

HUMAN RIGHTS OF TRANSGENDER COMMUNITY: TRANSCENDING SPACE OF TRANSGENDER LAW

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Using “Transgender” as a noun is never acceptable; it’s an adjective. For example, a woman who was assigned male at birth and later transitioned is a transgender woman not “a transgender,” and not a “transgendered” woman. “Transgendered” is not a word. Likewise, we were not “born as men” or “born as women.” We were born as babies.

*This paper discuss about their right to have “Right to livelihood”, which includes health care, housing, vocational education employment and **right to privacy**, so they can live with physical integrity. Transgender people in India are frequently publicly ridiculed and excluded from general society. Many transgender have no option but to either beg or engage in sex work. In the landmark judgment of **NALSA v. Union of India** the apex court ruled by providing third gender as well as special benefit in education and jobs.*

*The word “**Human Right**” does not see gender but provide right to “**Humans**”. India is a secular country. “**We the People**” accept, respect and live in different type of culture, but we are excluding them from the economy, society, family and also political participation. On one hand we find their blessing special but rest of the time we consider them aliens. **Section 375** of IPC should be amended and comprehensive sexual assault law should be enacted. The failure to investigate can itself give rise to a separate breach of international law. There should be “**Right to Livelihood**” for this people.*

Keywords: Sexual assault law, Education, Jobs, Humans, Right to Privacy, Right to basic Livelihood.

Introduction

Venus to Mars: “*I’m afraid, Mars, that I may have fallen in love with you. Mars doesn’t know what to say, so Venus says it for him: I’m a man. I am a man having woman qualities. And that’s exactly where I’m supposed to be. It’s the criss-cross that I’ve come to know. I don’t want the surgery. I don’t want to undo what God has given me. I know how beautiful I am.*”

Transgender around the world face the violence, torture and inequality for who they are and whom they love. No one is born LGBT but it is our internal aspect which should never lead to harm of dignity of any human being. There should be proper law and policies which protect the rights of this people. The Yogyakarta Principles on the Application of

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International Human Rights Law in Relation to Sexual Orientation and Gender Identity developed in 2006 by a group of LGBT experts in Yogyakarta.¹

The key issue this gender face is **Right to livelihood**, which includes health care, housing, vocational education employment and **Right to privacy**. In India, transgender people are frequently publicly ridiculed and excluded from general society. Many transgender have no option but to either beg or engage in sex work. All human being are born free and equality before law is entitled by everyone.

“The Constitution provides for the fundamental right to equality, and tolerates no discrimination on the grounds of sex, caste, creed or religion. The Constitution also guarantees political rights and other benefits to every citizen. But the third community (transgender) continues to be ostracized. The Constitution affirms equality in all spheres but the moot question is whether it is being applied.”²

Transgender Rights

Right to Livelihood

India has achieved significant growth and development as it has improved on crucial human development indices such as levels of literacy, education and health. Among these, the transgender community, in the country is seriously lagging behind on human development index including education. Majority of the population is uneducated or undereducated, so they find themselves excluded in participating in social, cultural, political and economic activities. Because of this transgender community faces poverty, discrimination, violence as these are some of the important factors which can be attributed to the poor participation of transgender persons in educational activities.

Transgender are deprived of social and cultural participation, it is shocking to know that their family and society are shamed from them as a result they are the people who suffers and gets restricted to excess right to education, health services and public spaces, they even restricted rights to marry, right to contest elections, right to vote, employment and livelihood opportunities. In legal aspect we can say from Article 14, 15, 16 and 21 of the Constitution of India. For fulfilling their primary needs Trans forces themselves for sex work .We should protest against a society that forces them to violate stigma and oppression.

Lack of opportunity and education limits their proper livelihood facilities. Lack of livelihood is the key option for any transgender to get into the sex work, which again increases the health-risk. If employment opportunities are the community has option to live their livelihood.

¹ <http://www.amnestyusa.org/our-work/issues/lgbt-rights/about-lgbt-human-rights>

² “Rights of Transgender People – Sensitising Officers to Provide Access to Justice” by Hon'ble Mr. Justice P. Sathasivam, then Judge, Supreme Court of India (presently Chief Justice)

“At regular places of employment people harass and tease us. But in sex work, it's give and take. I give my body, and the client gives me money.”³

27 year old transgender from Madhurai

The government efforts is remarkable in providing free compulsory education to children, as it has now become constitutional obligation for the state to provide free education this all sections are commonly applicable even transgender can take advantage of it. Also, reservation for transgender in government jobs as well as private companies can be made applicable. Recruiting transgender in certain sectors like traffic police, health worker, and lecturer will enhance the livelihood as well as will make them feel as part of the society. The best illustration is the **‘Seat Belt Gang’**.

Right to Privacy

The Constitution of India under Article 21:-

“No person shall be deprived of his life or personal liberty except according to procedure established by law.”

The article starts with the word “No person” but still there is discrimination among various gender and class of people. All human have right to privacy. There are many thing human needs to keep private.

