

ANALYSING TRANSGENDER RIGHTS IN INDIA

RAMAPAT TIWARI

ABSTRACT

The word ‘transgender’ still leaves chaos in the minds of Indians as our society has always recognized only two genders - male or female. If you ask anyone on the street about who a transgender is, they might laugh and say the local words like ‘hijras’ etc. But in reality, no one actually knows who a transgender is? They are like us, our classmates, our co-workers, our neighbours and our friends! Transgender people are people who earlier recognize themselves as of one gender but later on identify themselves as of other gender. Eg, A male later on identifies himself as female and vice-versa. The Indian laws for transgenders is in sharp contrast to International Human Rights Law which is guided by the principles of universality, equality and non-discrimination. The Hijra community are one of those who are forced into begging, sex work and collecting money from families during the marriage ceremonies or on occasion of a newborn.

Article 14 and Article 21 use the expression “person” while Article 15, 16 and 19 use the word “citizen” which clearly indicates a gender-neutral approach towards justice. The level of discrimination can be clearly depicted from the fact that prior to Census 2011, the data about transgenders was never collected. Thus, according to the 2011 Census, there are 4,87,803 transgenders in India having a literacy rate of just 56.07% as compared to 74% of the general public. This further exposes the reality that transgender people aren’t getting education as they drop out of school/college due to discrimination. The [National Human Rights Commission Report \(2018\)](#) says that 99% of transgender people face social rejections multiple times. 57% of the people from this community want to go for a sex reassignment surgery but can’t due to lack of money.

The task of enrolling the transgenders in the electoral roll involves submission of a legal document from the oath commissioner proving their credentials, and then declare this identity in at least two newspapers and then obtain the signatures of their parents/guardians on the legal documents

India has ratified the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR) derived from the Universal Declaration of Human Rights (UDHR). This makes it an obligation for Indian Constitution to recognise the rights of Transgender people.

HISTORIC JUDGMENTS

NATIONAL LEGAL SERVICES AUTHORITY (NALSA) Vs UNION OF INDIA AND OTHERS 2013¹

The judgement gave legal and constitutional protection to the Hiras/Eunuchs in the form of third gender and reiterated that non-recognition of their gender identity will violate Article 14 and 21 of the Indian Constitution. NALSA which was constituted under the Legal Authority Act, 1997 to provide free legal services to the marginalised sections of the society along with Poojaya Mata Nasib Kaur Ji Women Welfare Society came forward for this cause. During the case hearing, reference was made to Ramayana and Mahabharata too.

Reference from Ramayana : When Lord Rama along with Mata Sita and brother Lakshman were asked to live in exile for 14 years, all the people of Ayodhya cried and decided to follow them. Among them were the Hijras too! Impressed by this act, Lord Rama blessed them that they will have the power to confer blessings on the day of childbirth and marriage or other inaugural functions.

Reference From Mahabharata : Aravan, the son of Arjuna and Nagakanya in Mahabharata, offers to be sacrificed to Goddess Kali to ensure the victory of the Pandavas in the Kurukshetra war, the only condition that he made was to spend the last night of his life in matrimony. Since no woman was willing to marry one who was doomed to be killed, Krishna assumes the form of a beautiful woman called Mohini and marries him. The Hijras of Tamil Nadu consider

¹ <https://indiankanoon.org/doc/193543132/>

Aravan their progenitor and call themselves Aravanis.

The verdict of this case ordered the State and Central governments to grant reservation to the transgender community in educational institutes and public employment treating them as socially and economically backward classes. The court also ordered that separate public toilets and HIV Sero-Surveillance Centres should be provided to address their health issues.

