

A Comparative Literature Review of the Contribution of Transgender Rights in the Legal Context of India and Sri Lanka

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Abstract - Discrimination against any condition that a person acquires on their birth goes beyond the criteria of equality. The society has long created different social conditions for these two parties based on gender difference that has been biologically available to both men and women. Transgender people have identities different from the gender that corresponds to the sex organs determined at birth. The study is based on evaluating the level of contribution to establishing transgender social rights within legal systems of India and Sri Lanka. In comparison, transgender people have a stronger historical presence in India than in Sri Lanka. It is observed that the international legal context of transgender rights makes a positive contribution to gender orientation and gender identity. The legitimacy of American realism, sociological and natural law schools can also emphasize the legitimacy of securing transitional social rights. Accordingly, the statutory authorities and the Sri Lanka community should contribute to the expeditious preparation of legal provisions to develop transgender social rights while upholding the Indian legal position.

Keywords— *transgender rights, equality, t hirdgender*

I. INTRODUCTION

The definition of humanity must be based on justice and fairness because the discrimination that any individual acquires based on any condition he or she acquires at birth transcends the criteria for equality in humanity. Gender is different and more complex than biological sexuality. (How does a person perceive the world? How does a person know himself based on that? How to present it to the world? and how will it be re-conceptualized or acquired by the world?) Sex, Gender, and Sexual Orientation have different meanings socially and psychologically. Gender is the difference in sexuality from birth.

Society has long created different social conditions for these two parties based on gender difference that has been biologically available to both men and women.

Transgender people are people with identities different from the social gender that corresponds to the sex organs determined at birth. This category includes people who change their genitals to suit their identities and those whose genitals do not change or are half-changed, and it is difficult to measure their sexual orientation or social gender-based on heterosexual norms. Everyone in the transgender community has a legal right to determine their sexual orientation and identity. As transgender people are not considered men or women or are not recognized as third genders, they lose many of the rights and privileges enjoyed by other people as citizens of this country. People with transitional social status have lost social and cultural participation and are restricted from access to education, health care, and public places. It violates their constitutional guarantee of equality and the right for equal protection from the Law.

II. RESEARCH PROBLEM

This research aims to conduct a comparative literary inquiry into whether the Indian and Sri Lankan legal contexts have made a significant contribution to the establishment of transgender social rights within their legal framework.

III. LITERATURE REVIEW

In India, Transgender Community consists of Hijras, eunuchs, Kothi, Aravanis, Jogappas, Shiv-Shaktis, and so forth. They have a strong historical existence, as mentioned in Hindu mythology and other religious texts. The concept of the Trinity or the eunuch was also an integral part of Vedic and ancient literature, and it can be seen that there was a good social acceptance of transgender people during the Middle Ages and the Mughal Empire. Nevertheless, the

imperialist colonial rule has made a huge difference to the transgender community. Transgender peoples are said to have enjoyed equal or heterogeneous political rights with other genders in earlier eras. With the rise of the Christian empire, laws against transgender people were first enacted around the fourth century. Around the end of the sixteenth century, the awakening of liberal thought first sparked a discourse on the rights of those marginalized by gender and sexual orientation. The Nachchi community, the oldest transgender community in Sri Lanka, can be considered a minor sexual community which is endemic to Sri Lanka and can be identified as a group of gay and transgender people who have gathered in local cities of the island since the 19th century.

There are identities such as pandaka, ambiguous, and impotent in Buddhist literature and male and female. In Ayurveda philosophy, this anatomical difference is known as "Narashanda" and "Nari Shanda". However, the fact that these communities did not live as separate community reveals that they lived here without any distinction like the other parties. Living as a separate community because of sex is necessary because of the marginalization and discrimination caused by sex.

