International Humanitarian Approach on ‘Identity Crisis’ of LGBTQ: A Global Perspective

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Abstract

Unlawful attacks on sexuality perpetuated by intolerance of the binary sex poses a serious concern on the honour and reputation of a transgender person being an ‘individual’ making the minority vulnerable with poor physical and mental health. Being a person with diverse sexual expression is no limitation to enjoy basic inalienable rights being a ‘human’ suppressing sexual orientation and identity is an arbitrary denial of right to love with dignity. Streets taking up ‘pride parade’ movements confronting the Governments demanding progressive laws against discrimination, harassment and degrading treatment, recognition of their constitutional fundamental and basic human rights still remain far from reality. International commitments drafted at Conventions remain non-functional because most of the legal systems defend a stigmatised religious attitude and intolerance of culture. However, regardless of variation in customs, culture or societal norm, it is obligated on countries to secure freedom of expression of LGBTQ for an inclusive society. Homosexualities in sports and athletes have shown apologetic and disheartening incidents of voyeurism, trauma and humiliation. The alleged sex controversy of 2012 involving the Asian Games gold winner Pinki Pramanik (Indian Athlete) raised disturbing questions on a person’s anatomical features, right to privacy of body, standards of morality when she was mistreated and lodged in a male prison on accusations of raping her live-in-partner. This paper is an attempt to bring out the perspective of world community on personhood and human rights of the LGBTQ/transgender community.

Key Words: LGBTQ, Identity, Equality, Gender, Discrimination.

Introduction

Over the centuries they have endured cruel forms of physical assault, forced prostitution, hate crimes even honour killings. The prevailing social-political scenario and existing legal framework appear to be indifferent and negligent to the agony of the community who for no fault of their own suffer grave injustice at the hands of its fellow beings and the State. Thus, the paper intends to offer an insight into the state of affairs of the Government, the Judiciary in working out a humane approach towards the LGBTQ community or ‘third gender’ and looks ahead with some suggestions that will hopefully ensure equity and justice in true sense. United Nations Declaration on Human Rights (1948) has put an umbrella cover against all form of discrimination under Article 2, wherein, every individual has been granted rights and freedoms set forth in the UN’s Declaration irrespective of any distinction of any kind. While Article ¹ safeguards for all an equality before the law and equal protection of the law, Article12 protects right to privacy from arbitrary interference, any target upon honour and reputation of individuals. The Committee on the Rights of the Child (CRC), too stress that discrimination against vulnerable or marginalized groups of children (including children who are lesbian, gay, transgender or transsexual) must be addressed by the States parties.

Socio-Legal Perspective: Degrading treatment towards LGBTQ is often coupled with other parameters of superiority norms e.g. race, religion, disability, or economic, social or other status. Trans people across different countries face complex human rights issues often questioning their ‘gender identity’ unlike the self

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acclaimed superior genders of ‘male’ and ‘female’ who are perceived normal and without any chromosomal deficiency or discomfort in biological body. Apart from the instances of abuse, ostracization, and hate crimes, the following concerns need to be empathetically addressed across the globe under domestic laws and welfare policy measures justifying standard norm of ‘equality’ and ‘freedom’ meaningful irrespective of gender in whatsoever diversity:

1. Invasion on right to privacy
2. Criminalisation of homosexuality
3. Restricted access to health services
4. Limited access to public places and institutions
5. Exclusion from employment and livelihood opportunities
6. Forced labour, slavery and sexual exploitation
7. Discriminatory treatment in access to education
8. Freedom of free speech, assembly and association
9. Citizenship rights and freedom to participate in all civic body elections
10. Legalising right to marriage, parenthood, adoption

