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Social inclusion and legal empowerment of transgender in India: challenges, rights, and pathways to equality

Jaganath. R *

Post-doctoral Degree Scholar - D.Litt- Political Science, Manipur International University, India.

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Abstract

The goal of development in the modern era has articulated the role of liberal society based on democracy and social justice. It is a matter of gratification that today India is experiencing fundamental changes ensuing tremendous improvements in diverse sectors. India has also established itself in numerous fields resulting in the national economic growth and comprehensive advancement. However, this dramatic acceleration of development has not proved successful in bringing about the required changes in a few areas; one of them is the rights of transgender in India, especially the required social inclusion of transgender. Despite the humungous number, the existing international and national legislations fall short to concentrate and find the way out for the predicament of transgender in India which presently reflects as a mark towards dampening the spirit of rule of law in the country. Despite the overwhelming significance of the human rights and modern civilization the violations against the transgender have not been curtailed as required in the present era.

In the civilized and democratic societies, law is extremely essential for appropriate conduct of individuals and good governance in the State. Universal Declaration of Human Rights is one of the most prominent and inspirational documents which embodies the protection to individuals cherishing the inherent dignity of human beings reassuring the inalienable right to equal protection as the germinal determinant of justice. Under the umbrella of the international instruments the Indian Constitution also guarantees array of rights for individuals, which are embodied in Part III as fundamental rights. Nonetheless, it is disheartening to accept that despite the Universal Declaration of Human Rights and the Constitutional law, the rights of LGBT are neither protected nor secured in India. However, recently the recognition of transgender as a 'third gender' by the Supreme Court is certainly a silver lining on the dark cloud. There is need to have specific rights in Statutes defining and protecting rights of individuals apart from sexual orientation. Inclusion of transgender in the mainstream will help them to cultivate optimistic attitudes and self-confidence which will bestow immense strength and ability to counter the social barriers and will also augment their efficiency in this technological era. The solution of such multidimensional problems does not lie only in framing of laws and delivering landmark judgments, but it requires skilful drafting of welfare policies, appropriate implementation of such policies by the State and unconditional enthusiastic acceptance of transgender by the members of the society.

This research paper aims to shed vivid light on the significance and need of social inclusion of transgender with immense necessity of welfare schemes and policies for transgender in India. It also critically evaluates the present scenario of lack of legal provisions and existing discrimination against transgender in the society. The paper is concluded with a few recommendations to craft skilful measures and implement the same with immaculate perfection and also puts forth the immense need of indiscriminate social inclusion of transgender in the mainstream of the society.

Keywords: Transgender Rights; Legal Empowerment; Social Inclusion; Equality Pathways; India

* Corresponding author: Jaganath. R

1. Introduction

Presently, globalization, economic liberalization, internet revolution, industrialization and education all are factors leading to recreation have opened flood gates towards development of nations. Indeed, this goal of development in the modern era has articulated the role of liberal society based on democracy and social justice. It is a matter of gratification that today India is experiencing fundamental changes ensuing tremendous improvements in diverse sectors. India has also established itself in numerous fields resulting in the national economic growth and comprehensive advancement. However, this dramatic acceleration of development has not proved successful in bringing about the required changes in a few areas; one of them is the rights of lesbian/gay/bisexual/transgender (LGBT) in India, especially the required social inclusion of transgender. Regardless of the noteworthy progress, the transgender is not only marginalized but are victims of adversative forms of human activity paving way for countless challenges in future for the human race. Such discrimination and subjugation cross all known canons of human rights and results in widespread diagnosis of injustice.¹ Despite the humungous number, the existing international and national legislations fall short to concentrate and find the way out for the predicament of transgender in India which presently reflects as a mark towards dampening the spirit of rule of law in the country. Actually, the basic essence of development of democratic nations should lead to transpire a society which encompasses human civilization as the core of development by equal inclusion of human beings. Civilization does not only comprise of technological advancement and economic stability; it incorporates the code of indiscriminate behaviour of individuals towards each other in the society. Consequently, which formulates and silhouettes a society where the rights of individuals are protected not only by the State but also by fellow beings.