Decriminalisation of IPC Section 377 - Historic Judgment of NAVTEJ SINGH JOHAR V/S UNION OF INDIA²

Johann Wolfgang von Goethe aptly said, ‘I am what I am, so take me as I am’. When Shakespeare said, ‘What’s in a name? That which we call a rose by any other name would smell as sweet’, it also conveyed the message that essential qualities and fundamental characteristics of an entity matters the most and not the name by which person is addressed. The main controversy was that IPC Section 377 involved the non-recognition of the third gender in the fullest sense and Suresh Kumar Koushal and another v. Naz Foundation and others overturning the judgement of the Delhi HC in Naz Foundation v. Government of NCT of Delhi and others. Writ Petition (Criminal) No. 76 of 2016 was filed for declaring —right to sexuality, right to sexual autonomy and right to choice of a sexual partner to be part of the right to life guaranteed under Article 21 of the Constitution of India and further to declare Section 377 of the Indian Penal Code to be unconstitutional.

Reference was also given to K.S Puttaswamy and another v. Union of India and others by Justice Chandrachud saying that sexual orientation forms an imperative part of the Indian Constitution. The case of Mosley v. News Group Newspapers Ltd was also quoted highlighting the fact that this nation has individual freedom to conduct his sex life and personal relationships according to the wish of that person.

Using the reference to the judgement Shakti Vahini v. Union of India and others and Shafin Jahan v. Asokan K.M where it was said that an individual has freedom of choice in choosing a partner which is a feature of dignity and, therefore it is protected under Articles 19 and 21 of

² <https://indiankanoon.org/doc/168671544/>

the Indian Constitution. In the case of *Francis oralie Mullin v. Administrator, Union Territory of Delhi and others*³ and *Common Cause (A Registered Society) v. Union of India and another*⁴, it was held that the right to life and liberty, enshrined under Article 21, is meaningless without the right to dignity.

Earlier there was a debate on intelligible differentia or reasonable classification related to this matter but during the case hearing, it was submitted that there is no intelligible differentia between natural and unnatural sex as long as it is consensual. Reference was taken from *Anuj Garg and others v. Hotel Association of India and others* say that classification which might have been treated valid earlier can be ceased based on changing social norms. So, in this way Section 377 IPC was struck down.

THE TRANSGENDER PERSONS' (PROTECTION OF RIGHTS) ACT, 2019⁵

Parliament is the only place where debate and discussion on a particular bill can take place and our elected representatives become the voice of the common public. Listening to the recommendations and amendments put forth by the opposition party leaders and then sending the bill draft to the standing committee was considered to be a healthy practice a time ago. But if one analyses the current trends, one finds that lack of debate and a practice to pass the bills in hurry is a common practice. Only 18% of the bills today are referred to the standing committee due to which people at the end have to suffer. The acts are then challenged in the Supreme Courts by activists and politicians but it takes a long due process. The same is the case with India's Trans Bill, 2019.

- 1) The bill prohibits discrimination against transgender persons but does not specify the punishment for those discriminate against them.
- 2) There is no mention of the reservation in educational institutes and employment for the transgender people.
- 3) Though the bill has the provision to provide healthcare services including the sex reassignment surgery and hormonal therapy but whether it will be free or subsidised

³ <https://indiankanoon.org/doc/78536/>

⁴ <https://indiankanoon.org/doc/184449972/>

⁵ <https://prsindia.org/billtrack/the-transgender-persons-protection-of-rights-bill-2019>

isn't defined. The bill talks of an insurance scheme to cover the expenses but no steps have been taken by the government yet! If a Trans person has to change their preferred gender to male or female, the new law forces them to undergo a Sex reassignment Surgery (SRS) whose validity will also be decided by the District Magistrate.

- 4) The biggest criticism of the act is that it goes against the SC judgement in 2014, as it denies the right to identify one's gender. The Act says that district magistrate will grant a certificate for the identification of transgender person.
- 5) After a Trans person changes gender identity, he/she is allowed to change only their first name and not the last name.
- 6) The National Council for Transgender Persons having 30 people has a representation of just 5 Transgender people. Also, the appointment of the members has to be done by the Central government that raises questions on the independence of the council itself.

