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RESEARCH ARTICLE

TRANSGENDER : CONSTITUTIONAL AND INTERNATIONAL PERSPECTIVES.

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Abstract

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Introduction:-

The term transgender is an umbrella term and it houses various communities under it like the hijras/eunuchs, kinnar community, transsexuals amongst many other communities. Their gender identity does not conform with their biological sex. This term also houses hijras/eunuchs who do not conform with either male or female and refer to themselves as the third gender. They claim that they are like females with no reproduction organ. They do not have reproduction capacities as either men or women they claim to the 'third gender'.

Our society does not recognise the pain and mental agony that the members of the Transgender community undergo. The most critically hit members of this community are those who do not identify themselves by their biological sex. Our society shows an unwelcoming behaviour towards the members of this community. In public places they are looked down upon. They are not recognised in terms of marriage, adoption, divorce etc. They are treated as aliens. The society is closed to welcoming such people. It is the failure of the society that they are not able to open their mind set and welcome the members of the transgender community. It is a mind-set which our generation have to change.

This case highlights the grievances of the transgender community. This community seeks to find a legal declaration of their identity other than the one that has been assigned to them by birth. The community seeks the help of articles 14 and 21 in doing so. Their basic argument is that due to their identity not getting recognised, it violated their "right to equality under article 14 of the Constitution of India"¹ and also article 21 the right to liberty under the constitution of India. The community seeks to enjoy 'full moral citizenship'.

The court is of the view that they prefer to follow the psyche of the person and use the 'psychological' test instead of the 'biological' test to determine the gender of the individual.

After this judgement the court has directed the central and state governments to implement its findings within the span of 6 months.

There are some declarations made regarding the Transgender community.

¹Article 14, Constitution of India.

- Public health and sanitation: the central and state governments have been directed to make hospitals, toilets and other public places friendly to the transgender community. The hospitals are directed to make their treatment friendly to the transgender community.
- Socio economic upliftment: the court has directed the central and state governments to include this community in their various social welfare schemes and to treat this community under the socially and economically backward class. The court has also directed to give this community all the necessary reservations that are given to backward classes.
- Public awareness: the central and state governments have been ordered to create social awareness programs so that the transgender community feels like home. The programs will help them to feel like a normal individual and be a part of a general daily life. they should be treated as equal citizens and their complaints should be taken seriously and the actions accordingly.

“*NALSA* draws forth from the ethos and philosophy of the Indian Constitution, by emphasizing that a “truly liberal and democratic society would only progress when each individual has realized their full potential” and that the “rule of law demands protection of individual human rights.” The Court’s observation that “the true measure of development of a nation is not economic growth; it is human dignity”, makes *NALSA* seem like an extension of the Delhi High Court’s much cherished decision in *Naz Foundation* that was built on constitutional values of plurality and inclusiveness. *NALSA*’s clear and strong articulation of autonomy and self-determination is particularly remarkable and has the potential of advancing rights of other marginalised groups like sex workers”.²

This is a historic judgement and it seeks to strengthen and advance fundamental rights of an individual. It is a blend of philosophical, legal and practical in the area of the recognition of gender identity.

Definitions:-

We can perceive a wide range of transgender related identities, cultures or experiences which are generally as defined:

