

ANALYTICAL STUDY RELATING TO RIGHTS OF TRANSGENDER VIS-À-VIS SUPREME COURT VERDICT NALSA V. UOI 2014

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"But whatever a person is gay or transgender or straight, it doesn't change the fact that they are trying to lead their own life."¹⁴

Introduction

Transgender people have a way of expressing themselves, describing their gender, or gender identity (knowing that you are a boy or girl) that doesn't always fit society's rules- that boys are boys and girls are girls.¹⁵ "Transgender" or "Trans" means someone whose gender differs from the one they were given when they were born. Transgender people may identify as male or female, or they may feel that neither label fits them.¹⁶

Transgender people are individuals of any age or sex whose appearance, personal characteristics, or behaviors differ from stereotypes about how men and women are "supposed" to be. Transgender people have existed in every culture, race, and class since the story of human life has been recorded. Only the term "transgender" and the medical technology available to transsexual people are new. In its broadest sense, transgender encompasses anyone whose identity or behavior falls outside of stereotypical gender norms.¹⁷

Transgender people in India face a variety of issues. So far, these communities perceive that they have been excluded from effectively participating in social and cultural life; economy; and politics and decision-making processes. A primary reason (and consequence) of the exclusion is perceived to be the lack of (or ambiguity in) recognition of the gender status of *hijras* and other

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¹⁴ AyaKamikawa, <https://www.google.co.in/search?q=quotes+on+transgender&biw=1366&bih=631&tbm=isch&tbo=u&source=univ&sa=X&sqi=2&ved=0ahUKEwjIqs6LmOfJAhVPBY4KHQpyAWQQsAQIIO#imgsrc=T47SwNSYvh9WyM%3A>.

¹⁵ <http://www.belongto.org/group.aspx?contentid=2918>.

¹⁶ *Ibid.*

¹⁷ <http://socialjustice.nic.in/pdf/introduction.pdf>.

transgender people. It is a key barrier that often prevents them in exercising their civil rights in their desired gender. So far, there is no single comprehensive source on the basis of which an evidence-based advocacy action plan can be prepared by transgender activists or possible legal solutions can be arrived at by policymakers. Reports of harassment, violence, denial of services, and unfair treatment against transgender persons in the areas of employment, housing and public accommodation have been discussed in local media, from time to time.

Problems being Faced by the Transgender Community

The problems faced by the Transgender community as articulated in the PIL petition WP (C) No. 400 of 2012 filed by the National Legal Services Authority (NLSA)¹⁸, in short, are as follows:

1. Transgender persons are deprived of the fundamental rights available to the other two sexes i.e. male and female, and are not considered as the third sex.
2. They are deprived of many of the rights and privileges which other persons enjoy as citizens of India.
3. The transgender are deprived of social and cultural participation, are shunned by family and society, have only restricted access to education, health services and public spaces, restricted rights available to citizens such as right to marry, right to contest elections, right to vote, employment and livelihood opportunities and various human rights such as voting, obtaining Passport, driving license, ration card, Identity Card etc.
4. The transgender community is treated as a legal non-entity in violation of Articles 14, 15, 16 and 21 of the Constitution of India.
5. Other important submissions of NLSA¹⁹ are:

“(i) The transgender community, generally known as “Hijras” in this country, are a section of Indian citizens who are treated by Society as unnatural and generally as objects of ridicule and even fear on account of superstition. All human beings are born free and equal in dignity and ought to be entitled to enjoyment of human rights without discrimination on the basis of sexual orientation or gender

¹⁸ National Legal Services Authority v. Union of India, (2014)5 SCC438.

¹⁹ *Ibid.*

identity. Everyone is entitled to equality before the law and equal protection of the law without any such discrimination. Transgenders are also part of society and have equal rights as are available to other persons. The discrimination based on their class and gender makes the transgender community one of the most disempowered and deprived groups in Indian society.

(ii) In view of the constitutional guarantee, the transgender community is entitled to basic rights i.e. Right to Personal Liberty, dignity, Freedom of Expression, Right to Education and Empowerment, Right against Violence, Discrimination and Exploitation and Right to Work. Moreover, every person must have the right to decide his/her gender expression and identity, including transsexuals, transgender, *hijras* and should have right to freely express their gender identity and be considered as a third sex

(iii) The problems, faced by transgenders are discrimination, lack of educational facilities, unemployment, lack of shelter, lack of medical facilities like HIV care and hygiene, depression, hormone pill abuse, tobacco and alcohol abuse and problems relating to marriage, property, electoral rights, adoption. Ministry of Law and Ministry of Social Justice and State Governments need to recognize the deprivation suffered by transgender people and work on much needed reform.

(iv) In 2003, the Hon'ble High Court of Madhya Pradesh upheld the order of an Election Tribunal which nullified the election of a *hijra*, Kamala Jaan, to the post of Mayor of Katni, on the ground that it was a seat reserved for women and that Kamla Jaan, being a 'male' was not entitled to contest the seat. It is submitted that all the citizens of India have a right to vote and to contest elections. But in the electoral rolls only two categories of the sex are mentioned – male and female. This is unfair to the third sex of India as they are deprived of their statutory right to vote and contest elections.

(v) Transgenders, though human beings are not recognized as persons in violation of human rights as they are deprived of their fundamental rights as well as also other civil rights. The lack of recognition isolates transgenders, especially eunuchs, in the matter of civil rights. The Constitution of

India prohibits discrimination on the basis of sex. Since gender is taken to mean only male and female, the eunuchs and transgenders cannot effectively exercise or avail the benefits of constitutional rights and avail of facilities and benefits available to the male and female genders.

