



Third Gender Interrelated, Interdependent and Indivisible Rights

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Abstract

Their fall from poise, started in the 18th century during the British colonial rule. They lived on the fringes of Indian Society and faced discrimination in workplaces, jobs, public places and services such as health and education. As members of the marginalized and socially excluded sector, they were always at the receiving end of negative behaviour and attitude. This unacceptability by the public, limited their social contributions, resulting in low self-confidence and self-respect, which consequently isolated them from the society.

Keywords: Bounds; National commission; Transgender persons; Equal rights; Right to dignity; Separate identity

Introduction

The abominable state of the transgender persons worsened with the society viewing and treating them as different people, not capable of fitting into the prescribed sanctimonious bounds. Ostracized due to their gender identity, they found begging, prostitution as their only source of livelihood [1]. To improve the situation, certain rights were guaranteed to them but the implementation of the same was fraught with insurmountable hurdles, due to the dominating binary gender concept of male or female. *Corbett v. Corbett* was the first case to discuss about marriage involving sex change. In this case, the Court held that notwithstanding the sex change, the respondent was still a male and a marriage between males was void. Further, the principle used in the previous case was applied in the case of *R vs Tan*, where, it was held that post operation of change of sex; a male still remains a man by law. In India, it is observed after further consideration that neither the Hindu Marriage Act nor the Special Marriage Act includes transgender people in their umbrella. Eunuchs are not protected under National Commission for Woman since they do not form a part of fairer sex. Section 2© of National Commission for minorities which defines minority communities as Muslims, Christians, Sikhs, Buddhists does not cover transgender persons either. Interestingly, in the international legal order, there is silence on the status of the transgender in certain documents [2]. The preamble of UDHR, the seminal document on Human Rights, reads whereas the people of United Nations have in the charter reaffirmed their faith in fundamental human rights in the dignity and worth of human person & in the equal rights of man and woman and have determined to preamble social progress and better standards of life in larger freedom. The Charter of United Nations also has given no place to this gender. After years of discrimination and hostility, the transgender persons could finally wear the legal costume of a separate identity, after Supreme Court, in the landmark judgment of *National Legal Services Authority vs Union of India and Ors*, recognized the third gender category in the eyes of law [3]. The Court finally busted the bubble of binary gender structure of man and woman and granted equal rights and protection to transgender persons under the constitutional principles of Article 14, 15 and 16. In Article 14 of the Indian Constitution, which deals with Equality before law, the term person does not restrict itself to the dual concept of man and woman. Thus, Hijras who are neither male nor female, also fall within the expression person and are entitled to legal protection of laws in all spheres of State activity. Furthermore, Articles 15 and 16 are used to broaden the scope of sex to include psychological sex or gender identity and hence held that no one could be discriminated on the grounds of sexual orientation. The Court also made an effort to protect ones gender expression which is majorly reflected through dresses,

actions, behaviour and similar forms. The Supreme Court stressed on the importance of right to dignity by recognizing ones gender identity within the ambit of Article 21 of the Indian Constitution [4]. Further, beyond prohibiting discrimination and nuisance, the Court extended the global principles of dignity, freedom and autonomy to this unfairly marginalized and vulnerable community and met the norms of Universal Declaration of Human Rights and 1948, the International Covenant on Economic, Social and Cultural Rights, 1966, the International Covenant on Civil and Political Rights, 1966 as well as the Yogyakarta principles. Based on proper pronouncements and philosophical ideologies as well, this landmark decision, for the first time, gave due recognition to gender identity based on the reassigned sex after undergoing Sex Reassignment Surgery and explained that the person has a constitutional right to get the recognition as male or female after SRS, which was not only his/her gender characteristic but has become his/her physical form as well. In September 2014, Ministry of Social Justice and Empowerment followed up with a *The NALSA* judgment should certainly be lauded for condemning discrimination due to gender and for bringing hope and promise to a community which has always been far outside the ambit of legal framework. With immense faith and vision, the judges have given a legal identity to all those persons whose bodies which do not match up with the accepted gender standards at birth. One evolutionary aspect of the judgment came as a major implication for the current laws related to marriage, adoption, labour laws and inheritance which will now have to move away from the binary system of male and female in order to facilitate the legal rights of transgender persons. Further, it is impossible to ignore the irony that the judgment was delivered only a few months after the case of *Suresh Kumar Koushal and other vs NAZ Foundation and Others* which upheld the constitutionality of Section of the Indian Penal Code [5]. The Court, accepting that Section is discriminatory against the transgender persons, clarified that the judgment leaves the *Koushal* case uninterrupted and thus single-handedly focusing on the legal recognition of the trans-sexual community. One of the most innovative turn in the judgment was the involvement of fundamental

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rights directly from the Constitution, especially the application of Article 19, thus, acting as a bold motive in acknowledging the rights of a transgender being. The remedies that the Court awards are also exceptionally fascinating. Three mandates have, as of now, been mentioned that hijras are currently perceived as the third sex, that trans-persons have the privilege to pick between being male, female or having a place with the third gender, and that trans-persons are to be given benefits that are duly offered under governmental policies regarding minorities, since they would qualify as a socially disadvantaged, backward class. The Court goes ahead to give a large number of different bearings, including some particular orders; some expansive ones; and some uncertain ones [6]. A considerable measure of confusion has really emerged from the judgment. Indeed, even as the omnipresent media and civil society was commending the judgment, numerous transgender people were pointing out its innate issues and inconsistencies. An extensive list of reactions by observers and collectives has been posted by Orinam. In one of them, Gee Imaan Semmalar offers an in depth critical analysis of the content of the judgment, and it's conceivable implications. He states that the judgment, which he finds confusing and confounding, conflates various transgender personalities, for instance referring to all hijras as third gender, when in reality there exists differences between the two. The author also observes that the judgment oscillates between broad and narrow interpretations of the term transgender and between self-determination of identity and its biological requirements [7]. Justice Radhakrishnan wide definition of transgender was further narrowed down by Justice Sikri's section of the definition which explicitly leaves out Lesbian, Gay and Bisexual people from the ambit of transgender. Justice Sikris definition clearly acts out in contradiction to specific parts in the judgment, which states that LGB people also come under the umbrella of gender variant people [8]. Moving further to the nine important directives given by the Court in the judgment, at some points, these orders seemed to confuse transgender with hijras by repeatedly using the phrase transgender/hijras, specially in the fourth and the fifth directive [9]. This led to the judgment being perceived as pertaining to just the recognition of hijras as third gender, thus, eliminating the recognition of the umbrella term, which includes other gender variants too. One of the biggest flaws in the judgment, according to the author, is that the entire principle, upon which the judgment of *Koushal vs Naz14* was raised, collapsed along with the *NALSA* case. When we focus on sexual orientation, one's identity has no meaning if he can't express it. A statute/law that targets on the conduct, which is the very expression of identity, thereby targets the identity itself [10].

Conclusion

Therefore, when Section 377 prohibits homosexuals from engaging in same-sex intercourse, it doesn't just legalize a set of acts in prohibiting the most basic expression of ones sexuality, it criminalizes sexuality and thereby, identity itself. Further, the judgment is unclear and even contradictory about the requirement of medical transition procedures for self-identification of gender. At first, Justice Radhakrishnan based the judgment on Argentinean model of gender recognition which does not involve any kind of medical procedure and yet, at other times, he suggested psychological tests for self-identity of transsexual persons. Such conflicting propensities imply that the elucidation and execution of the judgment can be varied and irregular restricting its affirmative action

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Conflict of Interest

None

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