

## In Search of an Identity

*Dr. Shraddha Subedi<sup>1</sup>*

### Abstract

*Human being is always in need of identity, he is always ascribed to a particular sex or gender. The moment he is born he is accorded a gender. His or her gender always plays an important task for his identity. This gender identity becomes more important when necessary biological development starts to take place in his body. The situation becomes gruesome when biological development may not be in compliance with the biological development which is acceptable to the society. The norm of the society is only to accept the male and female version of the gender and nothing more than that. Gender recognition, apart from the male and female, has never been talked about. In common parlance, the excluded gender is the transgender or the third gender and more precisely, the LGBT. The third gender group has horrific stories to share with and it is an irony that we, as society have never understood them, be it in terms of their biological needs, their existence, their privacy and encompassing all, their right to life.*

*The present paper makes an endeavour to analyse the socio-legal condition of the transgender and how far they have reached in their battle to live with dignity.*

**Keywords-** *Transgender, LGBTQ, Social recognition, Legal issues*

### I. Introduction

The subject of providing transgender has started to gain momentum in recent years. The transgender has been in this world together with us; however, the only thing was that they were hidden from the society and family. The identity of transgender was never given recognition as the other gender of our society. Our society was habituated to recognize only the male and the female gender. However, in recent times, the issues relating to transgender have become prominent, the transgender are now not only fighting for their existence but for their rights in the field of family, employment, health and political rights. The transgender owe all the chaos in their body to biological development which is entirely the gift of chromosomes, hence, we as member of this society; have no right to ridicule the transgender.

---

<sup>1</sup> Assistant Professor, Sikkim Government Law College, Gangtok – Sikkim (India)

## II. Evolution of Transgender

To trace the history of transgender, we find that the transgender has existed since the 9<sup>th</sup> century B.C., which basically comprises of *Hijras* (biological males who reject their masculine identity in due course of time), *Enuch* (emasculated male and intersexed to a person whose genitals are ambiguously male like at birth), *Kothis* (biological males who show varying degree of femininity), *Aravanis*, (hijras of Tamil Nadu), etc. Our society has categorized transgender to belong to different socio-religious cultural group. We find their mention in early Vedic texts, Manu Smiriti texts and even in mythological stories. The earliest text of Hindu law, the Manu Smiriti explains the biological origin of the three sexes: “A male child is produced by a greater quantity of male seeds; a female child by the prevalence of the female; if both are equal, a third-sex child or boy and girl twin are produced; if either are weak or deficient in quantity, a failure of conception results. In Vedic astrology, the nine planets are each assigned to one of the three genders: the third gender, *trithya-prakriti*, is associated with Mercury, Saturn and in particular *Kethu*. In the Puranas there are also references to three kinds of divas of music and dance; *apsaras* (female), *ghandharavas* (male) and *kinnars* (neuter).

Lord Rama, in the epic Ramayana, was leaving the forest upon being banished from the kingdom for 14 years. He turns around to his followers and asks all the ‘men and women’ to return to the city. Among his followers, the *hijaras* alone felt not bound by his order and decide to stay with him as they were neither men nor women. Impressed with their loyalty, Rama sanctioned them the power to confer blessings on people on auspicious occasions like child birth and marriage, and also at inaugural functions, which, it was supposed to set the stage for the custom of *badhai* in which *hijaras* sing, dance and confer blessings.

In yet another tale, where Aravan, the son of Arjuna and Nagakanya in Mahabharata offer to be sacrificed to Goddess Kali to ensure the victory of the Pandava in the Kurushethra war, the only condition that he made was to spend the last night of his life in marriage. Since no woman was willing to marry one who was doomed to be killed, Krishna assumes the form of a beautiful woman called Mohini and married him. The *hijaras* of Tamil Nadu considered Aravan their progenitor and call themselves *Aravanis*. The Mughal Empire too had their presence. In certain cases, they occupied high positions and guarded the holy places of Mecca and Medina. During the British regime their positions changed

drastically, they were denied the rights and privileges they were habituated to. They were criminalized and civil rights were denied to them. Draconian laws like “The Criminal Tribes Act 1871” were passed against the transgender (*hijaras*) community. This Act treated the transgender person as criminal and penalized for dressing up as women etc. and this legislation was ultimately repealed in the year 1949.

