



“The Rights of the Transgender under Human Rights Perspective: A Critical Evaluation”

*¹Dr. Kabita Chakraborty

*¹Associate Professor, Department of Law, Brainware University, Barasat, West Bengal, India.

Abstract

Concept as well as development of human rights has an important role in shaping a nation's image. Human rights are the very basic rights which every people are entitled to enjoy by birth without any discrimination made on the basis of caste, creed, sex, religion, etc. Under this background, this researcher is trying to find out the true legal status of transgender community in our society. Though transgender is considered to be a different category of people, but they should also be entitled to enjoy certain basic human rights so that they can also lead a dignified life like us. But however, in real social scenario, what we find that this transgender community are seen to be a taboo and are victims of exploitation and thus they are still struggling for the recognition of their rights. However there is multidimensional attempt on the part of the three organs of the government to improve their conditions but there must be some additional support which we as a community should give and make this fight on united stand.

Keywords: Human rights, transgender, community, multidimensional attempt, different category

Introduction

LGBT stands for lesbian, gay, bisexual and transgender and these people are also known as homosexuals. The 'transgender' is all-encompassing term including those individuals whose gender identity does not match with the identity they were born at birth. But before going deep into the concept of the transgender community, we have to know the root. The term 'gender' is the socially constructive attribute to distinguish between males and females of our society. On the other hand the concept of 'gender identity' is the social expression of an individual as men or women. It is the ability of an individual to identify his sexual attribute. So far the concept of transgender is concerned, it is different from the one they were born with, and they are not fully female. They belong to a different category.

If we look into the history of India, transgender were a group of people who were considered as the ones who were close to the divine power. Although transgender are considered to be a different category of people, these people are human beings eventually who deserve to get certain basic human rights in order to lead a dignified life, but in our societal culture, these people are seen to be a taboo and are victims of exploitation. In today's world the gender equality is a very controversial issue. In past also this issue is very well-known when they were not equally treated with heterosexual. Due to their sexual orientation these people face harassment, discrimination, and the threat of violence. Since then these people continue to face discrimination and exclusion in society and violence. It is also observed that the majority of people who belongs to this community hide their sexuality out of fear of losing their job. Sometimes these people experienced disaffection from their family and friends, harassment at school which ultimately cause mental ill health,

dropping on their school and homelessness. All these factors ultimately affect the main social good such as education, employment, health care and housing of the LGBT persons.

The Indian constitution refers to a document which provides a special legal sanctity which sets out the framework and principal functions of the Government. It defines the powers of the main organs of the government i.e. legislature, executive and the judiciary and regulates the relationship with each other and with the people of the country. The Indian Constitution can be said to be made after its makers have analyzed the other constitutions of the world and have incorporated the best provisions in the Indian constitution. Part III of the Constitution has been described as the "Magna Carta" of India. Coming to the Preamble of the Indian Constitution, it contains the main objectives of the Constitution. The Preamble clearly states the following words.

In no part of the Indian constitution has the word 'sex' been mentioned which gives us the idea that the provisions of the Indian Constitution and the rights mentioned there can be availed by any person and no person shall be denied access to these basic fundamental rights which also includes the transgender community. Now let us look into some of the rights mentioned in the provisions of the Indian Constitution which can also be availed by the transgender community.

Right to equality is one of the most important and basic right mentioned in the Indian Constitution, this right has been bestowed on every person, where that person is an Indian citizen or not. This right provides for equal protection to all persons within the Indian Territory in the enjoyment of their rights and privileges. The word 'any person' means any individual and there should be no discrimination made on the basis of caste, creed, sex or religion.

The word 'sex' however does not only mean people belonging only to the male and female category. According to Article 15, the state shall not discriminate any citizen on the grounds of caste, creed, sex, religion, place of birth. The above mentioned right should be made available to the transgender community as because they are human beings just like us and they too deserve their share of rights.

