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THE OTHERS IN GENDER COLUMN: AN OVERVIEW OF THE LIFE OF TRANSGENDERS IN INDIA.

AUTHORED BY - STUTI TRIPATHI

Maranon says that, “There is scarcely any human being whose sex is not tainted by a doubt or atleast a shadow of doubt¹.” LGBTQIA+ group has always been an important part of our society, however our society and justice system has time and again failed them, discriminated against them and treated them as unequal. The justice system of India reached a milestone when the honourable supreme court passed the ruling of National Legal Services Authority Vs Union Of India² recognising and declaring the rights of third gender. The supreme court also recognized the right of individuals to affirm their “self-identified” gender. Gender dysphoria is a major problem suffered by transgender people; it is the feeling of one’s mind and gender identity not being in sync with their assigned gender. Gender dysphoria can cause individuals to feel distress. It is central to various problems faced by members of LGBTQIA+ community.

The Hijras Of India

While the concept of a non binary gender is just now being discussed in the west, India has had a long history of such individuals that neither recognise themselves as men nor women. Indian history is filled with mythology, folklore and religious depictions of such individuals that embody the qualities of both men and women. In Indian society the non-binary individuals, more commonly known as the “third gender” or the “hijras” have always had an important role, from considering a third-gender person’s blessing to bring good luck to viewing them as religious symbols, the society has different notions of the hijras. The hijras have been an important part of indian religious texts like the Ramayana and the Mahabharata, they have been depicted in heroic like with many references of them possessing god like powers. Even during the mughal rule the hijras held a place in court, many mughal rulers were patrons of the third gender. The Hijras of India always held a respectable place in the society. The Hijra identity however, is complex with many individuals born as intersex or those who have removed their male genitalia as an offering to goddess Bahuchara Mata, then there are others who decide to transition from the sex assigned to them at birth. It is difficult to put a label on the sexuality of these individuals, they are known

¹ The Evolution of sex, 266 (1932)

² (2014) 5 SCC 438

and identified by different names in different parts of the country. The hijras embrace a feminine personality as reflected by their choice of dressing and mannerism. The hijras in India can be seen as a transgender equivalent of the west, however the major difference between them is the ritual of leaving home and getting accepted by a clan of hijras, led by an elder known as “guru ji”. Thus the western notions on transgenders are fundamentally different from the Indian.

Considering the significant history of transgenders in India it comes as a shock that the society has started treating them as outcasts and made them a subject of gender based discrimination and oppression. The Indian transgenders experienced a dark period during the British rule, in the 200 year long rule the British government declared transgenders as criminals and ordered them to be arrested at sight. British officials began considering eunuchs "ungovernable". Commentators said they evoked images of "filth, disease, contagion and contamination". They were portrayed as people who were "addicted to sex with men". Colonial officials said they were not only a danger to "public morals", but also a "threat to colonial political authority"³. The British bias and disregard of the third gender enticed a stigma against the third genders in Indian society. The third gender has henceforth been subject of oppression, discrimination and numerous hate crimes.

Modern India and the problems of Transgenders

Indian Supreme Court while delivering the judgement of NALSA Vs Union of India, recognized the rights of transgenders for the first time. While delivering the 2014 Judgement Justice K.S. Radhakrishnan said, "Transgenders are citizens of this country ... and recognition as a third gender is not a social or medical issue but a human rights issue."⁴ The constitution of india also guarantees freedom against discrimination on the basis of gender⁵. The Indian government has however failed to ensure that these rights granted to transgenders are enforced, the Indian society lacks awareness about the transgenders and treats them as outcasts abusing and ostracising these individuals to make a living out of prostitution or begging. Majority of transgenders in India don't hold a bank account and are deprived of jobs, education and healthcare. The transgenders cannot access healthcare and other services that are designed around the cis-genders. By 2014 judgement and addition of the term “others” in the election ballot and identification certification, India has provided an umbrella term to cover all the non cis-gender individuals but has made little to no effort in their inclusion in the society. On the other hand the transgenders and transsexual population is trying to break free of age old shackles of gender and affirm their identity. The Indian

³ How Britain Tried to erase India's third gender, BBC.

