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Understanding the Challenges of Socio-Legal Framework among Transgenders in Kerala

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ABSTRACT

The transgender persons in India faces bitter-end prejudices and persecution that begin from domestic to socio-political spheres entrusted to protect their rights and interests. They had a sigh of relief with the apex Court's landmark decision in 2015 which finally recognized TG as a third gender. The Government of Kerala saw the opportunity to become the first State to draw up a 'State Policy for Transgenders in Kerala, 2015'. This research paper aims to analyse the evolution of the trans persons in Kerala, the myriads of hardships they had to go through until 2015 and after that, and the effectiveness of current government schemes. Furthermore, this paper attempts to view the TG persons through the lens of the social justice system in Kerala to focus on TG people in the State and discuss the socio-legal effect on the them. The scope of this research paper is to comprehend the socio-legal framework intersecting with the protection of the TG persons. Throughout the ages, there have been multiple factors that have pushed to the periphery of society. The very dynamic nature of society demands laws that would enforce the protection of the minority. These laws help them assert their identity and give them certain rights in mainstream society.

Keywords: *Transgender, Transgender Rights, LGTBQIA+, Kerala*

I. INTRODUCTION

The development of an individual's gender or sexual identity is largely based on the environment the person was brought up in including technology and media³ and the imperative role of genetics of the person. Conventionally, living organisms can be distinguished as either male or female with an exception of certain plants and animals that may develop both male and female reproductive organs.⁴ However, the segregation of male from female is established on the actions of genes.⁵ Nevertheless, the confusion among the masses to comprehend the various

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³ DANIEL MILLER ET. AL., HOW THE WORLD CHANGED SOCIAL MEDIA 114-127 (UCL Press 2016).

⁴ BRITANNICA, <https://www.britannica.com/science/hermaphroditism> (last visited Feb. 15, 2022).

⁵ Govindasamy Agoramorthy and Minna J. Hsu, *Living on the Societal Edge: India's Transgender Realities*, 54

gender categories exist in the present-day world. TG is an umbrella term for individuals who does not integrate with the conventional male or female categories of sex. Simply put, TGs are those individuals who identifies themselves as any other gender other than the gender that was assigned to them at the time of their birth. However, the term transgender is used to denote a group of people and does not mean to include any sexual orientation.⁶

To say the least, ancient India was a golden era for the TG persons. They were designated to critical posts at the royal courtyards and have secured their spots in classical texts like the Ramayana and the Mahabharata.⁷ With the colonization by the conservative Britishers, the TG persons as a whole was outlawed and identifying oneself as a TG was considered to be criminal. On the grounds of the above-mentioned reasons, it is evident that the TG persons has had a place in history even before pre-modern India⁸ mooting the narrative by certain members of society that this is a new age “epidemic”. For years the TG persons has been facing prejudice at the hands of the society and at the same time the government was neglecting to recognize their rights. To make matters worse many individuals had no choice but to face banishment from their own home and family just for the reason that they identify as a TG. It was up until the judiciary in all its might has proclaimed in the case of the National Legal Services Authority v. Union of India⁹ that people falling outside the conventional male/female gender binary to be recognized as the third gender. The Court enumerated on the Constitutional rights that each and every citizen of the country enjoys and being a TG does not strip away from those rights.

Kerala was the first state in the country to recognize the apex Court’s judgment and framed a ‘State Policy for Transgenders in Kerala, 2015’. The objective of this ambitious policy was to enforce the right to equality, equal protection, and the freedom of expression enshrined under Article 14, 15, 16, and 19 of the Constitution of India.¹⁰ TG welfare was entrusted to the Social Justice Department who have conducted studies on the myriads of issues faced by the TG persons in Kerala. Seven years down the road and after dozens of schemes committed for the welfare and empowerment of the TG persons, it is sceptical how much the State have achieved the policy objective and at what length the TG persons has benefitted from these schemes.

J. REL. & H 1171, 1451-1452 (2015)

⁶ A CRITICAL AND COMPARATIVE ANALYSIS OF CONSTITUTIONAL RECOGNITION AND PROTECTION OF HUMAN RIGHTS OF TRANSGENDER PEOPLE IN INDIA, MS. SUNITA T. BACHCHHAV

⁷ Agoramoorthy, *supra*, at 56.

⁸ Habin. H, *Transgender Community in India: A Study on The Religious and Cultural History*, 10 INT’L J. MULTIDISCIPL. EDUC. R. 1, 19-20 (2021).

⁹ AIR 2014 SC 1863

¹⁰ State Policy for Transgenders in Kerala, 2015

Methodologies and Techniques of Research

Research Design

The study employs both doctrinal and non-doctrinal research methods. The non-doctrinal research was executed in three phases, namely, reconnaissance, data collection, and verification phases respectively. Necessary changes in the nature of questions and interview were amended to evade ambiguity and inconvenience during the fieldwork for the data collection. Data verification phase was executed to identify gaps on missing data for the purpose of confirming the hypothesis.

Collection of Data

- i. **Personal Interview:** The researcher personally interviewed the subjects of the TG persons and other stakeholders that could contribute to the research.
- ii. **Questionnaires:** The researcher distributed the questionnaires with relevant questions vis-à-vis the research topic with utmost care to maintain the privacy and anonymity of the subjects. The questionnaire would contain 30 questions distributed and obtained from at least 25 persons from the TG persons.
- iii. **Books, journals, internet, et al.:** The researcher has availed assistance of journals, documents, academic research papers, law publications, and websites that discussed the topic in hand for the purpose of further understanding. Both online and offline materials have been used for further the knowledge of the researcher on the research topic.
- iv. **Precedent:** The researcher has mentioned case laws that deals with the research topic to give an insight into judiciary's stand point on the research topic throughout the history. The available case laws pertaining to the research topic has been accessed and used from authentic websites like SCC Law, et al.
- v. **Observation:** Finally, the researcher jots his personal observation from the places he visited and the subjects and stakeholders that he has interviewed or interacted with. Observation is one of the critical aspects of research work and provides an opportunity for him to display the in-depth understanding that he has on the research topic. The researcher has visited government offices, project offices, and dwellings of the TG persons to assess the day-to-day functioning that could be contributed to the research.

Research Problem

The TG persons in Kerala have been facing hardships from their friends, family, classmates, colleagues, and the public at large for quite some time now. They have to flee to other states fearing societal rejection and moreover familial rejection in search for a community like the Hijra system where fellow TG members would engage in begging and prostitution. Needless to say, the TGs face unemployment to earn a minimum wage and are subjected to both physical and emotional abuse from the society at large by way of exploiting their gender identity.

Despite the government schemes and policies to uplift the status of the TGs in the society by way of providing fiscal and emotional support, the TGs are either unaware or reluctant to come forward to be beneficiaries to these schemes. It is high time that TGs need to be integrated into the society.

Keeping in mind these issues, the following problems arise:

- a) How to destigmatise TG communities?
- b) How to effectively implement the various schemes and policies for the TG?
- c) How to provide socio-economic security to the TG persons?
- d) Does the current policy/scheme sufficient to uplift the TG persons?

Objectives

With this research paper the researcher seeks to address various issues the TG persons faces in Kerala and can help:

- a) To evaluate the needs of the TG persons and suggest measures to meet them.
- b) To suggest measures to sensitize the society about TG persons inter alia.
- c) To provide ways in which how effectively schemes and policies can be implemented to the best possible way.
- d) To suggest measures to effectively disseminate the details about the schemes and policies of the TGs.

Research Questions

- a) How to effectively solve the issues faced by the TGs in Kerala?
- b) How to sensitize the people of Kerala about TG persons?
- c) How to persuade TG persons to avail the benefits provided by the State to them effectively?

- d) Are the existing schemes and policies meeting the needs of the TG persons?
- e) How to provide protection to the TG persons from getting discriminated and abused?

Hypothesis

- a) If proper sensitization and training on TG persons is provided to the stakeholders and the members of the society, then there can be a possibility of TGs facing less discrimination.
- b) If the TGs are made aware of the various schemes and policies of the government for their welfare, then they could improve their livelihood.
- c) If proper legal awareness is provided to TGs, they could report injustices done to them.

Review of Literature

An assortment of journals, government websites, department pamphlets, and books have been conferred by the researcher. The researcher has availed the benefit of authentic websites to access judgments of various Courts on matters relating to TG persons.

Government orders and surveys published in government websites have been studied in detail and has been imperative in preparing the questionnaire and analysing the various measures taken by the concerned government authorities to implement the orders to its purpose.

Pamphlets provided by the government agencies that enumerated on various projects/schemes/policy. The researcher has taken the use of the literature available with the government agencies highlighting the mission and objective of their respective agencies that provided the researcher with an insight into the functioning of these agencies.

International documents like the Universal Declaration of Human Rights (UDHR), 1948 has been referred and identified Article 2 which throws light upon the fact that all human beings are born entitled to lead a life devoid of any form discrimination on the basis of religion, caste, race, colour, sex, place of origin, et al. Further concreting the provision of Article 2, Article 7 construes that everyone is equal before the law and all are protected against any form of discrimination.

Even though the International Covenant on Civil and Political Rights (ICCPR) does not deliberate upon gender identities per se, the document renders upon non-discrimination on the basis of sex, colour, race, language et al.

Books

Wilhelm, Amara Das. *Tritiya-Prakriti: People of the Third Sex Understanding*

Homosexuality, Transgender Identity, and Intersex conditions Through Hinduism. Xlibris Corp., 2003. The book explains the inclusion of the third sex during the Vedic Hindu era by way of discussing their existence through various Sanskrit texts. The book further sheds light into the effect of foreign powers alien to the concept of the third sex and the eventual erosion of it as a result of it. The author has rightly pointed out the need for an inclusive human society in the modern era taking cue from the Vedic era when persons of third sex were tightly knit into the social fabric as a normal gender. The book provides an insight into how advanced was the Vedic Hindu era was in terms of gender identities and sexual orientation and has appropriately defined the meaning of the ancient Hindu concept of gender. The book is engaging as it provides an opportunity to re-examine ancient Hindu practices and its approaches to the third sex.

Tripathi, Laxmi Narayan. *Me Hijra, Me Laxmi*. Oxford University Press., 2015. This autobiography book takes one into the life of Laxmi Tripathi who was born a male and later came out has a transgender. The book reveals every sphere of her life in detail and her struggle with the society as a transgender that lays down various events of sexual harassment that she had to endure from early childhood itself. The book lays emphasis of her internal conflict about her gender identity and sexual orientation. Later in the book, she discusses about her enrolment into the *hijra* community and her later on recognized herself as a *hijra*. The book also discusses about castration ceremony when one gets inducted into the *hijra* community and how the community welcomed her. The relationship between the TGs and the rules one has to follow as part of the community has been deliberated in detail. She fought for transgender rights in India and became member of various NGOs and rights groups that fought for the same. The book did not fail in examining the historical significance of the TG persons and the vital roles they played in ancient texts like the Mahabharata and Ramayana. Her work trying to uplift the TG persons has been widely accepted and cheered that she went on to attend various international events and eventually became the first *hijra* to attend the World AIDS Conference which was held in Toronto, Canada.

Vijayarajamallika. *Mallikavasantham*. Green Books India. 2020. The book is an autobiography of a transgender poet who has published her works in the Malayalam language. The book is a blend of prose, poems, and photographs where she highlights her struggle as a person who was born a cis male and transition to a transwoman and eventual medical diagnosis of intersex condition. The book details first-hand experience of a transwoman who had to experience internal and external conflicts about her identity. The book provides a unique opportunity to experience trans identity and how her family and the society at large has failed

to show any compassion about her identity. She further discusses her suicide tendencies and her attempt to end her life because of the intolerance the trans persons faces from the society. The book also shed light into the grim experience she faced at the hands of medical practitioners and how inconsiderate they were to her. She further dictates how modern society portrays trans people as merely a sexual object rather than a human being with emotions. In one of the chapters, she discusses how inconsiderate government officials were and how she faced humiliation from one of her close friends. The book has achieved its objective of informing the readers about the myriads of problems that the TG persons faces in Kerala at the hands of the family, friends, the government, and the society at large and was successful in encouraging fellow TGs to celebrate their identity and share their stories to the world.

Articles

H, Habin. “Transgender Community in India: A Study on The Religious and Cultural History” *International Journal of Multidisciplinary Educational Research*, vol. 10, no. 1(4), 2021, pp. 19-21. The article explores the religious and cultural nuances of the TG persons dating back to the Vedic era by reviewing ancient texts like the *Manu Smriti*, *Ramayana*, and *Kamasutra*. The author has pointed out the various definitions of genders and has given an insight into the evolution of TG persons in India. The article has established that the TG persons has been around and has played significant role in the history of the Indian society for centuries. Ancient Indian texts dealt in-depth about sexuality and the concept of the third sex which was also known as *Tritiya-Prakriti*. The article also deliberates upon the concept of “psychological sex” which can be found in ideological belief system like the Jainism where it has been mentioned about psychological personality of a person can be distinct from their sexual characteristics. The author further seeks out to find allusions from traditions in Kerala by examining the event of *chamayavilakku* where men dress up like women. The article further states that the TG persons are repressed by the Indian society and a dire need of change in perspective about the issues faced by the TG persons is imminent.

Agoramoorthy, Govindasamy and Hsu, Minna. J. “Living on the Societal Edge: India’s Transgender Realities” *Journal of Religion and Health*, vol. 54, no. 4, 2015, pp. 1451-1459. In this research paper the authors have conscientiously defined the paradox that revolves around gender and the various factors that affect the development of an individual’s sexual characteristics. The paper, time and again reminds us the myriads of issue and predicaments the TG persons faces. The authors have pondered over the historical significance of the TG persons by analysing ancient texts like the *Ramayana* and *Mahabharata*. Special emphasis has been given to the Hindu mythology and further argues that the TG persons has been well

perceived in the Hindu religion compared to other religions. The paper also discusses about the downfall of the TG persons in India with the British colonization. Further, the paper discusses about the landmark judgment in the NALSA case where the apex Court has made observations about the Constitutional rights of the TG persons and how it is striving to secure the rights of such minorities. The paper further pinpoints the ground reality where the TG persons has been neglected and deprived of their rights such as voting, access to healthcare, etc. It also brings our attention to the State of Tamil Nadu where various government schemes have enabled the TG persons to access quality healthcare facilities, education, etc. The paper also deliberates upon the health issues like HIV/AIDS among the TGs and states that there is a rise in positive cases. The paper concludes with a dilemma that there are no data available on the mental health problems of the TGs and the need for training healthcare professionals to deal with TG health issues and to provide TGs with necessary health subsidies. Above all the society should be warmer and more compassionate towards to this long-oppressed group of minorities.

