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TRANSGENDER'S RIGHTS IN INDIA: A STUDY FROM HUMAN RIGHTS PERSPECTIVE

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ABSTRACT

Transgender individuals, who have existed in various cultures and societies since the mid-1990s, are not considered normal human beings with all citizenship rights. They feel a psychological difference in their assigned gender, which can lead to hormonal or surgical changes. The term 'transgender' was first used in 1974 and is now used in place of third gender. It includes individuals who undergo Sex Re-assignment Surgery (SRS) to align their sex with their gender identity. India has long recognized the existence of transgender individuals, but has not granted them the same rights as straight individuals. The country has condemned sexual relations between people for the same sex, which was referred to as "unnatural offense" by the British. This law became part of the Indian Penal Code in 1861 during the British rule. Human rights are inherent to all humans without bias or discrimination, regardless of caste, creed, sex, race, nationality, or origin. The Universal Declaration of Human Rights (1948) includes rights to privacy, health, life, equality before the law, and freedom from torture, discrimination, and violence. However, the LGBT community faces ongoing threats, particularly transgender individuals, which often face social exclusion and lack of social welfare. The Indian legal system has faced challenges in enforcing these rights, with cases like Noshirwan v. Emperor and D P Minwalla v. Emperor involving the exclusion of transgender individuals from participation, social welfare, and involvement in evils like street begging. The Supreme Court has consistently proclaimed that the right to privacy is a fundamental right, but the idea of privacy has not been clarified or characterized in Indian statutes.

INTRODUCTION

Transgenders have been in existence in every society in different cultures, transgender persons came into knowledge in mid 1990's and pave a great history in South-Asian countries but still are not identified as normal human beings having all citizenship rights. Every individual is attached with a particular gender at the time of their birth where transgender persons are those

individuals who feel a sense of difference in opinion to the gender assigned to them at birth, i.e. they feel a psychological difference in the gender so assigned. The term 'transgender' includes Hijras, Enochus, Kothis, Aravanis, Jogappas, Shiv-shakti, etc. This non conformity to the sex so assigned may lead to alteration in their bodies hormonally or surgically, depending upon their choice. The first known use of this term was in 1974 after which it popularized in 1988. It is now used in place of third gender as well. It includes individuals who underwent or intend to undergo Sex Re-assignment Surgery (SRS) to align their sex to be same as the gender they identify with. It further takes in its ambit the people who cross dress, often known as transvestites. The Drag-Queens, who are quite popular in western countries, are also cross-dressers but they are not the same as transgender or transvestites, instead they are males who dress up in exaggerated manner just to entertain other and not necessarily associate to it. Also, there are people who dress or act in a gender-nonconforming way that is not typical of their assigned sex in their particular culture, yet they are not to be categorized as transgender.¹ These persons are often known as cis gender, the prefix 'cis' means on the same side. A cis gender person identifies with the sex assigned at birth and their gender identity is not in conflict to it but still they may express themselves at times in ways that are not typical for their gender. It is important to understand here that not all cis gender people conform to gender norms, and not all transgender persons defy those norms.

LAWS REGARDING THE PROTECTION OF TRANSGENDER PERSONS IN INDIA

In spite of such vocal history of LGBTQ, India has lawfully perceived their status as of late. The issue of their existential emergency has been gazing us in the eye for a considerable length of time while we have advantageously would not give them the rights that are theirs simply like some other straight person. We have stomped on over their human rights for quite a long time, and to aggravate it, India had condemned the sexual relations between the people for same sex. Besides, the Section that pronounced it so cites it as "Unnatural offense" while the history sings an alternate melody. This law turned into a piece of the Indian Penal Code in the year 1861 during the British standard. The Britishers condemned all the sexual exercises that didn't adjust to the regular standards. The Indian laws have a significant impact of the British Ideologies and Judeo-Christian convictions because of the British Raj.

CONSTITUTIONAL RIGHTS

Every cloud has a silver lining and the equivalent was demonstrated by the Supreme Court of India whereby in its judgment in Navtej Singh Johar v. Union of India it proceeded to decriminalize Section 377. The law was pronounced unlawful as it was seen that it disregarded

¹Austen Hartke, "TRANSFORMING: THE BIBLE AND THE LIVES OF TRANSGENDER CHRISTIANS", page: 22-23 ISBN 9781611648522 (ebk.) | ISBN 9780664263102 (pbk. : alk. paper)

the basic fundamental rights of the people having a place with this network or the people of this community. The Constitution of India offers its residents with Fundamental Rights in PART III and was propelled by the Bill of Rights of the US Constitution, as additionally by the Universal Declaration of Human Rights as pronounced by the United Nations General Assembly on December 10, 1948.