**International Scenario:** Though the countries have ratified commitments under the International law to safeguard individuals from cruel inhuman and degrading treatment, they have failed to realise the same. However, the last few decades have seen some visible movements, protests by the LGBTQ community leading to formal, intergovernmental meetings at the United Nations and other fora, demanding right to self identity, a life of dignity and mainstreaming into the society. At this juncture, the Yogyakarta Principles of 2006 comes as relief to ensure that States ensure and implement the obligations ratified under various International covenants, treaties or protocols. Keeping in view the growing concern on raising violations of human rights on account of orientation and identity, the Yogyakarta Principles plus 10 (adopted on 10 November 2017) to complement the Yogyakarta Principle on additional provisions of State in respect of application of the International Human Rights Laws as to Gender Expression, Gender Identity, Sex Characteristic and Sexual Orientation.²

The International Covenant as to the Civil and Political Rights, 1966 has a vital responsibility of upholding and protecting the human rights of people without any discrimination. Various provisions relevant to the mandate of such protection include Article 2(1) which emphasizes on the State parties to ensure to all individuals irrespective of distinction of any kind all the rights recognized by the Covenant. Article 26 on the other hand emphasizes on ‘equality before law’ thereby entitling every person protection of law without any discrimination.³

**Rights of Transgender: A Global Context**

**Australia:** The Australian Parliament passed same sex marriage laws in December 2017 with questions concerning adequate protection of ‘freedom’. Other legislation such as Family Law Act, Migration Act, Sex Discrimination Act etc. has to be amended so as to adapt the legislations consistent to the requirement of new law making the definition of ‘marriage’ which is being changed from a ‘union of man and woman’ to ‘union of two people’ in the Marriage Act,1961.⁴

**Bangladesh:** The Human Rights Watch, a non-governmental human rights organisation has time and again asked the Bangladesh Government to develop legal mechanisms to better protect the human rights of the transgender, but in vain.⁵ In 2017, few transgender persons from different parts of Bangladesh were interviewed by the Human Rights Watch and almost all of them allegedly spoke about being bullied at schools. They also expressed the difficulty in accessing health care, harassment in private and public places, barriers to employment etc. On the top of this, they were also attacked by religious extremist and targeted for their gender identity.⁶

Amidst all the issues faced by transgender in Bangladesh, though some small steps has been taken by the Government in the recent years, but declaration of legal recognition and policy implementation still remains a distant dream in Bangladesh with government rejecting
recommendation of the United Nations Human Rights Commission (UNHRC) to repeal the old draconian law forbidding same sex conduct.

China: Homosexuality was decriminalised in China way back in 1997 but same sex partnerships are yet to be recognised. Also, laws for protection of people from discrimination on basis of gender identity and sexual orientation are yet to be reformed. Moreover, the attitude of the Government towards homosexuality and transgender is quite paradoxical with instances of Chinese Authorities shutting down popular dating Application (App) for Lesbian online video programmes on abnormal sexual lifestyles. In addition to that, transgender communities are forced to cancel events and ‘Speak Out’ conferences. Also, instance of ‘conversion therapy’ continues in the country including electro shock therapy questioning the protection measures of the Government.

Europe: The European Union was one of the first international organisations to recognise sexual orientations explicitly. The protection of LGBT was first included in the Amsterdam Treaty of 1997. In 2000, in the Charter for Fundamental Rights, the directive for Equal treatment (in respect of trade and job prospects) of LGBT community was established in order to protect against discrimination. Also, the EU has got protection for the UK citizens on same sex partnership or marriage (who have registered their partnership or married in UK) when they work, live and travel within the EU continue having their relationship recognised and all legal rights protection intact.

In the year 2013, guidelines in supporting LGBT human rights were adopted by EU which is being used by the staff and embassy of the EU counties all over the world. Recently, in the year 2017, Council of Europe Secretary General T. Jagland highlighted the need of effective and strong anti-discrimination laws and following the same the ECtHR ruled that it is grave violation of human rights to force the transgender to undergo sterilisation operation to have their gender recognised. Later in March 2018 a resolution was passed by the European Parliament condemning the Conversion therapy and the EU member states were thereby urged to ban the practice.