Ironically, the Indian society is unable to brag about social status of lesbians/gays/bisexual/transgender, commonly known as LGBT. A lesbian means a homosexual woman, a gay means a homosexual specially a man. Gay is commonly a female body trapped in male body. Bisexual are the people who are attracted to persons of both genders. And generally, the transgender is known as *Hijra* (Urdu word- eunuch) in India since ancient era. Since the antediluvian phase the regular discrimination against sexuality minorities is embedded deeply in the society. Despite the overwhelming significance of the human rights and modern civilization the violations against the transgender have not been curtailed as required in the present era.

2. Legal status of Transgender

In the civilized and democratic societies, law is extremely essential for appropriate conduct of individuals and good governance in the State. Law thus plays a vital role in protecting rights of individuals in each and every aspect of life. After the Second World War, it was observed that immense discrimination and injustice to transgender prevailed in the world. Especially the episode of killing 100,000 gays in the concentration camp and forcing them to wear pink triangles which indeed was an anti-social element diminishing the articulation of foundational principles of justice and equality.² Hence at the international arena, the Universal Declaration of Human Rights was adopted by the United Nations in 1948 as one of the most prominent and inspirational document which embodies the protection to individuals cherishing the inherent dignity of human beings reassuring the inalienable right to equal protection as the germinal determinant of justice. Human rights are not only inalienable and indivisible but are interdependent.³ The Universal declaration of Human Rights further encompasses right to life, liberty and security of person.⁴ Undoubtedly, the Universal declaration of Human rights incorporates the source of several declarations, convention, treaties and State legislations for protection of various marginalized groups across the globe. Nevertheless, the most celebrated document for Human Rights lacks the unambiguous declaration of required specific rights for transgender. In fact, basic human right to privacy are systematically denied to transgender throughout the world because of religious and moral objections.⁵ Despite the international human rights provisions, the position of LGBT people is paradoxically at crosswords.⁶ Though Article 2(1) and 26 of the International Covenant on Civil and Political Rights, which India acceded in 1979 (ICCPR) refers the word "sex" as non-discrimination clauses which is to be interpreted as including "sexual orientation", which indirectly protects the rights of transgender, there is need of express mention of rights of transgender in legal provisions.

Under the umbrella of the international instruments the Indian Constitution guarantees array of rights for individuals, which are embodied in Part III as fundamental rights. The Constitution extends protection of equality and right to life and liberty which is contemplated as the stalwart foundation for justice. Similarly, right against discrimination is also guaranteed. However, despite having the Magna Carta of rights it has not proved adequately satisfactory and successful in protecting transgender from gross violations of human rights. During the British rule, the British had enacted the *Criminal Tribes Act, 1871*, under which certain tribes and communities were considered to be addicted to the systematic commission of non-bailable offences. Later on, the same was amended in 1897 to include eunuch in the said provision. Thereafter, the Indian Penal Code of 1860 incorporated a provision restricting homosexuality in India. Section 377 of

the Indian Penal Code 1860 criminalizes homosexuality as an offence for having unnatural sex. In 2009, *Naz Foundation v. Government of NCT of Delhi*,⁷ challenged Section 377 and several legal prohibitions against private, adult, consensual, and non-commercial same-sex conduct to be violative of fundamental rights enshrined under Article 14,⁸ 19⁹ and 21¹⁰ of the Indian Constitution. The Delhi High Court in the said matter held Section 377 unconstitutional and ultravires the fundamental rights of LGBT. However, in February 2012 the Home Ministry expressed its strong opposition to decriminalisation of homosexuality in India. Consequently, on 11th December 2013, the Supreme Court set aside the judgment of Delhi High Court decriminalising consensual homosexual acts. Thereafter, a review petition was filed in January 2014 before the Honourable Apex Court which to the dismay of LGBT was dismissed. The Supreme Court has however directed the Parliament to debate on this issue for further development. Nevertheless, the verdict of the Supreme Court has roused a set back to the LGBT and their future in the nation. It indeed is a matter of immense disgrace for the largest democracy of the world that after a long struggle the LGBT were bestowed right to vote as late as in 1994.¹¹ The very basic civil and political right was attributed after almost five decades after independence. It is disheartening to accept that despite the Universal Declaration of Human Rights and the Constitutional law, the rights of LGBT are neither protected nor secured in India. However, recently the recognition of transgender as a 'third gender' by the Supreme Court is certainly a silver lining on the dark cloud.