- Hijras: “Hijras are biological males who reject their ‘masculine’ identity in due course of time to identify either as women, or “not-men”, or “in-between man and woman”, or “neither man nor woman”. Hijras can be considered as the western equivalent of transgender/transsexual (male-to-female) persons but Hijras have a long tradition/culture and have strong social ties formalized through a ritual called “reet” (becoming a member of Hijra community). There are regional variations in the use of terms referred to Hijras. For example, Kinnars (Delhi) and Aravanis (Tamil Nadu). Hijras may earn through their traditional work: ‘Badhai’ (clapping their hands and asking for alms), blessing newborn babies, or dancing in ceremonies. Some proportion of Hijras engages in sex work for lack of other job opportunities, while some may be self-employed or work for non-governmental organisations.”³
- Eunuch: “Eunuch refers to an emasculated male and intersexed to a person whose genitals are ambiguously male-like at birth, but this is discovered the child previously assigned to the male sex, would be recategorized as intersexed – as a Hijra”.⁴
- “Aravanis and ‘Thirunangi’ – “Hijras in Tamil Nadu identify as “Aravani”. Tamil Nadu Aravanigal Welfare Board, a state government’s initiative under the Department of Social Welfare defines Aravanis as biological males who self-identify themselves as a woman trapped in a male’s body. Some Aravani activists want the public and media to use the term ‘Thirunangi’ to refer to Aravanis”⁵
- Kothi – “Kothis are a heterogeneous group. ‘Kothis’ can be described as biological males who show varying degrees of ‘femininity’ – which may be situational. Some proportion of Kothis has bisexual behavior and gets married to a woman. Kothis are generally of lower socioeconomic status and some engage in sex work for survival. Some proportion of Hijra-identified people may also identify themselves as ‘Kothis’. But not all Kothi identified people identify themselves as transgender or Hijras.”⁶

²<http://www.lawyerscollective.org/updates/supreme-court-recognises-the-right-to-determine-and-express-ones-gender-grants-legal-status-to-third-gender.html>

³ UNDP India Report (December, 2010).

⁴National Legal Services Authority V. Union of India, AIR 2014 SC 1863.

⁵National Legal Services Authority V. Union of India, AIR 2014 SC 1863.

⁶National Legal Services Authority V. Union of India, AIR 2014 SC 1863.

- Jogtas/Jogappas: “Jogtas or Jogappas are those persons who are dedicated to and serve as a servant of goddess Renukha Devi (Yellamma) whose temples are present in Maharashtra and Karnataka. ‘Jogta’ refers to male servant of that Goddess and ‘Jogti’ refers to female servant (who is also sometimes referred to as ‘Devadasi’). One can become a ‘Jogta’ (or Jogti) if it is part of their family tradition or if one finds a ‘Guru’ (or ‘Pujari’) who accepts him/her as a ‘Chela’ or ‘Shishya’ (disciple). Sometimes, the term ‘JogtiHijras’ is used to denote those male-to-female transgender persons who are devotees/servants of Goddess Renukha Devi and who are also in the Hijra communities. This term is used to differentiate them from ‘Jogtas’ who are heterosexuals and who may or may not dress in woman’s attire when they worship the Goddess. Also, that term differentiates them from ‘Jogtis’ who are biological females dedicated to the Goddess. However, ‘JogtiHijras’ may refer to themselves as ‘Jogti’ (female pronoun) or Hijras, and even sometimes as ‘Jogtas’”.⁷
- Shiv-Shakthis: “Shiv-Shakthis are considered as males who are possessed by or particularly close to a goddess and who have feminine gender expression. Usually, Shiv- Shakthis are inducted into the Shiv-Shakti community by senior gurus, who teach them the norms, customs, and rituals to be observed by them. In a ceremony, Shiv- Shakthis are married to a sword that represents male power or Shiva (deity). Shiv-Shakthis thus become the bride of the sword. Occasionally, Shiv-Shakthis crossdress and use accessories and ornaments that are generally/socially meant for women. Most people in this community belong to lower socio-economic status and earn for their living as astrologers, soothsayers, and spiritual healers; some also seek alms.”⁸

Article 14 and the Transgender Community:-

Article 14 of the Constitution of India guarantees that the state cannot deny “any individual” equality before law and equal protection of law in the territory of India. Equality of status as well as equality of opportunity is a fundamental right in Articles 14 and 16 of the Constitution respectively. It also means equality before law and equal protection of the law. Equality is spoken in the Preamble. Right to equality includes all the enjoyment and the protection conferred under Article 14. In the celebrated case of Indira Nehru Gandhi vs. Raj Narain⁹, it was observed that the Right to Equality is the basic structure of the Constitution and treating equals as unequal will violate this basic structure.

