



LEGISLATIVE MEASURES ON THIRD GENDER IN INDIA: AN ANALYSIS

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Abstract

A nation's development and prosperity rests on the upliftment of society in general and individual in particular. A society can have the socio-economic upliftment if all the sections of the society are part of the upliftment in the society. In Indian context, since independence, the nation has been on the path of development and improving the socio-economic status of common citizen of India, however, it's a fact that the Indian society is a highly stratified society. The inequality among sections of the society is all pervasive and stark. Inequality and lack of equal opportunities in the Indian society has led to formulation of targeted welfare measures for those sections of the society which have been neglected and are not in the mainstream social construct. The transgender community, which has been neglected in the nation's development story, needs to be the focus of attention in order to integrate the transgender community into the mainstream of society, as it was already stated at the outset that a nation's prosperity lies in the prosperity of all individuals without any discrimination. In the present paper, the author has discussed the plight of third gender in India. The author has also focused on the law and legislative measures pertaining to third gender. The author further discussed the lack of implementation of the existing laws which affect the around development of the third gender in India. At last, the writer has given some suggestions to bring the third gender into mainstream of the society through the proper implementation and awareness among the people.

Key Words: *Third Gender, Inequality, Injustice, Legislative Measures, Development, Society Etc.*

Introduction

It is pertinent to mention here that the existing laws and various provisions of law on third gender need to be deliberated, discussed, debated and examined critically. The constitutional provisions pertaining to third gender also need to be elaborately discussed. In the light of the same an analysis on earlier instances of application of legal codes to people of different sexual orientation and the like are the only ones that had been considered and laws to hold on fast to stereotypes were in vogue. Intersexual and castrated eunuchs were those of whom were employed in Queens chambers and in charge of food and might be even hospitality in royal courts. This article endeavors to discuss the situation in India since ancient times, to ascertain the legal status of those who had a different gender identity and sexual orientation and to trace it down to the present day and to find whether any lacuna exists in the legal framework in India with respect to transgenders. There are not many texts available from prehistoric times and not any cave paintings or drawings which depict the situation of transgender in society.

An ancient Indian work on statecraft called the Arthashastra mentions a wide range of extravaginally sexual practices that, whether they were carried out with a man or a woman, were intended to be sanctioned with the lowest possible fine. Although gay intercourse was not permitted, it was considered a fairly minor infraction, whereas other forms of heterosexual intercourse were subject to harsher penalties.¹

¹ Swati Sharma, "Societal Attitude Towards Homosexuality" SSRN 11 (2011).



Homosexual practices are mentioned in the Manusmriti,² which is a list of the first norms of conduct that were suggested to be adhered to by a Hindu, but solely as something to be regulated. Despite being included in the category of sexual practices, homosexuality wasn't always seen favorably. There were sanctions set down for homosexual conduct. A woman who pollutes a damsel (virgin) must immediately have (her head) shaved or two fingers cut off, and be made to ride (around the town) on a donkey, according to a scripture that refers to sexual contact between an older woman and a virgin (woman). A damsel who pollutes (another) damsel must be penalised 200 panas, pay the double of her (nuptial) cost, and get 10 (lashes with a) rod, according to the passage that refers to sexual contact between two virgins. When these regulations are taken out of context, they appear to be against lesbianism, but in reality, they are more concerned with a young lady losing her virginity and being unfit for marriage than they are with the gender of the partners. In contrast to the punishment prescribed for the same act between two virgins, the punishment for a forced sex act between a man and a woman, for example, states that "...if any man through insolence forcibly contaminates a maiden, two of his fingers shall be instantly cut off and he shall pay a fine of six hundred (panas)". The punishment for having sex with a non-virgin woman was a very small fine, but the punishment for having homosexual relations with a man was to take a bath while wearing clothes and to perform a penance of "eating the five products of the cow and keeping a one-night fast"—the penance serving to replace the traditional idea that having homosexual relations meant losing one's caste. Given that the Manusmriti is the same scripture that asserts that a woman's place in society is equivalent to or even lower than that of a man's land, his livestock, and other assets, the disparity in treatment may have resulted from the text's unequal beliefs on males and females.³

The revered Indian scripture Kama Sutra addresses all facets of sexuality—marriage, adultery, prostitution, group sex, sadomasochism, male and female homosexuality, and transvestism—without ambiguity or deceit.⁴

Stringent Laws against Gender and Sexual Minorities

The British Raj has made a great deal of impact on the legal system of India.

