

LEGAL MELODRAMA OF TRANSGENDERS IN INDIA

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Abstract:

“The transgender community deserves the dignity and respect that most people take for granted” – Ed Murray

Transgenders are also part of the society and they have equal right to anything in the world that is available to all other persons. Unanimously God has created human beings in equal stand without any discrimination. But it is only the humans who discriminate and abuse human being and misuse them as objects and the fault lies on the selfish nature of the human beings. The presence of transgender is there from time immemorial as could be seen from several scripts. The discrimination based on their class and gender makes the transgender community one of the most disempowered group in Indian society. Despite these sorts of discrimination, transgenders are emerging as successful personalities, thereby proving their potential. Transgenders are guaranteed with Constitutional rights under the Constitution of India and other legal rights accordingly they should not be overlooked. This research paper focuses on the legal acceptance of transgenders as third gender by the Indian judiciary and deals with the issues which are still faced by the transgenders as marginalized less societal acceptance group and how to bring them to the main stream of the society.

Keywords: Transgenders, marginalized group, empowerment.

Introduction:

The present research study has tried to explore the legal recognition of transgenders as third genders by the activist role of Indian judiciary. Transgenders are still facing many problems as marginalized less societal acceptance group and the study finds how to bring them to the main stream of the society. The problem of identifying the third gender is not the problem of our country. It has been an issue of sensitive debate all over the world. Third gender is referred as Hijra in Indian society i.e., eunuch or hermaphrodite. Transgenders are also part of the society and they have equal right to anything in the world that is available to all other persons. Unanimously God has created human beings in equal stand without any discrimination. But it is only the humans who discriminate and

abuse human being and misuse them as objects and the fault lies on the selfish nature of the human beings. The presence of transgender is there from time immemorial as could be seen from several scripts. The discrimination based on their class and gender makes the transgender community one of the most disempowered group in Indian society. Despite these sorts of discrimination, transgenders are emerging as successful personalities, thereby proving their potential. Transgenders are guaranteed with Constitutional rights under the Constitution of India and other legal rights accordingly they should not be overlooked.

Constitutional Guarantees to Transgenders in India:

Preamble to our Indian Constitution mandates justice – social, economic, and political and equality of status and of opportunity; and to promote among them all. Article 15(1) guarantees prohibition of discrimination on the ground of religion, race, caste, sex or place of birth. Article 16(2) guarantees no citizen shall, on the grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for or discriminated against in respect of employment or office under the State. Article 21 guarantees Right to Dignity within Right to Life as said by the Supreme Court. In *Maneka Gandhi v. Union of India*,¹ the Court gave a new dimension to Article 21 and held that the right to live is not merely confined to physical existence but it includes within its ambit the right to live with human dignity. In *Francis Coralie Mullin v. Union Territory of India*,² the Court elaborated the same view and held that the right to live is not restricted to mere animal existence. It means something more than just physical survival but it also includes “the right to live with human dignity”, namely not only the bare necessities of life indeed freely moving about and mixing and commingling with fellow human being. Article 23 prohibits trafficking in human beings as beggars and other similar forms of forced labour and any contravention of these provisions shall be an offence punishable in accordance with law. But in practice the transgenders are not allowed to maintain their dignity, they are abused by the society. This sexual discrimination makes them a disempowered group in the Indian society.

Legal Recognition of Transgenders in India:

The above mentioned Constitutional Safeguards are utilized only for the safeguards of men and women, whereby totally ignoring the rights of the transgender. Still there is no reason why transgender community should not get their basic human rights such as right to dignity, right against violence, discrimination and exploitation, and right to empowerment.

1. AIR 1978 SC 597.

2. AIR 1981 SC 746.

In jurisprudential concept the rights of sexual minorities should be protected. Hence Supreme Court being the guarantor of fundamental rights, it is the duty placed on the Indian Judiciary to interpret the provisions of Constitutional guarantees in such a way to include the transgender communities. The historic ruling in *National Legal Services Authority v. Union of India*,³ the Supreme Court held that self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Indian Constitution. A transgender has freedom to express one's chosen gender identity through varied ways and means by way of expression, speech, mannerism, clothing, etc., Values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to the members of transgender community under Article 19(1) (a) of the Constitution and the State is bound to protect, safeguard and recognize those rights and it is further stated that uniformity should be maintained in mentioning about the third gender in official documents, viz., Passport, Voter Identity Card, Aadhaar Card, Pan Card, Ration Card, Birth Certificates, Driving Licenses, Bank Pass Books as like which is the base for maintaining equality among male, female and the third gender and further held any insistence for Sex Reassignment Surgery (SRS) for declaring one's gender is immoral and illegal.

Sexual Rights of Transgenders in India:

In the light of transgenders sexual right the Constitutional validity of homosexuality under Section 377 of the Indian Penal Code (IPC) is challenged and tested for the first time in *Naz Foundation v. Govt. of N.C.T. of Delhi*,⁴ the Delhi High Court held that Section 377 of IPC as unconstitutional in so far as it criminalizes consensual sexual acts in private between adults who have attained 18 years of age being violative of Articles 14, 15, and 21 of the Constitution. This will hold good till the law is made by the parliament to enforce the recommendation of 172nd report of the Law Commission of India.⁵ In contrary to this the Supreme Court in *Suresh Kumar Koushal and Another v. Naz Foundation*,⁶ the Supreme Court on a Special Leave Petition has overruled the decisions of Delhi High Court in *Naz Foundation Case*⁷ and held Section 377 of IPC is Constitutional and stated that Lesbians, Gays, Bisexuals or Transgenders (LGBT) persons have been prosecuted for committing offences under Section 377

3. AIR 2014 SC 1863.

4. 2010 CrLJ 94 (DB).

