

SOCIETAL INCLUSION OF TRANSGENDER IN THE CONTEXT OF
THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

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Abstract

All human beings without any discrimination should get equal rights. However, the rights of the transgender persons are often been denied. Often they are subjected to hatred, torture, cruelty, physical injury, abuse. Due to lack of social, economic and educational rights, they get engaged in dangerous professions and are exploited. Very little research work has been done till now to enhance the social and legal rights of the transgender people. Thus, in this study, our attempt is to find out the social acceptance of the transgender persons, whether the laws are adequate in safeguarding their rights and to create public awareness to accept them as a part of the society by adopting a friendly attitude towards them.

Keywords- transgender community, law, rights, society, acceptance, awareness.

We all are acquainted with the term 'hijra' or 'transgender' and nowadays known as the 'third gender' after the passage of 'The Transgender Rights Bill, 2014'. They are different biologically from normal male or female gender. We often come across the regular scenarios of them in our daily life- begging for money, which often results in extraction of money, and out of coercion and exasperation they execrate and persecute people if their requisites are not met with. They can be regularly seen on local trains, parks, at big crossings in Kolkata, whether its Rashbehari crossing, Ballygunge Phari, Esplanade or Rabindra Sadan in glaring clothes with loud makeup on, going from cars to cars waiting at signals, tapping on the window-panes, clapping their hands and begging for alms and also can be seen collecting money in the house of a newly born baby and marriage.¹ For having different biological structure, they are often forced to beg or get into prostitution and often ill-treated by the 'so-called' civilized society of ours. Often they are denied access to health and welfare services which leads to high rates of HIV among transgender.² Though people with progressive mind are now accepting them as a part of the mainstream of the society, a large number of people are still against them. In this study, we argue that the rights are not given to the transgender persons completely. The Transgender Persons(Protection of Rights) Act, 2019 has been done in a haste manner and should be revised so that the flaws and issues pertaining to the Act get removed. We will also discuss the social issues experienced by them regularly to find out their real position in today's society and how much people are ready to accept them.

Literature review

Literature review acts as a major part of any research. It is very essential for every researcher to conduct a literature review of previous works done on a particular topic to

¹Sangita Laha, "Journey from marginal to Mainstream- The Woes of Transgender in India", Dr. Ram Manohar Lohiya University Journal, Vol. 11(2019)

²Sreoshi Sinha, "Social Exclusion of Transgender in the Civil Society: A Case Study of the Status of the Transgender in Kolkata", Internal Journal of Humanities & Social Science Studies (IJHSSS), Published by Scholar Publications, Karimganj, Assam, India, 788711

identity the gaps so that he or she can work on it keeping in mind the present situation. It is a complete summary of previous research on a certain topic. It portrays an idea about scholarly articles, books and other resources relevant to a particular area of research. An article on 'Historical Evolution of Transgender Community in India' by M. Michelraj, an article on 'Journey from Marginal to Mainstream' by Sangita Laha, and various books, legislation, statutes, case laws, websites have been referred and cited in this study.

Rationale of the study

The exploitation, abuse of the victims of the third gender has compelled the authors to go ahead with this study. The scope of this study is to find out whether people are ready to welcome them as part of their community and whether The Transgender Persons (Protection of Rights) Act, 2019 has done justice in safeguarding their legal and social rights.

Research Methodology

Research methodology is the path through which researchers conduct their research. It allows the reader to critically evaluate a study's overall validity and reliability. A research can be classified on the basis of the nature of data, tools of data collection, interpretation of already available data, purpose and other such criteria. In this study, partly doctrinal method and partly empirical method has been used by the authors while shaping this. In the doctrinal part, information has been taken from primary and secondary sources. Primary sources include statutes, legislation, case studies and the secondary sources include books, journal, articles and websites. For the close observation of the societal acceptance of the transgender persons in hands, the authors have done the empirical study. A case study was done in Kolkata in the state of West Bengal, India. While doing empirical study we gathered primary data by sending questionnaires to 38 common people who are residents of Kolkata through digital platforms like mail, whatsapp and face book messenger to the common people to evaluate the acceptance of the third gender by them. Accordingly, 38 common people from Kolkata gave their opinion. The data collected from the survey is analyzed and presented in a table by calculating percentage to draw logical conclusion.