Research Gap

Sufficient materials are available on the ancient relevance of the third sex and their significance in the history by way of religious texts and scriptures. Literature on the TG persons pertaining to the social, psychological, political, anthropological, psycho-social and socio-political aspects are available, the socio-legal or the legal aspect is widely spaced and often overlooked by researchers. There is a need to identify the existing laws and schemes are available for the benefit of the TGs and also to identify if the supposed beneficiaries are aware about these. What sets this research paper apart is that it explores to provide the socio-legal aspect of TG life in Kerala with relevant data to support the researcher's hypothesis. This research paper attempts to fill the gap by analysing the data procured from a small sample of TGs and to understand the effects of the various schemes and policies drawn for the TGs by the State. More importantly, the observations and suggestions made by the researcher in this research paper will be on the basis of the response from the interviews conducted of the government officials, TGs, and the stakeholders.

Limitations

- **Limitations of the Researcher**

During the process of data collection, some subjects engaged in long conversations that hampered with the researcher's ability to get the response to the questionnaire quickly. Subjects were not readily available as the researcher had to wait for several days to schedule a meeting and record their responses.

- **Limitation of Time**

The research paper has to be submitted within a stipulated time period and a considerable amount of time is spent on collecting data.

II. HISTORY

In order to understand the significance of TGs in India it is critical that one should know the history and the reputation that they held in the different time period of history. Even though deeply entrenched in the Indian society and culture yet they lost their shining as an influential community by the passage of time.¹¹ With the onset of colonization they were outlawed and were forced to keep their gender identities a secret and had to lead a life that is brought to naught. The poignant reality that the TG persons had to wait so long for the concerned government to realize their rights and make necessary developments for their welfare is itself a grave concern for the Indian society that it is high-time that we need to consider them as a unit of the society.

From having relance in religious texts and serving Kings and Queens for centuries to vagrants who begs in the streets and train TG persons has come along a long way. The historical evolution of TGs in the Vedic, Mughal, Colonization, Post-Independence, and finally in contemporary eras has to be examined for better comprehension. Religious texts like Mahabharata, Ramayana, and Kamasutra illustrates the contributions of TGs. During the British colonization TGs were put under constant surveillance and were considered to be an “opprobrium upon colonial rule”.¹² With the independence, TGs expected the draconian laws that made TG life miserable but were down on luck when the government did not repeal the Indian Penal Code, 1860 which prohibited sexual intercourse with the person of same sex. The fight for their rights began and after decades of fighting their rights were realised. Since then, many TGs have become prominent authors, poets, and even politicians.¹³

Vedic Era

Historical texts accounted about the recognition the TGs had in ancient period and has depicted in detail about their role in those periods. The Vedic literature that are voluminous details about all sciences.¹⁴ In order to understand the concept of human behaviour, sexuality, and practices

¹¹ SUNITA BACCHHAV

¹² Soutik Biswas, *How Britain tried to 'erase' India's third gender*, BBC (Feb. 25, 2022, 9:35 PM), <https://www.bbc.com/news/world-asia-india-48442934>

¹³ Gayathri Reddy, *with respect to sex: negotiating hijra identity in South India*, University of Chicago Press, 2005

¹⁴ Amara Das Wilhelm, *Tritiya-Prakriti: People of the Third Sex Understanding Homosexuality, Transgender Identity, and Intersex conditions Through Hinduism*. Xlibris Corp., 2003. Pg 41

it is advised to refer the *Kama Shastra*. It is in this ancient text that the concept of third gender has been discussed in detail. TGs in this text were known as *Shandha* viz. in Sanskrit refers to men who behaves like women or as a person whose manhood has been ruined. The term *Shandhi* is the Sanskrit term that refers to women. Such people do not recognise the sex that has been assigned to them in their birth but identify themselves as members of the opposite sex.¹⁵ In this context, male-to-female (MtF) TGs live as women and female-to-male (FtM) live as men. It is often assumed that TGs in ancient India, MtF TGs, even though self-mutilation is highly discouraged, may have castrated themselves so that they can claim to be a woman. They also practice tying their genitals to their groin using underpants known as the *Kaupinam*. Similarly, FtM TGs would tightly strap their breasts to their torsos. It is to be noted that castration of any kind is discouraged in the Vedas which is why these were not common in ancient India. In earlier centuries, slaves and servants who are homosexuals were encouraged to castrate during the Muslim rule.

Intersex, also known as, *napumsa* in Sanskrit is referred to a person who cannot reproduce in the third gender. This implies a person born with obscure or improper genitalia and the degree of their impotence can vary from person to person. These individuals may identify themselves as homosexuals, heterosexual, or neutral by nature. *Nisarga* is another term that is used to refer a person who has a combination of both male and female genitalia. It was considered that such condition persists in an individual because of their past sins.¹⁶ Despite this fact they were treated with respect in the Vedic society. It is fascinating to discover that the concept of intersexuality is a relatively new for modern science but it was already recorded and studied in the Vedic texts. Biologists and scientists believe that differences in sex development (DSD) is a unique health condition that involves a person's genes, hormones, and genitals where the person's sex development is different to others.¹⁷

In the epic Ramayana, Lord Rama was exiled to forest for fourteen years by his father King Dasharatha from the kingdom of *Ayodhya*. As a dutiful son he left to render his father's order and a crowd of loyal subjects followed him to the edge of the forest. This came into his attention and gathered all and consoled them and advised "all men and women" to return to *Ayodhya*. The loyal citizens obeyed their Lord's command and left for *Ayodhya* but those who were neither man or woman i.e., the TGs were confused and decided to remain there for fourteen years. When Rama completed his fourteen years of banishment, on his way back he notices

¹⁵ *Ibid.*

¹⁶ Mahabharata 13.145.52

¹⁷ NHS, <https://www.nhs.uk/conditions/differences-in-sex-development/> (last visited on Mar. 1, 2022).

them and way moved by their love and loyalty.¹⁸ He blessed them with the power to offer blessings at occasions like marriage, child birth, and at inaugural functions where they can dance and sing.¹⁹

In other Vedic texts, an important tale of Arjuna is the appearance of *Brihannala*, a MtF TG. When Arjuna refuses the advances made by Urvashi, she curses him to be a *Shandha*, a man who behaves like a woman. Later, Indra, the King of Heaven and Gods, reduces the curse to one year. Arjuna used this opportunity during his exile in the capital city of Virata. Arjuna enters the city as *Brihannala* as a person with strong masculine features but with effeminate attitude. *Brihannala* requests Maharaja Virata to provide an employment which was granted. *Brihannala* went on to teach dancing, singing, hairdressing, etc which are the usual work the TGs used to do in the Vedic era.²⁰

Kerala TGs has their own traditions and culture. The TGs in Kerala celebrate *chamayavilakku* festival that he is held at Kottankulangara Devi Temple in the district of Kollam. Numerous TGs dress up like women and pray in front of the Devi. The mythology behind the festival is that some boys who were rearing cattle found a coconut and tried to break open it by hitting it hard against a rock and to their surprise the rock began to bleed. After astrologers found out that Goddess Durga resides in the rock and the temple was advised to build a temple on it. Even though there is no direct connection between the TGs and the festival, there is no possible influence in the myth. The festival provides a platform for the TGs to express themselves.²¹

Mughal Era

The Islamic Mughal empire opened up opportunities to the TGs. They held vital position in the Mughal empire like the advisors on various subjects, administrators, military generals, and also the warden of the Mughal harems. They were considered to be intelligent tacticians, reliable and honest, and extremely loyal subjects of the Mughal empire. They were provided with adequate access to every segment of the society thus being crucial to the politics of the Mughal empire. They were also entrusted in providing protection to holy places like Meccah and Medina. They also played key role in influencing the decision of the Kings and Queens and was receiving huge sum of money in remuneration.²²

¹⁸ Wilhelm, Tiritiya-Prakriti, 145

¹⁹ M. Michelraj, *Historical Evolution of Transgender Community in India*, Asian Review of Social Sciences, Vol. 4 No. 1, 2015, pp. 17-19

²⁰ Wilhelm, Tiritiya-Prakriti, 123

²¹ Supra note 8.

²² M, Michelraj, 18.

Colonial Era

Trading posts established by the European shipping companies started to thrive and also began to establish important ports along the Indian coast lines. By the mid eighteenth century, the British East India Company came out as the leading European trading company in the country which went on to become a reign that lasted almost two centuries. The Britishers had all hands-on deck with India after losing the United States to the colonists. Meanwhile, in England and Europe at large where Christianity was the major religion, homosexuality was criminalised and people engaging in unnatural carnal intercourse was punished.²³ In fact, when the Europeans were taken back with the fact that TGs cohabitated peacefully among the population. They were disgusted that TGs held critical posts in royal courts and was given wide recognition. As a result of which the Britishers enacted laws criminalising the TG persons. Situation worsened for the TGs in India when several legislations were enacted to criminalise homosexuality. The Indian Penal Code, 1860 was enacted in which Section 377 prohibits intercourse against the order of the nature. They also enacted the Criminal Tribes Act, 1871 which laid down that any TG concerned with the kidnapping and castrating and also made it criminal to dress up like women and dance in public places. Also, the registered TGs were denied basic civil rights that allowed them from making a gift deed or will, become guardian to a minor, etc. They were put under constant surveillance and were charged and punished. For violating these laws, a person will be punished with life imprisonment, imprisonment which may extend to ten years or fine and two years' imprisonment and fine or both respectively. Sadly, the effect of these were carried on to the post-partition modern world.

In one of the first cases that was tried under Section 377 of the Indian Penal Code, 1860, in the case of *Queen Empress vs. Khairati*²⁴ where the accused was found dressed as a woman and was singing. Upon medical examination they found that the accused is a habitual catamite and has also contracted syphilis. One of the judges in the case called the incident as a “disgusting practice” and lauded the conviction but had to quash the conviction because of jurisdictional issues.

In the case of *Khanu vs. Emperor*²⁵ the Court observed that carnal intercourse is clearly against the order of the nature because the nature of carnal intercourse is to conceive human beings which in the case of oral sex, it is impossible. The judge also observed that even though the States that do not follow superstition still consider Sodom punishable because an erroneous

²³ Wilhelm, Tiritiya-Prakriti, 159.

²⁴ ILR (1884) 6 All.

²⁵ AIR 1925 Sind 286.

idea that a practice that is tolerated by the public creates a tendency to adopt unmanly and morbid method of life and thinking.

Post-Independence Era

The Criminal Tribes Act, 1871 was repealed and replaced in the year 1952. Unfortunately, the effect of this legislation was carried forward to the post-independence era. The Karnataka Police Act was amended in the year 2012 that enabled the police to put eunuchs under surveillance for kidnapping of children and engaging in unnatural sex which is as similar as the provision of the Criminal Tribes Act, 1871. But fortunately, this Act was amended in response to public outcry in the year 2015. In the case of *Karnataka Sexual Minorities Forum vs. State of Karnataka*²⁶ the Hon'ble High Court of Karnataka observed that Section 36A of the Act was in violation of the Constitution rights under Article 14, 15, 19, and 21 respectively. The Court further stated that the provision was arbitrary, discriminatory, and a clear violation of the Constitutional rights. The Government of Karnataka agreed to replace the word "eunuch" with "person". This is a landmark judgment that removed the TGs under the unnecessary surveillance of the police and constant harassment that they have to endure.

Even though, the Criminal Tribes Act, 1871 was repealed, the legislators did not remove Section 377 of the Indian Penal Code, 1860. The research paper will discuss about the legal battles that had to be fought for the TGs to get their rights recognised in the upcoming chapters.

Contemporary Era

The third gender has been declared to be one of the popular types of gender in the world. With the help of liberal interpretation of law, the apex Court of the country finally recognized TG as a third gender. LGBT rights were being recognized all over the world and as a result of which the Government had to introduce welfare programmes to uplift them. Kerala does not have a determined space for TGs like the *Hijra* community in other states. This may be a boon and a bane because the TGs not having a community is an inconvenience for policy implementation point of view but on the other hand it will disable the society from labelling them which in turn will help them reintegrate into the society.²⁷ Kerala became the first State to formulate State policy for TGs in the year 2015. The State has come up with several policies and programmes for the alleviation of TGs in the State. The Transgender Persons (Protection of Rights) Act, 2019 was passed laying down provisions against discrimination of TG people. But there is still

²⁶ W.P. 1397/2015.

²⁷ Sanju George, what is it to be a Transgender in God's Own Country (Kerala, India)? An Explorative Case Study, *Global Journal of Medical, Pharmaceutical, and Biomedical Update*, 15(3)

a need for uplifting the TGs.

III. INTERNATIONAL PERSPECTIVE

From a nonchalant perspective, TG rights around the world has made significant advancement in recognising the concept of gender identity and the rights of TGs. States all over the world has been introducing several legislations and policies for ameliorating the social, political, and economic wellbeing of the TGs. Rights vis-à-vis conjugal, healthcare, parental, etc., are being provided to the TGs. However, life in States that are yet to recognize these rights by way of domestic laws face severe humiliation and/or punishment.²⁸ Needless to say, the TG people in these States are repressed and experience inter alia unemployment, homelessness, and poverty.

In this chapter, the researcher seeks to dive into the instruments of international significance that protects the rights of the TGs and the landmark judgments of Courts in other States with regard to the TG rights. It is vital to analyse the various parameters, procedures, tests, and legal principles have been applied to enable TGs to lead a prosperous life.

Relevance of International Law in India

The relevance of international law in India has been enumerated in the Constitution of India and other relevant legislations. Article 51 of the Constitution of India that lays down the Directive Principles of State Policy (DPSP) states that the State has to promote international peace and security²⁹, maintain just and honourable relation with other States³⁰, to respect the virtue of international law and obligations³¹, and finally to resort to arbitration in case of international disputes.³² Article 253 of the Constitution of India empowers the Parliament to make necessary legislation to effect any treaty, convention, agreement, or decisions taken in any conference with another State(s).

The apex Court reiterated the relevance of international treaties or covenants in the case of *Vishakha vs. State of Rajasthan*.³³ The Court observed that for the purpose of comprehending the concept of gender equality, human dignity, and right to work enshrined in the Constitution of India under Articles 14, 15, 19(1)(g), and 21, referring to international instruments or

²⁸ AJ AGRAWAL Need for Recognition of Trans Rights in International Human Rights Law, Centre for Law & Policy Research, <https://clpr.org.in/blog/need-for-recognition-of-trans-rights-in-international-human-rights-law/#:~:text=Article%2026%20of%20the%20ICCPR,the%20category%20of%20%E2%80%9Csex%E2%80%9D> (last visited on Mar. 9, 2022).

²⁹ Art. 51(a)

³⁰ Art. 51(b)

³¹ Art. 51(c)

³² Art. 51(d)

³³ (1997) 6 SCC 241)

conventions are significant.³⁴ The need to pore over international instruments is significant as long as these does not violate the basic fundamental rights provided to every human being.