3. Present Scenario of Transgender in India

India, surpassing many other countries in the world in numerous sectors demonstrates diametrically opposed scenario when it comes to rights of transgender. A developing country like India heading towards accomplishing countless tasks, is still struggling to overcome such inequality which prevails in the society in various forms. Though transgender have always been an integral part of the Indian society since ancient times and was socially endorsed as *hijra*, they were only considered as a form of entertainment, care takers of queens, and called upon only to dance and sing on few occasions such as child birth, marriages, *etc.* But otherwise despite the national progress, the existence of transgender in a dispiriting stipulation was wrapped in indiscernibility and taciturnity. Presently there are more than twenty-five lakh transgender people in India as per few official statistics which cannot be considered absolute as many transgenders are not registered officially in the State record. It is only with the advent of few steps taken by the social organizations and few public-spirited citizens the issue and plight of transgender have been brought to the limelight. The first gay magazine *Bombay Dost* and a lesbian collective in Delhi titled *Sakhi* was a starting point in 1980 to publish literature about transgender in the country.¹² It should be noted that, a Hindi movie, *Fire*, faced a tough time on its release in theatres only because its outline story was based on lesbians, thus stands as a glaring example of non-acceptance of open and free discussion about transgender.¹³ Nonetheless now the situation has diverted slightly from the past and presently there are various magazines, newsletters, and organisations for verbalizing the unspoken issues of transgender.¹⁴ There are special help centres in the four metropolitan cities, Mumbai, Delhi, Calcutta and Bangalore.¹⁵ It is significant to mention that Tamil Nadu is the brilliant first State in India which has taken a step to provide welfare to the LGBT. According to the transgender welfare policy of Tamil Nadu, transgender people can access free Sex Reassignment Surgery in the Government Hospital, free housing program, various citizenship documents, admission in government colleges with full scholarship for higher studies, alternative sources of livelihood through formation of self-help groups and initiating income-generation programme.¹⁶ Tamil Nadu is also the first State to form a Transgender Welfare Board with representatives from the transgender community.¹⁷ All the States in India must learn a lesson and enact and implement policies to provide such welfare measures for the LBGT. The Supreme Court on April 2014 has declared the transgender as a socially and economically a backward class and thus is entitled for reservation in education and employment. It is a moot question to be pondered upon that why did it take so many years to realize and accept that LGBT is socially a backward class? We boast of society free from injustice whereas in case of transgender it is only in letter and not in spirit. The struggle by transgender community to participate in politics and the governance of the nation has long history. However, after the extensive fight for their rights extremely scarce participation is witnessed in India¹⁸ The transgender are now allowed to appear for Public Service Commission exams after an elongated scuffle.¹⁹ Though these few achievements are accomplished, yet the goal of dignified life with equal status in the society ironically lies miles away for the transgender.

Social stigma and discrimination of the transgender make them vulnerable to numerous forms of victimization. In fact, it opens a flood gate to harassment, violence, extortion, sexual abuse from relations, acquaintances, hustlers, gangsters and the police authorities.²⁰ It is awfully astonishing that even today's educated Indian society contributes to such discrimination. Such discrimination and inequity lead to injustice against LGBT which is in form of a cycle that manifests itself in many modes throughout their lives tarnishing the present and the future existence. There is need to have specific rights in Statutes defining and protecting rights of individuals apart from sexual orientation. Inclusion of transgender in the mainstream will help them to cultivate optimistic attitudes and self-confidence which will bestow immense strength and ability to counter the social barriers and will also augment their efficiency in this technological era.

The solution of such multidimensional problems does not lie only in framing of laws and delivering landmark judgments, but it requires skilful drafting of welfare policies, appropriate implementation of such policies by the State and unconditional enthusiastic acceptance of transgender by the members of the society.