A. Sexual Orientation

Law against people of varying sexual orientation had been made under Section 377 of the Indian Penal Code, which entered into force in 6th October, 1860. It was similarly instituted throughout most of the British Empire.⁵ This section has not been repealed as on date in India. At that point of time medical knowledge and biological understanding of the human body was limited. In the later part of this chapter the test of the legality of the section has been made and the continuing efforts to set right the same have been discussed.

² Yellavajhula Surayya v. Yellavajhula Subbamma, (1919) 37 MW 405

³ Devdutt Pattanaik, "What Do Manusmriti and Dharmashastra Have to Say About Homosexuality?", Qrius, Aug. 09, 2018, available at: <https://qrius.com/what-do-manusmriti-and-dharmashastra-have-to-say-about-homosexuality/> (last visited on Apr. 12, 2022).

⁴ Ruth Vanita and Saleem Kidwai (eds.), *Same Sex Love in India* 46 (Palgrave Macmillan, New York, 1st edn., 2000)

⁵ Indian Penal Code, 1860 (Act 45 of 1860), Section 377



B. The Criminal Tribes Act Of 1871

India during the colonial rule of the British was not much affected by the idea of Eunuchs. Any discussion regarding them available is only to the extent of the nature of work carried out by them in the courts of the Mohammadean rulers. The concept of differences in Gender identity was not too seriously taken. Their presence was untouched by the British Government, even though they were faithful to the royalty in India who were not under the British reign.

It was after 271 years of their settlement and governance in India that The Criminal Tribes Act of 1871, passed by the governor of India in Council, (received the assent of the Governor General on the 12th October 1871), an Act for the Registration of Criminal Tribes and Eunuchs as modified up to 1st, February 1897⁶. Whereas it is expedient to provide for the registration, surveillance and control of certain criminal tribes and eunuchs, it is thereby enacted as follows:

This act extends only to the interiors under the governments of the Lieutenant Governors of Bengal, the North -Western Province and the Punjab respectively, and under the administration of the Chief Commissioner of Oudh. The reason for passing the Act was on the grounds that were probably brought for the consideration that it was important that eunuchs who were suspected to be kidnapping⁷ or castrating⁸ children or found guilty under the provision of Section 377 of the Indian Penal Code were to be registered.

However there seem to be no mention of Eunuchs in either the Criminal Tribes Act 1911, or 1924, which clearly reveals that Eunuchs were not detrimental to the well-being of the society at large and that the allegations against them had no proper standing and that there was some group of people who wanted to put Eunuchs under pressure. It may also have been a political move to do away with the strong and loyal protection of the Muslim rulers and to make them weak without proper protection to take over rule or to bring them under the British control.⁹

Even during the British rule cases relating to Eunuchs were heard and decided in the High Courts¹⁰ in India. Recently the High Courts of the various states in India have time and again been faced with issues surrounding transgender/eunuchs and considered their conditions on humanitarian basis. In such a situation an analysis and study of the cases and the circumstances in which this issue arose may project the prior understanding, the present transition and the necessity for future change.

C. Protection against Sexual Harassment

Pandia was an effeminate male. He was added in the list of accused in a case and asked to report to the police station every now and then. It then came to light that he was sexually harassed by certain police personal. It became a permanent torture for him and it drove him to self-immolation in front of the

⁶ Suneeta Singh, Pallav Patankar, et.al., *A People Stronger: The Collectivization of MSM* 37 (SAGE Publications, New Delhi, India, 1st edn., 2013).

⁷ *Soni Natverlal Prabhudas v. State of Gujarat*, 1983 CriW 1124; *Nirmala Rani v. The State of Tamil Nādu*, 2003 CriW 3108.

⁸ *Anopkunver Kantha Kunver v. State*, 1983 2 GLR 1235.

⁹ Jessica Hinchy, "The Long History of Criminalising Hijras", *Himal South Asian*, July 02, 2019, available at: <https://www.himalmag.com/long-history-criminalising-hijras-india-jessica-hinchy-2019/> (last visited on Apr. 28, 2023).