Similarly, the Protection of Human Rights Act, 1993, which established National Human Rights Commission, State Human Rights Commission, and Human Rights Courts in country has defined human rights as rights to life, liberty, equality, and dignity of an individual has been protected under the Constitution of India or under the International Covenants.³⁵ International Covenants are in the Act describes the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).³⁶ The Act further states that the National Human Rights Commission (NHRC) to study applicable treaties and other international instruments pertaining to human rights and make necessary recommendations for its implementation.³⁷

It is noteworthy that India by way of its Constitution and through legislations has enabled itself to perform the duties as mentioned under international instruments. World nations have already in the forefront of securing human rights by adopting these international instruments and has championed at implementing them. India is also striving its best to conform to the standards laid down in these Covenants.

Universal Declaration of Human Rights (UDHR)

UDHR is one of the foremost international documents that had influenced States to formulate international treaties for the purpose of securing human rights.³⁸ The Declaration which was adopted in the year 1948 by the United Nations General Assembly (UNGA) includes 30 Articles was drafted soon after the world witnessed the atrocities that one human being can commit on another during the Second World War.³⁹ With its adoption human rights was recognised as to be the very basis for freedom, justice, and peace which also sets the relevance in the human history. UDHR detailed in its 30 Articles long document basic rights and fundamental freedoms of an individual. The document is “universal” in the sense that the rights are available to every person devoid of race, religion, sex, residence, language and nationality. In essence, these are inherent rights available to any person by virtue of being a human being.

³⁴ Vishaka & Others vs State of Rajasthan & Others AIR 1997 SC 3011

³⁵ Sec. 2(d) Protection of Human Rights Act, 1993.

³⁶ Sec. 2(f) Protection of Human Rights Act, 1993.

³⁷ Sec. 12(f) Protection of Human Rights Act, 1993.

³⁸ UNITED NATIONS, *The Foundation of International Human Rights Law*, <https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law#:~:text=Adopted%20in%201948%2C%20the%20UDHR,universal%20enjoyment%20of%20human%20rights> (last visited on Mar. 9, 2022).

³⁹ AMNESTY INTERNATIONAL, <https://www.amnesty.org/en/what-we-do/universal-declaration-of-human-rights/> (last visited on Mar. 9, 2022).

Articles 1-2: These articles deal with the foundational concepts of it that enumerates on the dignity, equality, and brotherhood.

Articles 3-11: These refers to the individual rights like right to life, prohibition of slavery and torture, equality before law and other fundamental rights.

Articles 12-17: These set forth an individual's rights towards the society such as freedom of movement, residence, right to marry, own property, etc.

Articles 18-21: These ensures an individual's spiritual right and religious autonomy including freedom of thought and expression.

Articles 22-27: These articles ensure individual economic, social, and cultural rights which includes right to work, leisure, standard of living and education.

Articles 28-30: These lays down the obligations i.e., areas in which these rights are inapplicable.

UDHR had a significant role in inspiring States to develop international human rights law, and laid the foundation for the International Bill of Human Rights which came into effect in the year 1976 that contains the UDHR, ICCPR, and ICESCR and its two optional protocols. Even though the document is not legally binding, it acted as a guideline for not only making international human rights treaties, but also inspired domestic laws of various States. However, ICCPR and ICESCR are legally binding documents that set forth the rights enumerated in the UDHR. For example, the fundamental rights guaranteed under the Constitution of India are closely similar with those enshrined in the UDHR, namely, Articles 14, 15, 16, 19, 20, 21, 23, 25, 29, 31, and 32. Article 3 of the UDHR defines everyone has the right to life, liberty and security of persons whereas in Article 21 of the Constitution of India states that no person shall be deprived of his life or personal liberty.

Transgender rights are well enveloped under the international human rights law as it is being extended to every human devoid of their gender. The element that distinguishes this document from others is that it is an inclusive document that it extends and preserves the rights of every human. Article 12 of UDHR states that no one shall invade one's privacy and prohibits attack on an individual's honour and reputation. The Article further states that everyone has a right of protection of the law for such attacks. The State intervening and infringing one's right to privacy is highly discouraged and considered a violation of an individual's privacy.

International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) is a multilateral treaty which

is one of the critical international instruments of the International Bill of Human Rights that strives to protect and preserve basic human rights such as, right to life and human dignity, equality, privacy, gender equality fair trial, freedom of speech, et al. The Covenant was adopted by the UNGA in 1966 and came into force in the year 1976.⁴⁰ Till date there are 173 Member States that have ratified the Covenant and 116 and 89 States have signed the first and Second Optional Protocols respectively.⁴¹ The Covenant obligates the Member States to protect and preserve the rights enshrined under the treaty and to take effective remedial measures. The compliance of the Covenant is ensured by the United Nations Human Rights Committee. The Committee reviews reports submitted to it by Member States on the progress made by the respective States to further the provisions of the Covenant.

There are 53 Articles to the Covenant which are divided into six chapters discussed in detail about the various rights enshrined upon every human being. It is imperative that this research paper should discuss about the Articles of this Covenant.

To begin with, Part I contain Article 1 lays down that everyone has the right to self-determination which includes the right to determine the political status and enables everyone to seek to fulfil their economic, social and cultural development.

Part II of the Covenant discusses Articles 2-5 which states that there shall be no distinction between people on the basis of race, religion, colour, sex, language, origin et al. It also states that the State parties shall have to draft legislations in their respective States to give effect to the rights provided in the Covenant and also to provide legal remedies for the violation of the rights enshrined under this Covenant.

Part III deals with Articles 6-27 provides to all the following rights:

- i. Right to life, freedom from torture and slavery.
- ii. Due process of law shall be followed and presumption of innocence.
- iii. Freedom for being unlawfully arrested and right to individual liberty and security.
- iv. Freedom of thought, expression, including the freedom to form associations.
- v. Right to privacy and nationality.
- vi. Equality before the law.

Part IV contains Articles 28-45 which deals with the establishment of the Human Rights

⁴⁰ ACLU, <https://www.aclu.org/other/faq-covenant-civil-political-rights-iccpr> (last visited on Mar. 15, 2022).

⁴¹ United Nations Human Rights Office of the High Commission, <https://www.ohchr.org/en/treaty-bodies/ccpr> (last visited on Mar. 15, 2022).

Committee and the general guidelines about its operation, reporting and monitoring of complaints. It also deals with the enabling provision that allows the Committee to resolve disputes between State parties on the implementation of this Covenant.

Part V deals with Articles 46-47 which states that the provisions of this Covenant shall not be interpreted in such a way that it would disable the specialised agencies of the UN and the rights of everyone to enjoy utilizing their wealth and resources.

Part VI contains Articles 48-53 which deals with the ratification, accession, applicability, amendment, date of entry into force, and the languages.

The Covenant does not particularly express about TGs but it has been enshrined through various Articles that no person shall be discriminated on the basis of the sex of the person.

International Covenant on Economic, Social and Cultural Rights

Another international instrument that came into being along with the International Bill of Rights is the International Covenant on Economic, Social, and Cultural Rights (ICESCR). ICESCR ensures a legal framework that protects and preserves human rights in the economic, social and cultural domains.⁴² The Covenant contains 31 Articles categorised into six parts. These rights include:

- i. Right to self-determination.⁴³
- ii. Right against discrimination on the basis of religion, race, colour, origin, sex, et al.⁴⁴
- iii. Equal rights for men and women.⁴⁵
- iv. Right to work.⁴⁶
- v. Right to form and join associations or trade union.⁴⁷
- vi. Right to social security.⁴⁸
- vii. Protection and assistance to family.⁴⁹
- viii. Right to standard of living.⁵⁰

⁴² Federal Department of Foreign Affairs, <https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/un-human-rights-treaties/international-covenant-economic-social-cultural-rights.html> (last visited Mar. 22, 2022).

⁴³ Article 1 ICESCR

⁴⁴ Article 2

⁴⁵ Article 3

⁴⁶ Article 6-7

⁴⁷ Article 8.

⁴⁸ Article 9

⁴⁹ Article 10

⁵⁰ Article 11

- ix. Right to enjoy highest standard of physical and mental health.⁵¹
- x. Right to free and compulsory education.⁵²
- xi. Right to cultural freedoms.⁵³

Special emphasis has to be placed on Article 2 of the Covenant that deals with an individual's right against discrimination. The Covenant restricts any form of discrimination on the basis of religion, race, colour, political opinion, origin, sex, et al. This allows TGs to benefit from this Covenant where it would enable them to address their issue of discrimination they face on a day-to-day basis at the hands of their respective government. Similarly, Article 6 provides the right of an individual the opportunity to earn a living and the State's responsibility to ensure that appropriate steps are taken to protect and preserve this right. The TGs face severe work-related discrimination including pay cut just because they are a TG. It is the State's responsibility to take necessary steps to make sure that such form of discrimination is eliminated.

Articles 9-14 can also be utilized by the TG people to realise their rights. The State has an obligation to ensure the TGs have social security and social insurance as many of them struggle to make ends meet in a highly inflated market economy; adequate standard of living like food, clothing, housing, et al., should be provided to TGs making sure that they attain the same standard of living of others without any discrimination; provide highest standard of mental and physical health facility so that the TGs can approach medical professionals to get the necessary treatment including Sex Reassignment Surgery (SRS) and post-surgery needs including counselling facilities; and provide education for all at the expense of the State including TG students and provide a safe environment for such students to attain proper education.

Nonetheless, this Covenant is the only UN human rights treaty that does not have a specialised committee to monitor the implementation of this Covenant.⁵⁴ The Committee on Economic, Social, and Cultural Rights (ECOSOC) has been charged with the overseeing this Covenant.⁵⁵

Yogyakarta Principles

A panel of international experts in international law and human rights law and sexual orientation and gender identity⁵⁶ drafted in Yogyakarta, Indonesia known as the Yogyakarta

⁵¹ Article 12

⁵² Article 13-14

⁵³ Article 15

⁵⁴ World Health Organization, https://www.who.int/hhr/Economic_social_cultural.pdf (last visited on Apr. 2, 2022).

⁵⁵ ECOSOC Resolution 1985/17 of 28 May 1985.

⁵⁶ Yogyakarta Principles.

Principles and was adopted by a group of distinguished human rights experts in the year 2006. The document contains 29 principles that deals with matters ranging from right to human rights, life, equality to right to seek asylum, public life, and redressal mechanisms. The document has been released by human rights experts of 29 States which included judges, academicians, former UN rapporteurs and High Commissioners, human rights advocates, NGOs, etc.⁵⁷

Documents like this would act as a tool for policy makers and other stakeholders in determining SOGI issues and assist in setting international legal standards for which TG people can enjoy their rights peacefully in their respective States. In 2017, Yogyakarta Principles Plus 10 (YP Plus 10) was adopted that complemented the Yogyakarta Principles. YP Plus 10 was adopted as a result of rising violations faced by individuals on the basis of SOGI.

IV. LANDMARK JUDGMENTS

Ever since the inception of the Criminal Tribes Act and the Indian Penal Code, TGs in India have faced severe injustice initially at the hands of the British and then from the hands of the Indian government, albeit the former was repealed after independence, Section 377 of the Indian Penal Code existed as a dire strait for the TG people. The sigh of relief from the repealing of the Criminal Tribes Act was short-lived because of the fact an almost provision exist in the IPC. LGBT movements and TG rights were being recognised throughout the world by way of judicial pronouncements, legislations and international committees. It took more than half a decade post-independence for Indian TGs to finally receive the recognition and rights they deserved.

The path to get their rights recognised did not come as easy as a walk in the park. It took years of legal battle for the judiciary to decriminalise Section 377 and identify TG as a third gender in the country. These case laws are of immense relevance to this research paper since it provides an outlook into the observations made by the judiciary and the contentions forwarded by the stakeholders.

Naz Foundation v. Government of NCT of Delhi and Others⁵⁸

The Delhi High Court after listening to the arguments set out to test of any law that interferes with an individual's personal liberty which was laid down in the landmark judgment of *Maneka Gandhi v. Union of India*⁵⁹ where the apex Court stated that: (a) there must be a procedure; (b) that procedure shall be tested against one or more fundamental rights enshrined under Article

⁵⁷ ARC International, <https://arc-international.net/yogyakarta-principles/> (last visited on Apr. 10, 2022).

⁵⁸ WP(C) No. 7455/2001

⁵⁹ (1978) 1 SCC 248

19; and (c) it is prone to be tested against Article 14 and must be just, fair and not arbitrary.

The Court further stated that even though right to privacy is not expressly stated in the Constitution, the Supreme Court has time and again interpreted Articles 19 and 21 to include right to privacy as well.

The Court also referenced a myriad of case laws of foreign jurisdictions like the *Roe v. Wade*⁶⁰ and *Planned Parenthood of South-Eastern Pennsylvania v. Casey*⁶¹. After analysing these case laws, the Court went on to examine the developments in India where it considered the case of *Kharak Singh v. The State of U.P.*⁶² where the Court identified that right to privacy is part of right to life and liberty enshrined under Article 21.

The Court also took note of the Yogyakarta Principles that were drafted by experts in the field of international human rights law. The Court took reference of the principles laid down in this international document to identify the rights of an individual of different sexual orientation and noticed that the document promoted the concept of equal rights shall be enjoyed by everyone devoid of one's sexual orientation.

Taking into account of all these, the Court reached into a conclusion that Section 377 of the Indian Penal Code, 1860 is in violation of right to privacy and denies dignity which comes under the ambit of Article 21 of the Constitution to people with such sexual orientation. The Court rejected MHA's contention that decriminalising the provision would lead to an increase in people contracting HIV/AIDS as there were no evidence to back this assumption. The Court observed that this contention is clearly contradicted in NACO's arguments.

The Court also mentioned that the argument of public morality raised by the counsel for the respondents, the Court cited the cases of *Dudgeon v. The United Kingdom*⁶³ and *Norris v. Republic of Ireland*⁶⁴ which were dealt by the European Court of Human Rights that mere disapproval by the public is not sufficient ground to restrict someone to enjoy their fundamental rights. The Court further stated that the only morality that matters is the Constitutional morality.

The Court declared Section 377 of the Indian Penal Code, 1860 to be unconstitutional under the ground of being in violation of Articles 14, 15, 19, and 21 of the Constitution of India on 2 July 2009.

The decision of this case was overturned by the Supreme Court in the case of *Suresh Kumar*

⁶⁰ 41 US 113 (1973)

⁶¹ 505 US 833 (1992)

⁶² (1964) 1 SCR 332

⁶³ 45 Eur. Ct. H.R. (ser. A) (1981)

⁶⁴ 142 Eur. Ct. H.R. (ser. A) (1988)

Koushal and Another v. NAZ Foundation and Others⁶⁵ on appeal in the year 2013.

