



WWJMRD 2023; 9(03): 65-68
www.wwjmr.com
International Journal
Peer Reviewed Journal
Refereed Journal
Indexed Journal
Impact Factor SJIF 2017:
5.182 2018: 5.51, (ISI) 2020-
2021: 1.361
E-ISSN: 2454-6615

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Descriptive Study of Legal frameworks towards Third Gender in India with Criminal occurrence: A Literature Study

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Abstract

Third gender it was western context and in India we calling them as a Hijras/arvani's or kinnar and some other terms we have used based on our regions, on this note Our Honorable Supreme court they ruled over these gender vulnerabilities, and this Trans gender is umbrella term under Third gender, these group of people they are more vulnerable and social exclusive than compared to other gender based groups as we called Cis gender in India, because of this reason these groups are facing more problems and more prone towards crimes. In India absence of proper laws and precautionary measures towards these groups except one or two specific laws. The crime rate against third gender is also increases day by day based on some official data. Due to all these factors, they are facing more problems and easily become victims by other gender groups with violation of their rights in India.

Keywords: Trans gender, Vulnerable, Laws and Rights.

Introduction

Transgender is generally described as an umbrella term for persons whose gender identity, gender expression or behavior does not conform to their biological sex. Tran's gender may also take in persons who do not identify with their sex assigned at birth, which include Hijras/Eunuchs who, in this writ petition, describe themselves as "third gender" and they do not identify as either male or female. Hijras are not men by virtue of anatomy appearance and psychologically, they are also not women, though they are like women with no female reproduction organ and no menstruation. (<https://blog.ipleaders.in/the-third-gender-and-the-indian-law-a-brief-history/?amp=1>.)

According to one estimate, India has about two million transgender people. In India, a common term used to describe transgender people, transsexuals, cross-dressers, eunuchs and transvestites is Hijra. Campaigners say they live on the fringes of society, often in poverty, ostracized because of their gender identity. Most make a living by singing and dancing or by begging and prostitution. The abominable state of the third gender can be traced back from the colonial era, when the legislation was enacted to supervise the deeds of ijras/TG community, called the Criminal Tribes Act, 1871, which deemed the entire community of Hijras persons as innately 'criminal' and 'addicted to the systematic commission of non-bailable offences. The Act provided for the registration, surveillance and control of certain criminal tribes and eunuchs and had penalized eunuchs, who were registered, and appeared to be dressed or ornamented like a woman, in a public street or place. Such persons also could be arrested without warrant and sentenced to imprisonment up to two years or fine or both (Laxmi Narayan Tripathy,2015)

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Section 377 of the IPC found a place in the Indian Penal Code, 1860, prior to the enactment of Criminal Tribes Act that criminalized all penile-non-vaginal sexual acts between persons, including anal sex and oral sex, at a time when transgender persons were also typically associated with the prescribed sexual practices. Reference may be made to the judgment of the Allahabad High Court in *Queen Empress v. Khairati* (1884) ILR 6 All 204, wherein a transgender person was arrested and prosecuted under Section 377 on the suspicion that he was a 'habitual sodomite' and was later acquitted on appeal. This judicial legislation plays in contrast to the historical times in India where TG Community had got a strong historical presence in our country in the Hindu mythology and other religious texts. Lord Rama, in epic Ramayana, impressed with their devotion, sanctions them the power to confer blessings on 11 people on auspicious occasions like childbirth and marriage, and also at inaugural functions. Jain Texts also make a detailed reference to TG which mentions the concept of 'psychological sex'. Hijras also played a prominent role in the royal courts of the Islamic world, especially in the Ottoman empires and the Mughal rule in the Medieval India.

However, the abject conditions of the Transgender communities have been redressed through a step taken by The National Legal Services Authority, constituted under the Legal Services Authority Act, 1997, to provide free legal services to the weaker and other marginalized sections of the society, has come forward to advocate their cause.

Laxmi Narayan Tripathy, claimed to be a Hijra, has also got impeded so as to effectively put across the cause of the members of the transgender community and Tripathy's life experiences also for recognition of their identity as a third gender, over and above male and female. As a result, In 2009, India's Election Commission took a first step by allowing transgender to choose their gender as "other" on ballot forms.

