
TRANSGENDER RIGHTS IN INDIA: NEGLIGENCE BY THE PEOPLE AND THE GOVERNMENT

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ABSTRACT

Transgender people are the ones who do not identify themselves according to the gender assigned too them at their birth. They have been facing discrimination for many decades in India. This article focuses on various issues faced by the transgender community in India, ranging from sexual and physical violence to marriage rights. It also tries to trace back the history of the transgender community in India and look into the origin of the discrimination faced by the transgender community. It also talks about the non-supportive legal system of India, against the transgender community, looks into the Transgender Protection Act 2019, and talks about its pros and cons and tries to suggest various ways to ensure proper rights for a transgender individual.

Introduction and History of the Transgender Community:

People who do not identify themselves according to the gender assigned to them at their birth are known as transgender. They are gender diverse and do not classify themselves within the gender binary norms of men and women. Their gender expression differs from what they are expected to follow according to society¹.

The history of the transgender community can be traced back to Ancient India. The Rigveda, which is considered to be one of the sacred texts in the Hindu religion, has a line “Vikriti Evam Prakriti” which means “whatever seems unnatural is also natural”². The Hindu Mythology also mentions “Mohini” who was a female embodiment of the male god Krishna, who converted himself to marry a hero named “Iraavan”. Arjuna, one of the greatest warriors according to “Mahabharata”, is also considered to have a transgender form during the time of his exile³. Similarly, the presence of a transgender person can be noticed in various texts, not only in Hindu scriptures but also in Mughal scriptures. So, ancient India seemed to be more adaptive and accepting of transgender society.

It is only in contemporary society, mainly after the arrival of the British, that the idea of the existence of any gender beyond the gender binary norm was considered unnatural. This is because the conservative churches in Europe did not promote transgender people.⁴ As a result, after the British colonization of India the transgender community started facing growing hatred from society and was disregarded by the people as the local individual got somewhat accustomed to the mindset of the British.

Issues Faced by the Transgender Community:

In India, the transgender community has been facing discrimination for decades now. They are disregarded by society, governmental officials, and even by their own family members. They are also victims of mental torture, sexual harassment, and physical violence. There are

¹LEARN MORE ABOUT WHAT IT MEANS TO BE TRANSGENDER OR GENDER DIVERSE MAYO CLINIC, <https://www.mayoclinic.org/healthy-lifestyle/adult-health/in-depth/transgender-facts/art-20266812> (last visited April 27, 2023)

² A BRIEF HISTORY OF LGBTQ+ IN INDIA THE CBS POST, <https://newsletter.sscbs.du.ac.in/a-brief-history-of-lgbtq-in-india/> (last visited Apr 27, 2023)

³ Govindasamy Agoramoorthy & Minna J. Hsu, *Living on the societal edge: India's transgender realities*, 54 JOURNAL OF RELIGION AND HEALTH, 1451–1459 (2014)

⁴ *Transgenderism and the Christian Church: An Overview*, in THE LEGAL STATUS OF TRANSEXUAL AND TRANSGENDER PERSONS, 27–76 (Duncan Dormor).

instances where the family of a transgender child has abandoned them or forced them to convert either by manipulating them mentally or through physical violence. Such instances have increased after the lockdown, which in turn have affected the mental health of the children⁵. These children are also discriminated against by their peers, who often make fun of their appearances and their way of expression, which further puts a dent in their mental health. Apart from this, people also tend to abuse transgender people physically and sexually. Laxmi Narayan Tripathi, who is the first transgender rights activist to represent Asia Pacific in 2008⁶, states in her speech on “Changing Gender Dynamics in Current Structure of India” that she was scared to use the public restroom as she could get grouped or sexually assaulted by the cis men⁷.

According to a report published by the National AIDS Control Organization in 2014-15 around 20% of transgenders faced sexual violence in a time span of 12 months, from a total of 5,588 transgender people. Amongst this, the main perpetrators were the Goondas (55.5%) followed by their clients (22.4%) and then their family members or relatives and others. Similarly, 20% of the total transgender population surveyed, even faced physical violence either by strangers (32.2%), by family members (22.6%), or by Law Enforcement Personnel (21.2%) and others.

