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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

JUDICIAL AND LEGISLATIVE RESPONSE **TO THE RIGHTS OF TRANSGENDER**

AUTHORED BY - DR. DIVYA GUPTA¹

ABSTRACT

Transgender people have existed in every society, nation, culture and class since ancient times while the rights of the members of the transgender community have started gaining attention only in modern world. Their rights are not protected and they face discrimination in various areas. The prohibition of discrimination including verbal abuse and physical violence against transgender persons and protection of their human rights are important elements of the legal order in several countries. In this paper the researcher has discussed the role played by the Hon'ble Court in protecting the rights of transgender and also the Transgender Persons (Protection of Rights) Act, 2019 passed by parliament in India.

KEY WORDS: Transgender, Human Rights, third gender, discrimination,

INTRODUCTION

Transgender people are those whose characteristics do not fall under stereotypical gender norms. The term 'transgender' or 'third gender' eludes cohesive definition. The term 'trans' to refer to people whose internal sense of their gender differs from the sex assigned at birth. For instance, an individual born female who identifies as male is a trans man and a person born male who identifies as female is a trans women. In most of the area in India they are known as "Hijra". Aravani is the famous local term for transgender in Tamil Nadu. Shiv-Shaktis are also transgenders community in Andhra Pradesh. Jogtas is the term famous in Maharashtra and Karnataka. Importance of transgender people can be traced back from the ancient India. They were presented in Mahabharata and Ramayana. They were given extremely important roles in Mughal emperor. Their situation got worst in the year of 1860 when British rule introduced section 377 of Indian penal code and started treating them as criminals. They have always been in Hindu

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methodology stories. According to these stories, Arjuna had a transgender form. A very beautiful fairy named Urvashi was attracted to him and wanted to marry him but he refused to marry her. Then Urvashi cursed him to become a transgender. The appearance of Lord Shiva as “Ardhnaari” –which is half male or half female is also accepted by millions of devotees. There is one more interesting story of Ramayana while going for “Vanvaas”, Lord Rama asked all men and women to return back , these transgender kept on standing for 14 years and when lord Rama asked the reason they replied as he only mentioned men and women in his speech. They had not returned because they are neither men nor women. Lord Rama was highly impressed by them and gave boon to bless people. That’s why this tradition of having Hijras on auspicious occasions such as child birth and wedding started.²

PROTECTION OF THE RIGHTS OF TRANSGENDER BY HON’BLE COURT IN INDIA

Since transgender people are individuals who differ from the stereotypes and existence of only two genders that is man and woman; they have different appearance, personal characteristics and behaviour. Being different from the other gender, transgender people have been subject to social oppression as society does not accept their gender identity and they suffer from the physical violence which is inflicted upon them. The main problems they suffer are lack of education, unemployment, homelessness, lack of health facilities, depression and discrimination throughout their life. The Supreme Court of India recognized transgender as third gender to eradicate the discrimination suffered by them and to safeguards their rights. The Apex court gave direction to centre to treat the transgender as socially and economically backward classes and to allow them to get admission in the educational institution and employment on the basis of their third gender category. In the landmark Judgement of *National Legal Service Authority v. Union of India*³ the Hon’ble Supreme Court of India ruled that the fundamental rights should be available to the third gender in the same way as they were provided to the male and females. The supreme court has given certain directions for the protection of the rights of the transgender persons by including of a third category in documents like the election card, passport, driving license and ration card, and for admission in educational institutions , hospitals, among others. The court provides the transgender with equal rights and protection under the Article 14, 15, 16 and 21. The Hon’ble court interpreted the meaning of Article 14 and held that the article provides protection to any

² Hsu, G. A. (August 2015). Govindasamy Agoramoorthy and Minna J. Hsu. Journal of Religion and Health, Vol. 54, 3-4.

³ AIR 2016 SC 1863.

person, and person includes the transgender person as well and hence, they are entitled to legal protection of law in all spheres. The court also ruled out that transgender should also have the fundamental right to live with dignity and also gave due recognition to their gender identity which was based upon reassigned sex after undergoing Sex Reassignment Surgery as the person has a constitutional right to get recognized as a male or female. Thus, the court recognized that the transgender were entitled to legal protection of law in all spheres of state activity including the education and employment. Further the court referred to Article 19(1)(a) and 19(2) and concluded that transgender personality can be expressed by transgenders behaviour and presentation and it cannot be restricted or prohibited.

In the case of *G. Nagalakshmi v. Director General of Police*⁴ (2014), the Madras High Court observed that in the absence of any special law, any person has the liberty to choose their sexual or gender identity, and upheld the petitioner's right to choose their own gender.

In the landmark judgment *Puttuswamy v. Union of India*⁵(2017), with regard to the right to privacy, the Supreme Court observed that there is a constitutional right to privacy inherent in the right to life, equality and fundamental freedoms. This includes the right to have intimate relations of one's choice and the right to sexual orientation and gender identity.

There was another case of *Navtej Singh Johar v. Union of India*⁶ in which the constitutionality of section 377 was challenged which stated that 'voluntarily carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment which may extend to ten years or with a fine'. In this case the petition was filed stating that section 377 of the Indian Penal Code is in violation of right to privacy, equality, freedom of expression and protection against discrimination. The petitioner in the present case filed the writ petition to seek the recognition of right to sexuality, right to sexual autonomy and right to choose a sexual partner to be a part of right to which is guaranteed under Art 21 of the Constitution of India. It was also argued that Section 377 was violative of Article 15 as it discriminates on the basis of the sex of a persons sexual partner and it was further violative of Article 19 as it denied the right to express one's sexual identity. The Hon'ble Supreme Court in this case held that Section 377 should be decriminalized and affirmed that homosexuality is not an aberration but a variation of sexuality. The Court further held that discrimination on the basis of sexual orientation is violative of right to

⁴ W.P. No. 15223 of 2014 available at <https://indiankanoon.org/doc/92922065/>

⁵ AIR 2017 SC 4161

⁶Writ petition (criminal) No. 76 of 2016

equality and right to privacy as sexual orientation forms an integral part of self-identity and denying the following rights is violative of right to life and fundamental rights can be denied.