Right to choose ones gender is an integral to the right of life and liberty under Article 21 of Indian constitution and that is all private. The spirit of the constitution is to provide equal opportunity to every citizen irrespective of caste, gender, or religion.

Gerety⁴ defines privacy as "an autonomy or control over the intimacies of personal identity".

Article 12: Universal Declaration of Human Rights (1948):

“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

Privacy is a broader terms means even they even should not be bound disclose their transgender status. In Kharak Singh v. State of U.P.⁵ where it was held by Supreme Court that right privacy is a part of right of protection of life and liberty. In Naz Foundation Case, the High Court of Delhi gave the landmark decision on consensual homosexuality, where S. 377 IPC and Articles 14, 19 & 21 were examined. Right to privacy held to protect a *“private space in which man may become and remain himself”*.

³ Intersectionality Framework to track Budgets for Transgender Communities in Tamil Nadu by Praxis May 2013

⁴ Gerety, fn 2 at 236, http://www.ebc-india.com/lawyer/articles/2006_3_31.htm

⁵ AIR 1963 SC 1295

Article 17 of the International Covenant on Civil and Political Rights, 1966 states that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation and that everyone has the right to protection of law against such interference or attacks.⁶

The Supreme Court of the State of Illinois in the *City of Chicago v. Wilson et al*⁷ struck down the municipal law prohibiting cross-dressing, and held as follows:

“The notion that the State can regulate one’s personal appearance, unconfined by any constitutional strictures whatsoever, is fundamentally inconsistent with “values of privacy, self-identity, autonomy and personal integrity that the Constitution was designed to protect.”

Lacking the privacy of home, the gender many times this people are mostly prone to attack not only by the police but also by the local goondas who take the advantage of the vulnerability. It appears that the police instead investigating in the matter, they extort, assault and wrongful confine them.

Exclusions

Lack of Opportunity

The basic spirit of our Constitution is to provide each and every person of the nation equal opportunity to grow as a human being, irrespective of race, caste, religion, community and social status. Equality plays a very keen role in providing equal opportunities to the citizen of the country. Article 16 speaks ‘*Equality of opportunity in matters of public employment.*’

The concept of Justice, social, economic and political; Equality of status and of opportunity for the individual has been incorporated in the Preamble which the basic essential right of the entire citizen. Opportunity allows every citizen to reach the highest level of its positional. The court while recognizing the third center has said that transgender are also citizens of India and they must also be provided equal opportunity as providing equal opportunity is the spirit of Indian constitution which is equally duty of the states directed under Article 42⁸ of Indian constitution.

Lack of education and opportunity does not allow them to get off the drainages of sex worker. Due to social discrimination they are forced to get indulge in the sex work.

The transgender community experts also argue that there is an urgent need for addressing the community concerns in education sector in a holistic way-that implies giving attention to the Four core issue of *Access*⁹, *Equity*¹⁰, *Enabling Environment*¹¹ and *Employment*¹² These four

⁶ Nalsa v. UOI

⁷ 75 Ill.2d 525 (1978)

⁸ The State to make provision for ensuring just and humane conditions

⁹ Accessibility indicates that the educational system is non- discriminatory and accessible to all, and that positive steps are taken to include the transgender persons.

pillars are the bases for getting the opportunity in any sector to get employed. Lack of education and social force them to survive in worst economic condition. Providing awareness, vocational skill and basic education will help them to get equal wage job and exploit the opportunities.

According to the World Policy Institute implementation of new law is solely lacking, preventing hijaras from getting driver's license and enjoying social welfare.¹³ The United Nations Development Program has also criticized India for failing to provide Hirjas with equal job and educational opportunities.¹⁴

Social Exclusion and Health Issue

In the 2004 Joint Report on Social Inclusion, the European Commission and European Council defined social exclusion as a “process whereby certain individuals are pushed to the edge of society and prevented from participating fully by virtue of their poverty, or lack of basic competencies and lifelong learning opportunities, or as a result of discrimination”.¹⁵

The HIV Sentinel Surveillance (HSS) for 2010–2011 found that transgender people had the highest HIV prevalence among all surveyed populations in the country, with 8.8% estimated HIV prevalence nationally, compared with 0.3% among the general population. Transgender population lives on the extreme margin.¹⁶ This people demonstrate high rate of diseases like HIV, Mental stress, Gender Dysphonic etc. which can hardly be curried. Globally an estimated 19% of the women are living in HIV.¹⁷

Legal identity has provided relief to this people but still society is pedantic towards them and today also society envisage this people as in humans which end up with lethal consequences. This is *classism*, which is *racisms cousin*. It is very important to be accepted who we are, and we are all humans. There should be no limits for these people; there life should be beyond the core value of gender identity. There is no doubt to the point that all the transgender feels them socially excluded or oppressed.