### **III. Gender and Sexual Orientation**

Before we dwell upon the matter related directly to transgender, it becomes important to discuss matter which is ancillary to it. In the first instance, we need to talk about two terms – sex and gender, which would help us in understanding the term transgender. We are often in the habit of using the term “gender” and “sex” synonymously in everyday speech, however, the two words carry with them two different connotations. Sex is more of a biological phenomenon wherein an individual may be a male or a female. It also refers to reproductive capacity or potential of human being, the sperm producers are said to be of the male sex while the egg producers are said to be female sex. While determining sex, the chromosomes play an important role and hence, biological importance is attached to sex. On the other hand, the term gender is derived from the word “*genre*” meaning “kind” or “type”, it being a more cultural phenomenon giving it the term “men” and “women”. Taking this background into consideration we talk about only two genders either a male or a female, where these two genders carry sexual desire or orientation towards a member of the opposite sex. Apart from this, we could also have “*heterosexual*” wherein desire is towards a member of different genders; ‘*bisexual*’, where the desire is towards a member of any gender, ‘*homosexual*’, where the desire is towards a member of the same gender. Likewise, ‘*intersex*’ refers to a spectrum of condition for those born with non-standard sexual biology of a male or a female. To illustrate, a male body due to genetic irregularities may cause it to look like a female at birth or it may happen that babies are born with genitals that may look like a female at birth or look like a mixture of typically male and typically female shapes. Such variation in the human body is often referred to as ‘*intersex*’. The medical term used for such variation is known as “Disorder of Sexual Development (DSD)”. There are a number of more such biological phenomena which are not talked about or rather people shy away to talk on such topic due to social stigma

attached to such kind of sexuality.<sup>2</sup> However, a transgender does not fall into any of the above categories. Study reveals that transgender may have sexual orientation towards any one.

Having dwelt with certain pertinent biological phenomena which could help us in understanding the concept of transgender, we now come to the most fundamental question as to who are transgender. The term 'transgender' most generally refers to any and all kinds of variation from gender norms and expectation. It refers only to those who identify with a gender other than the one they were assigned to at birth or who seek to resist their birth-assigned gender without abandoning it, or to those who seek to create some kind of new gender location.<sup>3</sup> If we happen to go by the dictionary meaning, 'transgender' means 'of relating to, or being a person whose gender identity differs from the sex the person had or was identified as having at birth; especially of relating to, or being a person whose gender identity is opposite the sex the person had or was identified as having at birth' – *Merriam Webster*. In transgender communities, people commonly use the words 'transmen', 'transgender men', 'transsexual men' when they are talking about people who were born with female bodies but consider themselves to be men and live socially as men (FTM). Likewise, the words, 'transwomen', 'transgender women' or 'transsexual women' refer to people born with male bodies who consider them to be women and live socially as women (MTF).

For the purpose of our study, having defined the term 'transgender', it now becomes imperative to outline how we make use of English pronoun in the present context. As we know that for distinguishing a male and a female the English language uses the pronoun 'he' or 'she', 'her' or 'him' respectively. In case of transgender it becomes difficult to address with these pronouns. The use of pronoun 'it' is not very correct for humans and to be more specific it does not indicate a gender, referring basically to a non-living entity. In recent times, new

---

<sup>2</sup> Transvestite, who wear clothes generally associated with a social gender other than the one assigned to them at birth, or cross dresser which is similar to Transvestite, or they could be called queer which was initially the term used for homosexual, transsexual – refers to those persons who have or are in the process of changing their anatomical sex by a surgery.

