

DISCRIMINATION TO THE TRANSGENDER PERSONS IN INDIA AND RIGHTS MOVEMENTS: A PERSPECTIVE

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INTRODUCTION:

The pressure of tradition and consequent conservatism in Indian society have often been sidelined and catapulted with onslaught of our remarkable achievements in social and physical sciences as well as technological applications enriching life with creativity, as can be reasonably expected. Despite such outstanding progress, in the domain of social norms and mores, moral constructs in society could not dent any other area of personal human choice to the extent it has affected matters pertaining to sex and gender identities. The society has delineated standard patterns of sex and gender in terms of expected ubiquitous patterns of behavior, speech, communication and styles in utter contempt of the inalienable rights of individuals to follow own styles of sexual preferences and gender life. Any deviation from the standard, and consequently ethical pattern, and moral value is considered as audacious and harmful and are dealt with ruthlessly with severity. The ideological regulation is dominant and its might is utilized to destroy assertion of personal choices in gender and sex-life. For example, there are mindsets about how a female will walk, speak, communicate and role-play even in private spheres, how her public roles are to be regulated to be able to be treated as a virgin, how attributes such as courage, physical strength and participation in social production will be associated obviously to male masculinity as opposed to females and so on with an outcome of extreme constraints of gender discrimination being laid down for the women only. Most families do not accept if their male child starts behaving in ways that are considered feminine or inappropriate to the expected gender role. Consequently, family members may threaten, scold or even assault their son/sibling from behaving or dressing-up like a girl or woman. Some parents may outright disown and evict their own child for crossing the prescribed gender norms of the society and for not fulfilling the roles expected from a male child. Parents may provide several reasons for doing so like bringing disgrace and shame to the family, diminished chances of their child getting married to a woman in the future and thus end of their generation (if they have only one male child) and perceived inability on the part of their child to take care of the family. The society thinks that it is the law of nature to have two kinds of sex, male and female and sexual relationships can only take place between opposite sexes. Any deviation from this “law of nature” is considered a disease and a sin. As a result, the transgender and bisexual persons are subjected to untold misery and atrocity in as much as they are considered as outcasts in a civilized social pattern. A conservative and prejudiced society does not rely upon gender identity being essential to a person's internal and personal sense of existence of being a man or a woman (or someone outside of that gender binary).

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Transgender:

Gender identity refers to a person's internal sense of being male, female or something else⁽¹⁻⁴⁾. Gender expression refers to the way a person communicates the gender identity to others through behavior, clothing, hairstyles, voice or body characteristics. Transgender people are individuals of any age or sex whose appearance, personal characteristics, or behaviors differ from stereotypes about how men and women are 'supposed' to be. "Trans" is sometimes used as shorthand for "Transgender." While transgender is generally a good term to use, not everyone whose appearance or behavior is gender-nonconforming will identify as a transgender person. Transgender is a term used to describe people whose gender identity differs from the sex which the doctor marked on their birth certificate. Transgender people have existed in every culture, race, and class since the story of human life has been recorded. The contemporary term 'transgender' arose in the mid-1990s from the grassroots community of gender-different people. In contemporary usage, transgender has become an 'umbrella' term that is used to describe a wide range of identities and experiences, including transsexual people, male and female cross dressers (sometimes referred to as 'transvestites,' 'drag queens' or 'drag kings') and inter-sexed individuals. Transgender also include such men and women who, regardless of their sexual orientation and appearance or characteristics are perceived to be gender atypical. In its broadest sense, transgender encompasses any person whose identity or behaviour falls outside of stereotypical gender norms. That includes people who do not self-identify as transgender, but who are perceived as such by others and thus are subject to the same social oppressions and physical violence as those who actually identify with any of these categories. Other current synonyms for transgender include 'gender variant,' 'gender different,' and 'gender nonconforming.' In India there are a host of socio – cultural groups of transgender people like hijras/kinnars, and other transgender identities like Shiv-shaktis, Jogtas, Jogappas, Aradhis, Sakhi, etc. However, these socio-cultural groups are not the only transgender people, but there may be those who do not belong to any of the groups but are transgender persons individually.

