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TRANSGENDERS' FIGHT: A QUEST FOR RECOGNITION

Authored By - Neha Pandey & Ankita Singh

Abstract

This article is an attempt to explain the situation of transgenders in India, through various laws that are present in the country. From many centuries the transgenders were and are a part of Indian community and mentioned in many ancient scriptures as well.

Being a part of the society for ages, the community is still unable to receive the recognition which they deserve from the Indian society. The discriminatory practices are continuing in many parts of the country. This article also analyses The Transgender Persons (Protection of Rights) Bill, 2019 this bill was an effort to recognise the rights of transgenders. This article attempts to prepare a comparative study of rights available to transgenders in countries across the world and it tries to show that how transgenders, although being innocent are suffering for getting gender recognition and rights which have been given to them by the nature itself. Our findings indicates that whatever has been done for the transgenders is just a small step towards a long journey of thousand miles.

Keywords - Transgender, LGBTQ, Society, India.

THE HISTORY OF TRANSGENDERS IN INDIA

In ancient India, the transgender community have their own position in the society. The ancient texts of around 1500 BC, mentioned a "*Tritiya Prakruti*" or third nature in humans, who are traditionally not a male or female or have a mixture of both since birth. They are adjusted in the society without much discrimination although not very much promoted. Around 200 BC, one of the great scholars of ancient India, Patanjali acclaimed that the three genders in the Sanskrit language is derived from the three natural genders present in the society. The reference of the transgender community is mentioned in various ancient texts

The composite avatar (form) of Lord Shiva (male) and goddess Parvati (female) - *Ardhanarishwar* is worshiped in the Indian mythology since ancient times. In the Hindu epic Ramayana, which was written by Valmiki, it was mentioned that when Lord Ram went for the 14 years exile with his wife- Sita and brother-Lakshman, many people of his kingdom started to follow them, because of their love and respect for the prince of Ayodhya. Lord Ram requested the “women and men” to return to their home. Among the people, there were a small group of Hijras who were also present who considered themselves as neither men nor women, so they decided to stay at the banks of Saryu river. When Lord Ram returned from the exile, he found the Hijra community at the same place, where he left them. Pleased with their devotion, he blessed them, and said that they would bless people on various auspicious occasions. The Hijra community still continues the same practice, and they bless people on the occasions like marriage or childbirth.

In Mahabharata, there are many instances, where the reference of transgender characters was given. It mentions about Shrikhandi, who took a re-birth as a male, to kill Bhishma and took the revenge of her previous birth as Amba.

When Arjuna, went to exile, for one year during the exile, he assumed the identity of a *Hijra*, which was due to the curse of a fairy Urwashi. He adopted a name as - *Brihannala*. He also performed ceremonial functions with the identity of a *Hijra*.

Another instance of the reference is during /Mahabharat war, where Iravan was destined to marry Mohini (female incarnation of Lord Vishnu), before he self-sacrifice himself to fulfil the boon given by the goddess Kali. Lord Krishna as Mohini, married to Iravan. After the sacrifice, Lord Krishna in the form of Mohini, wailed for Irawan. In Tamilnadu, the transgender or the hijra community called themselves as Aravanis, which means devotees of Aravan (Iravan).

¹ M.Michelraj, “Historical Evolution Of Transgender Community in India”, Vol. 4 no.1, *Asian Review of Society Science* pp. 17-19 (2015).

During the Mughal period (1504 AD -1719 AD), the people belonging to the transgender communities played a significant role. They were considered as a trust worthy, clever, loyal and brave. they had accesses to all spaces and different section of society due to which they played an important role in empire building during Mughal era. Eunuchs were known as *Khwaja Sira*, the discrimination was minimal and several eunuchs were at important positions. They had a great role in Islamic institution and they were given responsible positions in politics as well. They were also royal guards in the empire, some serve in the military as well as court advisers.

Things begin to change after the British rule (1757-1947) came in India, in the Indian Penal Code of 1860, they added section 377, making homosexuality illegal it also targets transgender or any other group which the British thought as deviant; they associated transgender people with filth, disease contagion and contamination. They included transgender in the Criminal Tribes Act of 1871, considering them as people who have “inborn criminal tendencies”. The British incarcerated the eunuchs for dressing like female and wearing ornaments like women. Many scholars claim that the stigma and hatred associated with the transgender was developed during the period of British rule.