In the case of State of West Bengal vs. Anwar Ali Sarkar¹⁰, the Supreme Court observed that “*equal protection of law is a positive concept and it is the obligation of the state to ensure that the same is being fulfilled to bring the social and economic changes. Everyone including the Transgender community should enjoy the equal protection of laws. The word ‘person’ under does not restrict itself to the males and females. The word ‘person’ includes the Transgender community in all activities of the state which includes employment, healthcare, education, civil and citizenship rights which are enjoyed by other ‘persons’ of the country.*”¹¹

The community is not treated equally in the daily spheres of life. The community faces extreme discrimination due to the non-recognition of the third gender. They are subject to harassment, violence, sexual assault including molestation, stripping etc. They are also discriminated in the field of employment, education, health care etc. Since there are very less toilets for the Transgender/ Hijras they are often the subject of sexual assault and harassment in the male toilets that they have to use. They also face discrimination on the ground of gender identity and this violates their equality before law and equal protection of law under Article 14 of the Constitution.

Articles 15 and 16:-

Article 15 of the Constitution of India reads as Follows:-

“15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

- (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them
- (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to
 - (a) Access to shops, public restaurants, hotels and palaces of public entertainment; or

⁷National Legal Services Authority v. Union of India, AIR 2014 SC 1863.

⁸National Legal Services Authority V. Union of India, AIR 2014 SC 1863.

⁹AIR 1975 SC 2299.

¹⁰AIR 1952 SC 75.

¹¹State of West Bengal v. Anwar Ali Sarkar AIR 1952 SC 75.

(b) The use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public

(3) Nothing in this Article shall prevent the State from making any special provision for women and children

(4) Nothing in this Article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.”¹²

Article 16 of the Constitution of India reads as follows:

“16. Equality of opportunity in matters of public employment

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect or, any employment or office under the State

(3) Nothing in this Article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment

(4) Nothing in this Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State

(5) Nothing in this Article shall affect the operation of any law which provides that the incumbent of an *office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.*”¹³

Articles 15 and 16 seek to prohibit discrimination done on the basis of sex and emphasises that this fact needs to be addressed. The Constitution makers were of the view that this fundamental right should be able to prevent the direct or indirect attitude to treat people differently because they are different than the people living the society. The term “gender” here is one’s self image, character, the deep psychological or emotional sense of sexual identity. The expression ‘sex’ used under Articles 15 and 16 is not only limited to the biological sex of male and females but also includes people who do not identify as males or females. The Transgenders are also free to enjoy economic, social, cultural and political rights without discrimination. However in reality it is different. Despite having so many rights and provisions they are denied this right of employment on the ground of sex.

Article 19(1) (a) and the Transgender Community:-

Article 19(1) (a) guarantees the citizens of India the right to free speech and expressions within certain restrictions imposed by the state under Article 19(2) of the Constitution of India. These rights which are given under Article 19 are not given to a person who is not a citizen of India. The Article 19(1) (a) includes the right of a person to the expression of this self-identified gender. This self-identified gender can be expressed by a person through dressing, words, action or behaviour or any other form. The state cannot confer any restrictions on these rights. This self-identified gender identity lies in the core of one’s individual identity.. The state and its authorities often forget to recognise such an identity. This happens due to the state failing to recognise such an identity or due to ignorance. This leads to their rights under Article 19 getting violated. This will have to be protected under this Article of the Constitution. A Transgender’s personality is expressed by their behaviour and presentation. It is the duty of the state and its authorities to protect and recognise these rights.

Article 21 and the Transgender Community:-

Article 21 of the Constitution of India reads as follows:

“21. *Protection of life and personal liberty – No person shall be deprived of his life or personal liberty except according to the procedure established by law.*”¹⁴

This Article has been time and again called the heart and soul of the Indian Constitution. Right to life is the basic fundamental right and even the state does have the authority to take it away. Article 21 protects the dignity of human life, one’s privacy etc. recognition of one’s gender identity falls under the right to dignity which is protected by this

¹²Constitution of India.

¹³Constitution of India.

¹⁴Constitution of India.