Suresh Kumar Koushal and Another v. Naz Foundation and Others⁶⁶

An appeal was made to the Supreme Court on the Naz Foundation case⁶⁷ and drew attention of many interveners. These interveners include individuals and organizations that states that they stand to protect the traditional Indian way of living. The two-judge bench of the Supreme Court heard the arguments from both the sides and decided to allow the appeal and as a result of which overturned the decision made by the Delhi High Court in the Naz Foundation case on 11 December 2013. The Supreme Court stated that the decision made by Delhi HC was legally unsustainable and was of the opinion that Section 377 did not violate the fundamental rights guaranteed under the Constitution of India. The Court also stated that both the Courts have the power to rule on the constitutionality of a law nevertheless there has to be a presumption of constitutionality on every law. The Court observed that Section 377 does not discriminate a group or class of people but merely identifies acts when carried out would constitute an offence and such prohibition regulates the sexual behaviour of an individual regardless of their gender identity. The Court also pointed out that the petitioners in the Naz Foundation case have failed miserably to support their arguments for producing relevant evidences that indicated discriminatory approach taken by the government. This decision from the apex court was a reversal of fortune for the LGBT people as they have started to witness a change in the society's attitude towards them and the judiciary as a watchdog to protect their rights. The decision was heavily critiqued by activists, academicians, and lawyers for failing to take into account the sufferings the LGBT people have gone through; the international perspective of this issue was ignored and the Court contemplated the issue narrowly rather than perpending it on a wider sense. The Court was also ignorant about the incidents of rape, extortion, and the abuse of both mind and body that the LGBT people face on a day-to-day basis.

National Legal Services Authority v. Union of India and Others⁶⁸

The bench consisted of a quorum of two judges – A.K. Sikri, J. and K.S. Radhakrishnan, J. The former endorsed the judgment of the latter and gave his separate opinion on the case. The Court observed that the TGs have faced tremendous amount of trauma and prejudice and has been in disadvantage since the colonisation. The Court also acknowledged that TGs have faced severe discrimination from basic providers like healthcare, education, employment, housing etc. The

⁶⁵ Civil Appeal No. 10972 of 2013

⁶⁶ Civil Appeal No. 10972 of 2013

⁶⁷ Supra 9

⁶⁸ Writ Petition No. 400 of 2012 with Writ Petition No. 604 of 2013

Court has directed the Central and State governments to take necessary steps to ensure that the fundamental rights of TGs are safeguarded. The Court also iterated that gender identity is part of an individual's personality and cannot mandate SRS or other procedures to legally recognise one's gender identity. It also made distinction between psychological and biological sex and stated that the former should be prioritised than the latter.

The Court also stated that the relevance of international conventions and mentioned that efforts should be taken to make national legislations of international conventions that are consistent with the Constitution. The Court laid emphasis on recognising and applying the Yogyakarta Principles when such a legislation is brought to existence.

Further, the Court held that TGs fall within the ambit of the Constitution of India and are entitled to the rights enshrined under it. This means that Articles 14, 19, and 21 are applicable to the TG people and the State has an obligation to safeguard these rights. The Court directed the Central and State governments to make necessary arrangements to establish HIV Sero-Surveillance Centres to monitor HIV/AIDS patients among the TGs and promote safe sex practices. It further provided to make arrangements to construct public toilets and medical centres for TG welfare. Thus, on 15 April 2014 the Supreme Court finally recognised the concept of third gender opening doors for opportunities for the TG people.

Navtej Singh Johar and Others v. Union of India and Others⁶⁹

The instant case was one the most important judgments for the LGBT people. The five-judge bench of the Supreme Court on 6 September 2018 unanimously decided that Section 377 was in violation of the fundamental rights guaranteed under the Constitution of India. By doing so, the Court overruled the decision of the two-judge bench decision of the Suresh Kumar Koushal case⁷⁰ which upheld the appeal and the constitutionality of Section 377. The Court relied upon numerous case laws including the NALSA case and arrived at an informed decision to hold Section 377 as unconstitutional. The Court observed that Section 377 restricted the freedom of expression and the right to privacy of the LGBT people which were well established in the same Court. The Court also stated that consensual carnal intercourse between two adults should not be part of the state's interest. Dipak Misra, C.J., who presided over the bench made a remark that "constitutional morality would prevail over societal morality"⁷¹ regardless of the approval of the majority of the society.

⁶⁹ AIR 2018 SC 4321

⁷⁰ Supra 8

⁷¹ p. 79, para. 121

K. Prithika Yashini v. The Chairman, Tamil Nadu Uniformed Services Recruitment Board and Others⁷²

This case received national attention where the petitioner was a MtF TG who applied for the post of Sub-Inspector as a female as there was no third category in the gender section of the application. Her application was rejected by the respondent stating that she did not fall under the directions issued by the Supreme Court despite a writ was filed in the same High Court directing the concerned educational departments to change her name from K. Pradeep to K, Prithika Yashini. The Court observed that the applicant has suffered a lot including being thrown out of her house by her parents and has been struggling to earn a living. The Court pointed that despite the judgment of the Supreme Court in the NALSA case the respondent failed to make necessary changes including people of the third gender. Despite unable to meet the cut offs in the written examination and physical endurance test she the Court passed favourable orders in order to attend the interview. The Court ordered the respondent to make necessary changes to include the category of third gender as directed by the Supreme Court. The case of is of remarkable significance as the judiciary played an important role in encouraging TGs to take up public employment by providing her with all the help it can extend and also by realising the severe discrimination that they face.

Hina Haneefa v. State of Kerala⁷³

The petitioner in this case is a MtF TG who had undergone SRS and has acquired the TG identity card that identifies her as a female. She applied to join the Girls Division of the National Cadet Corps (NCC) in her college. Her application was rejected on the grounds that the NCC does not have the provision to induct a TG person. The petitioner approached the High Court of Kerala challenging the rejection as it violated her fundamental rights. The Court had to ascertain whether Section 6 of the National Cadet Corps Act, 1948 restricts TG women to take part in the Girls Division. Section 6 states that recruitment to the Girls Division should be made from female students. The respondents tried to argue that gender specific organization like the NCC and the armed forces would have to face wider consequences if TGs are allowed to join which the Court refused to accept this contention and ordered for the admittance of the petitioner to NCC. The Court ruled that with the Transgender Persons (Protection of Rights) Act, 2019 in place it supersedes Section 6 of the NCC Act as it was an old legislation which requires to be observed to meet the needs of the present. The Court noted that this legislation

⁷² W.P. No. 15046 of 2015

⁷³ W.P. No. (C) 23404/2020

realises the fundamental rights guaranteed under Articles 14, 15, 19 and 21 of the Constitution of India. The Court however, held that the petitioner has undergone SRS and is entitled for admittance which goes against the Supreme Court's judgment in the NALSA case where the Court has explicitly said that it is not necessary for a person to undergo SRS to determine their gender identity.

International Case Laws

Toonen v. Australia⁷⁴

The Toonen case is a case of great significance where in 1991, Nicholas Toonen, a Tasmanian homosexual man who is an activist for the promotion of rights of the homosexuals sent a communication to the Human Rights Committee that two provisions (Sections 122(a) and 123) of the Tasmanian Criminal Code that criminalises men engaging in sexual activities including sexual activities between two consenting adult homosexuals in private. Toonen contended that these are in violation of the rights enshrined in Article 2 that states that the State parties should ensure that there shall be no discrimination on the basis of inter alia sex; Article 17 that ensures right to privacy for everyone; and Article 26 that deals with the right to self-determination. Toonen contended that there is no distinction between engaging in sexual activities in private and public and this enables the police to enter the premises of any house on a mere suspicion. He further contended that given the nature of the society in Tasmania that stigmatise the concept of homosexuality, he is prone to attacks to his body and reputation, hence, is a violation of his privacy. The Committee observed that the said provisions of the Tasmanian Criminal Code were discriminatory in nature and incompatible with the Covenant as well as restricts the right to equality of a person. It was observed that the provisions interfere with the privacy and was in clear violation of an individual's rights and recommended for its repeal.

P v. S and Cornwall County Council⁷⁵

This case is a landmark judgment which was decided by the European Court of Justice. In the instant case the applicant P was working as a manager in an educational establishment operated by the Cornwall County Council. The applicant was born male and was hired for the position as a male. The applicant later informed S, who is the principal of the establishment that she was planning to undergo SRS for changing her gender. She went on a sick leave for the surgery purpose and was not permitted to return back to work from her sick leave in her female gender. The applicant approached the ECJ stating that she was discriminated on the basis of her sex

⁷⁴ Communication No. 488/1992

⁷⁵ Case C-13/94, [1996] IRLR 347

which was in violation of the European Union (EU) directive⁷⁶ that prohibited discrimination in employment on the grounds of sex and also in violation of the principle of equal treatment for men and women in employment, promotion, etc. It was held that the principle of equal treatment has been violated especially on the basis of conditions pertaining to dismissal from employment. ECJ was of the opinion that Article 5(1) of the Directive prohibits dismissal of a transsexual person on the grounds that they had undergone SRS and such dismissal should be considered to be in violation of the said Article.

Goodwin vs. The United Kingdom⁷⁷

The case was presented before the European Court of Human Rights in the year 2002. In the instant case the applicant underwent SRS and was victim of constant harassment at her workplace where her co-workers refused to accept her current gender. She filed a case before the industrial tribunal for sexual harassment but in vain as she was considered to be a man under the law. Later she was dismissed from her employment for reasons relating to her health but she contends that it was because of her gender. She later began a new employment and requires to provide to her National Insurance number to the employer. She was concerned that the new employer can discover her gender identity using the NI number as she requested the concerned authority to provide her with a new NI number in her changed gender which was denied. As a result of which she had submitted the with her gender as a male and the employer was able to track down her previous employer and her gender identity. As a consequence, she began to face harassment at her new place of employment.

She further argued that she was denied pension by the state at the age of 60 which was the retirement age for women and was informed that she is only eligible at the age of 65 which is the retirement age of men as the relevant government documents considered her to be a man even after undergoing SRS.

ECJ was poised with the issue that whether lack of legal recognition of an individual's gender after SRS and transsexuals as a whole in the UK was in violation of Article 8 of the European Convention on Human Rights that laid down the right to privacy.

The Court held that Article 8 of the Convention guarantees every person the right to personal autonomy. The Court found that there was a considerable interference on the applicant's personal life as the State refused to recognise her in the identity that she prefers to be recognised as which is in violation of Article 8. This resulted in the U.K. government drafted a new

⁷⁶ Council Directive 76/207/EEC

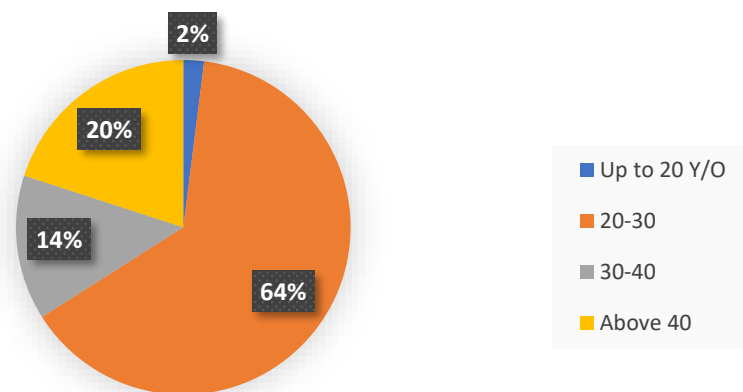
⁷⁷ ECLI: CE: ECHR: 2002:0711JUD002895795

legislation known as Gender Recognition Act, 2004 that enabled transsexual people to change their gender legally.

V. ANALYSIS

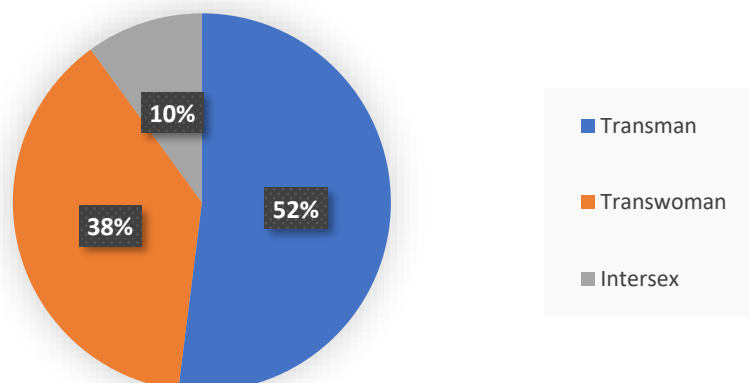
The analysis part is apportioned to the analysis of the data collected by the researcher from the TG people. The analysis of data is based on the data collected from 50 TGs retrieved by way of interview and distributing questionnaires.

Age



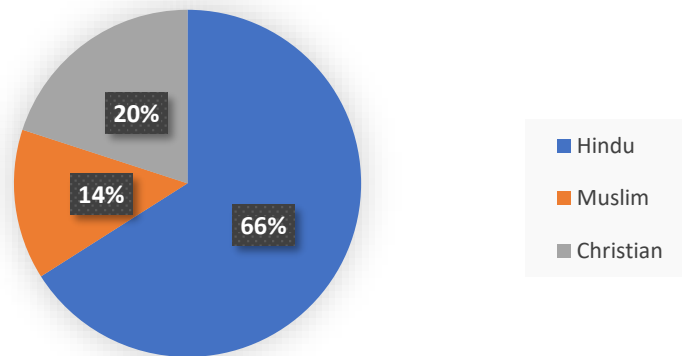
The age group of the TGs that the researcher interacted with up to 20 years are only 2%. Majority of the subjects were from the age group of 20-30 comprising of 64%, subjects from 30-40 age category comprises of 14% and 20% of the subjects were above 40 years old.

Gender



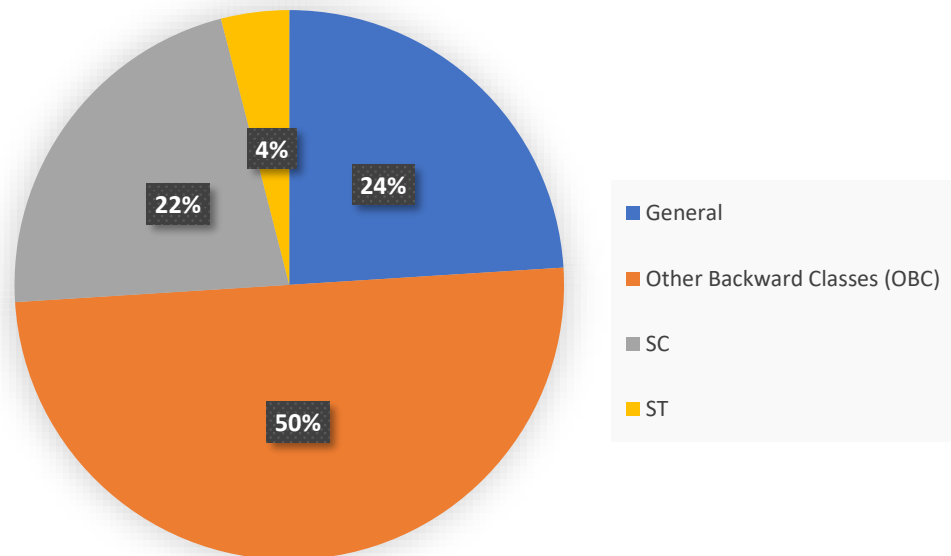
The majority of the respondents were transmen consisting of 52%, transwoman subjects consist of 38% and finally the intersex subjects amounted to 10% of the research.

