

A Critical Analysis of Third Gender's Legal Rights in India

Dr. Mihir Kumar and Mr.Ramakant Vats

Assistant Professor

Ishan Institute of Law Gautam Buddha Nagar
Greater Noida, U.P.

Abstract

Since the creation of Adam and Eve, the prime parents of making human beings are recognized as man and women are the basis of the biological features. The holy bible calls that who tries to impersonate the opposite gender and like them Women behaving like men and vice versa people of gender nonconformity. History of civilization clearly says that different societies in different ages have recognized them under various names but it is in the 20th century that the term "Transgenderism" was coined by transgender activist Virginia Prince. In the recent years, activism for transgender rights have received a huge support from the community in United States of America and rest of the World. The term 'Transgenderism' used for mentioning the people who reject their socially assigned identity and denying keeping them in men or women gender binary. Minter, (2006) says that the term transgender is an Umbrella word; it includes transsexuals, transvestites, cross-dressers, drag queens and drag kings, feminine gay men, femme lesbians and intersex people. In recent times the transgender are also called by the name of third gender in the academic and political world.

Key Words: Transgender, Third-Gender, Human Rights, Transgenderism, USA and Social-Transformation.

Introduction

“We see a pattern of violence and discrimination directed at people just because they are gay, lesbian, bisexual or transsgender. There is widespread bias at jobs, schools and hospitals, and appalling violent attacks, including sexual assault. People have been imprisoned, tortured, even killed. This is a monumental tragedy for those affected – and a stain on our collective conscience. It is also a violation of international law.”

Ban Ki-Moon¹

The biological characteristics of humans are based on the recognition of men and women as the first parents since the creation of Adam and Eve. The Holy Bible calls those who try to impersonate the opposite gender and like them Women behaving like men and vice versa are people of gender nonconformity. The history of civilization clearly says that different societies in different ages have recognised them under various names, but it was in the 20th century that the term "transgenderist" was coined by transgender activist Virginia Prince. The United States of America and the rest of the world have recently given agitation for transgender rights a strong amount of support.²

The term "transgender" is used to refer to people who reject their socially assigned identity and deny keeping them in the men's or women's gender binary. Minter (2006) says that the term transgender is an umbrella word; it includes transsexuals, transvestites, cross-dressers, drag queens and drag kings, feminine gay men, femme lesbians, and intersex people. In recent times, transgender people have also been called the "third gender in the academic and political worlds."³

¹United Nations Secretary General, Geneva, 7 March 2012

² (Chan, 2013).

³ (Chan, 2013; Khanna et al., n.d; Lind, 2010; Revathi, 2010).

Social Status of Transgender

The issue of transgender people is unique and cannot be brought under the general category of gender issues. Further there are specific concerns in transgender issues that do not fall within the common fold. In India, awareness relating to transgender issues has only now been brought under the judicial and executive framework, with a few judgments and orders being put forward on the same. The Supreme Court of India has recently dealt with this subject.⁴ Gender differences pose a very important legal concern in any aspect of social or personal life. The reason is that gender-based relationships, behavioral patterns, and personal needs are so varied and yet need to be regulated and coordinated to have a peaceful living environment. If one gender becomes weaker than another, there will be chaos in society. Therefore, the issue of gender balances needs to be probed into and rectified if there is a necessity for the same.

The necessity of Gender Balancing in Society:

Assessing gender balance in the existing laws will aid in finding ways to expedite changes if any are necessary in the present scenario and in the legal course of action in India. Further, it would also serve to refrain from bringing in clauses that may not be necessary or that may cause confusion or aggravate the present situation.

As transgenders are indirectly deprived of Education, they are not qualified to find ways to work; if they are educated they are indirectly prevented from finding a job to sustain their lives. In want of money to sustain themselves and those like themselves who are left to survive on their own, they find no other option but to indulge in sex work and collection and therefore are prone to mishandling and health hazards, for which again they are in want of money. They are forced to become dependent and thus their life is in a hassle with those who violate them. It is important to discover ways to affirm a safe and protected living to transgender persons. Protection of the person of the transgender needs to be guaranteed.

India has a multi faceted legal system which deals with almost all issues of life. This legal system is able to imbibe issues effectively and grant protection and remedies

⁴ National Service Authority v. Union of India and ors.(2014) 5 SCC 438

to transgender people. However, there is a necessity to probe the same to assess if or not intervention is necessary to update the legal system in relation to transgender issues and make special provisions for the same.

The issue of transgender people has been addressed by international organisations and a few countries. It would be an additional assistance to derive from them inputs that would help us to deepen our understanding in the issue and to assess whether the same would be relevant in the Indian context. This would enable us to compare and contrast different positions. By analysing the data collected in personal interviews with transgender and understanding drawn from their life situations in India it would be more apt to draught laws based on the same.