To review the context of international Law on transgender rights, attention should be drawn to Article 1 of the Universal Declaration of Human Rights (U.D.H.R.) 1948. Article 2 of the U.D.H.R. clarifies that the transgender community should have the same rights and dignity as other members of society. Article 6 of the U.D.H.R. also emphasizes that every person has the right to be recognized before the law. Under Article 7 of the U.D.H.R everyone has the right, individually and collectively, to develop, discuss, and support human rights ideas and principles. Article 12 and Article 17 of the International Covenant on Civil and Political Rights – 1966 (ICCPR) state that "no person shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence." According to Articles 6,7 and 17 of the International Covenant on Civil and Political Rights - 1966 (ICCPR), every human being has an inherent right to life. Law protects this right. No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment. In particular, no one should be subjected to medical or scientific experiments without his or her free consent. Also, no one shall be subjected to arbitrary or unlawful interference with others' privacy, family, home, or correspondence, or

his honour and reputation shall be unlawfully infringed upon, and all persons have the right to legal protection against such interference or assault. Paragraph 21 of the U.N. Convention Against Torture & Other Cruel, Inhuman Degrading Treatment or the Punishment states are obligated to prohibit, prevent, and supply. Articles 31 and 32 of the Vienna Convention on the Law of the Truths 1969 explain the applicability of the above international Law to Indian Law.

In 2006, a group of international human rights experts introduced the "Yogyakarta principles", a series of International sexual orientation and gender identity principles in Yogyakarta, Indonesia. Thus, The Right to the Universal Enjoyment of Human Rights, The Rights to Equality and Non-Discrimination, The Right to Recognition before the Law, The Right to Life, The Right to Privacy, The Right to the Highest Attainable Standard of Health, Protection from Medical Abuses also outline how the rights of transgender people should be optimally covered and how states should intervene. The United Kingdom has passed the General Recommendation Act, 2004. The act also provides for the legal recognition of a person's acquired gender and the provisions relating to their legal rights, marital status, succession, social security, and pensions, highlighting the consequences of the newly acquired gender on their rights. The Equality Act, 2010 - U.K.; repeals and replaces nine different laws, including the Sex Discrimination Act, 1986. The act empowers public institutions to eliminate all forms of discrimination, harassment and violence Through Australian Sex Discrimination Act 1984/2013 - 41, Hungarian Equal Opportunities Act 2003, E.U.E.U. Paper on T.G.T.G. person rights 2010 by the European Union, Argentine Law on Gender Identity 2012 and, German Civil Status Act 2013 / Article 22 / Sec 3 efforts are being made to give legal force to the subject of individual rights. In 2017, the Canadian Human Rights Act and the Criminal Code were amended to recognize transgender people as a third gender. In 2017, the Pakistani Senate passed the Transitional Human Rights Protection Bill, and in 2016 the United States Department of Education and the Department of Justice instructed public schools to allow transgender people to use bathrooms that match their gender identity. Following Eric Fanning's appointment as Secretary of the U.S. Army, Eric became the first civilian to act as a transgender community in the U.S. military, and in 2011 the ban on homosexuality in the U.S. military was lifted.

However, in 2017, President Donald Trump signed an order banning transgender people from joining the United States military.

IV. RESEARCH METHODOLOGY

To analyse the Contribution of Transgender Rights in the Legal Context of India and Sri Lanka, the study has used eight main variables. In addition, constitutional security, legal security for confirmation and recognition, statutory legal security, legal security for the promotion of social status, legal recognition as the "third gender", right to education, and right to marriage are used as the independent variables. Through these variables, the study is trying to prove the sufficiency of rules and regulations in the Sri Lankan legal framework by comparing it to the legal framework of India.

V. FINDINGS

A. Indian legal system

1) Legal status

The Constitution of India empowers the Supreme Court and the High Courts in writing to enforce/protect the individual's fundamental rights. A person who has violated his or her rights through an arbitrary administrative action can go to court to seek redress. Articles 32 and 226 of the Constitution of India give jurisdiction to the Supreme Court. Under these provisions, the Supreme Court is allowed to relax the traditional rule of "Locus Standi" and file public interest litigation (P.I.L.) at the request of enthusiastic citizens.

2) Constitutional Security

Article 15 and Article 16 (2) state that no citizen shall be discriminated against or discriminated against based on religion, race, caste, gender, place of birth, residence, or any of them. Also, Article 16 (4) cites a specific provision on the subject of transitional social rights, stating that "the government shall not prevent the appointment or appointment of backward class citizens who are not adequately represented in the services provided by the Government." Article 16 (4) cites a specific provision on the subject of transitional social rights, stating that "the government shall not prevent the appointment or appointment of backward class citizens who are not adequately represented in the services provided by the Government." Article 19 (2) does not impose any restrictions on one's appearance or choice of clothing, subject to the limitations contained therein.