⁴ National Legal Services Authority Vs Union Of India, 2014

⁵ Article 15, Constitution Of India

Supreme court has upheld the right of individuals to change their assigned gender to the one they identify with. In order to understand and resonate with the transgenders of India it is important to study different aspects, processes and reasons behind gender change.

Psychology behind transsexualism

An important aspect of transsexuals (the individuals who don't feel that their assigned gender is in sync with their self identified gender) is the psychological assumption of their sex. Individuals often change their attire and conduct to feel more in touch with their identified gender. These individuals; transsexuals often have the feeling of not belonging in their own body, thus in order for them to feel comfortable they choose to undergo a sex reassignment surgery that would make their physical appearance align with their self identified gender and make them feel comfortable. In order to feel confident in one's body the perception of self should match with how others perceive the individual, being stuck in a body that does not align with mind is a matter of great concern. Gender is a societal construct that should not hinder one's right to express themselves. Transsexual feelings do not always imply a desire to undergo a sex reassignment surgery but an individual's wish to adapt the likes and mannerism of the self identified gender. The individual planning to get a sex change surgery has to consult a psychiatrist to get a clear diagnosis that the sex perceived by them is the same that they wish to change to. This diagnosis helps the individual to get a clear picture about what they wish to do with their body, additionally it also helps in recognizing that whether the individual desires to undergo complete Sex Reassignment Surgery or they only wish to medically enhance parts of their identified sexuality.

Sex Reassignment Surgery (SRS)

Sex reassignment surgery is a series of medical procedures which improve the physical appearance of a transsexual making them more comfortable in their body. The Transgender Persons (Protection of Rights) Act, 2019⁶ was brought to ensure the welfare of transsexuals and to protect their rights. It is under this act that the individuals are given a right to self perceive their gender identity, it also empowers the individuals to ask for a gender certificate from the district magistrate. In the judgement of *Neha Singh vs State of UP and 2 others*⁷ The Allahabad High Court said that it is the constitutional right of an individual to change their gender through a sex reassignment surgery.

⁶ The transgender persons (protection of rights act), 2019

⁷ Neha Singh vs. State Of U.P. And 2 Others 2023 LiveLaw (AB) 276

In order for transsexuals to live comfortably in society with their self identified gender they have to be aware of the legal and medical implications of sex reassignment surgeries. A sex reassignment surgery aims to modify the physical features of an individual according to their identified gender, a SRS can be of two types a male to female sex reassignment surgery or a female to male sex reassignment surgery additionally there are other aspects of a gender affirmation procedure like a hormone therapy, puberty blocker and voice therapy, each of these procedure is made to target various preferences and demands of transsexuals. The individuals also have the choice to target a singular part of their body and work on it a facial reconstruction surgery for instance would help in attaining facial features that align with the self identified gender, whereas a top or chest surgery and a bottom or genital surgery will help in aligning other parts of body with the self identified gender of an individual. There are also some legal procedures that an individual can fulfil to socially transfer themselves to their self identified gender like legally changing their names and pronouns. Likewise an individual can change their attire and mannerism to align with the gender that resonates with them.

Legal procedure for gender change surgery in India

All Indian citizens above the age of majority have the right to change their gender and socially transfer themselves to their self identified gender. Indian citizens have a right to undergo sex reassignment surgery if they feel that they do not associate with the gender assigned to them at birth. Before undergoing the surgery an individual has to go through a set of procedures. Firstly doctors and psychiatrists determine that whether or not the individual is well suited for undergoing a sex reassignment surgery, this assessment is made keeping in mind that a sex reassignment surgery is permanent and cannot be reversed also the psychiatrists are required to recognize what an individual has thought of himself to be all along, a conception to which his autonomy will now confirm⁸.