<sup>3</sup> SUSAN STRYKER, *TRANSGENDER HISTORY 19* (Seal Press Publication, Perseus Book Group, 2008)

words have been coined like '*ze*' or '*sie*' in place of 'he' or 'she' or the word '*hir*' instead of 'his' or 'her'. Sometimes, in writing, people use the unpronounceable word *s/he*'.<sup>4</sup>

#### **IV. Social Issues and Complexity of the Problem**

The recognition of 'right of choice' as a universal principle, gives the transgender community the right to choose their identity which is crucial for their existence in this universe. The right to choose an identity according to their need gives them an opportunity to face the innumerable identities which come in conflict with their right to existence. If an identity is denied to them, they face psychological disorder as their justification for identity is the truth that they are swallowed in a wrong body. As human being, they face inner conflict with self and hence, dread social interaction which hinders their normal mental and physical growth.

The gender-variant groups are kept under an umbrella term of 'transgender' and often the acronym LGBT (lesbian, gay, bisexual and transgender) is used for referring the sexual minorities. Though the term 'transgender' is in vogue to refer to different sexual minorities, but the transgender activists are not happy for inclusion of all sexual minorities under the term 'transgender'. The reason varies from different personal and political aim. For example, some transsexuals who undergo sex reassignment surgery are not compassionate towards those who do not assume such surgery and yet seek government recognition. Transsexuals who undergo surgery feel that it is imperative for them to obtain such surgery because they are trapped in a wrong body and hence to move ahead in life they should submit to the surgery which in turn would help them to overcome distress and impairment in the society. In contrast the use of the term "intersex" under transgender community is also detested. The rationale for excluding is that this "inter-sex" state is more of a biological occurrence which is apparent at the birth of the child and which can be corrected by medical science whereas in case of a transgender situation, it is said to be more of a psychological phenomenon not manifest until the age of 3 or older, hence the transgender activist avoid the inclusion of inter-sex in this category.

Hence, what we find is that the 'transgender' when used as an identity label rather than a broadly descriptive term, often refers to those who live

---

<sup>4</sup>*Id.*

permanently in a social gender they were not assigned to at birth, might or might not use hormones, might or might not have chest surgery, but who usually don't have genital surgery. The right term to use in reference to any particular person really isn't in the eye of the beholder – it is determined by the person who applies it to him/her or self.<sup>5</sup>

The impact of anonymous life of transgender is that they face social exclusion and marginalization. This social exclusion may be within the family as well as in the society. This exclusion is linked to self-perception and sense of being human. This may then contribute to depression, anxiety and inferiority complex where they may find it difficult to face the society and their friends and hence commit suicide. Not only this, many transgender people lack legal recognition of their affirmed gender and therefore, are without identity paper that reflects who they are. Without appropriate identity papers, transgender people are excluded from education and employment. Transgender people face discrimination, violence and lack of access to appropriate health care. All these factors contribute to increasing the vulnerability of transgender people to HIV. Further, transgender people also experience bullying and harassment at school, which, apart from the physical and psychological efforts can undermine learning opportunities and educational achievement, thus affecting their employment prospects.<sup>6</sup>

#### **V. Legal Recognition of Transgender**

At the outset, having defined and discussed the social issues which govern the transgender and now that the term transgender is of a wide import including within its ambit the Gay, Lesbian, Bisexual, Cross-Dressers and also the queer. The Supreme Court,<sup>7</sup> through its recent decision used the term '*Self-Identified Gender*' to understand the transgender identity. In this context, now it becomes significant to deal with the legal recognition which has been granted to the transgender in India because we are governed by the 'Rule of Law' where equality pervades the entire thread of justice. In the grant of legal recognition, we might still remain behind because much has to be done for this community.

---

<sup>5</sup>Ibid.

<sup>6</sup>The GAP Report 2014, [www.unaids.org/sites/default/files/media](http://www.unaids.org/sites/default/files/media) at p 5&7, accessed on 25-04-2017.

<sup>7</sup>National Legal Services Authority v. Union of India and Others, (2014) 5 SCC 435 (India).