Any offence committed by a Transgender Person shall be punished as per the provisions of the Indian Penal Code. The case of *Mrs. X v. State of Uttarakhand (2019)* affirmed the NALSA Judgement and stated that a denial of the right to self-identify one's gender would deny the right to life and liberty. It is especially significant since it is one of the first cases that affirmed the right to self-determination based on the "psyche" of the individual even in the context of the criminal law.

LEGISLATION TO PROTECT RIGHTS OF TRANSGENDER

To protect their rights Judiciary in *NALSA v. Union of India*⁷, directed the Central Government and State Governments to take various steps for the welfare of the transgender community and to treat them as a third gender for the purpose of safeguarding their rights under Part III of the Constitution and other laws made by Parliament and the State Legislature. Following the judgment, the Rajya Sabha passed the Rights of Transgender Persons Bill, 2014. However, the 2014 Bill never made it to the Lok Sabha and ultimately lapsed.

Two years later, a new Bill was introduced in the Lok Sabha – the Transgender Persons (Protection of Rights) Bill, 2016. In contrast to the 2014 Bill, the 2016 Bill substantially diverged from *NALSA*. So much so that the Parliamentary Standing Committee on Social Justice highlighted several instances where the 2016 Bill conflicted with *NALSA*, in its 43rd Report presented to the Lok Sabha on 21 September 2017. Ultimately however, the Lok Sabha passed the Bill without incorporating the recommendations of the Standing Committee. The 2016 Bill became the Transgender Persons (Protection of Rights) Act, 2019 and came into force on 5 December 2019.

The 2019 Act allows the transgender person to be recognised as such and allows to have a self-perceived gender identity. The provisions also look into the issuance of a certificate of identity and issue a certificate stating the change in gender. A transgender person may make an application to the District Magistrate for a certificate of identity, indicating the gender as 'transgender'. A

⁷ Supra 3.

revised certificate may be obtained only if the individual undergoes surgery to change their gender either as a male or a female.

Under this Act, the Central Government is directed to provide the following rights to the transgender community.⁸

- **Prohibition against Discrimination:** This Act prohibits the discrimination against a transgender person, including denial of service or unfair treatment in relation to (i) education; (ii) employment; (iii) healthcare; (iv) access to, or enjoyment of goods, facilities, opportunities available to the public; (v) right to movement; (vi) right to reside, rent, or otherwise occupy the property; (vii) opportunity to hold public or private office; and (viii) access to a government or private establishment in whose care or custody a transgender person is.
- **Right of residence:** Every transgender person shall have a right to reside and be included in his household. If the immediate family is unable to care for the transgender person, the person may be placed in a rehabilitation centre, on the orders of a competent court.
- **Employment:** No government or private entity can discriminate against a transgender person in employment matters, including recruitment, and promotion. Every establishment is required to designate a person to be a complaint officer to deal with complaints in relation to the Act.
- **Education:** Educational institutions funded or recognised by the relevant government shall provide inclusive education, sports and recreational facilities for transgender persons, without discrimination.
- **Health care:** The government must take steps to provide health facilities to transgender persons including separate HIV surveillance centres, and sex reassignment surgeries. The government shall review the medical curriculum to address health issues of transgender persons, and provide comprehensive medical insurance schemes for them.
- **Establishment of National Council For Transgender Persons**

In addition, the Act also allows for the constitution of a National Council for Transgender Persons. The National Council has been tasked with (i) advising the Central Government on the formulation of policies, programmes, legislation and projects with respect to transgender persons; (ii) monitoring and evaluating the impact of policies and programmes designed for achieving equality and full participation of transgender persons; (iii) reviewing and coordinating the activities of all the departments of Government and other Governmental and non-Governmental Organisations which are dealing with matters relating to transgender persons; (iv) redressing the grievances of

⁸ <https://www.indiacode.nic.in/bitstream/123456789/13091/1/a2019-40.pdf>

transgender persons; and (v) performing such other functions as may be prescribed by the Central Government.

The Act recognizes the following offences against transgender persons: (i) forced or bonded labour (excluding compulsory government service for public purposes), (ii) denial of use of public places, (iii) removal from the household, and village, (iv) physical, sexual, verbal, emotional or economic abuse. Penalties for these offences vary between six months and two years, and a fine.

CONCLUSION

Thus the landmark judgments were given by the Hon'ble Court to protect the rights of transgender and an act passed by the parliament to protect the fundamental rights of the transgender in India. Besides all these constitutional rights, they are still being discriminated in accessing education, health care, employment and other public services. . Because of limited employment opportunities, these people are involved in sex work and risk their own life. They are more likely to get HIV and at high risk. Mental health, depression, harassment, mental and physical torture and violence are also very common in present times. They are facing a lot of challenges every day. Therefore, there is need to organise awareness programme to end the discrimination, to uplift them and to create safe environment for them. People should understand their feelings "this is not a problem, this is only a gender- a third gender". Third gender is different from male and female and this surely does not make them any less from human being. We need to remove this stereotype social stigma and give them chance to stand together common in present times. They are facing a lot of challenges every day. Therefore, there is a need of general awareness among the people.