Religion



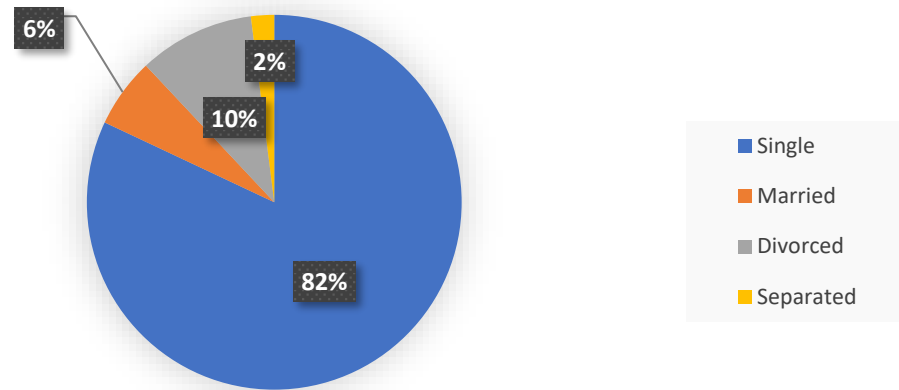
The religion of the TG subjects was as follows: 66% practices Hindu religion, 14% were from Muslim community, and 20% of the subjects are followers of Christianity.

Caste



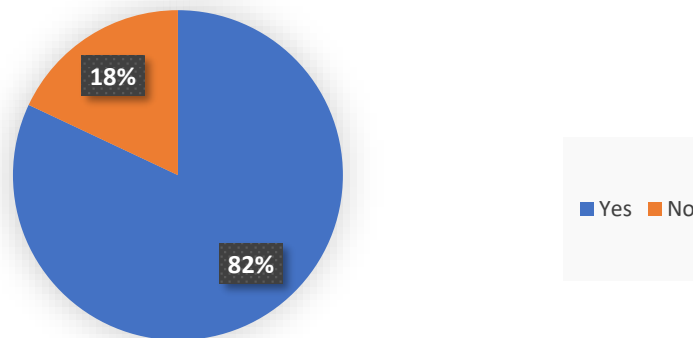
The caste distribution among the subjects of the research were as follows: 50% belonged to the Other Backward Classes (OBC) category, 24% of the subjects belonged to the General category, 22% belonged to the Scheduled Caste (SC) category, and only 4% belonged to the Scheduled Tribe (ST) category.

Marital Status



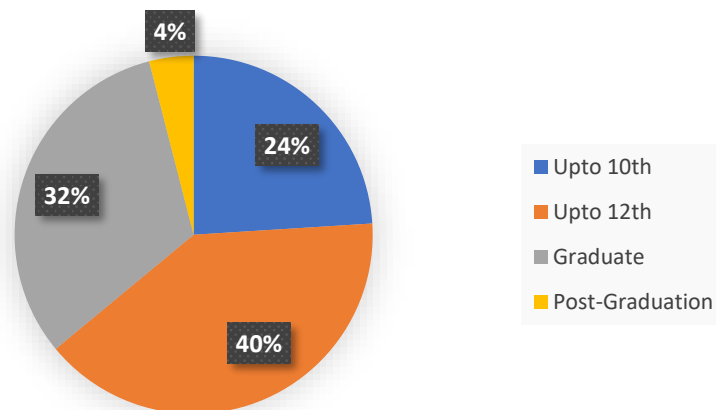
Majority of the subjects are single and they consist of 82% of the total subjects; 10% of them are divorced; 6% of them are married; and 2% of the subjects are separated.

Literacy



The literacy rate among the subjects stood at 82% of them said that they are literate whereas 18% of them said that they are illiterate.

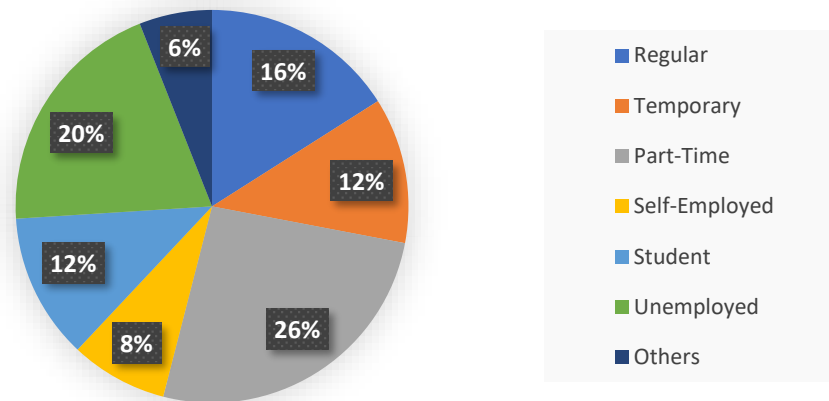
Educational Qualification



40% of the subjects have received education till 12th grade; 32% of them are college graduates,

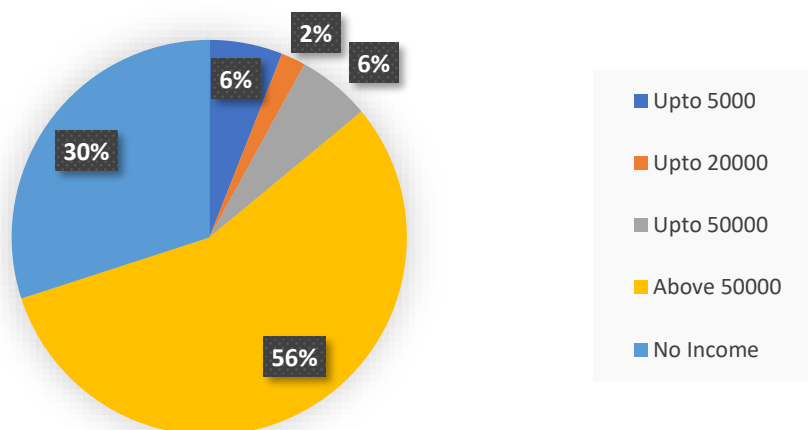
20% of them have received their education till 10th grade; and 4% of them have received master's degree.

Nature of Employment



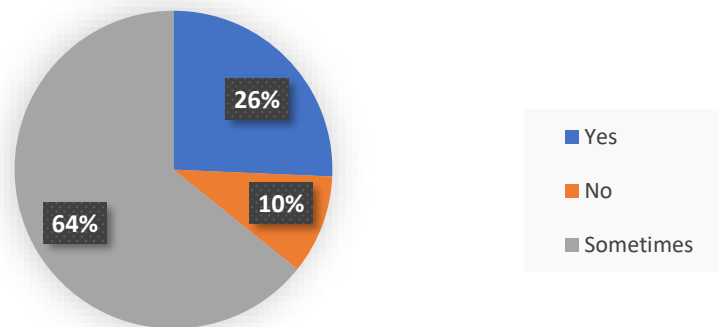
26% of the subjects are part-time employees; 20% of them are unemployed; 16% of them have regular jobs; 12% of them have temporary jobs; another 12% of them are students; 8% of them are self-employed; and 6% of them are engaged in jobs like daily wage workers.

Annual Income



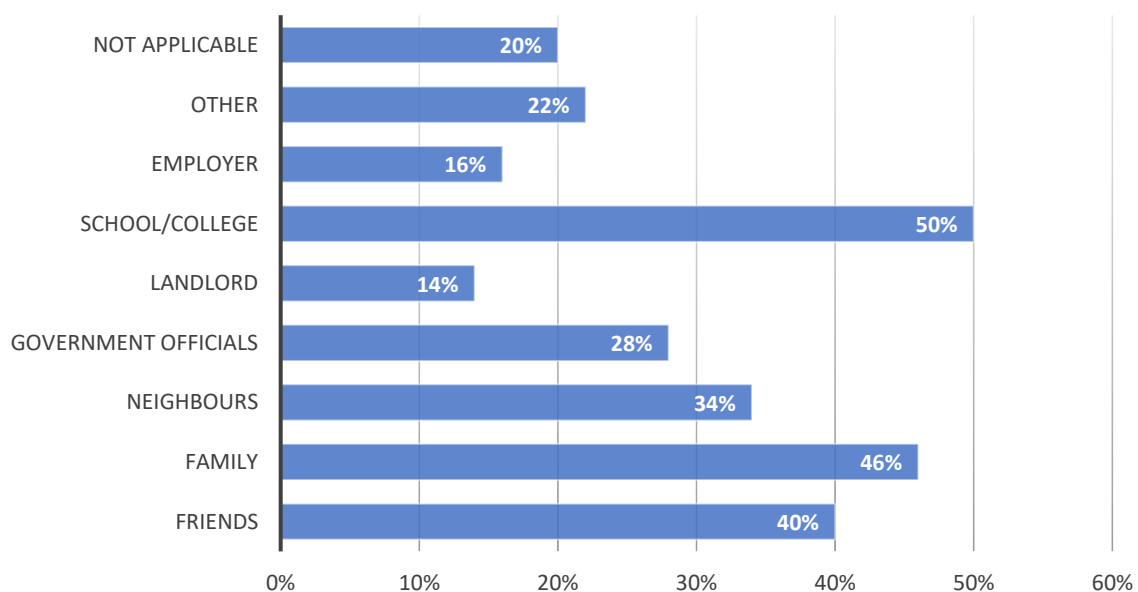
56% of the subjects have an annual income above ₹50,000; 30% of them have no income; 6% of them receives an income of ₹5,000; another 6% have an income of up to ₹50,000; and 2% of them have an income of up to ₹20,000.

Discrimination/Harassment



64% of the subjects responded that they have sometimes faced discrimination/harassment; 26% of them have definitely faced discrimination/harassment; and 10% of them have faced no discrimination/harassment.

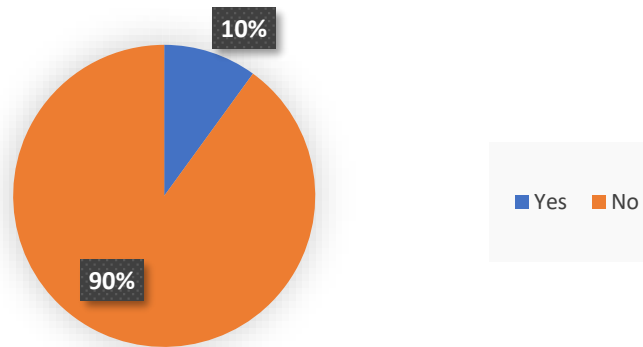
Source of Discrimination/Harassment



50% of the subjects responded that they have faced discrimination/harassment at school or college; 46% of them responded that they face it from their family; 40% of them said that they faced it from their friends; 34% of them responded that they face it from neighbours; 28% of them said that they have faced it at the hands of the government officials; 22% of them said that they face it from other categories including discrimination in places like hospitals, public transports, etc; 20% have said that they have not faced any discrimination/harassment; 16% of them said that they have faced it from their employers; and 14% of them said that they have

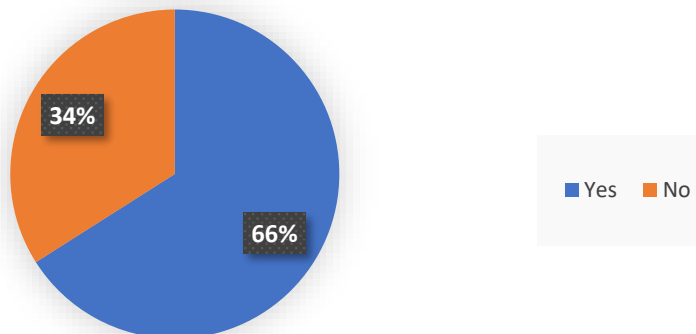
faced it at the hands of their landlord.

Complaint against Discrimination/Harassment



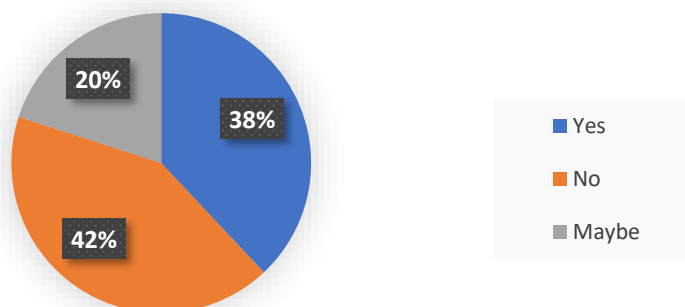
90% of the subjects responded that they have not complained against the discrimination/harassment that they have faced; and 10% of them has said that they have complained against the same.

Relocation



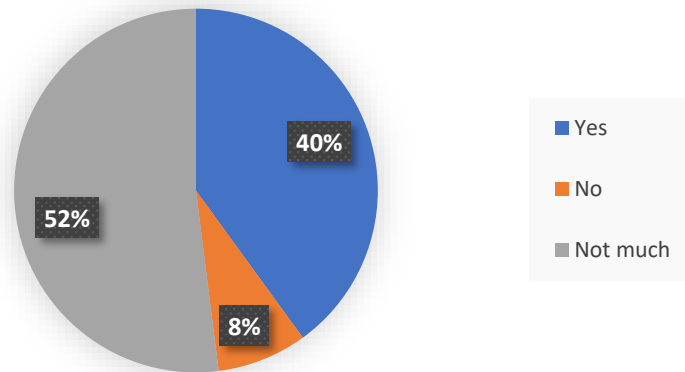
66% of the subjects responded that they have had to relocate because of the discrimination/harassment whereas 34% responded that they did not have to move to another state or district.

Family Acceptance



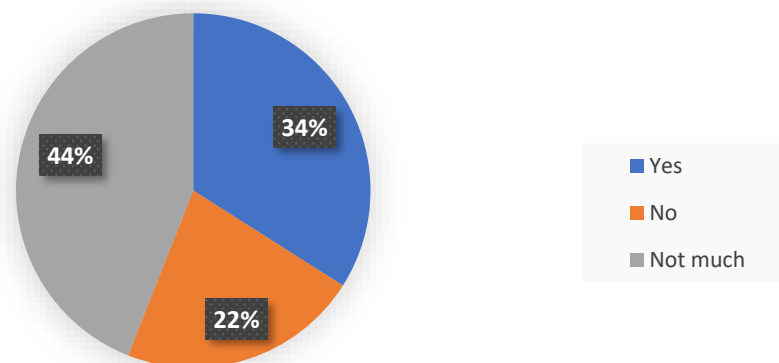
42% of the subjects said that their family have not accepted their identity; 38% of them responded that their family have accepted their identity; and 20% of them responded that their might have accepted their identity.