Article. Legal recognition of gender identity is a part of right to dignity and freedom guaranteed by the Constitution of India.¹⁵

Yogyakarta Principles:-

The United Nations has played a pivotal role in the protection and promotion of rights of sexual minorities including transgender persons. Article 6 of the Universal Declaration of Human Rights, 1948 and Article 16 of the International Covenant on Civil and Political rights, 1966 (ICCPR) advocates that every human being has the right to live and this right to live shall be protected by law and no one can deny anybody these rights. Every person has the right of protection of law against unlawful attacks on his honour. International Commission of Jurists and the International Service for Human Rights on behalf of a coalition of human rights organizations took upon a project to develop a set of international legal principles on the application of international law to human rights violations based on sexual orientation and sexual identity. This committee comprised of distinguished human rights experts. They drafted, developed, discussed and reformed the principles in Yogyakarta, Indonesia in 2006. Yogyakarta principles highlight a broad range of human rights standards and their application to the issues of sexual orientation gender identity.

United Nations Report and Recommendations:-

A detailed study was conducted by the United Nations Development Programme (UNDP – India) and it had submitted its report in December, 2010 on Hijras/Transgenders in India: “HIV Human Rights and Social Exclusion”. The Report highlights that the HIV Human Immunodeficiency Virus and Sexually Transmitted Infections (STI) is now increasingly seen in Hijras/Transgenders population. *“It is also reported that in the recent studies the Hijras/Transgender women have indicated a very high HIV prevalence (17.5% to 41%) among them. Study conducted by National Aids Control Organisation (NACO) also highlights the sad situation”*.¹⁶ Report submitted by National Accreditation Council of India (NACI) indicates that transgenders are extremely vulnerable to HIV. Both the reports highlight the extreme necessity of taking essential steps to improve their mental health, sexual health and the issue of social exclusion.

The UNDP in its report has made the following recommendations, which are as under:

- Address the gap: establish HIV sentinel sero surveillance sites for Hijras/TG at crucial locations, conduct operations research to design and fine-tune culturally-relevant package of HIV prevention and care interventions for Hijras/TG, provide financial support for the formation of community based organisations (CBOs) run by Hijras/TG and build the capacity of CBOs to implement standard programmes.
- Move beyond focusing on individual-level HIV prevention activities to address the structural determinants of risks and analyse the impact of risks. For example mental health counselling, crisis intervention (crisis in relation to suicidal tendencies, police arrests and harassment, sexual and physical violence), addressing drugs and alcohol abuse and connecting to livelihood programs all need to be part of the HIV interventions.
- Train hospital staff to be competent and sensitive in providing health care services (including STI and HIV-related services) to Hijras/TG as well as develop and monitor implementation of guidelines related to gender transition and sex reassignment surgery (SRS).
- *“Clarify the legal status of sex reassignment surgery and provide gender transition and SRS services (with proper pre-and post-operation/transition counselling) for free in public hospitals in various parts of India.”*¹⁷
- Implement stigma and discrimination reduction programs at various locations through a variety of ways like mass media awareness for the general public to focus training and sensitization for police and health care providers.
- *“Take action towards making a legal recognition of gender identity of Hijras/TG need to be taken in consultation with Hijras/TG and other key stakeholders. Getting legal rights and avoiding ambiguities in the current process to that issue identity documents to Hijras/TGs are required as they are connected to basic civil rights such as access to health and public services, right to contest elections, right to vote, right to education, inheritance rights, and marriage and child adoption (basic human rights).”*¹⁸

¹⁶ Social problems and social legislations by sureshmorgan.

¹⁷ National legal services authority v. Union of India, AIR 2014 SC 1863.

¹⁸ National legal services authority v. Union of India, AIR 2014 SC 1863.

- Open up the existing Social Welfare Schemes for downtrodden Hijras/TG and create special welfare schemes to fulfill the basic needs of Hijras/TG including housing, medical and employment needs.
- Ensure greater involvement of vulnerable communities including Hijras/TG women in program development and policy formulation.