LGBT Community

The LGBT community or GLBT community⁽¹⁻⁴⁾ is comprised of people with distinct choice of sex with same – sex partners. It is usually referred to as the gay community and is a loosely defined grouping of lesbian, gay, bisexual and other people, organizations, and sub-cultures with related behavioral manifestations, united by a common culture and social movement. These communities also value and celebrate their pride, diversity, individuality, and sexuality. LGBT activists and sociologists see LGBT community-building as a counterbalance to heterosexism, homophobia, biphobia, transphobia, sexualism, and conformist pressures that exist in the larger society. The term gay pride is used to express the LGBT community's identity and collective strength. The LGBT community is diverse in political affiliation. Not all LGBT individuals consider themselves part of an LGBT community. Groups that may be considered part of the LGBT community include gay villages, LGBT rights organizations, LGBT employee groups at companies, LGBT student groups in schools and universities, and LGBT-affirming religious groups. LGBT communities may organize themselves into, or support, movements for civil rights promoting LGBT rights in various places around the world. Sexual and Gender Identity.

The Biological Basis:

The concepts of gender identity and transgender identity differ from that of sexual orientation⁽⁵⁾. Sexual orientation describes an individual's enduring physical, romantic, emotional or spiritual attraction to another person, while gender identity is one's personal sense of being a man or a

woman. Transgender people have more or less the same variety of sexual orientations as cisgender people. Cis - gender refers to someone who identifies with the gender that they are assigned by birth. In the past, the terms homosexual and heterosexual were incorrectly used to label transgender individual's sexual orientation based on their birth sex. Professional literature now uses terms such as attracted to men (androphilic), attracted to women (nephiligyc), attracted to both (bisexual) or attracted to neither (asexual) to describe a person's sexual orientation without reference to their gender identity. Therapists are coming to understand the necessity of using terms with respect to their clients' gender identities and preferences. For example, a person who is assigned male at birth, transitions to female, and is attracted to men would be identified as heterosexual. Chromosomes define Gender. Once we decide to tear apart ignorance and superstition and examine the issues in the light of research in the biological sciences, we must understand that the most fundamental characteristic of gender is described in terms of the chromosomes, e.g., males have XY chromosomes and females have XX chromosomes. Whenever there are digressions from the correct mix of chromosomes, sex and gender identities assume a different form. We also find that there are medical theories about why some people are transgender or LGBT. Some studies have established that fluctuations or imbalances in hormones or the use of certain medications during pregnancy may cause intersex or transgender conditions. Other research indicates that there are links between transgender identity and brain structure. Each of the types mentioned above arises due to specific biological and physiological disorders in respective human organs, namely, lack of desired levels of Endrogen, Chromosomes (XXY in place of XY), abnormally low levels of X and/or Y Chromosomes and abnormal quantity of Hormones. Brain structure differences have also been noted between gay and heterosexual men, and lesbian and heterosexual women as part of extensive research on biology and sexual orientation. With regard to genetic factors, a study by Hare reported that Trans women have a longer androgen receptor gene than cis – men, which is less effective at binding testosterone, potentially preventing complete masculinization of the brain. Prenatal androgen exposure or sensitivity, or lack thereof, is an often cited mechanism to explain observed brain-structure differences. Psychological factors have also been proposed. We have heard recently about something unusual that happens in a small village in the Dominican Republic ⁽⁵⁾. One in 90 children there that are born girls are not destined to stay girls. Once these children start puberty, they grow penises and testicles. They are known locally as guevedoces, literally “penises at age twelve”. Scientists call them pseudohermaphrodites and Dr. Julianne Imperato, one of the first to study the guevedoces, discovered that the startling transformation was due to an enzyme deficiency. All humans start out as female in the womb. At the risk of over-simplifying, boys then get a shot of testosterone that changes the clitoris into a penis and changes the vagina into testicles. Guevedoces don't have as much of an enzyme called 5-alpha-reductase. It is this enzyme that converts the testosterone into the male genital building hormone dihydro-testosterone. At puberty, the “girls” undergo another surge of testosterone that belatedly causes the outward change into boys and ultimately men. The phenomenon is not confined to the Dominican Republic and further cases have been reported in Papua New Guinea. The condition that results in the guevedoces' late transformation is one of a variety of conditions that come under the umbrella term Intersex. Simply put, an Intersex condition occurs where a person's sexual anatomy doesn't fit the typical definition of male or female. It can mean that a person's genitals look different to the norm for their sex, or that the genitals look like the norm on the outside but the internal anatomy may more closely resemble the opposite gender. So children are not necessarily defined by the genitals they are born with. . People with Intersex conditions differ from people who are Transgender. Transgender people generally have hormones, genitals and chromosomes that seem consistent to one sex but they believe