The Indian Constitution has the Preamble going before it that is known to be alluded to by the lawmaking body or the legal executive when there is any contention with regards to the translation of any of the articles and their application in setting of the laws so upheld. It is said to be the way in to the brains of the designers of the constitution. A similar key reveres the thought of justice- socio, economic and political, liberty- of thought, expression, faith, belief and worship, and equality- of status and opportunity. . These were the dreams set somewhere near the constitution framers remembering the fate of the country as imagined by our political dissidents where every person right now have due equity conveyed in all circles and will not be compelled to bow down to the pointless impulses and wishes of somebody better which will permit them to live, stand and talk as equivalents. In any case, the vision was not completely acknowledged on the grounds that not we all reserve the privilege to communicate as far as our sexual orientation and no equity is given to abuse of an individual with a different sex in comparison to the broadly acknowledge done.

A Constitutional right is the right or freedom which is enshrined to all the individuals living in the country through a framework which is known as the supreme law of India i.e. the Constitution of India. Some of the constitutional rights which provide empowerment to the transgender persons are as follows:

The Right to self- identification of gender is a part of right to dignity and autonomy under Article 21, the Article also, provides for right to privacy as a natural right which is a mandate for the process of self-determination and Right to Privacy allows one's thoughts and beliefs to flow and protect the choices and decisions irrespective of the faiths or the gender of the person.

Article 15 provides for the prohibition of discrimination against any person on the grounds of sex, where in the famous NALSA judgement of 2014, the Supreme Court of India interpreted "sex" to incorporate one's gender identity. Article 19(1)(a) provides for the freedom of speech and expression which restricts the freedom of expression on identity from the transgender persons which leads to self-censorship of the identity of the transgender persons which the Constitution of India strictly denies.

Article 14 holds that the State shall not deny any person equality before law in the territory of India which makes it impermissible for the transgender persons to be socially excluded or

withheld from participating in social and cultural events. Thus, any discrimination on the grounds of sex with regard to the transgender persons would be hostile to the provisions therein stated by the Constitution of India.

LAW COMMISSION REPORTS

42nd report of the Law Commission of India²

The 5th LCI under the Chairmanship of Sh. K.V.K. Sundaram revisited the rape laws for review. The report looked into the various provisions of the IPC in respect of their relevance in the present. The major questions to be ascertained by the commission in its report were regarding the punishment to be imposed and of excluding from its application the acts done in private between two consenting adults. The questions were made open to certain people for their opinion on the same. The results saw a divided support with regards to both the questions. Some were of the view that for consenting adults it should not be criminalized as they are of a rational mind and are in position to make major decisions in their lives without the interference of the law, while others abhorred the act in all situations and suggested to retain the section without any changes being made to it. Despite the unacceptable attitude from the ends of those who had given their opinion, there was a general voice that stood opposed to the infliction of such harsh punishment for the act.

The committee also took note of the observation made by The Wolfenden Committee in England on the same issue.

The Wolfenden Committee

The committee began its research on the issue and law relating to homosexuality in U.K. in August 1954 and concluded in September 1957. The chairman of the committee was John Wolfenden. The report in its proposal recommended that a line must be drawn between private morality and immorality so that the interference of the law should be barred from the prior. By putting the homosexual act with consent of the adults indulging in the private domain of such individuals, the report stood in support of decriminalizing of homo sexuality.

After putting in a lot of thought, the justification of retaining the provision was also laid down in the report which stated that in a marriage, if one of the spouses is found indulging into homosexual acts which leads to a fall out between the two and the other has to suffer the consequence of the act of such spouse, then as a social responsibility, the state has to punish the latter to protect the rights of the prior. Also, another obstacle that stood in their way was that long standing belief of the society that shall be challenged if it was to be repealed altogether after being

² Law Commission of India, 42nd Report, Indian Penal Code (June, 1971)

in force for a longtime.

84th report of the Law Commission of India

The relevance of mentioning this report which primarily concerns itself with rape and allied offences³ and has no mention of Section 377 is to lift the veil of equality under which our government conveniently dodged the questions regarding the humiliation faced by the LGBTQ community under this section. For years, the debate has been won by the proponents of this section on the grounds that the law stands as much in opposition to the homosexual as to the heterosexuals who commit the act mentioned there under. If that is the case, then the same should concern women as well and should have a mention in this report as it concerns women.

156th report of the Law Commission of India⁴

The subject matter of the study was the India Penal Code and more specifically the “offences against Privacy” as given in the code was to be studied in relation to the “Right to Privacy” as enshrined in the Article 21 of the Constitution of India. The committee favored the criminalizing of homosexuality solely on the ground of the disapproval from the society. While we refer to the term society, it includes these homosexual individuals as a part of it and thereby, the disapproval of a section of the society towards the conduct and behavior of the other without any reasonable explanation is discrimination. In addition to that, we must also consider that the same was criminalized even if the relation was being maintained in privacy, which certainly violates Article 21. However the only positive step that was taken was to reduce the punishment in cases other than involving minors.