VARIOUS LAWS FOR TRANSGENDERS IN PRE-INDEPENDENT INDIA

With the arrival of Britishers in India the reputation of transgenders started changing as in the beginning of colonial period the transgenders were given some basics protection and rights by the Indian states as the transgender’s had the right to land, food, and to have some money from the agricultural land. With the enhancement of control of Britishers in India, the humiliation of transgender’s begin. From 18th century onwards many historical accounts of Britisher’s on India showed that they were very disgusted by the view of Hijras and they were not able to understand that why these transgenders were given so much of respect in the royal courts. The Britishers considered Transgenders as a tribe in many parts of India and in leu of their repulsion towards transgenders, the Britishers came up with a law called as Criminal Tribe Act ,1871, this law criminalize man dressed as women to dance in public. This legacy was carried forward by Britishers with the introduction of section 377 in IPC 1860 which criminalizes unnatural offenses and this practice has been carried out post-independence also.

The formation of section 377 was done by Thomas Maculary around 1838 but was added in IPC in 1860. This section in Colonial rule was framed on the blueprints of Buggery Act 1533² which was enforced during the regime of King Henry VIII in UK. The buggery act criminalized sexual act which is against nature (against god's will) i.e., Anal penetration, bestiality in wider sense homo sexuality. Later on, the buggery act was replaced by the Offences Against the Person Act 1828³ in UK, this particular act is the main inspiration for section 377 under IPC 1860. The ironic fact is that the country i.e., UK which had enacted section 377 IPC 1860⁴ which criminalizes Homosexuality in India has decriminalized homosexuality by in its own country by an act in year 1967 and India which was the subject of UK has continued to follow this provision till 2013.

LANDMARK JUDGEMENTS RELATED WITH **TRANSGENDERS IN INDIA**

Section 377 of IPC, talked about -

“unnatural offences – Whoever voluntarily has a carnal intercourse against the order of nature with any woman, man or animal, shall be punished with imprisonment for life or with imprisonment of any description for a term which may extended to ten years and fine.”

Explanation- Penetration is sufficient to constituted carnal intercourse described in this section.⁵

Section 377 meant that all type of sexual intercourse except heterosexual penile-vaginal intercourse are prohibited. It means that sodomy, bestiality, pedophilia, and homosexuality was prohibited. The section outright made consent immaterial in different type of intercourse.

In 2001 an NGO named Naz Foundation filed a writ petition in the High Court of Delhi demanding decriminalization of sexual activities between consensual sane adults which was indirectly criminalized under section 377 of IPC 1860. The High Court rejected petition

² The Buggery Act of 1533

³ The Offences Against the Person Act of 1828

⁴ The Indian Penal code ,1860 (Act 45 of 1860), s.377

⁵ Supra note 3 at 4

stating that the petitioners did not have a locus standi in the case. Later Naz Foundation knock the door of Supreme court against the Judgment of Delhi High Court. Supreme court in the appeal accepted the contention put forth by the petitioners and the Supreme court order Delhi High Court to admit the petition filed by Naz Foundation, which was an PIL.⁶

In 2009, The Delhi High Court in the case of Naz Foundation Vs. Government of N.C.T Delhi struck down section 377 as unconstitutional and violative of Article 14, 15, 19, and 21 of constitution of India. In the Judgment the court held that criminalizing homosexuality make a distinction between procreative sexual intercourse and non-procreative sexual intercourse which is against the spirit of Article 14 of constitution of India which is Right to Equality guaranteed as fundamental right. The court also held that the abovementioned section was discriminatory in nature and it was also violative of right to privacy. This judgment was a ray of hope for a section of society which was shadowed and on the other hand the judgment faced wrath and criticism of many social organization as they were of the view that this judgment will destroy the moral structure of society which gives validation only to heterosexual intercourse. In Regard to opposition of the Judgment of Delhi High court SLPs were filed in Supreme court.

One of the SLPs which was take up by the Supreme court was in case **Suresh Kaushal & Anr. V Naz Foundation**⁷ -

In this case the Supreme court overruled the Judgment of Delhi High Court In case of Naz Foundation Vs Government of N.C.T, and Homosexuality was criminalized again.

The reason cited by the Supreme Court for overruling the judgment by Delhi High court was that

- There is presumption of constitutionality when it comes to laws passed by Parliament are concern and the fact that Post -Independence IPC, 1860 has been amended by parliament many a times but section 377 of IPC has been remained untouched, this fact shows that the parliament is not willing or not thinking of to amend or to delete the section.