themselves to be of the opposite sex. Intersex conditions manifest as some sort of physical mismatch between the genders that shows up in chromosomes, internal sexual anatomy or genitals that may differ from the norm. There is crossover between the groups but they are also distinct. So, a transgender person may look male, have XY chromosomes, have the same male sex hormones levels and undergo male changes during puberty. Yet all the while the person feels like a girl trapped inside a boy's body. Similarly, a female may identify as male. Why? Is it all in the head? Possibly, but that doesn't mean that it's not real and the head is a great place to start searching for answers. Surprisingly, there are not a lot of studies on transgender issues. But those that have been carried point towards actual differences between transgender people and their cis - gender peers. Transgender, or transsexual, can refer to someone who may feel like they're a member of one sex trapped in the body of another or that their birth gender is just wrong somehow or may refer to someone who has an intense desire to be a member of the opposite sex.

Problems faced by Transgender Community :

The main problems that are being faced by the transgender community are of discrimination, unemployment, lack of educational facilities, homelessness, lack of medical facilities: like HIV care and hygiene, depression, hormone pill abuse, tobacco and alcohol abuse, penectomy, and problems related to marriage and adoption. In 1994, transgender persons got the voting right but the task of issuing them voter identity cards got caught up in the male or female question. Several of them were denied cards with sexual category of their choice. The other fields where this community feels neglected are inheritance of property or adoption of a child. They are often pushed to the periphery as a social outcaste and many may end up begging and dancing. This is by all means human trafficking. Sometimes running out of all options to feed themselves, they even engage themselves as sex workers for survival. Transgenders have very limited employment opportunities. Transgenders have no access to bathrooms/toilets and public spaces. The lack of access to bathrooms and public spaces access is illustrative of discrimination faced by transgenders in availing each facilities and amenities. They face similar problems in prisons, hospitals and schools. Thus, later transgender women may find it difficult even to claim their share of the property or inherit what would be lawfully theirs. Sometimes, the child or teenager may decide to run away from the family not able to tolerate the discrimination or not wanting to bring shame to one's family. Some of them may eventually find their way to Hijra communities. This means many Hijras are not educated or uneducated and consequently find it difficult to get jobs. Moreover, it is hard to find people who employ Hijras/TG people. Some members of the society ridicule gender-variant people for being 'different' and they may even be hostile. Even from police, they face physical and verbal abuse, forced sex, extortion of money and materials; and arrests on false allegations. Absence of protection from police means ruffians find Hijras/TG people as easy targets for extorting money and as sexual objects. A 2007 study documented that in the past one year, the percentage of those MSM and Hijras who reported forced sex is 46%; physical abuse is 44%; verbal abuse is 56%; blackmail for money is 31%; and threat to life is 24%. Hijras face discrimination even in the healthcare settings. Types of discrimination reported by Hijras/TG communities in the healthcare settings include: deliberate use of male pronouns in addressing Hijras; registering them as 'males' and admitting them in male wards; humiliation faced in having to stand in the male queue; verbal harassment by the hospital staff and co patients; and lack of healthcare providers who are sensitive to and trained on providing treatment/care to transgender people and even denial of medical services. Discrimination could be due to transgender status, sex work status or HIV status or a combination of these. Social welfare departments provide a variety of social welfare schemes for

socially and economically disadvantaged groups. However, so far, no specific schemes are available for Hijras except some rare cases of providing land for Aravanis in Tamil Nadu. Recently, the state government of Andhra Pradesh has ordered the Minority Welfare Department to consider 'Hijras' as a minority and develop welfare schemes for them. Stringent and cumbersome procedures and requirement of address proof, identity proof, and income certificate hinders even the deserving people from making use of available schemes. In addition, most Hijras/TG communities do not know much about social welfare schemes available for them. Only the Department of Social Welfare in the state of Tamil Nadu has recently established 'Aravanigal/Transgender Women Welfare Board' to address the social welfare issues of Aravanis/Hijras. No other state has replicated this initiative so far.