¹⁰ *Murarji Gokuldas and ors. vs. Parvatibai* (1877) ILR 1 Born 177



police station. He succumbed to the burn injuries. This was viewed seriously by the court and disciplinary action was ordered on those who subjected Pandian to harassment¹¹.

Chinnasamy, transgender had executed a sale deed on his property. The reason that has been attributed to nullify a sale deed executed by a transgender by his own nephew is that such person is a mentally retarded person. The court made two things clear, one that being a transgender is not a mental illness and two that as the owner of a property a transgender has equal right to deal with it as any other human, in the way that such person pleases. The High Court clearly accepted the title of Chinnasamy, the transgender person and rejected the plea of his nephew, to nullify the sale¹².

The struggle in this case is based on a custom⁹ that the property of the guru should be transferred to his chellah. The court held that in the opinion of this Court, the custom does not violate the aforesaid law. It only limits the choice of legatee without affecting the right to execute the will. Such a custom cannot be held to be either against public-policy or the aforesaid Mohammadan Law. The custom would, therefore, not be rendered invalid for this reason.

D. Employment and Equal Opportunity

The Joint Director of Government, Examinations (Personnel), DPI Complex, College Road, Chennai, had rejected an application of a transgender named S. Swapna the petitioner made an application to the third respondent requesting to correct the entries in S.S.L.C. and Higher Secondary Course certificates on account of sex change that took place consequent to the surgery. The said application was rejected ... on the ground that prevailing regulations does not permit such course of action . . . the prevailing rules does not permit such sex and name changes.

The Madurai Bench of the Madras High Court set aside the order of the Joint Director of Government, Examinations (Personnel) and ordered fresh consideration of the candidate on merit¹³.

In the situation of K.Prithika Yashini the court ordered the appropriate authorities to carry out appropriate changes in the relevant records to affirm her identity as transgender¹⁴.

The High Court of Karnataka has further held that reservation needs to be provided for transgender persons in the state as per the Supreme Court judgment¹⁵.

The Kolkata High Court has however brought out a new issue in a situation where the court has drawn a line between women and transgender (trans women). The Court held that when appointment is made only for women and men are excluded the third gender can also be excluded from such appointments and the same is not discriminatory.

¹¹ Jayalakshmi us. The State of Tamil Nadu (2007) 4 MW 849

¹² Veerasekaran us. Deuarasu 2011 CIJ 109 REJ

¹³ fflyas and ors. vs. Badshah Alias Kamla AIR 1990 MP 334;

¹⁴ S.Swapna (Transgender) vs. The State of Tamil Nadu

¹⁵ K.Prithika Yashini vs. The Controller of Examination



Emasculation sometimes done on religious inducement on a person who does not have such an intention becomes a permanent scar in the mind of that person and therefore a CBI probe had been ordered into the same by the court.¹⁶

E.Homosexual Marriages/ Different Sexual Orientation Validity

In spite of Section 377 IPC, in the year 2011, a Gurgaon court from effectively recognizing a marriage between two lesbians. While granting police protection to a runaway lesbian couple from Khekada village in Baghpat, additional sessions judge Vimal Kumar recorded matter-of-factly that Beena and Savita claimed to be married to each other. Their statements were recorded in the order without any indication that such a marriage had no legal status. "We have married to each other on July 22, 2011 of our own free will without coercion, duress, fraud, misrepresentation etc.," it stated.¹⁷

The High courts have made it clear that law would be interpreted on the basis of the inherent rights of the individual and not in its letter. Of late Judicial Intervention has clearly aided both transgenders and the various State Governments and the Central Government to move forward in setting right the situation of transgenders in India. However, the case of Tamil Nadu has taken a lead in this issue.

Central Legislation

At the National Level, the Ministry of Social Justice & Empowerment, Department of Social Justice and empowerment, Department of Disability Affairs, Government of India, in the Report dated 27.1.2014 of the Expert Committee on the Issues relating to transgender constituted by the same has gone into the details of the issues surrounding transgender persons and made a study of various legal parameters. They have studied in detail the work of the Transgender Welfare Board in Tamil Nadu and have tried to analyze issues of health, young and adolescent transgenders and discrimination.

On analysis of the situation in relation to transgenders, they have put forward valuable recommendations for the welfare of transgenders. They have defined transgender Persons to include, "All persons whose own sense of gender does not match with the gender assigned to them at birth. They will include trans-men & trans-women (whether or not they have undergone sex reassignment surgery or hormonal treatment or laser therapy, etc.), genderqueers and a number of socio-cultural identities, such as kinnars, hijras, aravanis, jogtas, etc."