5. Law Commission of India, 172nd Report on Review of Rape Laws (March, 2000).

6. 2014 (1) SCC 1.

7. *Ibid*, Note 4.

of IPC and this cannot be made sound basis for declaring that homosexuality is *ultra vires* the provisions of Articles 14, 15, and 21 of the Constitution. Subsequently, in *Navtej Singh Johar and Others v. Union of India*,⁸ the five-judge bench of the Supreme Court unanimously overruled its earlier decision in *Suresh Kumar Koushal case*⁹ and held that Section 377 of the Indian Penal Code, 1860, insofar as it applied to consensual sexual conduct between adults in private, was unconstitutional. Whereby, the Court relied upon its decision in *NALSA Case*¹⁰ to reiterate that gender identity is intrinsic to one's personality and denying the same would be violative of one's dignity. The Court relied upon its decision in *K.S. Puttaswamy v. Union of India*,¹¹ and held that denying the LGBT community its right to privacy on the ground that they form a minority of the population would be violative of their fundamental rights. It held that Section 377 amounts to an unreasonable restriction on the right to freedom to expression since consensual carnal intercourse in private "does not in any way harm public decency or morality"¹² and if it continues to be on the statute books, it would cause a chilling effect that would "violate the privacy right under Art. 19(1)(a)".¹³ The Court affirmed that that "intimacy between consenting adults of the same sex is beyond the legitimate interests of the state"¹⁴ and sodomy laws violate the right to equality under Articles 14 and 15 of the Constitution by targeting a segment of the population for their sexual orientation. Furthermore, the Court also relied upon its decisions in *Shakti Vahini v. Union of India*,¹⁵ to reaffirm that an adult's right to "choose a life partner of his/her choice"¹⁶ is a facet of individual liberty.

Appraisal of Marital Rights of Transgenders in Tamil Nadu:

A law that posits that a person must be either male or female for the purposes of marriage leaves no space for the transgender. Therefore transgenders are outside the law and became vulnerable. In this regard a laudable judgment has been delivered by the Madurai Bench of Madras High Court in *Arunkumar v. The Inspector General of Registration*,¹⁷ the facts of the case are Arunkumar got married to Sreeja, a transwoman, on 31 October 2018 at a temple in

8. AIR 2018 SC 4321.

9. *Supra*, Note 4.

10. *Supra*, Note 4, p. 156.

11. 2017 (10) SCC 1.

12. *Ibid*, p. 165.

13. *Ibid*, p. 224.

14. *Ibid*, p. 142.

15. 2018 (7) SCC 192.

16. *Ibid*, p. 72.

17. 2019 (4) MLJ 503.

Tuticorin, as per Hindu rites and customs. The Registrar refused to register their marriage. The petitioners challenged this decision before the District Registrar of Tuticorin who in turn confirmed the Joint Registrar's decision. And this matter came up for consideration before the Madurai Bench of Madras High Court and decided by Justice G.R. Swaminathan. The controversial issue before this Court was whether the term 'bride', as mentioned in Section 5 of the Hindu Marriage Act, 1955 meant only women, or included transgender persons as well, since Sreeja was a transwoman. The Court stated that a marriage solemnized between a male and a transwoman, both professing Hindu religion, was a valid marriage. The Court therefore held that refusal to register the marriage of would amount to a violation of her fundamental rights under Articles 14, 19(1)(a), 21 and 25 of the Constitution of India and directed the Joint Registrar No. II to register the marriage of the Petitioners. The Court decided to address the next issue on Sex Reassignment Surgery (SRS) or Intersex Genital Mutilation (IGM) of intersex children. The Court pointed out that as held in *NALSA Case*¹⁸ no one shall be forced to undergo medical procedures as a requirement for legal recognition of their gender identity and directed the Government of Tamil Nadu to issue a Government Order to ban SRS on intersex infants and children. This is the first judgment in India where the right to marry under Article 21 of the constitution has been affirmed for transgender persons and holding that 'bride' under the Hindu Marriage Act would cover transgender persons who identify as women.

Conclusion and Suggestions:

Besides the Constitution of India guarantees the fundamental Right to Equality and does not paved way for sexual discrimination the so called transgender community continues to be blackballed. Unless the family accepts the third gender it is very difficult for the State to protect the rights of transgenders. Let the fundamental Rights of transgender people be protected by ensuring the following measures which may bring them into the main streams of society. The possible measures are:

- Creating awareness among public regarding transgenders are the creatures of naturally accepted norm of third genders and not to ill treat them.
- Ensure statutory guarantees of reservation to transgenders in the matters of education and employment opportunities to empower them.
- Quality medical facilities to transgenders is the need of the hour especially on Sex

18. *Supra*, Note 6.

Reassignment Surgery (SRS) or Intersex Genital Mutilation (IGM) and make awareness among them such is not the mandatory one as decided by the Supreme Court in *Arunkumar's Case* and make them a informed citizens about their rights.

- To come out from their extreme level of poverty transgender should be given vocational training by the Government and other Self Help Groups to make them earn in a decent manner and achieve high status in the society.
- A draconian law should be enacted to bridge the gap between judicial decisions and to overcome the problems still faced by the transgenders as marginalized less acceptance group.

A proposed law to protect the rights of transgender people in India falls short of the country's human rights obligations. The Transgender Persons (Protection of Rights) Bill, 2019, introduced in parliament is unclear on a transgender person's right to self-identify, which the Supreme Court recognized in a landmark judgment in 2014. So it is due season for the Parliament to legislate and pass a law on protecting transgenders in India as early as possible.

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