⁶ Naz Foundation V. Government of NCT of Delhi and others, The High Court of Delhi at New Delhi, India (2 July 2009) available at : <https://www.icj.org/sogicasebook/naz-foundation-v-government-of-nct-of-delhi-and-others-the-high-court-of-delhi-at-new-delhi-india-2-july-2009/> (last visited on March 24,2021).

⁷ Suresh Kumar Kaushal & Anr Vs. Naz Foundation and Ors (2014)1 SCC 1.

- The court held that as far as section 377 is concern doctrine of severability cannot be applied because the part related to homosexuality cannot be deleted without affecting the whole section and the whole section is the only section which criminalizes all type of sexual abuses.
- Section 377 does not make a difference between homosexual and heterosexual. The section is gender neutral. The section does not make compulsion or exclusion for the police to treat the LGBTQ community in a way they used to. Further, the court said that the section does not violate right to life Guaranteed under Article 21 of Constitution of India.

Navtej Singh Johar and ors. Vs. Union of Indian and ors.

This case came to resolve the main issue raised in the case of Suresh Kaushal & Anr. V Naz Foundation,⁸ about the constitutionality of section 377 of IPC. The supreme court held that section 377 is unconstitutional as it violates the fundamental rights mentioned in article 14, 15, 19 and 21 of the Constitution of India. The key point for including this section in the IPC was to protect women as well as children from being harassed and abused by carnal intercourse; however, the carnal intercourse (consensual) that is carried out by the LGBTQ+ community is neither harmful to women nor children.

The apex court decriminalising the section said that, the section of population belonging to LGBTQ+ community have a right to privacy which includes physical intimacy as well. With this judgement, the apex court overruled the judgement given in the case of Suresh Kaushal & Anr. V Naz Foundation. With this judgement, the Supreme Court gave the recognition to this community, which they were longing for since ages.

NALSA Judgement

In 2014 in case of NALSA V. Union of India & Ors. NALSA filed a writ petitioner in 2012, in Supreme court of India. Under this petition the issue of gender identity of person was raised. In case the supreme court held that Protection of article 14,15,16 and 21 of Constitution of India is also available to Transgenders and other such communities.

⁸ Case Comment on Navtej Singh Johar V. Union of India, available at : <http://www.legalserviceindia.com/legal/article-3662-case-comment-on-navtej-singh-johar-v-union-of-india.html> (last visited on: 23 March , 2021).

- The court said that the word “person” used in article 14 is not limited to male or female instead it also includes transgenders, /hijras person who are neither male or female comes under the expression “person” use in article 14. Thus, the legal protection of law is available to them in all sphere of state activity.
- Article 15 and 16 prohibit discrimination on different grounds one of which is on the ground of “sex”. The court held that sex constitutes of gender and biological attributes.
- “The court held that biological characteristics certainly consist of genitals, chromosomes and secondary sexual features but gender attributes one ‘self-image, the deep psychological or emotional sense of sexual identity and character, thus discrimination on ground of “sex” under article 15 and 16 consist of discrimination on the ground of gender identity and the expression “sex” under article 15 and 16 is not limited to biological sex i.e., male and female but also includes people who consider themselves nether male nor female
- Article 21 of constitution of India talks about protection of life and personal liberty. Article 21 a vital part of Indian Constitution and the state do not have the power to take away this right. Recognition of one’s gender identity is the base of fundamental right to dignity. Gender identity is a core of one’s sense of being and also an integral part of person’s’ s identity thus, legal recognition of gender identity is a part of right to dignity and freedom guaranteed under Indian constitution. As gender identification is a one ‘sense of being thus, the individuals have the right to self- identification as a man, a woman, or other identified category.⁹

TRANSGENDER PERSONS (PROTECTION OF RIGHT BILLS)

After the landmark case of National Legal Services Authority v. Union of India in year 2014, where the Supreme Court held the transgender people to be a “third gender” in the same year a Private member bill was introduced in the Rajya Sabha. However, this bill was lapsed and in 2016, the government introduced its own bill and it referred to a standing committee. The standing committee made many recommendations in the bill, which involves the definition of

⁹ National Legal Services Authority Vs. Union of India &Ors (2014) 5 SCC 438.

transgender person, granting reservations to socially and educationally backward classes and providing them many civil rights including marriage, adoption, partnership and divorce. However, the bill was lapsed due to the dissolution of the 16th Lok Sabha session.