The further recommendations from the Department of Social Justice and Empowerment have made it plain that the terms "sex" and "gender" should not be used interchangeably in official publications. It has also been felt that a Certificate that a person is a transgender person should be issued by a state level authority, similar to a birth certificate. This is based on the recommendation of a District level Screening Committee, which is chaired by the Collector/District Magistrate and is made up of the District Social Welfare Officer, a psychologist, a psychiatrist, a social worker, two representatives of the transgender community, and such other person or official as the State Gender.¹⁸ In line with the same recommendation, it would also be appropriate from the cases in the High Court discussed to

¹⁶ Dr. Malabika Bhattacharjee v. Internal Complaints Committee, Vivekananda College, W.P.A. 9141 of 2020

¹⁷ Dipak Kumar Dash and Sanjay Yadav, "In a First, Gurgaon Court Recognizes Lesbian Marriage", The Times of India, July 29, 2011, available at: <https://timesofindia.indiatimes.com/city/gurgaon/in-a-first-gurgaon-court-recognizes-lesbian-marriage/articleshow/9401421.cms> (last visited on Apr. 22, 2022).

¹⁸ Government of India, "Report of the Expert Committee on the Issues Related to Transgender Persons" 25 (Ministry of Social Justice & Empowerment (MSJE), 2014)



above to bring a connection between the official documents of the person in case of matters of mark sheets, certificates ID Cards etc., before and after transition.

The Twelfth Five Year Plan (2012–17); Social Sectors, Volume III includes the following information in its section on transgender communities:

“The Twelfth Plan suggests empowering the transgender community by urging line Ministries to promote their access to financial aid, education, housing, healthcare, skill development, and work opportunities. Transgendered people shall be identified in all government and non-government records by adding a separate column with the third gender. In order to draught legislation to safeguard the community's interests and enhance living conditions for transgendered people, the Ministry of Social Justice and Empowerment will count the number of transgendered people living in India and map their socioeconomic status.”

Further recommendations include establishing policies and strategies to safeguard transgender people from sexual harassment and assault in workplaces, schools, and colleges, as well as to provide housing and counselling for transgender people in their families. It has also been suggested to provide pension plans for elderly transsexual people. Overall, the investigation has been extremely thorough, and there have been some significant recommendations made to deal with these problems. Parallel to the efforts taken by the Union and State Governments, Judicial intervention from courts in this issue has played an extremely important role.

In India, the Law is not inclusive of LGBT rights. In the last two years the Supreme Court has dealt extensively on this issue. But since there were two major cases one on sexual orientation and the other on gender identity, the view on these subjects has also been divided - one was annulled and another was granted. The Supreme Court has been very careful in dealing with issues relating to transgenders. They have never taken a negative stand in their concern. In *Suresh Kumar Koushal & anr vs. Naz Foundation & ors*¹⁹, the Supreme Court has found it unnecessary to strike down Section 377 of IPC as violating Articles 21, 14 and 15 of the Constitution of India, in *Suresh Kumar Koushal & Anr. vs Naz Foundation & Ors*²⁰. In this case relating to homosexual activity (other than heterosexual activity as the normal norm is accepted in Indian society, where heterosexual is relationship between male and female in ethical terms and limited intimacy), the Apex Court concluded the judgement by shifting the burden of assessing the issue to the competent legislature.

Concluding observations

To conclude, third genders are not only subjected to physical acts of criminalization, they are also dying on the inside in their psyche for fear of being found out. So, living a life of fear and trauma, not knowing how to overcome their natural self to satisfy the society, they undergo a lot of pressure and stress because they cannot confide their ordeal to anyone for fear of being prosecuted for what they naturally are. Simply enactment of laws for protection of rights of the LGBT is not sufficient, it should be properly executed. Non implementation of law pertaining to third gender is a gross violation of human rights also. There is need of a comprehensive law on third gender to bring them to the mainstream of the society. The existing laws need to be examined, deliberated and find out the loopholes so that a comprehensive law can be enacted for better protection of rights of the third gender in India.

¹⁹ AIR 2014 SC 563.

²⁰ AIR 2014 SC 563.