172nd Report of the Law Commission of India

Although the report dealt with the change in the definition of the rape with the contemporary times where the boys are as victimized as are the girls. The report considers the impact of sexual assault on a child thereby proposing to make the law more gender-neutral rather than just focusing on the girls. Before we move forth, it is important to discuss the idea of gender neutral laws and their relevance in the Indian legal system:

Gender neutral laws do away with the discrimination on the basis of gender and give equal opportunity to all irrespective of their gender identity or sexual orientation i.e. any heterosexual individual or TG or Gay shall have an even field to compete in without any prioritization being done on the above grounds. This shall bring the much needed equality and the best person shall

³Law Commission of India, 84th Report on Rape and Allied Offences: Some Questions of Substantive law, Procedure and Evidence (April, 1980).

⁴Law Commission of India, 156th Report on Review of Rape Laws, 2000

be getting the job thereby not just giving employment opportunity but also increasing the efficiency and effectiveness of individual corporations.

Universal Declaration of Human Rights, 1948

The United Nations Declaration of Human rights on violation of human rights of the LGBT community

What are Human Rights?

Human rights are the basic rights which are inherent to all humans without any bias and discrimination no matter of whatsoever caste, creed, sex, race, nationality, origin, etc.

These universal human rights are enshrined to each and every individual by law by way of treaties, conventions, declarations or obligations by the government. The Universal Declaration of Human Rights (1948) came into existence as a result and effects of World War II.

The Declaration incorporates right to privacy, right to health, right to life and equality before the law and additionally includes freedom from torture, discrimination and any sort of violence but it is still a continuing threat to the LGBT community involving the transgender persons which often come to knowledge as the blatant violation of their basic human rights in many countries including India.⁵

The Declaration provides for anti-discrimination policies for the clauses relevant to sexual orientation and gender identity. Despite the obligations provided by the Universal Declaration of Human Rights the social exclusion of the transgender persons as a part of the LGBT community still means to oppress them from any participation, they suffer lack of social welfare, most of the families disown them and they tend to live in dysphoria and become a part of evils like street begging.

JUDICIAL APPROACH

. In *Noshirwan v. Emperor*⁶, where two men were seen entering the house belonging to one of them, a neighbor peeped into their private space and found them attempting to commit sodomy and forcefully took them to the police station. Since, the act of sodomy was not complete; they were allowed to leave after a stern warning. Further, in *D P Minwalla v. Emperor*¹²³, two men named Minawalla and Tajmahomed, were convicted under section 377 as they were caught having an all inter course in a lorry. They were both punished,

⁵V. Revathy, “The violation of Human Rights Against the LGBT Community In India- A Critical Study”, Vol 120 No.5, pp. 4875-4884 (2018)

⁶AIR 1934 Sind 206.

*Khanu v. Emperor*⁷- the issue raised in the case was that whether the accused that is guilty of committing the sin of Gomorrah Coitus per os with an innocent child is to be charged with the commission of the offence u/s377 of IPC. The language of this section criminalizes carnal intercourse against the order of nature; therefore, the issue was regarding the inclusion of the act of the accused under the ambit of this section for it being carnal intercourse.

RIGHT TO PRIVACY AND LGBTQ

The need of privacy was beautifully explained by a nine judge bench in the case of *Justice K.S. Puttaswamy (Retd.) and anr. v. Union of India*⁸. The issue was to find out whether the right to privacy is a constitutionally ensured privileged? This inquiry coordinated the court towards Article 21 wherein right to privacy has been given insurance as a fundamental right. This privacy incorporates assurance from undue state impedance and the obligation of the state to defend this privilege of the people from others. The idea of privacy has not been clarified or characterized anyplace in the Indian Statutes. The Supreme Court proclaimed consistently from its nine-judge Bench that 'right to security' is a Fundamental Right having its foundations in Article 21. The indication of alleviation that the country took after the judgment was a consequence of parting from the patience that the judiciary had been keeping up in the understanding of the resolutions.

The beginning of this idea has been as old as mankind. . The court traced back the history of privacy only on find that the right is indispensable to humans with Aristotle dividing the 'public sphere of political affairs to the personal sphere of human life'⁹, followed by Austin discussing a similar differentiation. This familiarity with the private space later developed to turn into the privilege to personal liberty of an individual. This privilege came to include 'right to be let alone'.

CONCLUSION

In the wake of experiencing the historical backdrop of the LGBTQ persons it is obvious that their decisions throughout their life, with respect to how they decide to distinguish themselves, didn't really worship them to be revered by the remainder of the society in the prior days, yet it is sheltered to state that the gravity of the analysis, brutality and discrimination that they are looking in the 21st century is way more awful.

⁷AIR 1925 (Sind).

⁸WRIT PETITION (CIVIL) NO 494 OF 2012.

⁹*Ibid.*

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