The Supreme Court judgment on Transgender Rights:

The judgment was pronounced in National Legal Services Authority v. Union of India & Ors⁽⁶⁾. This judgment covers persons who want to identify with the third gender as well as persons who want to transition from one identity to another, i.e. to male to female or vice versa. The Court has directed Centre and State Governments to grant legal recognition of gender identity whether it be male, female or third gender. The ruling has guaranteed legal recognition for Third Gender and ruled that fundamental rights are available to the third gender in the same manner as they are to males and females. Further, non-recognition of third gender in both criminal and civil statutes such as those relating to marriage, adoption, divorce, etc is discriminatory to the third gender. The Court has also ruled legal recognition for people transitioning within male/female binary although the procedure has been left quite vague. It has directed to provide public health and sanitation, proper measures to provide medical care to Transgender people in the hospitals and also provide them separate public toilets and other facilities. Further, they have been directed to operate separate HIV/ Sero-surveillance measures for Transgender. The Court has further ensured socio-economic rights like access to social welfare schemes and to treat the community as socially and economically backward classes. They have also been extended reservation benefits in educational institutions and for public appointments. The Centre and State Governments are asked to take steps to create public awareness so that Transgender people will feel that they are also part and parcel of the social life and not be treated as untouchables; take measures to regain their respect and place in society; and seriously address the problems such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, and social stigma.

Parliament has passed the Act on Transgender Rights in pursuance of the Supreme Court orders. However, while Transgender have been provided constitutional protection including benefits of reservation and legal remedies by the apex court, the LGBT community has been denied similar protection. The Delhi High Court ruling of 2009 has been stayed by the Supreme Court on 11 Dec., 2013. According to this Order, homosexual intercourse remains a "carnal intercourse against the order of nature" and is a criminal offence under Section 377 of the Indian Penal Code, 1860. On January 28, 2014, the Supreme Court dismissed the review Petition filed by the Central Government, NGO NAZ Foundation and several others, against its December 11 verdict on Section 377 of IPC. The Court⁽⁷⁾ finds that discrimination on grounds of sexual orientation and gender identity violates Article 14, and that transgender are extremely vulnerable to harassment, violence and sexual assault in public spaces, at home and in jail, also by the police. If we are to read this with their finding that 377 are used to harass and physically abuse transgender persons, we can clearly make the link that 377 fail the test of equality under the Constitution. Subsequently, however, the

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Supreme Court has admitted a fresh petition by the said NGO for consideration and the same is pending for disposal.

Meanwhile, the nine - judge bench of the Supreme Court verdict on 24 August, 2017 in the right to privacy case, the Court has ruled that Privacy is a fundamental right under Article 21 and the same is inviolable, subject to reasonable restrictions as laid down therein. The ruling has generated a resurgent hope that the Order dated Dec. 11, 2013 read with the same dated Jan.28, 2014 may now be reversed and same-sex relationships of the LGBT community may now be recognised as fundamental right within the domain of private choices of citizens. The litigation is pending before a separate bench.

Reforms Needed to Improve Situation⁸ :

Legal Measures :

- i) Every person must have the right to decide their gender expression and identity, including transsexuals, transgenders, transvestites, and hijras. They should also have the right to freely express their gender identity. This includes the demand for hijras to be considered female as well as a third sex.
- ii) There should be a special legal protection against this form of discrimination inflicted by both state and civil society which is very akin to the offence of practicing untouchability.
- iii) The Immoral Trafficking Prevention Act, 1956, as has been pointed out earlier, is used less for preventing trafficking than for intimidating those who are the most vulnerable i.e., the individual sex worker as opposed to brothel keepers or pimps. This law needs to be reformed with a clear understanding of how the state is to deal with those engaged in sex work.
- iv) Civil rights under law such as the right to get a passport, ration card, make a will, inherit property and adopt children must be available to all regardless of change in gender / sex identities.

Police Reforms :

- i) The police administration should appoint a standing committee comprising Station House Officers and human rights and social activists to promptly investigate reports of gross abuses by the police against kothis and hijras in public areas and police stations, and the guilty policeman be immediately punished.
- ii) The police administration should adopt transparency in their dealings with hijras and kothis; make available all information relating to procedures and penalties used in detaining kothis and hijras in public places.
- iii) Protection and safety should be ensured for hijras and kothis to prevent rape in police custody and in jail. Hijras should not be sent into male cells with other men in order to prevent harassment, abuse, and rape.
- iv) The police at all levels should undergo sensitization workshops by human rights groups/queer groups in order to break down their social prejudices and to train them to accord hijras and kothis the same courteous and humane treatment as they should towards the general public.

Other Measures :

- I) A comprehensive sex-education program should be included as part of the school curricula that alters the heterosexist bias in education and provides judgement-free information and fosters a liberal outlook with regard to matters of sexuality, including orientation, identity and behavior

of all sexualities. Vocational training centers should be established for giving the transgender new occupational opportunities.

- ii) The Press Council of India and other watchdog institutions of various popular media (including film, video and TV) should issue guidelines to ensure sensitive and respectful treatment of these issues.

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