Noted International Legislations:-

- Multiple countries have enacted the laws for recognising the rights of the Transgender persons.
- United Kingdom: the UK passed the General Recommendation Act in 2004. The Act not only states legal recognition to the obtained gender of a person but it also lays down guidelines highlighting the consequences of the newly acquired gender status. It grants legal rights and entitlements in various aspects such as marriage, parentage, succession, social security and pensions etc. One of the chief features of this Act is that it is not necessary that a person needs to have undergone or in the process of undergoing a SRS to apply under this Act. Reference in this connection may be made to the Equality Act of 2010 (UK) which has consolidated, repealed and replaced around nine different anti-discrimination legislations including the Sex Discrimination Act of 1986. This Act describes specific characteristics to be “protected characteristics” and no one shall be treated or discriminated less favourably on grounds that they possess one or more of the “protected characteristics”. This Act also lays down duties on Public Bodies to end all kinds of discrimination and victimization. Gender reassignment has been declared as one of the protected characteristics under this Act, of course, only the transsexuals i.e. those who are proposing to undergo, is undergoing or has undergone the process of the gender reassignment are protected under this Act.
- In Australia: There are two Acts dealing with the gender identity, (1) Sex Discrimination Act of 1984 and (ii) Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act, 2013 (Act 2013). The new Act 2013 amends the Sex Discrimination Act of 1984. Act 2013 defines gender identity as “*the appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not) with or without regard to the person’s designated sex at birth*”.¹⁹
- The European Union Legislations on transsexuals. Recital 3 of the Preamble to the Directive 2006/54/EC of European Parliament and the Council of 5 July 2006 makes specific reference to discrimination based on gender reassignment for the first time in European Union Law. The European Parliament adopted a resolution on discrimination against transsexuals on 12th September, 1989 and called upon its Member States to take steps for the protection of transsexual persons and to legislate further on the subject. Following this Hungary enacted the Equal Treatment and the Promotion of Equal Opportunities Act of 2003. The Act includes sexual identity as one of the grounds for discrimination. In 2010 paper on ‘Transgender Persons’ Rights in the European Union Member States made by the Policy Department of the European Parliament presented the specific situation of the transgender people in 27 Member States of the European Union.
- In the United States of America some of the laws enacted by different States are inconsistent with the laws of other state. “*The Federal Law which provides protection to transgenders is The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009. The Act expands the scope of the 1969 United States Federal Hate-crime Law by including offences motivated by actual or perceived gender identity.*”²⁰ 15 States and District of Columbia in the United States possess legislations which prohibit discrimination on grounds of gender identity and expression. Few States have issued executive orders prohibiting discrimination.
- The Parliament of South Africa in the year of 2003, enacted Alteration of Sex Description and Sex Status Act of 2003. This Act permits transgender persons who have undergone gender reassignment or people whose sexual characteristics have evolved naturally or an intersexed person to apply to the Director General of the National Department of Home Affairs for alteration of his/her sex description in the birth register; however the legislation does not contemplate a more inclusive definition of transgenders.
- The Senate of Argentina in the year 2012 passed a law on Gender Identity that recognized the right by all persons to the recognition of their gender identity. It also recognised free development of the person according to their gender identity and that person can also request that their recorded sex be amended along with the changes in first name and image, whenever they disagree with the self-perceived gender identity. Not necessary that they seemed to prove that a surgical procedure for total or for partial genital reassignment, hormonal therapies or any other psychological or medical treatment had taken place. “*The Article 12 deals with respecting*

¹⁹<http://iiir.co.in/ijir/vol1issue2/IJIR-01-02-11.pdf>

²⁰<https://www.coursehero.com/file/p7t2brm/b-a-characteristic-that-appertains-generally-to-persons-of-intersex-status-or-c/>

*the gender identity adopted by the individual, dignified treatment, even though the first name it is different from the one recorded in their national identity documents. Further laws also provide that whenever requested by the individual, the adopted first name must be used for summoning, recording, filing, calling and any other procedure or service in public and private spaces.*²¹

- In Germany, a new law came into force on 5th November, 2013. The new law allows the parents to register the sex of the children as ‘not specified’ in the matter of children with intersex variation. According to Article 22, Section 3 of this Act, “If a child can be assigned to neither the female nor male sex then the child has to be named without a specification” The law has also added a category of X, apart from “M” and “F” under the classification of gender in the passports of the German Civil Statutes Act.

²¹<http://www.lawintellectindia.com/recent-sc-judgement-national-legal-services-authority-vs-union-india-15-04-2014/>