3) Statutory legal security

Under the Indian Criminal Tribes Act of 1871, the Hijras were inherently considered 'criminals' and 'addicted to the systematic commission of non-bailable offences. Article 377 of the Indian Penal Code has been violated there, and in 2018 the Supreme Court of India repealed Article 377 of the outdated, imperialist, Victorian Penal Code, which criminalizes homosexuality.

4) Legal security for authentication and acceptance

The Transgender Persons (Protection of Rights) Bill 2016, drafted based on the N.A.L.S.A. ruling that year, was introduced in the Lok Sabha in 2016. In the same year, the Indian Parliament proposed a three percent quota for government jobs for transgender social workers who later voluntarily changed their sexual orientation.

Tamil Nadu government banned Reassignment Surgery for babies, or the Central Cabinet approved intersex babies who do not know whether their biological sex belongs to both sexes at birth in 2019 and the proposal to introduce Transgender Bill of India. The Bill defined transgender people to include the majority of the broad identities that belong to transitional society. It Includes;

- a transgender man or transgender woman who does not match the gender assigned to that person at birth
- a person -who undergone gender reassignment surgery or hormone therapy or laser therapy, or other treatments
- Intersex person
- Hijra, Aravani, Jogta (who Defined as "a person with sociocultural identities")
- someone who wants to be of the opposite sex.

5) Legal security for the upliftment of social status

The Government of Tamil Nadu established the Transgender Welfare Board in April 2008 for facilitating. it includes;

- Free Transgender Reassignment Surgery (S.R.S.)
- Free housing program
- Preparation of Various citizenship documents
- Enrollment in government colleges with full scholarships for higher education

- The establishment of self-help groups (for savings)
- launch of income-generating programs (I.G.P.s)

In May 2008, the Tamilnadu authorities ordered a "Third Gender" option for admission to government colleges. In 2009, Election Commission allowed the transgender community of India to refer to the gender of the ballot as "other". 2014, in N.A.L.S.A. Case; the landmark judgment of t India, the Supreme Court of India legalized the introduction of transgender people as the third gender. The N.A.L.S.A. ruling provided for the protection of the rights of the Hijras and Eunuchs under Part III of the Constitution of India and by-laws enacted by Parliament and the State Legislature, allowing them to be treated as a "Third Gender" other than bisexual gender. To provide legal facilities for transgender people to legally recognize their gender identity as male, female or third gender, to treat them as socially and educationally backward citizens, to make reservations for them in admission to educational institutions and employers, and to provide medical facilities Central and State governments were also instructed to improve welfare schemes.

6) *Legal security for social acceptance*

In N.A.L.S.A. Case, the court emphasized that programs should be designed to ensure that the identity of transgender people is recognized by society. The need for programs and planning for this was emphasized to the State and Central Governments. Accordingly, individuals with that "third gender" should be considered "socially and educationally backward groups" from education and workplaces. In the N.A.L.S.A. case, the court recommended that opportunities be provided for them and that social welfare programs benefit the community.

7) *Right for education*

In 2017, the first boarding school for transgender adults was opened in Cochin, Kerala, India.

8.) *The right to marry*

In 2019, under Article 21 of the Constitution, *Arun Kumar v. The Inspector General of Registration and others* granted the right to marry to Transgender people. The judgment also affirmed that the bride's definition under the Hindu Marriage Act included transgender people identified as women.

B. *Sri Lankan legal system*

1) *Legal status*

Compared to India, Sri Lanka's cultural heritage shows that transgender people are not encouraged to engage in transgender activities, and Sri Lankan transgender people seem to be discriminated against due to their lack of recognition of their rights.

2) *Constitutional Security*

Article 12 of the 1978 Constitution of Sri Lanka emphasizes that people should not be discriminated against based on gender and primarily cover gender identities. Although there are constitutional provisions for identifying transgender people in Sri Lanka, previous cultural barriers have negatively acknowledged this reality because people see it as an act of immorality.

3) *Statutory legal Security*

The pronoun "he" in Article 7 of the Penal Code of Sri Lanka 1883 and its derivatives are used to denote both genders, and Article 7 has not been amended. It can therefore be considered irrelevant to the subject of transgender people. Sections 365, 365 (A) of the Penal Code (Amendment) Act No. 22 of 1995 prohibit "unnatural sexual intercourse" and "gross misconduct between persons", which are used primarily to say that Law prohibits transgender acts in Sri Lanka. Thus, this can be identified as a denial of transgender sexual behaviour in Sri Lanka and a form of criminal treatment. (India has now decriminalized this situation - Indian DNS377). Initially, only male transgender acts were punishable under the Law, and in 1995 (365 (a)), the Law was amended to make it possible to punish Female transgender acts. It is an offence to pretend to be someone else in Article 399 of the Penal Code, and this Law is often misinterpreted and misused against transgender people.