The Constitution talks about equality under Article 14 of the Constitution where this equality extends to persons. Article 15 of the Constitution uses the expression 'citizen' and 'sex' with reference to prohibition of discrimination and Article 21 of the Constitution has used the expression 'person'. All these expressions do not point to a specific gender or identified gender only. Non-application of these constitutional provisions to the transgender cannot be ruled out and we also cannot say that these provisions are applicable to male and female only. The Constitution in its true spirit prohibits discrimination on the ground of sexual orientation and gender identity and discrimination by way of exclusion, prohibition, penalties and restriction would defeat the very purpose of equality before law and equal protection of law. The transgender have every right to be recognized as part of this social structure and they deserve protection of their right and social existence.

In the international field, the United Nations has been influential in protecting the rights of the third gender, the UDHR, the ICCPR and the ICESCR talk about the inherent dignity of the human being under various Articles. In recent years, the Yogyakarta Principle, were developed by a distinguished group of human rights experts. They drafted, developed, discussed and reformed the principles in a meeting held at Godjah Mada University in Yogyakarta, Indonesia from 6 to 9 November 2006 which culminated into Yogyakarta Principles on the application of International Human Rights Law in relation to Sexual Minorities Orientation and Gender Identity. The Principles provides that human beings of all sexual orientation and gender identities are entitled to the full enjoyment of all human rights. The Principle casts an obligation upon the State that it shall embody the principles of the universality, interrelatedness, interdependence and indivisibility of all human rights in their national constitutions or other appropriate legislations and ensure the practical realization of the universal enjoyment of all human rights.

United Nations governing bodies, Regional Human Rights Bodies, National Courts, Government Commissions, and Council of Europe have endorsed the Yogyakarta Principles and have considered them as an important tool for identifying the obligations of states to respect, protect and fulfill the human rights of all persons regardless of their gender identity. Keeping this principle in mind, many countries have come forward and endorsed for recognizing the rights of transgender persons who have undergone either complete or partial

SRS. These countries include United Kingdom, Netherland, Germany, Australia, Canada, Argentina, etc. To cite one example, the U.K has passed the General Recommendation Act, 2004. The Act provides legal recognition to the acquired gender of a person and it also highlights the rights and entitlements in various aspects of marriage, parentage, succession, social security and pension etc.

In India, the question of applicability of Section 377 of the Indian Penal Code arises towards homosexual and transgender. Section 377 criminalizes same-sex conduct putting them under “Unnatural Offences”.<sup>8</sup> Section 377 of the IPC has been justified on the ground of preserving public decency and morality. In this pretext, Section 377 IPC was vehemently misused and it was used by the law enforcement agencies to harass and exploit the homosexual and transgender. However, this penal provision was challenged in a case before Delhi High Court<sup>9</sup>. The judgment had far reaching consequence, because, it recommended the deletion of the provision. However, further episode took place to justify the issue related to the retention of the same provision and the Supreme Court has been at its best to give them what has been due to the very citizens of this country.

## **VI. Judicial Response to the Issue of Transgender**

In India the judiciary has always played a proactive role in protecting the rights of endangered and susceptible lot and in this context, it would mean the transgender too. The doors of the judiciary have been knocked on various occasion to ponder upon their rights. In a landmark decision of *National Legal Service Authority*, (2014), the Apex Court identified the transgender and coined the word ‘self-identified gender’.

The issue of transgender was brought before the Court for the first time in 2001<sup>10</sup> wherein the Court, for the first time, acknowledged the pathetic treatment meted out to ‘homosexuals’ who are one of the identities of transgender. In this case, a non-governmental organization, the NAZ Foundation filed a writ petition

---

<sup>8</sup>Section 377 of Indian Penal Code, 1860

<sup>9</sup> NAZ Foundation V. Govt. of NCT of Delhi and others, WP (C) NO 7455/2001, Delhi High Court; Decision on 2<sup>nd</sup> July 2009.