Historical Background and occupation

The Vedas, the Kama Sutra and various texts suggest that the third sex individuals were well known in the pre-modern India. We also find evidence of the hijras or transgender in the epic Ramayana, where Lord Rama authorized them the power to confer blessings on people on fortunate occasions like birth of a child and marriage where they are supposed to sing, dance and confer blessings. During the British colonial administration, they were denied civil rights. The British criminalized the hijra community and considered them to be separate caste or tribe in different parts of India. The Criminal Tribes Act, 1871 included all hijra who were engaged in kidnapping and committing unnatural offence and dresses like woman to dance in public places. They were penalized for such activities. After independence, the Karnataka Police Act, 1964, amended in 2012, was enacted to register the names and places of all hijras who were engaged in kidnapping or committing unnatural offences.³

³M. Michelraj, 'Historical Evolution of Transgender Community in India, Asian Review of Social Sciences', Vol. 4 No.1, 2015

Their occupation is not only to collect alms on streets, parks, local trains but also collecting money by singing and dancing in the house of a newly born baby. They are also engaged in prostitution. Due to their distinct behavioral nature, they are regularly harassed by the common people both physically and mentally. There are certain exceptions where the transgender persons made an extra effort to become successful in their career by becoming lawyers, professors, judges, military officers after 2013. In this background, this study makes a meek attempt to highlight the injustice done to the victims both socially and legally because the society is still not ready to accept them and certain legal rights are denied to them.

Laws relating to Transgender in India:

Mainly two genders are recognized everywhere i.e. Male and Female. Transgender persons face many problems due to their different sexual orientation from male and female. That is the reason why legal recognition is very important for them to get equal rights like male or female. Recently, to protect their rights and thinking about their welfare the legislature has passed one Act named “The Transgender Persons (Protection of Rights) Act, 2019.” Now the question is how much this Act is serving the purpose for which it was enacted.

Background of “The Transgender Persons (Protection of Rights) Act, 2019”⁴

Before critically analyzing this Act we can discuss the background of it in short. In the case of *NALSA v. Union of India*,⁵ the Supreme Court of India in its judgment recognized the rights of transgender people in India and for the purpose of securing their rights it has mentioned a series of measures like prohibiting discrimination and recommended the formation of welfare policies and recommended for reservation of those third gender persons in educational institutions and jobs. Further, in the case of *Justice K.S. Puttaswamy (Retd.) and anr v. Union of India and ors*⁶ (2017) and *Navtej Singh Johar v. Union of India*⁷ (2018) the Supreme Court of India affirmed the 2014 judicial mandate. However, before enactment of this Act some bills were introduced like the Rights of Transgender Persons Bill, 2014. During the pendency of this Bill, 2016 Bill was tabled. After that the Transgender Persons(Protection of Rights) Bill, 2018 also lapsed and finally in the light of the lapse of the 2018 Bill the 2019 Act was introduced in the Lok Sabha by the Minister of Social Justice and Empowerment on July 19,2019.

Salient features of this Act:⁸

The Transgender Persons (Protection of Rights) Act, 2019 consists of total nine chapters. This Act is applicable in India. This Act prohibits discrimination against transgender people, acceptance of gender identity through certificate issued by the District Magistrate, option to change gender either as a male or female through surgery subject to satisfaction of the District Magistrate on receipt of an application

⁴[https://en.wikipedia.org/wiki/Transgender_Persons_\(Protection_of_Rights\)_Act,_2019#cite_note-th2-2](https://en.wikipedia.org/wiki/Transgender_Persons_(Protection_of_Rights)_Act,_2019#cite_note-th2-2), visited on 15-08-2020 at 07:30 p.m.

⁵*National Legal Services Authority v. Union of India*, AIR 2014 SC 1863

⁶*Justice K.S. Puttaswamy (Retd.) and anr v. Union of India and ors*, W.P. (Civil) No. 494 of 2012

⁷*Navtej Singh Johar v. Union of India*, W.P. (Crl.) No. 76 of 2016

⁸[https://en.wikipedia.org/wiki/Transgender_Persons_\(Protection_of_Rights\)_Act,_2019#cite_note-th2-2](https://en.wikipedia.org/wiki/Transgender_Persons_(Protection_of_Rights)_Act,_2019#cite_note-th2-2), visited on 15-08-2020 at 07:30 p.m.

and certificate issued by the Medical Superintendent or Chief Medical Officer, adequate steps by the Government for their protection, equal rights of them in educational institutions, health facilities, National Council for Transgender Persons for the enforcement of their rights and penalties for sexually abusing or exploiting them.