4. Human rights of transgender: need for inclusion in society

As the emergence of globalization and modernization has upshot sweeping and extreme transformation in the society, especially the changes in the concept of right to dignity and human rights of individuals have undergone drastic changes. Though human rights are not articulations of only the contemporary practice but have been exercised historically world over.²¹ In fact, human rights should be protected in their positive form as a basic legal right.²² Nevertheless, it is evident from the present scenario that LGBT are frequent victims of human right violations. Denial of right to basic human rights thrusts aside the theories of justice which are rich in its content and presentation.²³ It can be averred that despite an overreaching commitment to provide right to equality, Indian government lacks the capacity and will to implement laws and policies designed to ensure the protection of rights.²⁴ And with inequalities or subjugations from which individuals suffer and which have good reason to resent, but it applies to more widespread diagnoses of injustice in the wider world in which we live.²⁵ The inclusion of transgender in the mainstream of the society with a dignified and equal life requires a social transformation. Law indisputably plays a catalyst role in moulding the society. Rather, Roscoe Pound has considered law "as an instrument of social engineering with immense capacity to plan and execute desirable structural changes in the society."²⁶ Additionally he has emphasized that the social interest should be secured with minimum of friction and upholding of the ideal element of liberty and humanitarianism are implicit in this process.²⁷ Nonetheless, the issues of desirability of change and its justification in terms of people's aspiration through law are extremely important but the law-linked social changes in a developing multicultural democracy like India is a stupendous task looking at the vastness of the area and complexities of issues involved.²⁸ Though law is momentous element to mould the society however, social transformation only by means of law is an improbable task unless equal contribution and co-operation is extended from the society. Law can be viewed as one tool in the arsenal of tools to advocate and achieve transgender rights.²⁹ Thus it is not only law which can attain the goal of social inclusion and protection of human rights of LGBT but the society also has to make equivalent endeavours to conquest the skirmish of transgender people. The success of democracy is not merely a matter of having the most perfect institutional structure but it depends inescapably on the behaviour and social interactions.³⁰

Recommendations

Discrimination is a societal impairment which has far reaching adverse consequences; hence there is an urgent and momentous need to deracinate inequity faced by transgender. The marginalization of transgender has multiple core causes, such as, lack of legal will, inappropriate welfare measures and schemes, deficient policies, non-acceptance by society, poverty, illiteracy, economic dependency, *etc.* The only panacea to liberate transgender from the clutches of discrimination and undignified life is empowering, educating, and giving equal opportunities in all sectors to them. The inability of transgender to access justice is magnified by the fact that they are not economically dependent and hence providing employment opportunities will strengthen them to fight their battle. Moreover, awakening of collective consciousness by changing the attitude and mentality towards transgender in the society is a persuasive requirement. There should be extensive awareness campaigns launched at regular intervals to educate people at large about transgender rights and need of social inclusion without prejudice. Over the centuries of human civilization transgender are deprived of their deserving human rights. To reduce the discrimination and attribute a life full of dignity and honour it is highly imperative to provide employment, housing facilities, public accommodation, marriage rights, parenting rights, *etc.*, to the transgender people.³¹ There is immense need to frame and implement policies for the welfare of transgender in India. The most vital requirement is indiscriminate social inclusion of transgender by passionately and unwaveringly accepting transgender as an equal human being like ourselves.

5. Conclusion

It can be construed that denial of right to equality, right to dignity and right of social inclusion of transgender is indeed a gross violation of their human rights which needs a multidimensional, multifaceted, appositely amalgamated, well-organized and resourcefully dispensed legal, structural and social response for guarantee, protection, promotion and enhancement of rights of transgender in India. Collective and composed endeavours can definitely ameliorate transgender to combat the insurmountable battle successfully with social inclusion as their shield protecting the human rights at large. India is recognised today as one of the powerful nation at the international level. Since India is the only country which will have the maximum young population by 2020 in the world the youth should aim to gain maximum pride for the country by shouldering the responsibility as an important wing of the society. Regrettably, the present scenario of Indian society exhibits a demoralizing fact of countless violations of human rights of transgender in several

forms across the country. This situation essentially needs to be transformed to meet the objective of being a developed nation. Undoubtedly, a few developments for protection of rights of transgender in the last few years are noteworthy, but these steps are dawdling like the snail tread which needs to be accelerated at the earliest. And in order to accomplish the desired goal, it is imperative to draw the attention of the policy makers, government, legal luminaries, social leaders, and the society to the acute social dilemma of gross injustice to transgender prevailing in the country. Apart from the legal enforcement perspective, to exterminate discrimination of transgender, it is of imminent importance to educate and empower them, and make the society more responsible and sensitive towards this issue. In order to uphold the democratic principles and rule of law in the society, it is indispensable to break the cob web of discernment which epitomizes the darker side of human civilization and progressive social transformation. Invigorating transgender from social prejudices will create a congenial atmosphere to further develop and progress Indian social fabric. Hence, complete and equal participation of transgender in political, civil, economic, social, and cultural life at regional and national level will certainly result in eradication of injustice encountered by transgender and will unquestionably bestow a life full of dignity and honour.

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