<sup>10</sup>NAZ Foundation V. Govt. of NCT of Delhi and Others, WP (C) NO 7455/2001, Delhi High Court; Decision on 2<sup>nd</sup> July 2009.

in the Delhi High Court challenging the legitimacy of Section 377 of IPC, claiming that the law violates Article 14, 15, 19 and 21. A Bench consisting Chief Justice B.C. Patel and Justice Badar Durez Ahmed dismissed the petition in 2004, and the petitioners approached the Supreme Court. The Supreme Court directed the High Court to examine the matter, deeming it worthy of consideration. Hence, the Delhi High Court reconsidered the petition. The Delhi High Court in its judgment “decriminalized consensual sex between homosexuals and transgender which simultaneously served as a source of protection from maltreatment and viciousness at the hands of the law enforcement officials”. The High Court stressed the importance of upholding the values of equality, tolerance and inclusiveness in Indian society by stating “...if there is one constitutional tenet that can be said to be underlying theme of the Indian Constitution, it is that of ‘inclusiveness’. This Court believes that Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognizing a role in society for everyone. Those perceived by the majority as ‘deviants’ or ‘different’ are not on that score excluded or ostracized.”

This decision of the High Court was challenged in Suresh Kumar Koushal<sup>11</sup> wherein the Supreme Court opined that act which fall within the ambit of section 377 IPC can only be determined with reference to the act itself and to the circumstances in which it is executed. It went on to add that Section 377 IPC does not criminalize a particular people or identity or orientation and only identifies certain acts which, when committed, would constitute an offence. Such prohibition regulates sexual conduct regardless of gender identity and orientation. The panel of two Supreme Court judges deciding the case allowed the appeal and upturned the decision of NAZ Foundation, finding its declaration to be ‘legally unsustainable’. The Supreme Court ultimately found that Section 377 of IPC does not violate the Constitution and dismissed the Writ Petition filed by the Respondents

---

<sup>11</sup>Suresh Kumar Koushal and Another V. NAZ Foundation and Others, Civil Appeal No 10972 of 2013 at p. 61

In a matter before the Supreme Court<sup>12</sup>, 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, had come forward to advocate their cause by filing Writ Petition No. 400 of 2012. The contention put forth before the Court was that, “whether non-recognition of the identity of *Hijaras*, a Transgender Community as a third gender, denies them the right to equality before the law and equal protection of law guaranteed under Article 14 of the Constitution and violates the rights guaranteed to them under Article 21 of the Constitution”. The Court was apprised of a number of facts by the counsel and other government agencies that appeared before the Court. The Supreme Court taking care of the situation declared the transgender as ‘third gender’ for the purpose of safeguarding and enforcing appropriately their rights guaranteed under the Constitution. The Court observed thus “by recognizing transgender as third gender, this court is not only upholding the rule of law but also advancing justice to the class, so far deprived of their legitimate natural and constitutional rights.” It is, therefore, the only just solution which ensures justice not only to TG but also justice to the society as well, Social Justice does not mean equality before law in paper but to translate the spirit of the Constitution, enshrined in the Preamble, the Fundamental Right and the Directive Principles of State Policy come into action, whose arms are long enough to bring within its reach and embrace this right of recognition to the transgender which ultimately belongs to them.”<sup>13</sup>

*Justice A.K.Sikri* has exhaustively described the term “Transgender” as an umbrella term which embraces within itself a wide range of identities and experiences including but not limited to pre-operative/post-operative transsexual people who strongly identify with the gender, opposite to their biological sex i.e., male/female. Such a person carrying dual entity simultaneously, would encounter mental and psychological difficulties which would hinder his/her normal mental and even physical growth. It is not easy for such a person to take a decision to undergo SRS procedure which requires strong mental state of affairs. However, once that is decided and the sex is changed in tune with psychological behavior, it facilitates spending the life smoothly. Even the

---

<sup>12</sup> National Legal Services Authority V Union of India and Others (2014) 5 SCC 435

<sup>13</sup>Ibid.

process of transition is not smooth. The transition from a man to a woman is not an overnight process.

The Court in this case acknowledged the mental and psychological harassment the transgender face and also the, deplorable socio-economic condition they encounter. The court was of the opinion that the appropriate authority should consider the situation of the transgender in consonance with the judgment pronounced. It was this decision that led to introduction in the Lok Sabha in 2<sup>nd</sup> August 2016 The Transgender Person (Protection of Rights) Bill 2016. The Bill seeks to protect the rights of the transgender as well as their welfare and for matter incidental thereto. The Bill still awaits the process of becoming an effective legislation.