Kiran, a transgender woman who was kept in the prison, “accuses several convicted and undertrial prisoners, and jail staff – all cisgender men – of molesting and raping her, and the other transwomen arrested along with her.”⁸ Similarly One of the members of Telangana Transgender Welfare Board was recently attacked by 7 people while she was on her way to attend an event organized by Queer Trans Centre of Yugantar.⁹

Non-supportive System:

Though the legal system in India seems to evolve in favor of the transgender community, as could be seen after the case of National Legal Service Authority v. UOI,¹⁰ which recognized

⁵ AS INDIA'S LGBTQ+ COMMUNITY STAYS LOCKED IN, SOME YEARN TO COME OUT ROMITA SOUTH CHINA MORNING POST, <https://www.scmp.com/week-asia/people/article/3090851/indias-lgbtq-community-face-domestic-violence-and-pressure-convert> (last visited Apr 29, 2023)

⁶ LAXMI NARAYAN TRIPATHI: THE ACTIVIST WHO FOUGHT AGAINST ALL ODDS FOR SOCIAL CHANGE NEWS18, <https://www.news18.com/news/mission-paani/laxmi-narayan-tripathi-the-activist-who-fought-against-all-odds-for-social-change-4446722.html> (last visited Apr 29, 2023)

⁷ CHANGING GENDER DYNAMICS IN CURRENT STRUCTURE OF INDIA | LAXMI NARAYAN TRIPATHI | TEDXSUIHINJEWADI YOUTUBE, <https://www.youtube.com/watch?v=BE47-5Mi6d8> (last visited Apr 29, 2023)

⁸ MISGENDERING, SEXUAL VIOLENCE, HARASSMENT: WHAT IT IS TO BE A TRANSGENDER PERSON IN AN INDIAN PRISON THE WIRE, <https://thewire.in/lgbtqia/transgender-prisoners-india> (last visited Apr 30, 2023)

⁹ Donita Jose, *Telangana Transgender Welfare Board member attacked in Hyderabad*, TIMES OF INDIA, Apr. 29, 2023

¹⁰ *National Legal Service Authority v. UOI*, AIR 2014 SC

transgender as a third gender and affirmed their fundamental rights. However, there are still various loopholes present in the Indian legal system, which provides space for the exploitation of the transgender community, one of them being the absence of marriage rights. In India, a marriage between a transgender person and a cis person or between two transgenders are not considered legally valid. Even though the right to marry falls under the ambit of the right to life which is a fundamental right under Article 21 of the Indian Constitution. The Court also explicitly mentioned Article 21 in the judgment stating that “Recognition of one’s gender identity lies at the heart of the fundamental right to dignity” and “Right to dignity has been recognized to be an essential part of the right to life”¹¹ and yet marriage of transgender person is not legalized. Even after so many years since the final verdict of the judgment was announced no stringent steps are taken by the government to legalize the marriage. However, the government seems to take an opposite stance in a recent case regarding the legal recognition of same-sex marriage, where it opposed the plea seeking legal validation of same-sex marriage stating that “it would cause complete havoc with the delicate balance of personal laws and in accepted societal values.”¹²

This then creates many further issues such as the non-availability of succession, maintenance, and pension rights that are generally available to a married couple. Non- recognition of transgender marriage also makes it hard for one person to sue the other partner in case of bigamy as their marriage was never legally recognized, which can be seen in many instances¹³.

Apart from this one of the other crucial issues that they have to face is regarding sexual violence and rape. As seen from the report of the National AIDS Control Organization mentioned above, we can see that almost 20% of transgender people are victims of sexual violence. Daina Dias, who is the founder of Wajood, a trans welfare group tells that she was raped, while she was young, by one of her clients, and that she did not report this case as there were no strict laws that covered the instances of rape of a transgender¹⁴. The rape laws in India mainly consider women as victims and men as perpetrators and thus exclude transgender from the scope of rape laws. Although there are provisions under Transgender Protection Act, 2019 that punishes an

¹¹ *National Legal Service Authority v. UOI*, AIR 2014 SC

¹² *Legal recognition of same-sex marriage: SC refers pleas to 5 Judge constitution bench, hearing to begin from April 18* TIMES OF INDIA, Mar. 13, 2023

¹³ TRANS WOMEN HAVE ALWAYS MARRIED IN INDIA - IT'S THE LAW THAT NEEDS TO CATCH UP THE NEWS MINUTE, <https://www.thenewsminute.com/article/trans-women-have-always-married-india-it-s-law-needs-catch-174418> (last visited May 5, 2023)

¹⁴ *India's rape laws don't cover transgender people. They say it's putting them at risk* CNN (last visited Apr 1, 2023), <https://edition.cnn.com/2020/12/08/india/india-transgender-rape-laws-intl-hnk-dst/index.html>

individual for physical and sexual violence against a transgender, the punishment is only limited to a maximum of 2 years. This when compared to the punishment provided, to a man who raped a woman, under IPC sections 375 and 376, which may range from 10 years to life imprisonment is not enough¹⁵.

Transgender Protection Act 2019 and its Pros and Cons:

Despite the shortcomings in the legal system, there appears to be progress toward transgender rights by the Government. This forward leap can be noticed in the recent Transgender Protection Act, which was formed in the light of the National Legal Service Authority vs. UOI judgment¹⁶. The main aim of this act was to prohibit discrimination against transgender people, recognize their identity, the obligation of government to introduce welfare measures, provide inclusive education and proper health facilities to transgender persons, and penalize people who commit an offense under this act¹⁷. The introduction of this act was a major milestone for the transgender community, who have been fighting for their rights and legal recognition for decades. However, this act still contains many flaws and loopholes.