On 19th of July 2019, The Transgender Persons (Protection of Rights) Bill, 2019 was introduced by Mr. Thaawarchand Gehlot, the Minister for Social Justice and Empowerment. This bill was passed by the Lok Sabha on 5th of August 2019 and on 26th November 2019 it was passed in Rajya Sabha. On 5th December 2019 president gave assent to this bill which become an act.

The main features of this Act are-

- The act gave a definition of a transgender person, according to it a transgender person as one whose gender does not match the gender assigned at birth. It includes trans-men and trans-women, persons with intersex variations, gender-queers, and persons with socio-cultural identities, such as kinnar and hijra.
- Non-discrimination against transgender person in education institutes, health care facilities, employment etc.
- Identity Certificate- According to the act, any transgender individual may make an application to the District Magistrate for a certificate of identity, which shows the sex as 'transgender'. If an individual go-through any medical surgery to change their sex either as a male or a female, a re-examined declaration is needed.
- National Council for Transgender person (NCT) is set up by the central government, which consists of members from the transgender community and members of the government.
- Punishments and Offences- offences against transgenders will attract imprisonment between six months to two years, and a fine.¹⁰

Analysis of Transgender Persons (Protection of Right) Act

The act received lot of negative feedback from the transgender community itself. There are several flaws in the existing act, due to which it faced protest across the country, by the community and transgender right activists.

¹⁰ The Transgender Persons (Protection Of Rights) Act, 2019 (Act 40 of 2019).

The act yet fails to address the issues raised in the judgement of National Legal Services Authority v. Union of India,¹¹ the hon'ble court held that the self-identification of one's gender is enough to provide rights to individuals. However, the act mandates that each person would have to be recognised as 'transgender' on the basis of a certificate of identity issued by a district magistrate. Although, the act says that an individual belonging to the transgender community, have a right of 'self-perceived identity' but if the requirement of certification is mandatory then the act itself contradicts the provision of self-perceived identity'. The act does not differentiate between a transgender person and an inter-sex person.

The offences against any transgender individual awards punishment of maximum two years, which in itself is discriminatory. For instance, if any individual commits a sexual offence against a transgender, then he will get maximum imprisonment of two years which in itself is a bailable offence; however, the same individual commits the same offence against a woman he will be awarded imprisonment of seven years or more and this itself is a non-bailable offence. This reflects that the law itself treats any transgender differently.

The act lacks on the ground of medical measures taken for the individuals who wanted to have sex-reassignment surgery or for the individuals who are diagnosed with HIV or at a high risk of it. It does not address the issue of non-consensual sex-reassignment surgery.

The act does not provide any reservation in education or employment to the individuals belonging to the transgender community, this was recommended in the NALSA judgement. Legalising marriage of transgender community and adoption is also not mentioned in this act. With this the act ignored many issues for the upliftment of the community.

In some way, the act not give the basic civil rights that the transgender community deserves. It ignores various suggestions that the standing committee recommended. The demands that the activist and transgender communities raised are not an undesirable demand. Many countries across the world gave these rights to the transgender communities. In the neighbouring country Sri Lanka, the adoption and serving in the military of individual belonging to the transgender community is legal. Country like Kazakhstan also legalize adoption and military services for transgender communities. The next section discusses in detail about the laws prevailing in other countries about transgender rights.

¹¹ Supra note 8 at 7.

THE LAWS PREVAILING IN OTHER

COUNTRIES ABOUT TRANSGENDERS

India is one of those countries in the world, which ranks lower in the list of countries, where LGBTQ community have all the equal opportunity as any cis-gender person. The Countries like Israel also performed better than India, in fact Israel was ranked seventh in the first world gay happiness index conducted in the year 2015¹². Recently, the Israeli MPs have taken steps to outlaw the practice of "gay conversion" therapy by psychologists and became the first Middle East country to do so.

In the year 2014, Taiwan's ministry of Interior, reversed an order of the year 2008 that requires psychiatric evaluation and the surgical removal of reproductive organs before transgender citizens can amend their legal gender markers on their identification cards.¹³

India can also learn from its neighbouring country Nepal, in 2011 Nepal became the first country in the world to include a third gender in its census. In the year 2015, it became the tenth country to specifically protect LGBT people in its constitution. In a landmark case of Sunil Babu Pant v. Nepal Government¹⁴, the supreme court of Nepal said that individuals gender identity is to be determined by self-perception or "self-feeling" – not by the society, state, or law and without medical examination or intervention. It also included the right to self-determination under the right to life and dignity of Article 12 of Nepalese constitution.