It is important to note that transgender people are more likely to be convicted of sexual misconduct because they are not properly described in the Law, and that law enforcement should be responsible for determining the motives behind the concealment of a person's identity. The use of a 138 - year - old, obscure set of laws to discriminate against transgender, bisexuals, and transgender people is also seen as a vital opportunity for legal reform.

By voluntarily criminalizing the sexual acts committed by adults in private places and, by interfering in personal relations with which the State has no right to interfere, the right to assembly is denied under Article 14 (1) (c) of the Constitution.

Many individuals violate the same protection and discrimination provided for under Article 12 of the Constitution by subjecting them to discrimination in employment, denial of health care, etc. The Marriage Registration Ordinance No. 19 of 1907 does not recognize a transgender marriage. The vagrant's Ordinance is widely used against transgender people and sex workers.

Emergency regulations, Prevention of Terrorism Act (1978), Quarantine and Prevention of Diseases Ordinance. (497 / 30-9-1940), the Obscene Publications Ordinance (1927), and the Penal Code (1883) identify the high risk of disproportionate and unjust use of various laws against transgender societies, such as the offence of inciting religious hatred.

legal Security for authentication and acceptance from June 16, 2016, transgender people in Sri Lanka will change their identities such as Gender Recognition Certificate, Birth Certificate, and National Identity Card, which is a victory for the Sri Lankan transgender community. However, to obtain it, one must first be certified by a relevant specialist psychiatrist in charge of the Ministry of Health, Nutrition, and Indigenous Medicine, where the transgender person does not have the right to self-perceived gender identity. Further, the definitions and methods used in Sri Lankan law do not include many people with different identities in the range of transgender identities, therefore they have to be limited to two choices, male or female. It should also be emphasized that this creates an unfair position on transgender people who do not require gender reassignment.

A comparative examination of the Indian and Sri Lankan contexts reveals that transgender legal Security has been established in both countries through constitutional provisions and affirmation and recognition of identity. However, reaping the full benefits of the concept of public welfare litigation; The Indian Legal System has been able to create a comparatively positive legal environment for the rights of legal status, statutory legal Security, legal Security to uplift social status, legal recognition as "Third gender", legal Security for social recognition, the right to education, and the right to marry.

VI. JURISPRUDENTIAL ASPECTS

What is the Law? There is no definite answer to this, and there are different interpretations from different

perspectives. American realists believe that law is a precarious phenomenon, and it is an accepted norm for a judge to exercise his or her discretion in situationism, which develops on judges' interpretation.

According to H.L.A. Hart, a professor at Oxford University, UK can be interpreted as the judge wishes because law is not a full weave, and there are holes in that weave. The judge can, at his discretion, close such loopholes to prevent offenders from escaping the law. Judges such as Bhagwat and Krishna Iyer have developed the concept of "public welfare litigation" to enable anyone to sue an aggrieved party. Often the victim's poverty, lack of understanding of the injustice, and the fact that the aggrieved party is unrecognizable make it possible to sue someone else interested in the injustice.

It was inspired by the American realist jurisprudence, in Indian Law, with judges **Suresh Kumar Koushal and another v. N.A.Z. Foundation and others** case, **N.A.Z. Foundation v. N.C.T. Delhi** case, **Navtej Singh Johar v. Union of India** (Article 377 of the Indian Penal Code decriminalized in 2018 by this case) helped to develop statutory provisions in India through their judgments. Thus, it is clear that India has taken a leading and developing position in transgender sexual rights compared to other countries in the region.

Sri Lankan law is also evolving into a judicial system in which individual and collective rights emerge, and judges need to continue to give a broader definition of social reform and individual rights.

According to the Natural Law School, law is the most appropriate tool for civilizing human society. Philosophical focus on the values concepts of justice and fairness of law, the willingness of society to achieve the above concept through the application of the law, how social interests reflected on the application of the law, and the application of the law to balance the conflicting rights of society. More critical commentators, such as Aristotle and Aquinas, argued that "there must be a strong connection between law and social tradition and that law must be fair and just."