Policy Awareness



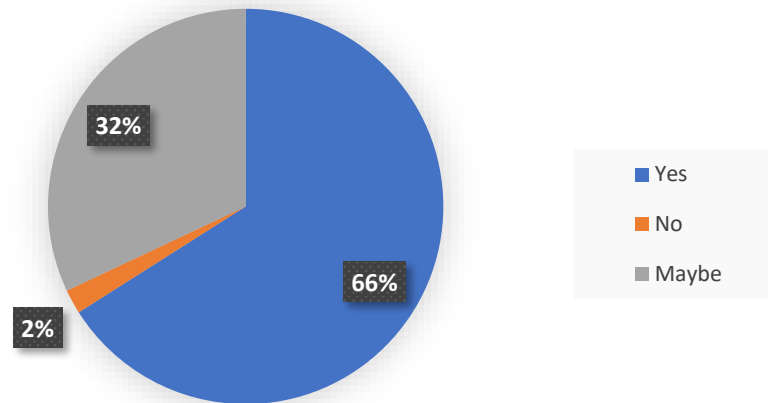
52% of the subjects said that they have seldom any awareness about the policies and schemes of the government for the welfare of TGs; 40% of them said they are aware of these policies; and 8% of them said they have no knowledge about these policies.

Awareness of Legal Rights



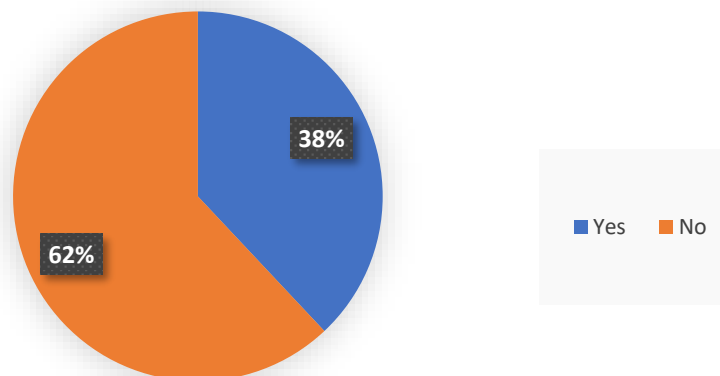
44% of the subjects responded that they have little awareness of their legal rights; 34% said that they are aware of their legal rights; and 22% of them responded that they have no awareness of their legal rights.

Empowerment through Legal Awareness



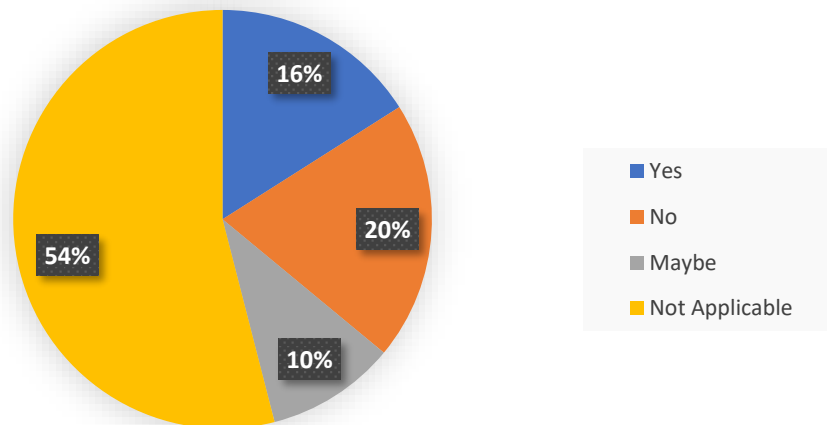
66% of the subjects agreed that with proper dissemination of legal awareness would result in empowerment of TGs; 32% responded that legal awareness might empower TGs; and 2% of them said that no empowerment comes from legal awareness.

Legal Aid/Police Station



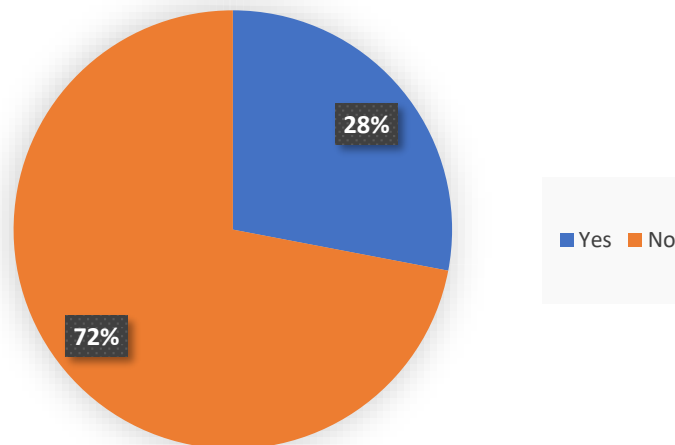
62% of the subjects said that they have not approached a legal aid clinic or a police station to complain against discrimination/harassment; and 38% of them responded that they have approached these places to complain.

Complaint Resolution



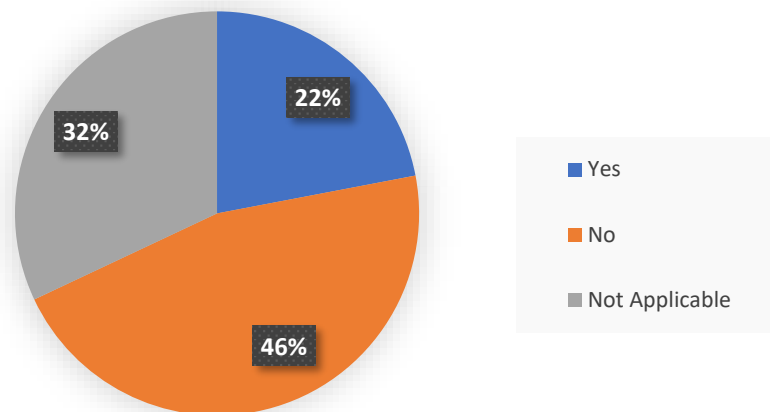
54% of the subjects responded that since they have not approached a legal aid clinic or police station to complain against any discrimination/harassment; 20% of them said that their complaints were not resolved by them; 16% of them said that they were able to resolve their issues; and 10% of them responded that they might have helped in resolving their issues.

Sexual Harassment



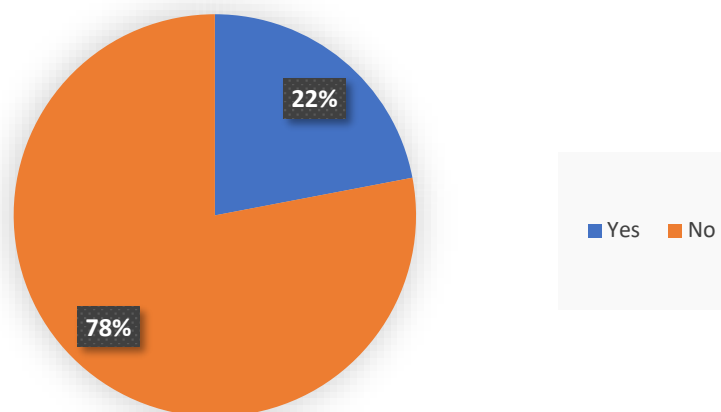
72% of the subjects responded that they have not been sexually harassed; and 28% of them responded that they have been victim of sexual harassment.

Effect on Employment



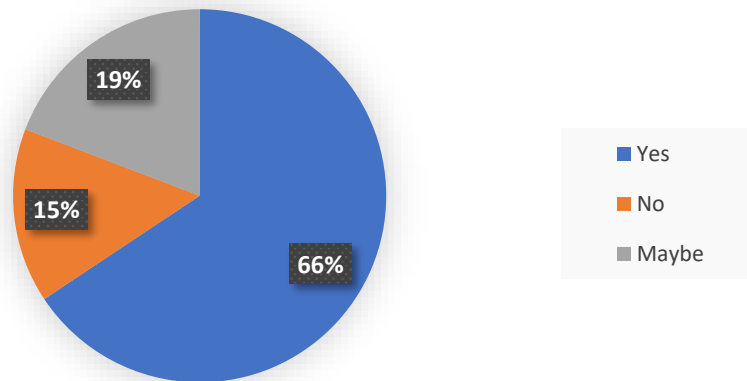
46% of the subjects said that they did not have to resign from their job because of any discrimination/harassment at their workplace; 32% of them said that it is not applicable to them as they are unemployed or are students; and 22% of them responded that they had to resign from their jobs because of the discrimination/harassment.

Salary/Wages



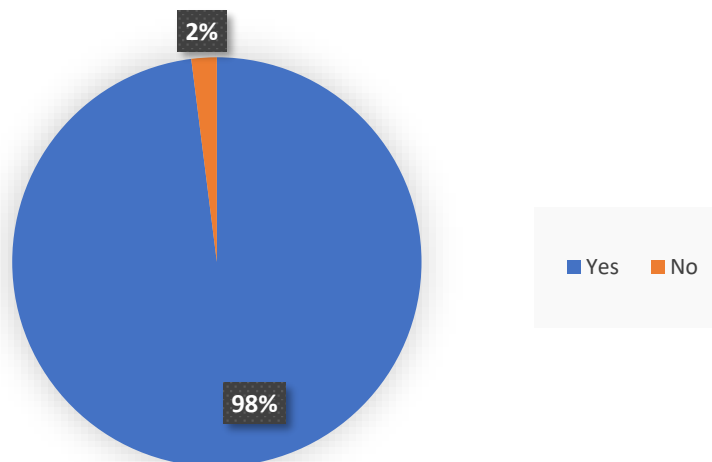
78% of the subjects responded that their employer has not been paying them lower salary/wages because of their identity; and 22% of them said that they have been receiving lower salary/wage than their colleagues because of their identity.

TG Expenses



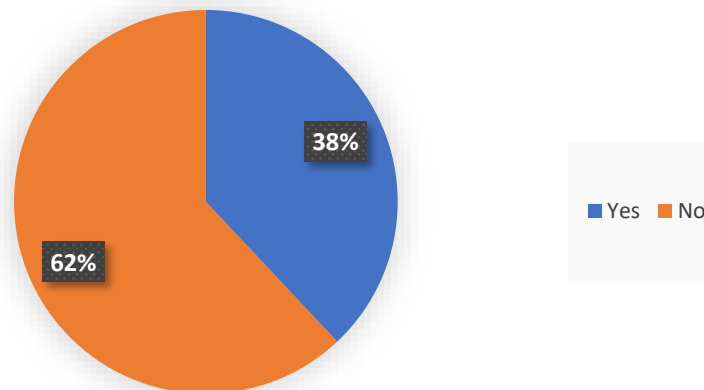
66% of the subjects answered that TGs have higher living expenses than their cisgender peers; 19% said that the expenses of the TGs might be higher than the cisgenders; and 15% of them answered that the expenses of TGs are not higher than the TGs.

Gender Sensitivity Training



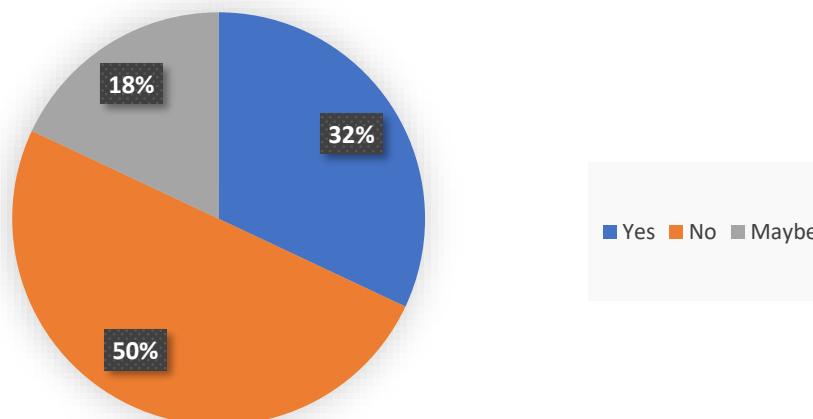
98% of the subjects answered that gender sensitivity training should be imparted to students/teachers/government officials; and 2% of them said that no such training shall be imparted.

Activity Life



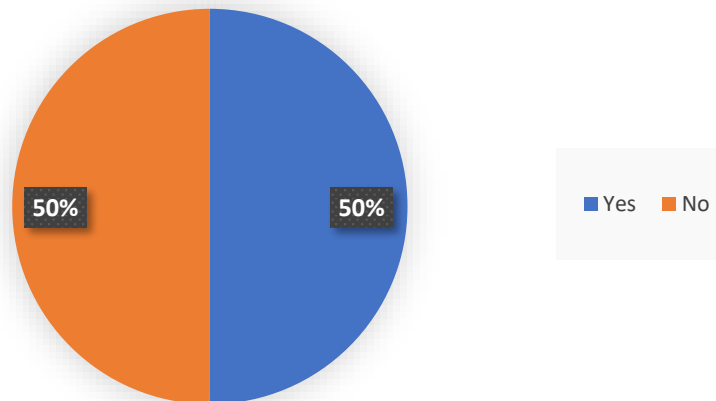
62% of the subjects responded that they have not been voluntarily compelled to engage in sex work because of their situation; and 38% of them answered otherwise.

Mental Health



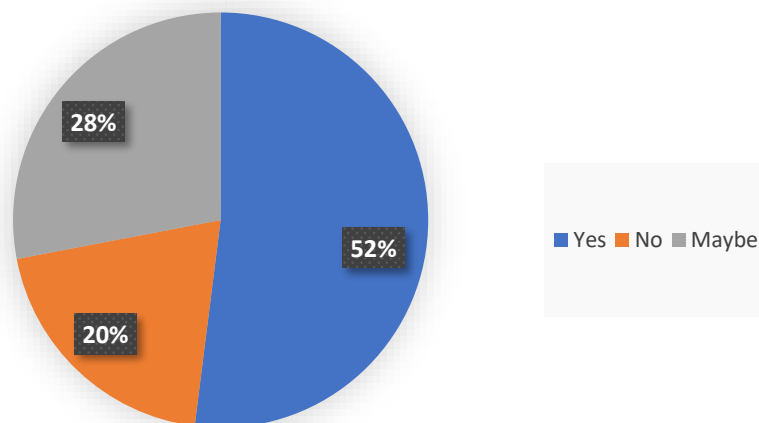
50% of the subject answered that they do not have suicide tendencies; 32% of them said that they have had suicide tendencies; and 18% of them answered that they have had occasional thoughts about suicide.