The court also expanded this to include non-interference in the right to choose a marital or sexual partner. In 2013, the UN expert on torture called on governments to eliminate surgical requirements for trans legal recognition. The diagnosis of "Gender Identity Disorder" — much like that of "transsexualism" — is no longer recognized in either of the two major international diagnostic manuals, the Diagnostic and Statistical Manual (DSM) and the International Classifications of Diseases (ICD). The following table displays the rights given to the transgender community in various countries across the world-

¹² Johannes Gutenberg University of Mainz, Germany, "Gay Happiness Monitor" (May-2015)

¹³ Chih-Hsing Ho, "The Legal Status of Transsexual and Transgender Persons" in Jens M. Scherpe (ed.), 425-440, (2015)

¹⁴ Sunil Babu Pant v. Nepal Government Writ Petition No. 917 of 2007

15 LGBTQ RIGHTS IN DIFFERENT COUNTRIES:

| COUNTRIES | LEGAL | ADOPTION | MARRIAGE |
|----------------|-----------|------------------|---|
| ISRAEL | ✓ Legal | ✓ Legal | Foreign same sex marriage recognised only |
| NEPAL | ✓ Legal | ✗ Single only | Unrecognized |
| JAPAN | ✓ Legal | Ambiguous | Unrecognized |
| THILAND | ✗ Illegal | Not unrecognized | unrecognized |
| VIETNAM | ✓ Legal | ✗ Single only | unrecognized |
| SOUTH AFRICA | ✓ Legal | ✓ Legal | ✓ Legal |
| U.S.A | ✓ Legal | Varies by region | ✓ Legal |
| UNITED KINGDOM | ✓ Legal | ✓ Legal | ✓ Legal |
| INDIA | ✓ Legal | ✗ Illegal | ✗ Illegal |

Similarly, in Netherland the transgenders are recognized as third gender, they have right to choose their gender without undergoing any surgery or hormone therapy, they are allowed to sever in Armed forces, they have rights to adopt kid, same-sex marriage is legal and recognize under statute of Netherlands¹⁶. The countries like Netherlands and many more like this is a glimpse of hope for transgenders whereas countries like Brunei, Saudi Arabia,

¹⁵ "Equaldex: Collaborative LGBT Right knowledge base", Available at: <https://www.equaldex.com/> (last visited on March 20, 2021)

¹⁶ Rights In Exile Programme, available at : <https://www.refugeelaidinformation.org/netherlands-lgbti-resources> (last visited on March 20 ,2021).

Afghanistan and Iran where transgenders are not recognized as a gender, they are not allowed to serve in military, same -sex marriage is not legal and the transgender could be given death penalty as punishment for crimes under homosexual offenses, and Adoption of kids is also illegal is an epitome of unjust and arbitrary rule.¹⁷ There is a need that United National Assembly should address the grievances of Transgenders community at international level and it should make members countries accountable for their arbitrary action against the transgender community, The UN must sanction such nation and should aim to build a world where transgenders live with dignity. Though the change has been reflecting in many countries, still The Community have to cover a far-fetched journey to get recognition and access to basic rights in different parts of world.

PRESENT STATUS OF TRANSGENDERS IN INDIA

In India, the situation is changing at very slow pace. The gender-friendly policies aren't adopted at many work or public places. However, certain guidelines issued by the judiciary or legislations drafted by the legislative assembly give a ray of hope to the community that they would soon be identified as an individual who is the part of society and a limb that has been cut-off from the body.

Last year in November, 2020 the Ministry of Social Justice and Empowerment (MSJE) launched an online portal on which the transgenders are allowed to get their identity certificates; without appearing before the district magistrate or visiting any government office. This allowed the community to identify themselves without any discrimination which they usually face. However, self-identification is still not enough for any transgender as the individual have to get certified of their gender.

In the month of July 2021, the Delhi High Court issued a notice to the centre as well as the state government and also the municipal offices seeking directions to construct separate public toilets for transgenders.¹⁸ It's distressing to see that in this modern world the community is still struggling to get the basic necessity like proper hygiene and sanitation.

In all this hustle that has been created in the pandemic in which the voice and rights of the

¹⁷ Editorial, "Brunei stoning : which places have the death penalty for gay sex?" BBC News, April 3 ,2019.