People born with the same intelligence and abilities at birth are discriminated against and abused by society because of their selfish behaviours and motives. Transgender people are also part of society and have the same right to enjoy all other people's rights. The peculiarity is that they are discriminated against by society. page 88 of **N.A.L.S.A. judgment**

states, "the concept of ensuring the dignity of the individual included in the preamble of the Constitution of Equality and Opportunity from the Socio-Economic and Political Situations of Justice is designed to produce the personality of the citizen."

In post-traditional liberal democratic theories of justice, the underlying assumption is that people have equal value and should be treated equally with equal laws. Thus, justice and fairness can be considered two unconnected and unrelated concepts, and these concepts are essential to the existence of a good human society.

According to Roscoe Pound, Irene, and Erlene, the School of Sociology founding speakers, law is a tool for balancing conflicting interests. Accordingly, the role of law is more important to maintain social stability by balancing the conflicting human aspirations.

In countries such as Sri Lanka and India in the South Asian region, transgender rights are denied based on the circumstances charged by the contemporary religious and cultural environment, as they view the community as behaving contrary to their religious teachings. For example, the Code of Penal Code's word "unnatural sexual behaviour" is a synonym for biblical teaching. The influence of the Christian religion was initially met with greater opposition to the subject of the transgender community in the West. However, with the post-industrial revolution, the idea of a transgender community in the European region became more humane and egalitarian.

According to Islamic Law, transgender sex is not allowed in most Islamic countries. According to them, the transgender community conflicts with the "natural" order in which the God created man, destroying family and marriage.

However, the transgender community also has the right to enjoy equal rights from the health and social welfare sectors of a state; to reform the legal conditions that create conflicts with those institutions; to recognize their right to vote as citizens; to stand up for their goals and endeavours, to receive formal education and to pursue a career of choice based on qualifications. Therefore, discrimination, employment, education, housing, HIV / AIDS risk and hygiene, stress, overuse of hormone pills, tobacco and alcohol abuse, gender reassignment surgery, marriage and adoption, identity certification, and the insecurities associated with ageing can never neglect their right to

experience the same situation as any other citizen in several related issues.

When it comes to criminal liability, it can be seen that they are also relatively more likely to be punished when they are charged with a crime, and this kind of discrimination is by no means justifiable from sociological viewpoint.

VII. RECOMMENDATIONS AND FUTURE STUDY REQUIREMENTS

To ensure that the Government of Sri Lanka abides by its Constitution and other legal documents, Sections 365, 365 (A), and 399 of the Penal Code must be decriminalized under Sri Lankan law. In addition, the vagrants Ordinance should be removed. The government should then ensure that any person's real or perceived sexual orientation or gender will not be used to target and harass them and that if they are subjected to such harassment, there should be a mechanism in place to make complaints and safely investigate. It should also ensure that all relevant cases are properly investigated, and appropriate action is taken to punish the perpetrators.

Accordingly, states that focus on balancing equality and recognized rights should implement social engineering and create a database on transgender people. Formal programs should be set up to address their problems, and provisions should be made to admit transgender people to government schools and colleges. The governments also need to create new job opportunities and programs for transgender people and educate the community. They need higher education and vocational training to improve their earnings and status, and they need proper medical care, including health insurance.

Accordingly, it provides special legal protection against discrimination on bisexual, and transgender people (L.G.B.T.I.Q.) and violence perpetrated by State and civil society and related legal proceedings and following points could be suggested as initiatives.

- Eliminating sexual orientation and gender segregation through a constitutional amendment, legal reforms will make civil rights accessible to all, regardless of gender/gender identity, under the law, such as the right to obtain a passport/ration card/inheritance and adoption of children.

Establishment of Vocational Training Centers to provide new career opportunities for transgender people

Issue guidelines to ensure a sensible and respectful treatment in various popular media (including movies, the Internet, and television)

Focus on developing programs to bring transgender people on an equal footing with other citizens and change society's attitude towards them.

VIII. CONCLUSION

Laws criminalizing transgender acts were imposed on Sri Lanka during the British Empire, and many similar laws in Britain and elsewhere have been repealed. Also, there is no evidence that homosexuality was a crime in this country before the colonial era. However, it is important to understand that transgender, which is not 'female' or 'male' in gender, is also a social construct. Therefore, it is important to provide 'awareness' to eliminate transgender, bisexual or transgender - phobia.

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