According to Article 21, no person shall be deprived of his life and personal liberty except according to the procedure established by law. This right is available to both citizens and non-citizens.

This is one of the most important and basic fundamental right which is made available to all the citizens as well as non-citizens which will also include the transgender community and this right cannot be taken away from them except due procedure established by law., thus, in Maneka Gandhi case, the court gave a new dimension to Article 21. It was held that 'right to live' however does not mean mere existence; it also includes a right to live with human dignity.

The current scenario which is prevailing for the transgender community is a really a sad one as these groups of people are neglected and mistreated by their own family members, solely because of their nature, they are subjected to torture and they have not been considered as a part of the society. It is sad reality to speak of, but the Indian society is seen to be developing one, still it needs to broaden its mindset in some specific areas as because these transgender people are human beings just like the rest of us and they do deserve a place in the society.

Status of Transgender Community in India

The Transgender community in India was for the first time recognized in the landmark case of NALSA v. Union of India. The said case was filed by The National Service Authority of India to acknowledge and identify people who fall outside the category of male/ female gender and put a legal recognition to them. The main issue which was put in front of the Supreme Court was whether these groups of people who fell outside the purview of male / female can be recognized as 'third gender' persons? To solve this issue it was referred to an 'Expert Committee on Issues Relating to Transgender' incorporated under the Ministry of Social Justice and Empowerment to conclude the matter. This case holds its significance where the Supreme Court had put a legal recognition on the transgender community and had discussed their identity on a broader perspective. The Supreme Court had put out its verdict that these people were entitled to the rights provided under the Constitution of India. Moreover, the court had sub classified these groups of people into two categories. The first category of transgender people who psychologically believed to be a part of the gender opposite of the gender they were born with and opted for getting their sexuality changed, the second category which identified themselves to be belonging to the 'third genders' which were also known by the term 'Hijras', the court had granted a proper recognition only to the people belonging to the second category.

The first category of people mentioned above who opted for getting their sexuality changed were also known by the term "Transsexuals" "which preferred to get their gender changed. In other words, "transsexuals" are individuals who alter from the male gender to the female gender and vice-versa^[1]. These group of people feel that were supposed to born with the opposite gender rather than the one they were born with and they prefer to get their sex changed. Some of these people having no other option do get habituated to using hormones

and gene suppressing medications in order suppress the traits of their sexuality, while others go for a procedure which is known as Sex Reassignment Surgery. This process is performed to transform individuals who have got gender anxiety into their desired gender. This process is a complex one which involves psychiatric evaluation, psychotherapy as well as surgical operations such as breast surgery, voice surgery to mention a few. This type of sexual transition from one gender to another is irreversible so one should carefully arrive at such a decision. Once this procedure is completed, the individuals who have gone through this procedure cannot revert back to their original sex. This is a process which is very expensive involving a lot of money and it requires expert specialization.

The second category which identified them to be belonging to 'third gender' category is popularly known as Hijras. These individuals have got their own customs, behavioral traits and a unique way of expressing themselves in our society. The existences of this group of people have been found in the ancient Hindu mythological scriptures and divine books like the Ramayana and the Mahabharata. The Hijras are often male people who identify themselves as belonging to the opposite gender and they dress themselves like females. These people try to distant themselves from the society and lead a very isolated life. Since, these people are away from the society, they are often subjected to poverty, unemployment, sexual violence and are harassed by the higher authorities.