Analytical study of this Act:⁹

Now the question is that how much this Act is effective to protect the rights of transgender persons practically because there are so many oppositions against this Act already. In this regard we may highlight some points to critically analyze this Act. First of all very few people are aware of this Act. We also found out that the common people are mostly ignorant of this Act. This Bill was passed on 5th August, 2019 but it did not come in the news properly because on that day, Art 370 of the Indian Constitution which used to providespecial status to the State of Jammu and Kashmir was abrogated and the attention of the whole country was on that issue. However, after passing of this Act how much people are aware of it and how much the society is ready to accept the transgender persons as a part of them or the legal and social rights provided by this Act is a million dollar question. However, this Act has some area of controversy like this Act requires a transgender person to get certified as a transgender person and in this process of certification their gender will also be checked. So they may feel awkward if the District Magistrate check them physically to ascertain their gender. It may hamper their dignity to some extent. It seems like that this Bill is not accepting the gender as a spectrum. In this Bill punishment for sexual offence to a transgender person is six months to years whereas in case of female it may be 7 years or more and may extend to life imprisonment so it seems like that sexual offence against transgender people is too less in comparison. This Act does not provide any kind of reservation for transgender persons in educational institutions and public employment, which is a clear violation of the NALSA judgment. There is also a common scenario of people giving weird look at them in any public office or public places. Most of the time they face problems to get education and employment and also harassment from their peer group. From this point of view they should get reservation in different aspects of the society while some people opine that reservation will never give them the opportunity to come into the mainstream of the society. It will always push them backward.

For example, in the case of SwatiBidhan Baruah, she challenged the constitutional validity of this Act.¹⁰She alleged that the Act violates the transgender persons' right to privacy, life and security. She also said that Section 14 of this Act is not even clear in providing welfare schemes to support the community. The Parliament should have provided in the Act. The Act is not only discriminatory but also humiliating to the entire transgender community living in the country. Thus, the loopholes of this Act should be looked into.

⁹Ibid

¹⁰<https://m.economicstimes.com/news/politics-and-nation/sc-notice-on-plea-against-transgender-act/articleshow/73685247.cms>, visited on16-08- 2020 at 09:15 pm

Result of the empirical study¹¹

We have already made a survey based on some questions to find society’s consideration regarding them. The data is as follows:

Table 1: Opinion given by the common people of Kolkata (Total no. of respondent: 38)

| Sr. no. | Item | Agree (%) | Disagree (%) |
|---------|---|-----------|--------------|
| 1 | Do you have any idea about transgender? | 100 | 0 |
| 2 | Do you know there is an Act named The Transgender Persons (Protection of Rights) Act, 2019? | 57.89 | 42.10 |
| 3 | Do you think they need to get a certificate to prove their gender identity? | 47.36 | 52.63 |
| 4 | Under section 7 of the aforesaid Act it is said that if any transgender person undergoes surgery to become male or female it will not affect the person’s right as a transgender person. Do you think it is just? | 57.89 | 42.10 |
| 5 | Do you think they should be given equal rights in educational institution and in employment as given in the statute to get socially recognized? | 100 | 0 |
| 6 | Will you accept if they use either of the male or female public urinals? | 81.57 | 18.42 |
| 7 | Do you think their parents should give them moral support and a proper upbringing so that they can live with them just like other male or female children? | 100 | 0 |
| 8 | Do you think their rights are protected under Article 15, 19 and 21 of the Constitution of India which recognizes gender identity, right to life, privacy and equality of a transgender person? | 31.57 | 68.42 |
| 9 | Do you think they should get reservation in different aspects of the society as they still do not belong to the mainstream of the society? | 42.10 | 57.89 |
| 10 | Do you think they should have the right to adopt a child? | 81.57 | 18.42 |
| 11 | In case of sexual harassment to them punishment is 6 months to 2 years. Do you think this should be enhanced? | 100 | 0 |

From the age group 25-60, 21 female respondents gave their opinion regarding their acceptance of transgender persons in the society whereas we got opinion from 17 male respondents. Table 1 presents the analysis of the data of the opinion given by the respondent within the study area. The outcome of this table 1 is further elaborated in the Figure 1.

