irrespective of any caste, religion, gender and color is provided under our Constitution. Thereby non-acceptance by some sectors of the society have led to deteriorating of the guaranteed right to the citizens and creating a vulnerable state for the transgenders and compelling them to beg and dance to earn a bread.



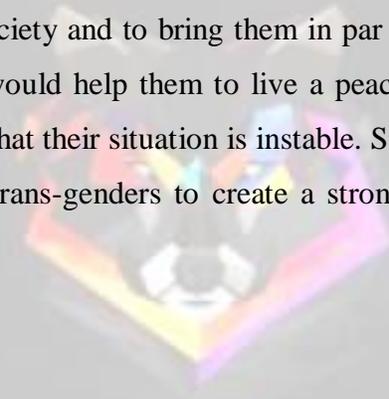
4.7.Marriage & Inheritance

Legal challenges are also faced in case of marriage and inheritance of properties by the third gender. Though it had being decriminalized, there exist no legality of their marriage in law. Also, certain glitches have being faced in inheritance of the property. There situation is totally vulnerable and need to be worked upon to give equal recognition to them in all spheres.

5. CONCLUSION

The society even after the equality, justice and liberalization continues to be wise and foolish at the same time. They have become biased to the situation and keep themselves away from knowing and accepting the natural process. The rational thinkers have become hypothetical and that's why when there are number of people who are accepting the existence of trans-community, there are more number of people who continue to tag it with disgrace and shame. They are as normal as us, but it's us that make them feel different.

Everyone in our society is unique in itself. Everyone has a hidden talent and should be given a fair and equal opportunity to showcase it. No discrimination should be made on the basis of gender on any aspect. There a serious need of the hour to promote and protect the third gender in the society and to bring them in par with other sectors of the society. Evacuating the barriers would help them to live a peaceful and healthy life like others. Therefore, it can be said that their situation is instable. So removing these legal and social barriers would help the trans-genders to create a strong identity and prosperous in the society.



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