Atrocities and Dilemma against the Transgender Community in India

The transgender community in India has to face a lot of challenges and difficulties in order to get their share of rights, these groups of people are not someone new to the society as because these people have been remotely keeping away from the society as they do not want to expose themselves to the crowd of the society. These people are discriminated from exercising their basic rights, the sole reason why this happens as because of the social stigma that is present in the minds of the society that these people are born different than the rest of the people. This sort of biasness denies the transgender community access to employment, basic health care facilities, lack of education etc. As a result of this discrimination, the transgender community becomes one of the most vulnerable groups prevailing in the Indian society because of which they are exploited in every sphere of their lives. Some of these grave issues which the transgender community has been facing have been elaborated below-

- **Educational Facilities:** As mentioned earlier, the transgender community has been regarded as the most vulnerable group prevailing in the Indian society today on the account of their nature i.e. sexual attribute. Most of these people hardly have got access to basic education, as a result of which they are left behind. Most of these people are denied admissions to educational institutions. Due to the lack of education, these people are the ones which do not get their participation in the social, economic activities.
- **Medical Facilities:** Most of the transgender community do not have access to medical treatment and health care facilities. The reason which may be cited for this is because these people are hesitant to go for medical treatment and even if they visit hospitals for medical treatment, the doctors are hesitant to provide them with

proper care and medical treatment on the account of their nature.

- **Employment Facilities:** The lack of educational opportunities and social exclusion limits the employment opportunities for these groups of people. There are various factors responsible for this such as stigma, exclusion from family and society, sexual abuse which hampers the Trans people to find a suitable place for employment to earn their daily bread.
- **Discrimination at Workplace:** They are suffering from discrimination at the workplace.

The Transgender Person (Protection of Rights) Bill

The Transgender Person (Protection of Rights) Bill was put forward in the Parliament on November 26, 2019. This bill has defined transgender people as someone whose gender does not match the one assigned at birth. The Bill has clearly stated in its provisions that it prohibits any kind of discrimination which is shown to the transgender community in respect of employment, education, health care etc. The Bill has given a proper legitimate recognition to the Trans people on the basis of an issuance of a certificate which will be issued by a district magistrate. The Bill imposes a penalty for causing any harm to the transgender people whether physical or sexual and provides punishment varying from six months which may extend up to two years. According to the provisions of the bill, the government has taken several steps to ensure that the transgender community are not deprived of their basic rights, ensure equal participation of these people in the society, create various schemes to promote the participation of the transgender community in cultural activities etc.

This has been enacted by the Parliament to protect the interest of the transgender community has been a subject of controversy as the transgender people feel that this bill denies them some essential basic rights like education, health care and employment and self-identification. The transgender community has been protesting the various provisions of the bill by citing its various loop holes demanding the Centre to amend them. Some of the key issues were-

- i) The bill which was enacted with the sole objective of protecting the rights of transgender people had been enacted without the opinion of the transgender community. As a result, these people felt that the law makers should have considered their opinion as it was a bill concerning their rights, so these people considered themselves to be neglected.
- ii) The bill also had a provision that they would be given a certification by a District Magistrate stating themselves as transgender and the procedure to obtain this certificate is to show the Magistrate evidence of sex reassignment surgery which the transgender people feel is a grave violation of their right to privacy.
- iii) The bill has not got any provision regarding marriage rights, property rights, social security or pension scheme for the transgender community. This has led the transgender community to protest the bill which claims to protect this group of people in our society.

Although members of the opposition criticized the 2019 act and assured transgender people that they would not vote in favour of it, it was passed by the Lok Sabha on 5 August 2019 and by the Rajya Sabha, the upper house of the Parliament, on 26 November 2019. The president assented to it on 5 December 2019, upon which the act was published in

the Gazette of India. It has been in effect since 10 January 2020 following a notification of the same in the Gazette on the same day.