(vi) Transgenders have very limited employment opportunities. Transgenders have no access to bathrooms/toilets and public spaces. The lack of access to bathrooms and public spaces access is illustrative of discrimination faced by transgenders in availing each facilities and amenities. They face similar problems in prisons, hospitals and schools.

(vii) So far as criminal liability is concerned, transgenders cannot escape punishment when they are accused of committing crimes. The word "person" in the Indian Penal Code and General Clauses Act means all human beings. Persons who can be punished for committing offences include transgenders, though they are consciously deprived of their civil rights.

(viii) Transgenders have very limited employment opportunities as most jobs are confined to male and female sexes. Transgenders, being a third sex, cannot even apply for most of the jobs.

(ix) Transgender persons must be properly documented in census. There is need for statutory reservation in education, elections and employment both in the public and private sectors. They need to be empowered and uplifted by facilities for higher education and vocational training to upgrade their earnings and status in society so as to promote their acceptability in society.

(x) Since transgenders are prone to health risks and setbacks, they need to be provided proper medical facilities, including health insurance and clinics, where free or subsidized treatment should be made available.

(xi) The different manifestations of discrimination and deprivation are a consequence of the practice of recognizing and providing only for the male and/or the female sex. This gets reflected in prescribed forms for applying for various privileges, facilities or amenities, as these do not reflect that

a person may belong to a gender, other than male or female.”

Poojya Mata Nasib Kaur ji Women Welfare Society, the petitioner²⁰ in other petition has made similar submissions and referred to transgenders as *Kinnars*. They have prayed to the Supreme Court to direct the Respondents (Central & State Governments) to inter alia bring a policy for upliftment and for socio-economic development of the *Kinnar* Communities in India.

The Salvation of Oppressed Eunuchs (SOOE),²¹ the petitioner in has brought out some issues, which are different from the above and are as follows:

(i) Eunuchs are forced by their ‘gurus’ to lead a life of servitude and bonded labourers. A prayer has been made to ensure that the condition of eunuchs living as bonded labour be ended forthwith under the provisions of the Bonded Labour System (Abolition) Act, 1976.

(ii) The word ‘rape’ in Section 375 of Indian Penal Code (IPC) should include all sexual crimes against women, men, children and transsexuals/eunuchs, as eunuchs are often the targets of some of the worst sex crimes, more so, if they happened to be sex workers. It has, therefore, been prayed to direct appropriate modification/interpretation of section 375 to include transsexuals and eunuchs in the definition of the term ‘rape’.

(iii) There is an order of the Hon’ble High Court, Delhi about Section 377 of IPC, validating rights of the homosexual people and that right has been denied to eunuchs until now, simply because their disability was attempted to be concealed. A prayer has been made in this context for directing appropriate modification/interpretation of Section 377 of IPC, validating the rights of homosexual people be modified/interpreted to include transsexuals and eunuchs in the definition of the term ‘homosexuals’.

Hon’ble Mr. Justice P. Sathasivam, then Judge, Supreme Court of India had stated²² in a lecture delivered on Refresher Course for Civil Judges (Junior Division)-I Batch:

²⁰ WP No. 604 of 2013.

²¹ PIL No. 1 of 2012 in the High Court, Mumbai.

"The Constitution provides for the fundamental right to equality, and tolerates no discrimination on the grounds of sex, caste, creed or religion. The Constitution also guarantees political rights and other benefits to every citizen. But the third community (transgenders) continues to be ostracized. The Constitution affirms equality in all spheres but the moot question is whether it is being applied.

The main problems that are being faced by the transgender community are of discrimination, unemployment, lack of educational facilities, homelessness, lack of medical facilities like HIV care and hygiene, depression, hormone pill abuse, tobacco and alcohol abuse, penectomy and problems related to marriage and adoption."

The Supreme Court directed the Centre and the State Governments to recognize transgender as the third sex and also to provide the benefits of socially and economically backward class. The Supreme Court bench comprising of Justice KS Radhakrishnan and Justice A.K. Sikri observed that the nonexistence of law recognizing transgender as third gender could not be continued as a ground to discriminate them in availing equal opportunities in education and employment.²³

Further the Supreme Court also directed the Centre and the state governments to frame new schemes for the welfare of transgender community including reservations for education and employment purposes, health and medical facilities. In this historic judgment the court also opined that the Centre and the state governments should develop social welfare schemes for third gender community and run a public awareness campaign to erase social stigma attached to the community, apart from considering reservation in jobs. The Supreme Court also added that if a person surgically changes his/her sex, then he or she is entitled to her changed sex and cannot be discriminated.²⁴

²² At Tamil Nadu State Judicial Academy on 12.02.2011 "Rights of Transgender People Sensitising Officers to Provide Access to Justice".

²³ Read more at: <http://www.livelaw.in/transgender-community-formally-recognised-third-sex-also-avail-benefits-socially-economically-backward-communities-supreme-court-directs-centre-stat/>.

²⁴ <http://www.livelaw.in/transgender-community-formally-recognised-third-sex>.

Thus we can term that this judgment of Supreme Court is welcoming boon to all this third gender human beings and we can conclude it to be for social advancement of TGs community who were craving for equality and legal status in India.