After an individual has decided that he has to undergo a sex reassignment surgery and has passed the psychiatric test he would have to create a gender change affidavit, declaring the change of gender and name, the affidavit should adhere to the affidavit format prescribed by the department of publication. This affidavit must be notarized. After the declaration to the government a individual has to advertise his change of gender in the leading newspaper of the city, the advertisement's content should be similar to that of the affidavit. In the next step a duly signed application has to be filed with the required documents and notified in the gazette. After the

⁸ Douglas k smith, ' transsexualism sex reassignment surgery and law' note 13 at 967-968

acceptance of the application it would be published in the government's official Gazette. The individual would now receive a notification which would serve as the proof of his change of gender.

Gender Recognition Certificates

Individuals can apply for gender recognition certificates⁹ to protect themselves from any harassment or injustice. This certificate acts as a tool in safeguarding the individuals, it protects the individuals from social and economic injustice. This certificate helps transsexuals in living affirming their self-identified gender in the society and live their life comfortably. For getting a gender recognition certificate an individual should be of the age of majority. These certifications have however been a topic of debate among Indian transgenders, the entire procedure to advertise a gender change and change of name in the society could subject the individual to social scrutiny and segregation.

Gender reassignment surgery on Minors

There is no clear consensus on whether minors should be allowed to undergo sex reassignment surgery in India or not. The legal position on the matter is still developing, the issue of minors undergoing a sex reassignment surgery has been discussed in the courts continually. India lacks a statute to deal with this matter, the rulings of the court however provide a precedent as to what should be expected in this case.

The state government of Tamil Nadu following the direction of High Court of Madras in the case of Arunkumar Vs Inspector General of Registration¹⁰ banned gender affirming surgeries on minors except for in life threatening situations. In the case of Arunkumar the Madras High Court relied on NLSA Vs Union of India and stated that no individual can be compelled to undergo medical procedures that could alter their gender¹¹. This ensured that a child's dignity, freedom and opportunity to develop in a healthy manner is not compromised as per article 39(f) of the constitution¹².

The Indian judicial system has also recognized the importance of free consent while undergoing a

⁹ The Gender Recognition Act, 2004

¹⁰ Arunkumar & Anr vs Inspector General of Registration & Ors 2019

¹¹ National Legal Services Authority Vs Union of India, 2014

¹² 39 (f), Constitution of India

sex reassignment surgery, in the case of X Vs Director of health services¹³ brought in front of the High Court of Kerala the court held that a minor child cannot give free consent, thus performing a life altering surgery on a minor cannot be allowed.

It is therefore clear that the sex reassignment surgery cannot be performed on minors as they are incapable of giving consent, it should be kept in mind that sex reassignment surgeries are irreversible in nature and once performed cannot be reformed, thus giving a minor an opportunity to grow in a healthy manner and then decide the future of his anatomy when he is capable in the eyes of law seems to be the most appropriate path.

Conclusion

A man's identity is his greatest asset, in order to feel comfortable in his own body his mind and body should be in sync with one another. It is important to feel safe and accepted in order to lead a comfortable life in society. Our constitution has given individuals an option to live their life according to their self identified gender, however just possessing a right does not guarantee its enjoyment, the right should be enforced and accepted by the society. There is a lot of ambiguity surrounding the rights of LGBTQIA+ individuals and an urgent need to constitute appropriate statues to uphold them. India has come a long way in its pursuit of transgender rights and it yet has a long path to cover. India lacks awareness in matters of LGBTQIA+ community and thus the stigma, in order to ensure that the non cis genders in India get the same opportunities as the cis genders, the government has to start several awareness campaigns and constitute strict laws against discrimination, hate crimes and violence towards the transgender community. Representation alone can help in unlifting the state of transgenders in india. By cultivating and promoting an environment where people view others just as individuals irrespective of their caste, class, gender, sexuality and social standing, India would be able to build a society based on mutual respect and cooperation. It is then that India will truly embrace its diversity.

¹³ X Vs Director of health services, SCC 2023