¹⁸ Jasmine Kaur Chhabra v. Union of India & Ors W.P.(C) 2997/2021

community seems to disappear, one good news for the community came from the State of Karnataka, as Karnataka became the first state to reserve one percent of government jobs for the transgender community. The government amended the Karnataka Civil Services Rules, also known as General Recruitment Rules, 1977 in the month of July 2021. This decision definitely helps the community in seeking employment and it would be a great benefit if other states also welcome this decision and follow the same. The community is demanding the reservation from a long period. The centre neglected this demand as there's no such provision in the Transgender Persons (Protection of Right) Act of 2019.

These small steps in the recognition of the identity of transgenders is beneficial for the community however it's a long road to travel, we need some firm decisions and guidelines from the legislative as well as judiciary in recognizing the rights of the community.

CONCLUSION:

The preamble of Indian Constitution has contained the principle of Democracy, equality and for ensuring the same the constituent assembly incorporated many special provisions for the wellbeing of the disadvantaged communities but unfortunately the list of disadvantage community did not include Transgenders and their presence has been unrecognized by the society as well. The injustice with the community violates the very principle of Preamble of Constitution.

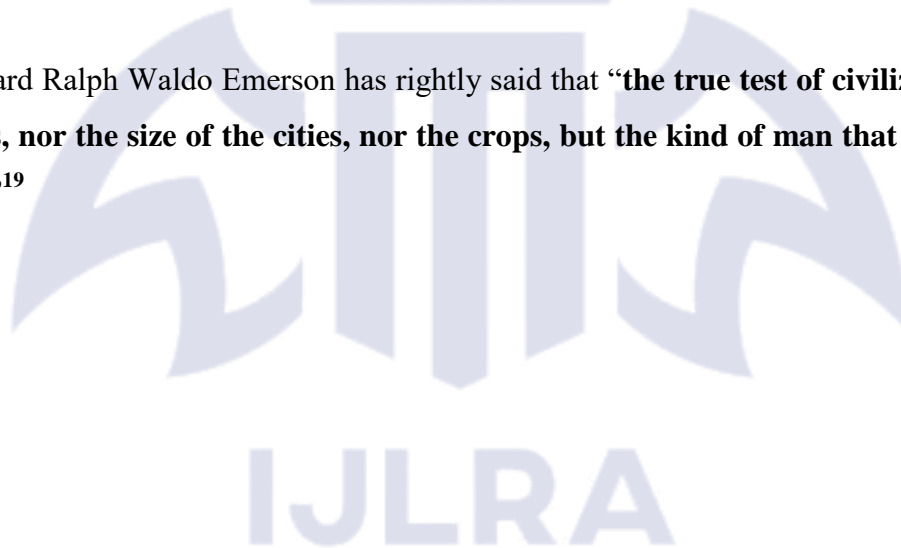
The fight of Transgenders has not ended yet, instead it has started with a new facet. The new goal is to make the society and government aware of their "Human Existence" because before 2014 (when S.C recognized Transgender as a third gender) they were existing but they were deprived of the human rights available to every cis-gender person in India like, right against discrimination, right to have gender identity and many more rights.

In the present era where Civilization, human rights, Rule of law, due process of law democracy is the ruling principle these very principles are absent for the Transgenders. The community has always existed but either as a god like Ardhnareshwar or as a beggar, prostitute, as a carrier of HIV or mentally insane person but they never existed as a human being for the society. However, the community welcomed whatever the society offered them from past to present day, they bare all the humiliations, they bare all the inhuman treatment.

Their tolerance should not be considered as their ignorance or weakness, instead their peaceful protest, their approach through lawful means show that they are more civilized than many of the individuals who have access to probably all the basic human rights and were offered with lot many privileges.

The Indian society needs to recognize the rights of Transgenders and it requires to welcome the community with open arms and by doing so, the Indian society is doing favor to itself because the identity of a civilized society and glorified history, for which India has been known, would be tarnished by the deprivation of Transgenders from the basic human rights. The government needs to take action so, as to ensure availability of all the rights to the members of Transgender community. Only then the citizens of India has the right to say that- “India is a land of Gandhi and Nehru who fought against discriminations and try to build a glorified image of Indian on International platform”.

In this regard Ralph Waldo Emerson has rightly said that **“the true test of civilization is not the census, nor the size of the cities, nor the crops, but the kind of man that the country turns out”**¹⁹



¹⁹ Ralph Waldo Emerson, *Society and Solitude*. (Fireside Edition, Boston and New York, Vol.7 1909)

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