It appeared that things were working well in protecting the rights of the transgender especially after the decision of the Supreme Court in *National Legal Services Authority case*<sup>14</sup> and *the decision in NAZ Foundation*<sup>15</sup> which took the view that Article 15 of the Constitution prohibits discrimination on several grounds including sex and that the time has come to give an expansive interpretation of sex and hence it prohibits discrimination on the ground of sexual orientation. The court further opined that “where a society displays inclusiveness and understanding, the LGBT’s can be assured of a life of dignity and non-discrimination”. And that in this context Section 377 of IPC turns out to be violative of Articles 14, 15 and 21 of the Constitution in so far as it criminalises consensual sexual act of adults in private”. A review petition was filed which was dismissed then on April 3, 2014 a curative petition was filed to be heard in open court which was finally referred to Constitutional Bench. This matter was heard and disposed of in 2018<sup>16</sup>. Before this case was decided, the Supreme Court dealt upon the concept of “right to privacy - being a fundamental right or not “in *K.S.Puttaswamy v. Union of India*<sup>17</sup> the court while upholding this dynamic notion also held that sexual orientation is essential component of right guaranteed under the Constitution which are not formulated on majoritarian favor or acceptance. The opinion expressed on the Right to Privacy

---

<sup>14</sup> Ibid

<sup>15</sup> NAZ Foundation V Govt. of Delhi & others (2009) 111 DLR 1

<sup>16</sup> Navtej Singh Johar & ors v/s U.O.I WP (Crim) No. 76 of 2016. Other Writ Petitions were joined with this case.

<sup>17</sup> K.S.Puttaswamy and another V Union of India others (2017) 10 SCC. 1

case also helped in formulating the decision of the Navtej Singh Johar case. The present judgment rendered by a Five Judge Bench elaborately dealt with far reaching consequences of Section 377, through their separate judgment however concurring in their opinion. The court did not deny the fact that for all these years injustice was being meted out to them and that they had suffered due to ignorance and the human tendency of not accepting. The community has suffered due to the indifferent attitude posed by the society. The nation should break the silence and stigmatization in the name of morality which prohibits their relationship in the ground that they are against the order of the nature. Justice Nariman observed that persons who are homosexual have a fundamental right to live with dignity, which, in the larger framework of the Preamble of India, will assure the cardinal constitutional values of fraternity such groups are entitled to be treated in society as human beings without any stigma attached to them and that Section 377 in so far as it criminalizes homosexual sex and transgender sex between consenting adult is unconstitutional.<sup>18</sup> Similar views were expressed by Justice(Dr) D.Y.Chandrachud, who observed that “the choice of whom to partner, the ability to find fulfillment in sexual intimacies and the right not to be subjected to discriminatory behavior are intrinsic to the constitutional protection of sexual orientation” and that section 377 is unconstitutional. The judgment no doubt would have far reaching consequence in compensating the injustice the LGBTs have suffered in the recent past, the gates being now open for the legislature to do the needful.

## **VII. Conclusion**

The Constitution of India under Article 15(3) of the Constitution provides that a person should not be discriminated on grounds of sex only. This duly includes persons of different sexual orientation. LGBT are humans and this identity needs to be recognized starting right from the family because it is the family which makes them the first victim of abhorrence. The family needs to understand their biological need and helplessness of their being different, instead of making them to leave the house and become the victim of the society. The issues related to LGBT have gained much substance in recent years starting very much with Suresh Koushal and National Legal Services Authority Case, though the application of both the case is different. And the recent Supreme Court judgment on Right to Privacy changed the application of privacy to

---

<sup>18</sup>Ibid at p 97

transgender also. The LGBTs were very happy when the Supreme Court changed the dimension of Right to Privacy. The Supreme Court in the recent judgment held that discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. It is the mind-set of the people that needs to be changed and the groups need to be brought in the mainstream. Society and the law which governs us should not destroy an individual's sexual autonomy and orientation and allow them to live as we also.