Legal and Social Status of LGBT People

In developed nations condition of LGBT people are in better position than underdeveloped or developing nations. In Brazil LGBT people contribute significantly to the socio-economic and political status of the country. That's why Brazil is also known as best LGBT tourist destination place. In 2013 Brazilian National Council of Justice legalize gay marriage nationwide. It is to be noted that from last decade LGBT rights in Brazil experienced significantly progress. In 2018 restriction on undergoing surgery or judicial review in order to change names or gender on identification document for LGBT people has been removed by council. The one of the highest degrees of freedom for LGBT people is provided by United Kingdom. LGBT people have same legal rights of non-LGBT people. Meanwhile 86% citizens of U.K accept homosexuality. As per the section 11(A) and 11(B) of Gender Recognition Act 2004, transgender people are allowed to change their gender in legal documents, recognize their sex for all purposes and allow acquiring new birth certificate. In U.S.A many LGBT rights have been established through the judgment of Supreme Court. In its five landmark rulings between 1996 to 2020 court disapproved the state law which prohibit LGBT people recognition based upon homosexuality. Court nullifies section 3 of Defense of Marriage Act which denied recognition of same-sex marriages and sodomy laws in whole nation. The preamble of Indian constitution ensures justice, equity and liberty to all people. Article 14 of constitution ensures equality before law and equal protection of law. In NALSA vs Union of India, Supreme Court held that under constitution rights and freedom of transgender people are guaranteed. In 2018, landmark judgment of Supreme Court in Navtej Singh Johar vs. Union of India decriminalizes the adult consensual same-sex relationship and breakdown the section 377 of Indian Penal Code.

Discrimination on The Basis of Sexual Orientation and Gender Identity

There are four types of sexual orientation discrimination

- a) Direct discrimination, in which someone treat LGBT people differently in similar situation due to sexual orientation.
- b) Indirect discrimination, happen when a corporation has a particular policy or way of working that discriminate with LGBT people.
- c) Harassment is a situation when someone feel humiliated, offended or degraded.
- d) Victimization when you are treated badly because you have made a complaint of sexual orientation and gender identity related discrimination under particular act which prohibit discrimination.

In many nation laws against cross dressing are enacted to punish LGBT people. Many UN Human rights mechanism express repeatedly violence are occurring at different part of world against LGBT people since the early 1990's. These mechanisms include international conventions and treaties which set up to monitor the state compliance with them. Human Rights Council appointed special rapporteurs and independent experts in many states to investigate and report in the violation of human rights of LGBT. The first UN resolution on gender identity and sexual orientation was

adopted by Human Rights Council on June 2011, due to grave violence of LGBT human rights.

LGBT Rights-International Perspective

It is true that initially from its establishment UN has not sincere on LGBT rights. But after the case of *Toonen vs. Australia* in which UN Human Rights Committee declared that laws which against the homosexuality, breach international human right standards of International Covenant on Civil and Political Rights. After this decision World Conference on Women^[2] was called by UN to achieve Global legal equality. On April 2003, Brazil presented a resolution before United Nations Commission on Human Rights (UNCHR) to prohibit discrimination on the ground of sexual orientation and gender identity. The fundamental treaties of UN also prohibit discrimination and encourage respect for human rights of all humans in the world i.e., Article 1 of Charter of United Nations and Article 2 of Universal Declaration of Human Rights. Slowly but surely, UN has taking a progressive step for ensuring equal rights to LGBT people. On April 2011, United Nation Office of the High Commissioner for Human Rights (UNOHCHR), United Nations Development Programme and World Health Organization, jointly organize the programme on HIV and AIDS and publish a brochure titled "The United Nations Speaks Out: Tackling Discrimination on Grounds of Sexual Orientation and Gender Identity" for the LGBT people. UNOHCHR release the first report on LGBT human rights which details the report on worldwide violence occurring against LGBT people.

The Declaration of Montreal on LGBT is a human right document adopted by International conference on LGBT Human Rights which formed the part of first world out games. Declaration contains the rights of intersex peoples that are universally accepted. It ensures all fundamental rights of LGBT people from right to education, healthcare and immigration. Conference focus on the states where homosexuality is criminalized and punishable by corporal punishment. According to the International Lesbian, Gay, Bisexual, Trans and Intersex Association's (ILGA) there are thirteen countries in globe where homosexuality is punishable by death.