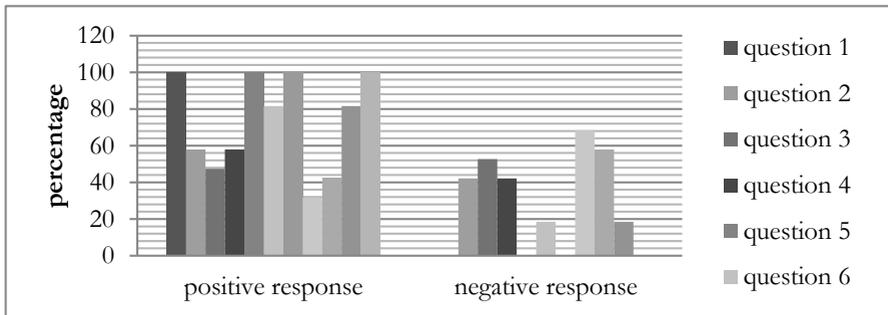


Figure 1 : Pictorial presentation of the responses of respondents

Figure 1 presents the percentage of the positive and negative responses of 38 respondents which includes both male and female respondents with respect to the questions as asked by the authors within Kolkata.

¹¹Source : Authors

Suggestions

Following are some measures to improve the condition of the most ignored and marginalized community so that they can surmount their problems—Unbiased attitude of the common people, They should be encouraged in starting businesses like selling clothes, books, toys, work in medicine shops etc. to earn their livelihood so they do not have to beg on streets, Awareness in the workplace to take necessary steps to prevent sexual harassment against them and a complaint mechanism for the redress of complaint by the victim, Equal rights in schools and colleges for them, guidelines for prohibition of harassment, torture and abuse, accommodation for transgender students, allot gender neutral washrooms for them to secure their privacy and allow participation and membership of co-curricular activities, Establishment of gender-neutral urinals in all public places so that they are free from any harassment, abuse and torture, Moral support from family, siblings and friends, Enhancement of imprisonment term for sexual abuse against them, Gender-neutral laws for right to marriage, inheritance, adoption, rape, Global awareness of their rights through media.

Conclusion

The main aim of the study was to find out how much the society is ready to accept the transgender persons as a part of them and gender as a spectrum. From the above discussion and by questioning different types of people it can be concluded that society is still not ready to accept them completely. Present generation people gave positive opinion towards acceptance of transgender persons as a part of their society but overall study revealed that society is not ready to accept them entirely. Even some people were so hesitant and ignorant to give their opinion on transgender just because they personally do not like them. There is also lack of awareness of the Transgender Persons (Protection of Rights) Act, 2019 and this Act has some major loopholes and controversial provisions which need to be modified.

There are some serious problems faced by the transgender community which needs immediate action by the Government and supplement necessary measures for them regarding their health, education, employment, basic amenities etc. Amelioration of the mentality of the people is also needed to bring the transgender persons to the mainstream of the society.

References

- Pandey J.N, (2019) Constitutional Law of India, Central Law Agency.
Jain M.P, 8thedition, Indian Constitutional Law,Nagpur.
DebabrataBasu, “The Role Played by the Indian Pharmacopoeia Commission in Today’s Era: A Critical Study”, Voice of Research, Vol. 9, Issue 1, June 2020.
Sreoshi Sinha, “Social Exclusion of Transgender in the Civil Society: A Case Study of the Status of the Transgender in Kolkata”, Internal Journal of Humanities & Social Science Studies (IJHSSS), Published by Scholar Publications, Karimganj, Assam, India, 788711.
[https://en.wikipedia.org/wiki/Transgender_Persons_\(Protection_of_Rights\)_Act,_2019#cite_note-th2-2](https://en.wikipedia.org/wiki/Transgender_Persons_(Protection_of_Rights)_Act,_2019#cite_note-th2-2)
<https://m.economictimes.com/news/politics-and-nation/sc-notice-on-plea-against-transgender-act/articleshow/73685247.cms>