When laws are general, they are provided with exceptions to provide certain protections and rights to those who have found it hard to assert themselves in society. For instance, special provisions are available for women and children in many cases. In some situations, general gender based laws did not help. In the case of *Vishaka v. State of Rajasthan*⁵, for instance, a special situation arose where, in the case of transgender and various other situations that are specific to transgender alone, will general gender laws help? This is an issue to be probed into.

Any law that is not transgender specific may not be able to cater to the specific issues of transgender people. Therefore, there may be certain issues that must be addressed in such a situation. It is therefore important to ascertain whether certain issues that are completely outside the general gender based legal arena have to be addressed in the case of transgender people.

If there are issues that have not been dealt with in any law in the Indian legal system then it is important to assess whether such issues can be attended to as in some situations, the Indian Legal System is quite complex. But if it is found that the issue in question is of extreme importance, then the issue has to be further tested to find out whether it can be resolved only if a specific law has to be made to address such an issue.

It is further important to assess the actual impact of the issue in question with a careful and comprehensive study of the same in relation with other laws that might be

⁵ 1997 (6 SCC 241)

affected because of this issue and whether the impact so made is helpful for the society at large. This kind of Analysis will help to decide what kind of law needs to be proposed and what issues are to be attended to.

Equality before the Law:

The right to equality is a very important right and has expressly been referred to in the Preamble of the Constitution. Equality of status is ensured by means of the guaranties of the equality before the law, and equal protection of the laws. According to Article 14 of the Constitution, "The State cannot deny to any person equality before the law and the equal protection of laws." Discrimination on the grounds of religion, race, caste, sex or place of birth or any one of them is absolutely forbidden, except in the interest of the socially and educationally backward classes of citizens, or scheduled castes and scheduled tribes.⁶

This means that for purposes of equal protection of the laws clause no classification can be made on grounds only of religion, race, caste, sex place of birth or any of them. The Constitution (First Amendment) Act, 1951, by inserting clause (4) to Article 15 has provided that special provisions may be made in favour of the educationally and socially backward sections of the population including the Scheduled Caste (SC) and Scheduled Tribes (ST) has been raised to the status of a fundamental right to overcome the barrier of non-enforceability of Article 37 and the Champakam's case⁷.

Judicial View on Third Gender:

In the case of *National Legal Services Authority v. Union of India (2014)*⁸, the Hon'ble apex court of India held that transgender person have separate status, which is known as *Third Gender* and it have equal Fundamental Rights like right to Live, Right to foods, Right to opportunity of Job etc. confirm according to the our Indian Constitution and they have individual identification of their own Gender like as Male, Female or third

⁶ Article 15(1)/15(4).

⁷ Champakam Dorairajan V. State of Madras, AIR 1951 SC 226.

⁸ The Guardian. 15 April 2014. Retrieved 15 April 2014

Gender. This judgment has been a landmark judgment by which the our Supreme Court make a healthy step towards provide separate entity and try to distinguish other gender like Male and Female. This type of judgment come in society by the Honb'le Court only because court know that third gender persons are economically, educationally and socially backward class. They provide be provision of reservation in the admissions of any school in India and opportunity of Jobs.

Conclusion

It is suggested that a useful study of the government's as well as social activities be made. The government must have open and honest discussions with all stakeholders of the society to trust and make its activities more transparent. Basic liberties cannot be cartel on the name of religions and social vice and must be protected on their rights. Because it's not a moral duties of the government to protect third gender rights, its legal obligation of the government to protect their social status and the Fundamental Rights which is granted by the Constitution of India. While one hand our Government should be protect their legal right and other hand provide opportunity to job and respectful job. Implementing legal plans and ensuring that all inhabitants have access to basic rights will provide them a sense of security and encourage them to assist the government. After all was said and done, the government worked effectively in a massively convenient shutdown to contain the calamity and protect third gender rights. In select rural areas of the country, it worked out how to provide basic requirements such as food, shelter, and opportunity of job. Our Supreme Court of India passed so many judgments which was mentioned above for the protection of Third Gender or Transgender people's right and provide equal opportunity of education, jobs develop their overall personality and status of living because as we know the Supreme Court of India is a custodian of the Constitution of India according to the article 129 of the Constitution of India.

Bibliography

1. United Nations Secretary General, Geneva, 7 March 2012
2. Chan, 2013
3. Chan, 2013; Khanna et al., n.d; Lind, 2010; Revathi, 2010
4. National Service Authority v. Union of India and ors.(2014) 5 SCC 438
5. 1997 (6 SCC 241)
6. Article 15(1)/15(4)
7. Champakam Dorairajan V. State of Madras, AIR 1951 SC 226
8. The Guardian. 15 April 2014. Retrieved 15 April 2014