Yogyakarta Principles are a distinguished group of International Human Rights expert gathered in response to well documented patterns of abuse happening to LGBT people in different parts of world, met in Yogyakarta, Indonesia. To enact the set of international principles which deal with the sexual orientation and gender identity? These principles were universal guide to human rights which affirm binding international legal standards, which all states should follow.

Conclusion

The diplomacy of LGBT rights has the power to transform societies and the state who previously not desirous to promoting and safeguarding the human rights of LGBT. This paper analysis the problem of LGBT people which they face daily in their life and also analyze what steps has been taken by the international community for upliftment of their status. Human Rights Organization such as Human Rights Watch and Amnesty International continuously working for safeguarding the rights of LGBT at domestic level to international level. LGBT rights activist through International Gay and Lesbian Human Rights Commission demanding ban of discrimination based on sexual Orientation. In concluding remarks of this research article, it can be clearly seen that the transgender community differ in sexual orientation face a lot of criticism, discrimination and exclusion from the society. The legal system has taken various steps to make sure that these people are given their share of rights but unless we as a community bring change in our mindset, the struggle for equality will continue for the transgender community. Even the Indian constitution has mentioned some of the basic rights which should be made available to all individuals

without any sort of discrimination on any grounds and there are various international instruments like The Universal Declaration of Human Right (UDHR) which provides that all human beings are born free and equal and the rights mentioned here should be made available to all human beings without any discrimination which also includes the transgender community. As mentioned earlier, the government has taken various steps, but the implementation aspect is still under question. In addition, there are reports of violence which is being covered by the media regarding transgender violence. The government has to adopt a multi-dimensional approach to look into the various aspects of this problem and suggest measures. This happens to be a major hindrance for a developing country like India as because transgender people are human beings just like the rest of us in the society, Even though laws are being implemented for the protection of interest of the transgender community, something additional needs to be done and for that we as citizens of this country need to take a united stand. The fight for the transgender rights in a country like India will be a long one and it requires a united effort.

References

1. Iyer VR, Krishna Human Rights and Inhuman Wrongs, BR. Publishing Co., New Delhi, 1990, 36.
2. The Universal Declaration of Human Rights, <http://www.un.org/en/documents/udhr/>.
3. The Convention on the Political Rights of Women, <https://treaties.un.org/doc/Treaties>
4. Convention on the Elimination of all Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981), 1249 UNTS 13. As of May 2014, 188 States are party to CEDAW, out of 193 UN Member States.
5. Office of the Special Advisor on Gender Issues and Advancement of Women, Gender Mainstreaming: Strategy for Promoting Gender Equality, 2001, 1.
6. In the CEDAW preamble; Human Rights Committee, General Comment No. 28, Article 3 (The equality of rights between men and women), UN Doc. HRI/GEN/1/Rev.9 (Vol. I), 29 March 2000.
7. UN Women, Annual Report 2012-2013, 2013.
8. The United Nations, Beijing Declaration and Platform of Action (adopted 15 September 1995 at the Fourth World Conference on Women), UN Doc. A/CONF.177/20, p. 10. To this end, 189 governments adopted the Beijing Declaration and Platform of Action, which is not legally binding but has nonetheless been integral to the identification of areas of critical concern and the development of a forward-looking agenda for achieving gender equality.
9. Human Rights Committee, General Comment No. 28, Article 3 (The equality of rights between men and women), UN Doc. HRI/GEN/1/Rev. 2000; 9(I):5.
10. CEDAW Committee, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, UN Doc. CEDAW/C/GC/28, 2010, 16.
11. Art. 2 of CEDAW; Art. 2 of Maputo Protocol.
12. Pandey Jn. The Constitutional Law of India, 30(50th ed, 2013.
13. Prachi Singh. Why is transgender community unhappy with Trans Persons Bill?, Down To Earth(Oct 9, 2019), <https://www.downtoearth.org.in/blog/governance/why-is-transgender-community-unhappy-with-trans-persons-bill-67158>.