Mental Health Facility



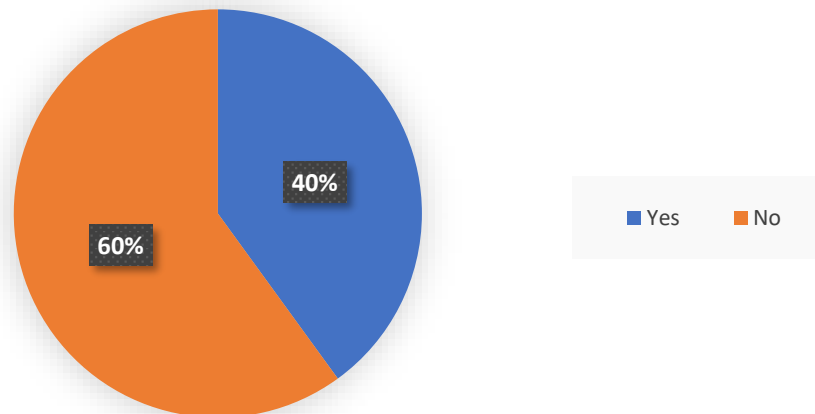
50% of the subjects responded that they do not think there is a proper mental health facility for TG people; and the other 50% have said that they have access to proper mental health facility.

Reception of TGs



52% of the subjects said that Kerala is more receptive towards TG people than other states in India; 28% of them answered that the state might be receptive to the TGs; and 20% of them have disagreed.

Adequacy of Laws/Policies



60% of the subjects answered that there is no insufficiency of laws/policies to address the problems of TGs; and 40% of them said that there is an inadequacy of laws/policies to address TG problems.

FAMILY AND FRIENDS

It is human nature to turn to their family and friends in times of distress and destitution. Unfortunately, the safe haven provided by one's family and friends to confide in becomes void when a person identifies as a TG. During the self-realization phase of a TG, most of the time, during their childhood, they reveal their identity to either a family member or a close friend. In this chapter, the researcher seeks to identify the legal dynamics in the social sphere of the TG persons.

Family

Writer and philosopher Gilbert K. Chesterton once said that "the family is the test of freedom; because the family is the only thing that the free man makes for himself and by himself." The Indian society construes family as a great institution and an integral part in deciding an individual's place in it. Keeping in mind the imperative nature of family, it is necessary to point out that every person in a family requires a support system especially during childhood and the subsequent phases of growing up. It is only fair to say that the TGs face immense discrimination and harassment at the hands of their family members. Accepting one's gender identity by their family is still a dream for many TGs. It is disheartening knowing the fact that they cannot express or identify themselves as a TG in their own home. Providing a safe space for a person at home to express themselves is paramount in such a way that they can disclose their feelings to their parents without fearing judgment. In most of the cases, the TGs were forced to leave their homes at tender ages and had to find an earning. Since it is difficult to sustain a living as

a TG in the state, they have to move to other districts or even to other states where TG persons are welcomed.

From the interviews, not accepting one's gender identity by the family remains one of the main reasons for which the TGs suffer from depression and suicidal tendencies. In one of the interviews, the interviewee who was born a female and now identifies as a transman has responded that he has attempted to commit suicide seven times. He said that his mother was reluctant to accept his gender identity and faces constant ignominy from his sister. He said that as early as seven years old he would ask his father to buy him boys' uniform instead of girls' uniform when he was enrolled into the school which his father paid no mind. He said that he once confided with his elder sister with whom he had strong connection and was met with serious ridicule and bickering. Once he came out as a TG his sister said to his face that she does not want to see him and hear his voice ever in her life again.

In another interview, where the interviewee who is born a male and now identifies as a transwoman has shared her part of the story. She came out at the age of fifteen and being born into an orthodox Muslim family she was constantly harassed because of her feminine mannerism by religious authorities and her relatives. Her mother asks her almost every time why is she like the way she is referring to the women's dress and makeup she wears. Her mother has said that because of her she cannot go attend any family functions fearing that their relatives would taunt her for her son being a TG.

In one of the interviews, a transman who works in one of the state departments said that he is in love with a cisgender woman with whom he is in a relationship for several years. He asked her parents for her hand and they snubbed him by saying that they would rather marry their daughter to a lunatic person but would not marry her off to a TG person.

All these instances are proof that there is a long way ahead for Kerala society to accept and integrate TGs in their society. As long as members of the society accept them as regular people the social issues such as mentioned above would persist.

Friends

Some people find friends as confidants with whom they can discuss matters that are sensitive to discuss with their parents. They say that they are more comfortable discussing certain matters with people who know them personally and shares almost everything candidly. Regrettably, during the self-realization phase, most of them disclose about their gender identities with their friends. Some of the interviewees answered that their friends would estrange their friendship. Also, some interviewees responded that they faced harassment from their friends by name

calling and bullying.

One of the interviewees has revealed that their friends from school and college have bullied her profusely for her effeminate mannerisms. According to a survey conducted in Tamil Nadu by UNESCO⁷⁸ on bullying faced by gender minorities founded that bullying of TG students had devastating results where more than half of the students have skipped classes to avoid confrontation with their bullies and about a third of them dropped out of school because of bullying. It is appalling that more than 80% of the bullying comes from co-students who shares the bench with the TG students. Classmates would often engage in verbal and physical abuse including name calling, spreading rumours, stealing their belongings, and was inappropriately touched. As a consequence of facing these problems a large amount of TG students falls in depression and anxiety, as well as, would withdraw themselves from any social activities and lead a solitary life. This will also prompt them to question their gender identity and sexual orientation because people around them seems to be not accepting them for who they are. Emphasis has to be placed on the fact that research has found that TG children are prone to higher chances of having depression and anxiety.⁷⁹ Social exclusion especially from friends could have adverse effect on the mental health of a TG person and would result in increased chances of suicide tendencies.

From the data analysis above it is evident that a vast majority of the subjects have been victims of severe bullying at school/college. As a result of which some had to drop out from the education system and as a consequence to which most of them lack proper educational qualification to either apply for higher education or seek employment.

The term “inclusive education” has been defined in the Transgender Persons (Protection of Rights) Act, 2019.⁸⁰ The term is defined as an educational system in which TG students learn together with other students without the fear of discrimination, harassment or neglect and an education system where the teaching and learning is suitably adapted to meet the needs of the students.

VI. SUGGESTIONS & RECOMMENDATIONS

Transgender Cell

The Social Justice Department (SJD) of Kerala is entrusted with the alleviation of the TG

⁷⁸ ORINAM, http://orinam.net/content/wp-content/uploads/2019/06/UNESCO_researchbrief.pdf (last visited Mar. 20, 2022).

⁷⁹ TICTI, *is being a transgender child traumatic?* Trauma Institute and Child Trauma Institute (Mar. 20, 2022, 6:47 PM), <https://www.childtrauma.com/blog/trans>.

⁸⁰ Transgender Persons (Protection of Rights) Act, 2019, § 2(d), No. 64, Acts of Parliament, 2019 (India).

people in the state. A transgender cell has been established as per a government order which oversees the implementation of the numerous programmes that intends to alleviate TGs and focuses on the welfare of TGs. The TG cell consists of a project officer, two project assistants, and an office attendant. It is noteworthy that the staffs of the TG cell are TGs making it easier for fellow TGs to reach out. The TG cell also has a helpline in place to provide assistance to TGs in distress and to those who requires information regarding the policies and programmes. The researcher visited the office of the TG Cell in SJD in person and met with the project officer and discussed in brief about the current scenario surrounding TGs. The initial impression about the infrastructure of the TG Cell is that even though it is part and parcel of SJD and is situated in the same floor as SJD, TG Cell occupies a cramped-up office adjacent to the office of the SJD. A segregation between employees is visible as the office of the SJD is well lit and computerised and on the contrary TG Cell functions in a minimal capacity.

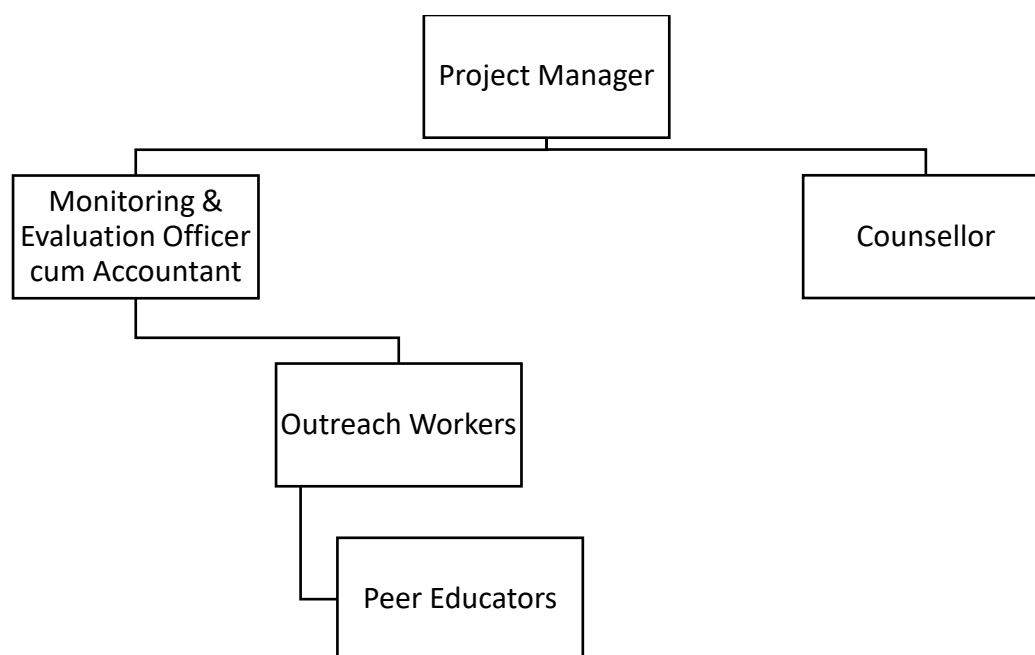
Another observation is that a helpline number is set up to address the problems of TGs but surprisingly the staffs are not qualified to extend counselling or mental health support professionally. A qualified professional to offer necessary psychological help is non-existent. The researcher upon informed by one of the interviewees has contacted the helpline at night in an attempt to find if the helpline service is available 24 hours. Unfortunately, it appears that the helpline is operational only during office hours viz., 9AM-5PM. The purpose of the helpline is to extend help for TGs in distress or crisis, the helpline should be manned 24x7 and should have access to qualified mental healthcare professionals. This challenge has to be overcome by increasing the number of qualified manpower and more importantly encourage TGs to utilise the benefit of the helpline.

The Dale View Transgender Suraksha Project and HIV Serosurveillance Centre

In order gain information regarding TGs, the researcher visited a Non-Governmental Organization (NGO) in Thiruvananthapuram district called the Dale View which was established with an aim to provide education, employment, skill development, HIV prevention among TGs etc. The Dale View has a significance of receiving an increasing number of TG visitors as a result of which it received funding from the state SJD to implement projects for TG welfare and functions under the control of the Kerala State Social Welfare Board (KSSWB). Projects like the Dale View HIV Serosurveillance Centre for TGs, TG Suraksha, and the Office of the Economic Empowerment Hub for TG People were constituted to provide necessary assistance to TG people.

The Dale View TG Suraksha Project was initiated to prevent HIV among TGs by way of

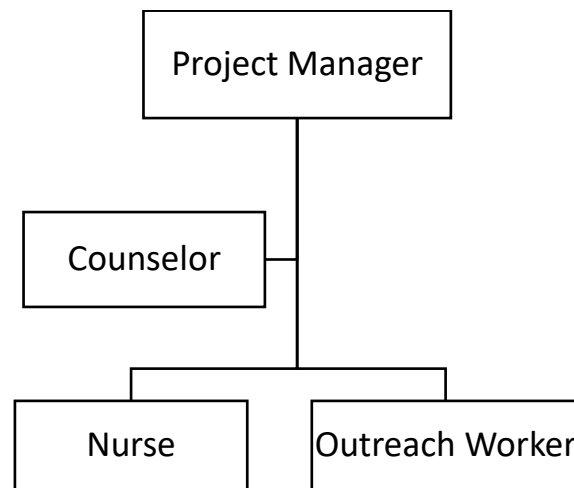
counselling, HIV testing, treatment for HIV and STI, condoms distribution, and other welfare programmes aimed at controlling HIV and STI prevention. The project was launched by the Kerala State AIDS Control Society (KSACS) which was established to implement the National AIDS Control Programme (NCAP) in the state. KSACS receives its funding from the Ministry of Health and Family Welfare of the Government of India.⁸¹ The project is managed by a project manager who oversees the overall progress of the project and is assisted by a monitoring & evaluation officer cum accountant (MEA). Two outreach workers have been employed to manage eight peer educators who are assigned different places in the district to inform and bring in other TGs to benefit from the services rendered by the project. A qualified counsellor is employed to deal with mental health problems of TGs.



The HIV Serosurveillance Centre was established in the year 2018 as the pilot project by KSSWB vis-à-vis the TGs with the aim to eliminate TG HIV and provide medical assistance. The centre receives its funds from the state SJD. The Centre is responsible to educate TGs about HIV and STI control and prevention and conduct counselling.⁸² The functions of the centre is monitored by a project manager, a counsellor who extends counselling for TGs in crisis, a nurse to offer health and medical assistance, and an outreach worker to bring in TGs from the district to the centre for treatment.

⁸¹ Kerala State AIDS Control Society <https://ksacs.kerala.gov.in/about-ksacs/> (last visited on Apr. 18, 2022).

⁸² The Dale View, <http://daleview.in/health.html> (last visited on Apr. 18, 2022).



It is well evident from the structure and the objectives of both these projects that there exists perplexity as these projects strive towards HIV and STI prevention. Two projects striving to achieve the same objectives would meet with inefficiency and more importantly this parallelism is a misapplication of public fund. It is the suggestion of the researcher that either of the plan to merge with one another and utilise excess fund to fund other outreach programmes. The challenges of merging these projects should be examined and proper resolution to these problems should be adopted by the concerned authority. This will enable empowerment to TGs and also help in achieve the project objectives.

Education System

The question of the hour is does the education system of the state adequate to educate students about gender identity and sexual orientation. Despite Kerala being lauded for being the country's most literate state, it has failed in imparting proper sex education and gender sensitivity training to the students. It is imperative that the education system should contain not only the concept of reproduction and reproductive health but also alter the syllabus to include concepts of gender identities and sexual orientation. This will enable students who are gender dysphoric to realise their true self. In one of the interviews, the interviewee, a transman, revealed that during his school days he felt confused about his gender identity and was taken to a psychiatrist to confront his confusion where he found out that he is a TG. Rather than keeping these matters within the four walls of a doctor's office, gender identity issues should be discussed in schools and colleges. Gender sensitivity training should be imparted to students, teachers, and school/college authorities. Unless and until these are made part of the school/college curriculum the issue of discrimination, harassment, and bullying would persist. These changes are imminent and unless a change in the TG landscape the dream of a TG student to pursue higher education would remain unattainable.