United States: The LGBT rights have significantly progressed over the period of time but the rights vary by jurisdiction. In Mississippi, until April 2016 when the govt enacted laws for LGBT community, discrimination based on religious and moral bias as to same sex marriage and recognition of transgender identity was permitted. In Michigan, the State funded adoption and foster care agencies are at a liberty to refuse to place children with LGBT parents on grounds of moral and religious objections. In some States, due to their religious exemptions, LGBT people fear mistreatment in public places and from seeking services. Almost hundred Bills promoting LGBT rights were introduced by legislators in several States in 2017.

Rights of Transgender in Indian Context:
Transgender constitute an integral part of every cultural diversity across the globe, subjected to similar prejudices owing to their sexuality and gender with denial of basic human rights and restrictive definitions of ‘freedom’ negating and affecting recognition, realization of rights on the same footing as secured under international law. They comprise a diversity including lesbian, gay, and bisexuals, cross dressers. In India, however, it has assumed distinct and separate class/category which may encompass various visible regional and trans-regional communities like hijras/kinnars, kothis, aravanis, jogtas, and shiv-shaktis.

From guaranteeing right to dignified life (Article 21), securing primary right to ‘freedom of expression’ (Article 19), ‘equality before law’ (Article 14), safeguarding from discrimination on any ground be it race, caste, religion, sex and place of birth (Article 15) and equal opportunity of employment (Article 16) to protecting against human trafficking and forced labour (Article 23), the Constitution of India promises to gift a dignified way of life.

Dilemma of Identity: Gender identity and sexual orientation has been the key criteria for ascribing various rights under the NALSA judgement establishing identity with the gender is person’s right to self-identification either as binary sex or transgender or other category where one’s orientation indicates to individual’s enduring physical attributes, or an emotional attraction towards other identities. The two-judge bench judgment though made assertive directives for the third gender and transgender, but the confusion over the word ‘transgender’ still hangs open for some vague interpretation. While, Justice Sikri, has given a restrictive definition to the term based on essentialist criteria, Radhakrishnan J.
exhaustively interprets ‘transgender’ as an open ended umbrella clause embracing a variety of expressions and experiences including any surgically operative (pre or post) trans sexual people.

Dilemma of Special Status: India being a welfare State has made special provisions for its minority and marginalised groups considering their vulnerability, special condition and justifiable requirements (subject to criteria of ‘reasonable classification’) as permitted within the ambit of the Constitution. However, the newly coined status of ‘socially and educationally backward classes’ given to the transgender has raised some criticism. The question often raised is whether it is justified to categorise a minority community (transgender) within another minority class (SEBC) of citizens to give access to welfare measures under various schemes. Again there is a likelihood of confusion of associating the third gender under “Other Backward Classes” or the leaving wide ambiguous interpretations.

Though, the third directive under the NALSA judgement secures the transgender a status of ‘SEBC’ of citizens with all kinds of reservation(Quotas) in cases of admission in educational Institutions and public appointments, making Article 15(4) bring meaning to their long drawn plight in getting access to such public space.

The approach to categorise ‘TGs’ as a whole under SEBC replaces the axis of gender in the place of caste, however ignoring the fact that ‘minority community’ may span an array of class and caste positions. In the growing concerns and debate at State and national level on inclusion of third gender into a class based category or gender based reservation, the NALSA judgment is yet to yield some success in meaningful terms.

Conclusion

Transgender and people of LGBTQ community have been the worst victims of harassment and exploitation due to statelessness and no compartmentalised identity and also being deprived of access to basic education, employment opportunities within the society. Though safeguards are being made mandatory through national implementation of laws, very few objectives are being observed and realised in real sense. In India, while the ramifications and impact of landmark NALSA judgment are yet to stand the test of time in meeting the aspirations of minority community of ‘transgender’ against social stigma, existing binary laws and evolving legislations seeking to protect their socio-economic rights, instances of societal rejection, marginalisation and discrimination seem to be on the rise.

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