THE CONSTITUTIONALITY OF TRANSGENDER ACT, 2019 CHALLENGED

The section 4 to 6 that makes self-identification 'subject to certification by the State' is unconstitutional if we keep in mind the judgments of NALSA V. Union of India and Puttaswamy V. Unions of India. The recognition by the District Magistrate goes against the right to gender identity protected under Article 19 and 21 along with right to privacy. These sections make no reference as to whether the District Magistrate has any discretion to reject an application to be recognised as a trans person. The NALSA judgement says that an self-attested affidavit is sufficient enough for the process of determination as anything more onerous would violate the principle of self-determination and self-identification.

These sections also go against the right to equality as it imposes a burden on trans people for certification but not on non-trans people. If we consider the NALSA judgement that clearly says that self-identification is a fundamental choice under Articles 19 and 21, then cis-and trans-identities are to be treated on an equal footing. Since, Section 4(2) makes identity conditional upon identification, these sections can be deemed to be unconstitutional.

The constitution clearly says that if the State wants to impose obligations upon private individuals to behave in certain non-discriminatory ways against other private individuals, a mechanism must be laid down by the state to make those obligations meaningful. Section 3 of the Trans Act that sets out the non-discrimination provisions, has no mention of penalty or

remedy for the breach of these provisions. Section 18 of the Act prescribes punishment of upto two years for offences like forced labour, abuse etc against the trans people but punishment under normal circumstances for these offences is much more. Therefore, this section makes the punishments for the offences lighter under this Act.

SAME SEX MARRIAGE STILL NOT ALLOWED IN INDIA

The petitioners cannot claim a fundamental right for same sex marriage because marriage in India is a bond between a biological man and biological woman. The acceptance of such marriage is not recognised in any uncodified personal laws or any codified statutory laws. Number of writ petitions have been filed in various state High Courts challenging the section 4 and Schedule 2 to 4 of the Special Marriage Act, 1954 on the grounds that it is violative of the article 14, 15(1), 19(1)(a) and 21 of the Constitution as it allows the marriage between a man and woman.

By reading Sections 4 to 14 of Chapter II of the Act, one comes across words like “either of the parties” and “such party” rather than “man” or “woman”. This shows that rather than using the gender specific words, gender neutral words have been used, thereby enabling same-sex marriages.

Though the Government might call same-sex marriage against our culture and tradition but prohibition of this act is certainly against the fundamental right to marry a person’s one own choice. The judgement of Shafin Jahan V. Asokan K.M and others also concluded that the right to marry is integral to Article 21. Matters of dress and of food, of ideas and ideologies, of love and partnership, are within the central aspects of identity.

Similarly reference can be taken from the Common Cause V. Union of India and Shakti Vahini

V. Union of India judgement too!

In cases like Arun Kumar and others V. UOI and others, State of Goa V. Western Builders, and Election Commission of India through Secretary V. Ashok Kumar and others, clearly depicted that if the statute is silent then the court would adopt a method that would lean towards addressing the grievances to uphold justice, equality and good conscience. Now, since Schedule three and four of the SMA cannot apply to the same-sex marriages, in the interest of

Justice, under article 226, the HC can direct the State Governments to prepare separate declaration forms for same-sex couples and marriage to officers to register such marriages.

Until a law is enacted, the High Court using the powers granted under Article 227(2)(b) can make rules for the subordinate courts and tribunals within the State to consider the applications of same-sex marriage.

Reforms Required to Make our Country Best Place for Transgenders to Live

Social acceptance and educating the public is the key to solve the issue at hand. The public perception about transgenders has always been wrong and in a negative way. Apart from educating the youngsters, it is the need of the hour to train our administration and employees working the private firms to start discussing such topics and don't make it a buzzword! There have been horrific incidents of police torturing the transgender people or managers harassing and abusing trans individuals at workplace.