The University Grants Commission's (UGC) SAKSHAM Report and the SAMAAGATI Report published by the Kerala State Higher Education Council (KSHEC) the objectives of which is to provide gender justice and equality and more importantly to fend off any form of harassment faced by girl students. Ironically, the gender sensitization report has failed to address transgender students.

It is the researcher's suggestion that necessary amendments have to be put forth in include transgender students and necessary redressal mechanisms to be put in place. It is also the researcher's opinion that a number of TGs shall be appointed for the purpose of sensitizing students and teachers. This will serve two purposes – employment for unemployed TGs and empower gender dysphoric students and teachers to approach and confide in.

In a recent judgment of the Madras High Court⁸³ the Hon'ble judge reiterated the need for gender sensitization in schools and especially for the teachers. In the instant case a lesbian couple had approached the Court to seek relief against harassment that they face from parents and the police. The same Court has already issued guidelines to the police against harassment of members of the LGBTQIA+ along with the direction to change the MBBS curriculum that was found to be queerphobic. The Court rightly observed that the children face serious apprehension from parents and teachers to discuss about their issues. This could in later years could have serious mental trauma which could eventually lead them develop suicidal tendencies. Further, it also observed that teachers could be the right person a child can confide in and provide necessary help that The Court directed the state government to formulate a gender sensitivity training to teachers for 6-8 weeks.

Legal Awareness

Legal awareness is imperative in ensuring that no State entity or private individual(s) can encroach upon the rights of an individual. An understanding about the basic fundamental rights enshrined under the Constitution of India which is inherent to each and every citizen of the country. Severe exploitation follows often times because of unawareness of one's rights most probably by the State actors. From the analysis it is quite evident that majority of the TGs are either completely or partially unaware about their legal rights. As a consequence of which many TGs have/has faced constant discrimination/harassment at the hands of the law enforcement agencies, landlords, employers, etc. From the interviews conducted by the researcher many of the TGs have confessed that police officers would often use their authority to extort sexual favours from them. Regrettably TGs who are unaware of their legal and constitutional rights

⁸³ S Sushma and Another v. Director General of Police and Others (WP 7284 of 2021)

comply to these exploits thinking that people in such authority could make their lives even more miserable.

In certain cases when approached with a complaint to the police station, instead of filing a First Information Report (FIR), the concerned police officer in-charge either send them away or convince the complainant to compromise the problem with the accused. A total disregard to the complaints from TGs shows that the police simply view the problems of the TGs as without merits. A legally aware person could approach the judicial magistrate and file a criminal complaint under Section 200 of the Code of Criminal Procedure, 1973 if the police officer in-charge refuses to register a FIR under Section 154 of the Cr. PC.

It is only plausible to haul the attention towards the services of Kerala State Legal Services Authority (KELSA) as the leading legal aid agency of the state. KELSA was established by an act of parliament under the Legal Services Authorities Act, 1987. The Act came into force in Kerala in the year 1998. The objective of KELSA like other legal services authorities is to offer free legal services to the weaker sections of the society in the state. KELSA has been organizing events to impart legal literacy among students, industrial workers, tribals, etc.⁸⁴ KELSA has been organising awareness programme for TGs about their rights, various cultural programmes, workshops and seminars for lawyers on TG issues, counselling programmes etc.

In a document published by KELSA titled “Highlights of Activities from 1.11.2017 to 31.10.2018” sheds light to the number of legal aid beneficiaries. It was astonishing to find that only 10 TGs have benefitted from the services of KELSA.⁸⁵ This substantiates the researcher’s assumption that legal awareness among TGs is minimal and there exists a challenge before KELSA.

It is suggested that instead of having to visit KELSA or in the district level the District Legal Service Authority (DLSA) to discuss legal issues; a legal liaison should be appointed in NGOs like the Dale View where TGs visit on a regular basis. This will enable the Dale View to be a one stop solution site where TGs can accomplish their physical and mental needs through the TG Suraksha and HIV Serosurveillance Centre, employment and career counselling through Office of the Economic Empowerment Hub for TG People and possibly a legal wing to address the legal problems of the TGs.

Housing

One of the common suggestions that was put forward by TGs when asked about improving

⁸⁴ Kerala State Legal Services Authority, <https://www.kelsa.nic.in/prog.htm> (last visited on Apr. 18, 2022)

⁸⁵ Page 37 Highlights of Activities from 1.11.2017 to 31.10.2018

their lives was the need for shelter homes or provisions for housing facilities. Many of the interviewees do not stay with their family as they have forceful exoduses. As a result of which they seek temporary shelter at their friends' or others. There are instances where landlord charges more rent from TGs which makes living in rented spaces arduous. Discrimination/harassment faced from landlords is not to be ignored. A large chunk of their income is used to pay rents. Many of them face increased rent or eviction without any rhyme or reason. Since most of them have no knowledge about drafting a rent agreement before tenancy, they face severe discrimination at the hands of landlords.

Payment of rent is only pertinent to those who have a source of income. Despite having good educational qualifications many TGs struggles to find a job; as a consequence of which they remain homeless. Some interviewees responded that they had to engage in activity life just to find a shelter for the night. Shelter for TGs was set up in the districts of Thiruvananthapuram and Ernakulam. Unfortunately, shelter homes are a provisional accommodation and has to be vacated after a couple of months.

It is the suggestion of the researcher that a comprehensive housing plan similar to that of the LIFE (Livelihood, Inclusion and Financial Empowerment) Mission of the Kerala state that aims at assisting economically weaker sections of the society. The Mission prioritises people with disabilities, unmarried mothers, widows, TGs, mentally challenged people etc.⁸⁶ Even though TGs are on the priority list, possibly because of large number of applicants to the Mission TGs are nowhere mentioned as beneficiaries of the Mission. A survey has to be conducted by the concerned authority to identify the economically weaker category of TGs and extend the benefit of housing.

The Transgender Persons (Protection of Rights) Act, 2019

The purpose of a social welfare legislation is to provide protection to the rights of the marginalised people. For years the TG people have endured constant hardships and has been victims of abuse. Their identities have been mangled in such a way the word abuse would end up short. With the onset of a series of legal battles and eventually a dedicated legislation for the betterment of TGs. With the NALSA judgement there was a sigh of relief to the TG people. Soon after the NALSA judgment a series of bills were introduced but were met with severe criticism. The law made discrimination of TG people in employment, education, healthcare services available to general public, purchase, rent or occupy a place, etc punishable.⁸⁷ It also

⁸⁶ <https://lifemissionmis.kerala.gov.in/#life>

⁸⁷ Section 3 TG Person Protection of Rights Act.

has provisions for recognition of identity of TG people and the application and issuance for the certificate of identity. The Act obligated respective states to formulate welfare measures for the upliftment of TGs in the society. Non-discrimination at the place of work and education, right of residence, social security, and grievance mechanisms has also been laid out.

Unfortunately, the Act was not without any flaws. The Act met with criticisms from lawyers, academicians, activists and more importantly from the TGs. It was condemned by TGs for not properly taking into account of their needs. The following are certain shortcomings of the Act:

- a) To begin with, the term ‘transgender’ was exhaustive in nature which clearly showcases the lack of comprehension about how complex gender identities are.
- b) The District Magistrate (DM) has been vested with extraordinary power to decide which TG person shall be eligible for the TG certificate. There is no check and balance to the powers of the DM.
- c) The Act strong-arms TGs to undergo medical procedures like SRS that one might not wish to undergo. This is in clear violation of the SC’s direction in the NALSA case where it was observed by the Court that any attempt to make SRS mandatory to declare an individual’s gender is immoral and illegal.
- d) Even though there are provisions that prohibits discrimination in every front, it lacks a proper enforcing body, a victim compensation mechanism, and an apt punishment for offences committed against a TG person.
- e) Sexually violating or physically harming a cisgender would attract a minimum of 3 years to a life imprisonment, whereas under this Act a person doing the same to a TG would be punished for a maximum of 2 years. This indicates the disparity between TGs and cisgenders.
- f) Another unfortunate exclusion was that the term ‘intersex person’ should be properly described; instead, the Act conflated the definition of ‘transgender persons’ with ‘intersex people.’ Special protection shall be extended to the intersex persons as they may fall victims to unnecessary medical surgeries for the purpose of “normalising”.⁸⁸

An amendment is imminent to this Act in order for it function in the way it was designed to function viz., the welfare of TGs. A study has to be conducted to understand the needs of the TGs by empanelling TG opinions.

⁸⁸ Kyle Knight, *India’s Transgender Rights Law Isn’t Worth Celebrating*, HUMAN RIGHTS WATCH (Apr. 18, 2022, 10:52 PM), <https://www.hrw.org/news/2019/12/05/indias-transgender-rights-law-isnt-worth-celebrating>.

Employment

One of the most common suggestions that the TGs would like the government to implement is to provide employment opportunities. Many TGs continue to face hardships as they find it difficult to seek employment as prospective employers refuse to employ them even though they are well qualified for the position. This can be best illustrated in the case of Aneera Kabeer which caused a significant stir in the state. Aneera Kabeer was a TG who was constantly turned away from jobs because of her gender identity despite holding double master's degrees. In the instant incident after many attempts, she was employed temporarily as a junior faculty of sociology at a government school where she faced constant harassment at the hands of her colleagues. Out of the blue she was asked not to come to the school again. Torn, she approached KELSA seeking for a unique relief – to be euthanised. This caused major stir in the state that the education minister reached out to her and extended help from the government. The minister further directed to reinstate her to her old job.

During the interviews the researcher observed that few of the TGs despite being well qualified are engaging in menial jobs like food delivery to make ends meet. Some suggestions put forward by TGs are that those who do not possess a college degree or have not completed their school education should be considered for menial government jobs like sweepers, cleaners, etc. They are of the opinion that having a job is better than no job. It is the suggestion of the researcher that vacancies for menial jobs in panchayats and municipalities usually remain vacant. These vacancies should be filled by TGs who are ready to do it. For academically qualified TGs more government opportunities shall be presented, if possible, reservation shall be considered. A strict no discrimination policy in workplace shall be implemented to ensure that TGs are not denied jobs that they are qualified for.

VII. CONCLUSION

The first part of the research paper provides the general overview of the research topic. This part has outlined the various issues that has to be examined and analysed in conformity with the research objective. Relevant questions have been raised for the readers to contemplate upon on the existing policies, schemes, and legal system for the protection of the rights of the TG persons. Several books have been referred to get necessary insight into the TG persons especially autobiographies that equipped the researcher with first-hand experiences of eminent TG authors and poets. The books have provided the researcher with relevant acumen to what extent the TG persons has suffered at the hands of the government and the society. The books have also provided the researcher with significant perception about the historical aspect of the

TGs and their subsequent development to the contemporary society. The introductory chapters provide the readers with a blueprint of the research topic and also a sturdy foundation for upcoming chapters.

The second part discusses about the significance of the TGs from the ancient period onwards. The significance of TGs in the ancient texts has to be put specially emphasised. Though, the TGs were once maintained a very high social status in the ancient India with the onset British colonial rule everything changed drastically for Indian TGs. Laws were made to criminalise TGs by putting them under constant surveillance and making their actions criminal. Even after the independence things were bleak for the TG persons. Decades of legal battle finally recognised their rights. Kerala has made policies and programmes to improve the lives of the TGs in the State. But the need for proper implementation is still yet to be fulfilled.

In the third part the realization that TG issues cannot be restrained to only a particular State has been identified. TG rights issue are of global significance and the relevance of international law on such issues are ineluctable. The efforts and contributions made by the international persons in recognising and conferring rights to the TG people should not go unnoticed. International organizations and experts in international human rights law have been striving to develop mechanisms to peacefully resolve SOGISC matters and have been reinforcing the States obligation towards the TG persons. With the adoption of international documents like ICCPR and ICESCR, TGs around the world have received international recognition and can enjoy rights set out in them. Any deviation from the rights guaranteed under these documents enables anyone to report it to the respective Committee and necessary action will be taken against the State party. The Yogyakarta Principles which were drafted by experts in the field of international human rights law have achieved an authoritative status by greasing the wheels for policymakers in national and international arena. The document was drafted keeping in mind the enduring prejudice faced by individuals on matters regarding to sexual orientation and gender identity.

The fourth part contemplates on the road to legal recognition of TG rights and how hard won through time consuming legal battles. Judiciary has played a consequential role in ensuring and protecting the rights of the citizens by stepping as the watchdog of the Constitution of India. From Naz Foundation case to Navtej Singh Johar and many more TGs in India finally received the recognition they deserve. This chapter discussed the various landmark judgments of the Supreme Court, High Courts of India and International Courts and the various instances where TGs in India and around the world have suffered and endured discrimination, sexual harassment and other abuses.

The fifth part deals with the analysis of the data collected from 50 TGs from all over the state. The questions asked to the subjects ranged from their basic details like religion, caste, educational qualification etc., to the legal aspect such as their legal awareness. Special emphasis has been laid to the family and friends' section as majority of the subjects responded positively towards the discrimination/harassment faced by them at their hands.

The sixth part gives a glimpse on TG welfare and the realization how vast a topic to discuss about. If the researcher would embark on listing the problems faced by the TGs it would be a never-ending process. The suggestions and recommendations put forth by the researcher was based on the observation made by interacting with number of TGs and it reflects their needs. This part deals with certain suggestions and recommendations that the researcher believe shall be done immediately in order to vindicate years of injustice and hardships these folks had to undergo.

During the course of this research the researcher found that even though Kerala was the first state to implement a comprehensive state policy for TGs it has a long way to go when it comes to TG welfare. Proper policy implementation is key to the success of any welfare programme. Studies and surveys should be conducted and opinions of the prospective beneficiaries i.e., the TGs shall be considered for effective reach. Most of the TGs are unaware of the programmes and schemes available for their benefit. Legal awareness among TGs is tenuous and requires serious attention since they are and can be subjects of abuse by private individuals and more importantly by state machineries. Educational reforms are imminent and comprehensive sex education shall be implemented at school and college level compulsorily.

TGs are part and parcel of the society and it is distressing that members of the same society consider their gender identity as a contagious disease. This paper analysed the socio-legal challenges of TGs in the state of Kerala. TGs are systematically marginalised due to the lack of awareness and acceptance in the society. This paper examines the extent to which how social institutions like schools/colleges, family, friends etc., plays a seminal role in providing a safe space to express TG identity and their rights.