They are excluded from civil rights like getting married and to the parenthood. Relationship with the family faces difficulties even with their parents. Society still is living in

¹⁰ Equity looks into the dimensions of disadvantage, social exclusion, gender disparity, and special needs for marginalized section like Transgender persons and other neglected groups. It focuses on gaps in enrolment, infrastructural provisioning, management, and governance issues social groups (teachers, students), training, and motivation and so on.

¹¹ Enabling Environment refers to supportive environment that harmonize policies with laws, reduce harassment, violence, stigma, remove structural barriers to the use of services.

¹² Approach Paper on Education and Employment opportunities & Challenges for Transgender, National Expert Committee on Issues of Trans gender Persons Ministry of Social Justice and Empowerment, Government of India.

¹³ <http://www.worldpolicy.org/blog/2014/01/29/hijras-battle-equality>

¹⁴ <http://thediplomat.com/2014/04/indian-supreme-court-creates-third-gender-category-for-transgenders/>

¹⁵ European Commission (2004) Joint Report on Social Inclusion , Brussels
http://www.europemsi.org/background_definitions.php

¹⁶ <http://www.unaids.org/en/resources/presscentre/featurestories/2014/may/20140516india>

¹⁷ GAT Report 2014

Transphobia. Transphobia, defined here as the fear of and stigmatization of transgender people, is at the root of the problems that many transgender people experience. This occurs at the individual level, because most people are afraid of people who are 'different', or gender ambiguous, particularly when this is linked with sexuality.¹⁸

International law on Tran respect

In the **European Union**, a 1996 decision of the European Court of Justice in *P v S and Cornwall County Council*¹⁹ provided protections from employment discrimination related to "gender reassignment." The **United Kingdom** formalized this EU decision when it passed the 1999 Sex Discrimination Regulations. This law provides protections for transgender people "intending to undergo, undergoing or having undergone gender reassignment," and applies to any stage of employment. The European Court of Human Rights has continued to uphold and require protections for transgender people, and both the U.K. and **Spain** also have laws that allow transgender people to change their name and gender on official documents without needing to undergo surgery.

Also Article 21 in the **Charter of Fundamental Rights of the European Union** states that discrimination on grounds of sexual orientation is prohibited. Outside of Europe, countries like South Africa and many states and territories of Australia also prohibit discrimination against transgender people. Businesses that operate in these countries are prohibited, and could be held liable for, discrimination against or harassment of transgender employees.²⁰

The Yogyakarta Principles is a document drafted by an international group of legal experts who met in Yogyakarta, Indonesia in 2006 under the guidance of the International Commission of Jurists and the International Service for Human Rights. The Principles, launched in 2007, bring together in one document and affirm binding international human rights legal standards applicable to issues of sexual orientation and gender identity.²¹

In recent years, many countries have started putting their efforts to strengthen human right protection for transgender people. Except India in other countries new laws has started adopting like banning of discrimination in the society, making easy for transgender individuals to obtain official documents that reflect their preferred gender. In India it is difficult for transgender to recognize their position in society, law is helping transgender to have their identity in society but meanwhile our Indian society is not ready to accept transgender as a third gender. In the United States, international transgender issues are rapidly evolving. Even there is a seat for transgender in parliament.

Some authors' view, which International law requires to take in order to safeguard their rights of transgender people:

¹⁸ <http://www.gender.org.uk/gendys/2001/13surya.htm>

¹⁹ Case C-13/94, 1996 ECR

²⁰ <http://www.hrc.org/resources/entry/international-laws-protecting-transgender-workers>

²¹ Global Commission on HIV & Law, UNDP (HIV, Health & Development) 2014

- To protect them from torture and cruel inhuman treatment done by the society, provide a perfect system for victims.
- To ensure not to detained transgender on the basis of their sexual orientation or gender identity and are not subjected to any degrading physical examinations intended to determine their sexual orientation.
- To provide education and training to prevent discrimination of transgender from the society.
- To safeguard freedom of expression, association and peaceful assembly for all transgender people.

Conclusion

Transgender suffer social banishment from the society. It's a serious issue that we had created and the one that we can, together, fight against. Our society needs to know that transgender aren't people to be afraid of, or people to be looked down upon. We, as a human society, should be accommodating, not just in letter but also in spirit, to these people, to a world where they too belong, by not just granting them a legal recognition, but more importantly, a social one as well. More than 60% of the transgender people have thought about committing suicide for non-acceptance and discrimination in family and the society. I think problem with our society is that we are obsessed with merging things. We want to categorize things in simple order like in case of gender we try to fit all humans in two category like male and female. But truth is that all these categories are human constructed so why can't we broaden our view by recognizing them. It's nice to see that transgender getting some respect. In a country where their only livelihood is in making fools of themselves, and forceful begging, the very fact that they are shown as a medium of boon and blessings is beautiful. For all who call themselves modern and forward, it is time to start discriminating them. They are human beings and deserve to be treated with respect like any other human being. When we are posing as a democracy with theories of equality for all, than transgender also has right to enjoy their gender as everyone is *Born Free and Equal*.