The aforementioned judgment is buttressed by the recent landmark judgment (April, 2014) by Justice KS Radhakrishnan, who headed the two-judge Supreme Court bench, which recognition to transgender as the third gender. The landmark ruling asks the Centre and state governments to treat them as socially and 'economically backward classes', to enable them to get reservations in jobs and education. This goes along with the court's decision to grant them all facilities including a voter's ID, passport and driving license. Further, The Centre and States were also directed to take steps for bringing the community into the mainstream by providing adequate healthcare, education and employment. Ironically, Section 377 of the Indian Penal Code, according to which same-sex relationship is an "unnatural offence" is existing in conjunction with the court's recent decision of giving 'recognition' to the third

gender. Legal experts say that the aforementioned judgment puts transgender people in a strange situation: on the one hand, they are now legally recognized and protected under the Constitution, but on the other hand they may be breaking the law if they have consensual gay sex. (Laxmi Narayan Tripathy 2015.)

Trans gender the term in India was umbrella term under third gender we have history of 4000 years mentioned in ancient context like Hinduism (context of Ramayana and Mahabharata) and it also evolved during Mughal period & Delhi Sultan where some Hijras were used as servants for elite household, house work servant and guardian of the "LAREM" (The House where the Muslim women are present for residential) during British period.

Objectives of the Study

- ❖ To understand the legal frame works towards Third gender Person's in India.
- ❖ To analyze the Transgender Persons (Protection of Rights) Act- 2019 in India.

Research Methodology

Objectives are to be explore with qualitative study to explain the problems and using secondary data collection. For fulfillment of the paper, the data is collected through the secondary sources like News sources analysis, Government published Document sources, published paper articles and E-Resources available during my Review study.

This paper includes the area of the research is all over the legal system of the India towards Third gender persons.

Analysis

To Understand the Legal Frame Works Towards Third Genders in India.

India is developing country where all the people are getting equal rights and all are equal before law. At the same time. The Third genders are also coming under this frame work so in India we have some specific legal frame works those are as followed.

Constitution

The Constitution of India gives equal rights and protection under the Article 14, 15, 16 and 21.

The right of equality before law and equal protection of law is guaranteed under Article 14 of the Constitution. The right to choose one's gender identity is an essential part to lead a life with dignity which again falls under the ambit of Article 21

And gender expression invoked by Article 19 (1) (a) and held that "no restriction can be placed on one's personal appearance or choice of dressing subject to the restrictions contained in article 19(2) of the Constitution and Article 19(1)(a) and 19(2) and concluded that transgender personality can be expressed by transgender's behaviour and presentation and it cannot be restricted or prohibited. Lastly, the court referred to Article 21 and held that "Hijras/ Eunuchs have to be considered as third gender, over and above binary gender under our constitution and the laws.

Article 15 which deals with the prohibition of discrimination on the ground of religion, race, caste and sex includes the third gender under its ambit as being the citizens they have the right to not to be discriminated on the

ground of their religion, caste race and sex. They have the right to protect their gender expression which is majorly reflected through their dresses, action and behaviour.

Article 16 deals with equality of opportunity in the matters of public employment as this article is used to broaden the concept of sex which includes "Psychological Sex" and gender identity within its ambit. The transgender being the citizens of India has the right to employment and equal opportunity in the matters of employment and they should not be discriminated on the basis of their sexual orientation. Article 21 which deal with the protection of life and personal liberty states that no person shall be deprived of his life and personal liberty except according to the procedure of law. For ages transgender have been deprived of their life and personal liberty. The transgender being the citizen of India should have full right to protect their right and personal liberty. The Supreme Court has also recognized the right to dignity by recognizing gender identity within the ambit of Article 21.

Statutory Laws

The Transgender Persons (Protection of Rights) Act- 2019. The Act came into effect on 10th January 2020, which is the first concrete step towards ensuring welfare of transgender persons. The rules seek to recognise the identity of transgender and prohibit discrimination in the fields of education, employment, healthcare, holding or disposing of property, holding public or private office and access to and use of public services and benefits.

Ministerial/Departmental works:

Union Minister for Social Justice and Empowerment is the central ministry works for third genders in India. Recently it launched the Central sector scheme 'SMILE- Support for Marginalized Individuals for Livelihood and Enterprise' aimed to provide welfare and rehabilitation to the transgender community and the people engaged in the act of begging.

Supreme Court Guidelines:

A Bench of Justices K.S. Radhakrishnan and A.K. Sikri, in separate but concurrent judgments, said "eunuchs, apart from the binary gender, be treated as a "third gender" for the purpose of safeguarding their rights under our Constitution and the laws made by Parliament and the State Legislature." The ruling came on a petition filed by the National Legal Services Authority.