The company's HR department can hire Trans individuals by dropping the pronouns 'He/she' from the job posts and using the gendered pronouns. The HR department should be trained to interact with Trans people. Also, the dress code also should not be gender specific but gender neutral, as what the person feels can wear.

INDIAN EDUCATION SYSTEM AND TRANSGENDERS

How the condition of transgenders in India is ignored can be established from the CBSE board results 2020 that pass percentage of transgender persons of class 10 decreased by 15.79% and those of class 12 decreased by 16.66%. The 2011 census recorded 54,854 transgenders below the age of six⁶. Therefore, those children are today in the age group of 10-16 out of whom many should have given the class 10th and 12 board exams. But the reality is that only 19 transgender students appeared in class 12 board exams and only six transgender students for class 10. The biggest reason behind this is bullying which our educational institutes always miss out and don't address. Even the teachers and authorities sometimes don't address the issue and

⁶ <https://www.wionews.com/south-asia/why-indian-schools-have-so-few-transgender-students-18451>

themselves bully such students. The government policies and Supreme Court Judgements speak a lot about establishing washrooms for transgenders and giving them reservation but every promise is in the world of looney toons. Though the NEP talks about changing curriculum and is shown as a gender inclusive policy document, it falls short of training the teachers about transgenders. No attempt has been seen around adding any chapter related to LGBTQ⁷

Teachers must be sensitized regarding the issues related to transgender, their life and culture, psycho-social and emotional condition and cognitive aspects, cooperation among all the children and relationship of transgender and other students etc. Teachers could be sensitized regarding content delivery which may be specially related to transgender children.

In order to make the transgender students self-dependent, the private and public educational institutes can provide vocational training that can make them job ready too. The Anti-discrimination cell should address the issues of discrimination and harassment with transgender students strictly.

Recommendations

After the Supreme Court verdict on Section 377, the next step in the journey of providing equal rights to transgenders will be same sex marriage. But the Central government has recently told the Delhi High Court that marriage in India depends upon “age-old customs, rituals, practices and societal values”. Then government said that allowing same-sex marriage will be against the sanctity of this nation. It is now time that social activists start demanding the government to formulate a new legislature allowing LGBT couples to marry, adopt, and inherit their spouse’s property. If the government denies such basic rights, it can be termed as unconstitutional on the basis of sexual orientation, thus violating the right to equality (Article 14) and liberty (Article 19).

Light must be thrown on a fact that though many Hindu religious leaders term same sex marriage to be against their religion, it is in fact Hinduism only that allows same sex marriage.

⁷<https://www.edexlive.com/news/2019/may/31/modi-20-plans-to-provide-safe-reliable-schools-and-quality-education-for-transgender-kids-6382.html>

The examples can be Lord Ayappa born out of Lord Shiva and Lord Vishnu OR 'Shikhandi' in Mahabharata.

We have Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013 that prevents sexual harassment when women is a victim but completely ignores the situation when transgender people are harassed.

The language used in the Maternity Benefit Act of 1961 must be gender neutral so that LGBT+ families can take the advantage of parental benefits. Similarly, there is no recognition given to LGBTQIA+ families in the Workmen's Compensation Act, 1923, Payment of Gratuity Act, 1972 and Factories Act of 1968.

There is no provision for same-sex couples to adopt a child. Section 5(3) of the Adoption regulation Act, 2017 allows only a couple having a stable relationship of 2 years to adopt a child. Since the section uses the words 'husband' and 'wife', it is clear that the act doesn't recognize the rights of transgender people. Therefore, India needs to recognize the same-sex marriages and further take a step regarding this issue too!

Thus, the need of the hour is that government must leave behind its conservative mindset and take concrete steps to bring a legislation allowing same-sex marriages in India. The laws related to marriage, surrogacy, inheritance, adoption, guardianship must also be amended to make them gender neutral. All this will lead to proper inclusiveness.