One of the loopholes is the inconsistency within the Act itself. Section 4 of the Transgender Protection Act 2019 states that “a transgender person shall have a right to be recognized as such” and any person recognized as transgender shall have the right to “self-perceived gender identity.” However, the subsequent sections say that in order to issue a certificate of identity they must “make an application to the District Magistrate”¹⁸ and in case of sex-reassignment surgery they may “make an application, along with a certificate issued to that effect by the Medical Superintendent or Chief Medical Officer of the medical institution in which that person has undergone surgery, to the District Magistrate for a revised certificate.” This defeats the main purpose of expressing one’s identity, as the decision of being considered transgender lies in the hands of another person. Since the identity certificate is necessary for changing the

¹⁵ *India’s rape laws don’t cover transgender people. They say it’s putting them at risk* CNN (last visited Apr 1, 2023), <https://edition.cnn.com/2020/12/08/india/india-transgender-rape-laws-intl-hnk-dst/index.html>

¹⁶ TOWARDS A GENDER-INCLUSIVE FUTURE: JUDICIAL DEVELOPMENTS RECOGNISING RIGHTS OF THE TRANSGENDER COMMUNITY IN INDIA BAR AND BENCH, <https://www.barandbench.com/columns/towards-a-gender-inclusive-future-judicial-developments-recognising-the-rights-of-the-transgender-community-in-india-and-the-road-ahead> (last visited Apr 2, 2023).

¹⁷ Transgender Protection Act, 2019.

¹⁸ Transgender Protection Act, 2019, Section 5, No. 40, Act of Parliament, 2019 (India).

gender in any official document so in the absence of it the transgender person would not be categorized as a transgender legally, hence defeating the purpose of Section 4¹⁹.

Another shortcoming of the act is that the act does not talk about the legal recognition of the marriage of a transgender person which was discussed above. Uma, a transgender activist in their speech states that “The NALSA (National Legal Services Authority) judgment of 2014 clearly says we have a right to identify either as a man or a woman. So, legally, I’m a woman, but at the same time, as a transwoman, I don’t have legal marriage rights. This violates my constitutional right to equality.”²⁰

Apart from this, the punishment for rape of a transgender individual range from 6 months to 2 years along with a fine which is significantly less than the punishment provided under Section 375 and 376.

Apart from this, the Act does not talk about the validity or procedure for the adoption of a child or any type of Assisted Reproductive Technology (ART) for transgender couples to conceive a child. Since adoption in India is mainly governed by Hindu Adoption and Maintenance Act, 1956, which only talks about the capacity of a male individual²¹ and the capacity of a female individual to adopt a child²² and nowhere in this act it talks about a transgender adopting a child. Hence depriving them of the right to adopt a child, which is one of the essential parts of life for a transgender couple.

Similarly, there are various other topics on which the Act provides us with no clarity such as reservation in various fields to empower transgender individuals, the succession of the property after the death of one of the partners after they got married, ensuring inclusivity in the educational institution and workspace through various rules and many more.

Conclusion and Way Forward:

It can be concluded that even though the government seems to be taking steps to promote transgender rights, these steps seem to be inadequate in nature. As even after various judgments

¹⁹ Transgender Protection Act, 2019, Section 4, No. 40, Act of Parliament, 2019 (India).

²⁰ THE RIGHT OF TRANSGENDER PEOPLE TO GET MARRIED OUTLOOK INDIA, <https://www.outlookindia.com/national/-i-have-a-right-to-get-married--magazine-281964> (last visited May 5, 2023)

²¹ Hindu Adoption and Maintenance Act, 1956, Section 8, No. 78, Act of Parliament, 1956 (India).

²² Hindu Adoption and Maintenance Act, 1956, Section 9, No. 78, Act of Parliament, 1956 (India).

and acts passed by the government people continue to discriminate against the transgender community and treat them inappropriately. Apart from this, the validity of transgender marriage, succession, and maintenance in the case of transgender marriage and adoption remains in question. There are no major steps taken by the government to ensure the actual functioning of the rules established under the Transgender Protection Act as transgender people continue to face sexual and physical violence.

In order to provide the transgender community with proper rights and inclusivity in society the government must take the following steps. Initially, children must be taught about various sexual orientations present in the world, except the traditional binary norms, at a primary level in schools. Secondly, the government must look into the loopholes and shortcomings of the Transgender Protection Act and must come up with a way to eliminate them and lastly, the government must ensure that the rules and regulations are being followed by introducing stringent punishment for the ones violating the rules.

Apart from this, the common public must also understand that a transgender individual is also a person just like anyone else and has their rights and dignity just like anyone else, and just because they express themselves differently from the binary gender norms doesn't make them different from anyone else.