The Bench directed the Centre and States to take steps to treat them as socially and educationally backward classes and extend reservation for admission in educational institutions and for public appointments.

The Bench said "recognition of transgender as a third gender is not a social or medical issue but a human rights issue. Transgender are also citizens of India. The spirit of the Constitution is to provide equal opportunity to every citizen to grow and attain their potential, irrespective of caste, religion or gender."

By virtue of this verdict, all identity documents, including a birth certificate, passport, ration card and driving license would recognize the third gender.

The Bench said gender identification is essential. It is only with this recognition that many rights such as the right to vote, own property and marry will be meaningful.

To Analyze the Trans gender Persons (Protection Of Rights) Act- 2019 In India.

To the review there is only one statutory frame works for third genders in India,i.e.The Transgender Persons (Protection of Rights) Act- 2019 in India it explains the rights and prohibition of the crimes against third genders in India.

To overlook this act

Background: In 2014, the Supreme Court of India, in the case of the National Legal Services Authority versus Union of India, established the foundation for the rights of transgender persons in India by recognising 'transgender' as a 'third gender' and laying down several measures for prohibition of discrimination against transgender persons and protection of their rights.

The judgment recommended reservations for transgender in jobs and educational institutions and their right to declare the self-perceived gender identity without undergoing a sex reassignment surgery.

Key Features of the Law Relating to Transgender Persons:

Definitions: Definitions of 'person with intersex variation' and 'transgender person' have been provided to include Tran's men and Trans women (whether or not such person has undergone sex reassignment surgery, hormone or other therapy).

Non-discrimination: It prohibits the discrimination of transgender persons at educational establishments, in employment or occupational opportunities, healthcare services and access to public facilities and benefits.

It further reinforces transgender persons' right to movement, right to reside, rent, or otherwise occupy property.

Certificate of Identity: It provides for a right to self-perceived gender identity and casts an obligation on the district magistrate to issue a 'certificate of identity' as a transgender person, without the requirement of any medical or physical examination.

If the transgender person undergoes medical intervention to change sex either as a male or female and requires a revised identity certificate then they would need to apply to the district magistrate along with a certificate issued by the medical superintendent or chief medical officer of the concerned hospital.

Equal Opportunity Policy: Every establishment has been mandated to formulate an equal opportunity policy for transgender persons with certain specific information as prescribed under the law. This will help create inclusive establishments like inclusive education, etc.

The process of inclusion also requires creation of infrastructure facilities like separate wards in hospitals and washrooms (unisex toilets).

Complaint Officer: Every establishment has been mandated to designate a person as a complaint officer to handle complaints from transgender persons.

Transgender Protection Cell:Every state government will also have to set up a Transgender Protection Cell under District Magistrate and Director General of Police to monitor offence against transgender persons.

Welfare schemes: The government has been mandated to formulate welfare schemes and programs which are transgender sensitive, non-stigmatising and non-discriminatory.

Medical Care Facilities: The government has been

mandated to set up separate Human Immunodeficiency Virus (HIV) sero-surveillance centres to conduct sero-surveillance for transgender persons; provide for medical care facilities including sex reassignment surgery and hormonal therapy; and provide for coverage of medical expenses by a comprehensive insurance scheme for surgeries and other therapies.

National Council for Transgender Persons: Constitution of the NCT to advise the government for the formulation and monitoring of policies and redress the grievances of transgender persons.

Offences and Penalties: Offences, like indulging transgender persons in forced or bonded labour or denial of access to public places or physical, emotional or sexual abuse.

Other offences committed under the provisions of the Transgender Persons Act, are punishable with imprisonment for a term of at least six months, extending up to two years along with fine.

Conclusion

Through this study it clearly shows that, in India presently there is no proper legal frame works for third genders. Only few are working towards third genders and protecting their rights. And according to the Constitution of India it clearly gives some fundamental rights to the third genders in the country, except the Constitution only one or two frame works are working. Because of these reasons the violation of rights and crime against Third genders are increasing day by day.

And The Transgender Persons (Protection of Rights) Act-2019, this is only one statutory law in India, its working towards protection of rights and Prohibition of crime against Third genders in India and also gives the some protecting measures to the third genders in India.

Suggestion

Through the study it shows that in India we required the proper legal frame works and effective Statutory law towards third genders then only we can protect the rights of third genders and make them to social recognition.

Then only we can protect the Third gender from new patterns of crime which are occurred in India.

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