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A TRANSGENDER CHILD RIGHTS VIS-A-VIS THE TRANSGENDER PERSONS ACT, 2019

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1. INTRODUCTION

The development index of a country depends on the quality of the Human Resource. In 1992, India became a signatory to the United Nations Convention on the Rights of the Child. According to United Nations Convention on Rights of the Child (UNCRC), “a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier”. Children are the future of this country and thus, there arises a greater responsibility on part of the state to ensure a proper development of children of this country. In 2002, the International Labour Organisation launched the first World Day against Child Labour. Now, it is observed on June 12 every year.

The entire rights in the UNCRC concern to transgender children but some rights are particularly imperative to them such as Protection from discrimination (Article 2); protected from all forms of violence (Article 19); right to the best possible health care (Article 24) and the right to a broad based curriculum which helps develop life skills, talents and abilities, including the ability to make well-balanced decisions and develop a healthy lifestyle (Article 29).¹ This gives the various countries freedom to fix the age limit in determining that who is a child. However, in India there is no one definition assigned to the term 'CHILD'. The meaning of the term is different under different laws: For instance – as per the Child Labour (Prohibition and Regulation) Act, 1986 – a child is defined as a person who has not completed 14 years of age. The Plantation Labour Act 1951 has separate definitions for child, adolescent and adult. According to it ‘child’ means a person who has not completed his fourteenth year. ‘Adolescent’ means a person who has completed his fourteenth year but has not completed his eighteenth year where as ‘adult’ means a person who has completed his eighteenth year. The Motor Transport Workers Act 1961, and the Beedi and Cigar Workers (Conditions of Employment) Act 1966, both define a child as a person who has not completed 14 years of age. Matrimonial laws such as Prohibition of Child Marriage Act, 2006 add to the confusion. It states that a male cannot attain majority until he is 21 years of age and the corresponding age for a female is 18.² Under The Juvenile Justice (Care and Protection of Children) Act 2000, any person below the age of 18 is considered as a child as

¹ http://www.crae.org.uk/media/118087/CRAE-BULLETIN_TRANS_FINAL.pdf

² Shubhomoy Sikdar, ‘Who is a Child?’, *The Hindu*, June 15, 2012.

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the mental state of adults and children are different; therefore there is a need to treat them separately under the different purview of law. And so there are different provisions in our legal system to ensure that children do not suffer any ailment due to prevalence of similar legal system.

Biologically, a child (plural children) is a human being between the stages of birth and puberty or between the developmental period of infancy and puberty. The legal definition of child generally refers to a minor, otherwise known as a person younger than the age of majority. Children generally have fewer rights and less responsibility than adults. They are classed as unable to make serious decisions, and legally must be under the care of their parents or another responsible caregiver.

2. TRANSGENDER CHILD: MEANING AND ETYMOLOGY

Children typically consistently, persistently, and insistently express a cross-gender identity and feel that their gender is different from their assigned sex. They may begin talking about their gender as soon as they begin to speak and some may express displeasure with their genitals. Transgender children are more likely to experience gender dysphoria (i.e. discomfort related to their bodies not matching their internal sense of gender) than gender diverse children, although some transgender children are comfortable with their bodies.³

Children are not born knowing what it means to be a boy or a girl; they learn it from their parents, older children and others around them. This learning process begins early. As soon as a doctor or other healthcare provider declares – based on observing the newborn’s external sex organs – “it is a boy” or “it is a girl,” the world around a child begins to teach these lessons. Whether it’s the sorting of blue clothes and pink clothes, “boys’ toys” and “girls’ toys” or telling young girls they’re “pretty” and boys they’re “strong.” It continues into puberty and adulthood as social expectations of masculine and feminine expression and behaviour often become more rigid. But gender does not simply exist in those binary terms; gender is more of a spectrum, with all individuals expressing and identifying with varying degrees of both masculinity and femininity.⁴

Some children have a gender identity that is different from their gender assigned at birth, and many have interests and hobbies that may align with the other gender. Some children, as the American Academy of Paediatrics explains, do not identify with either gender. They may

³Subhrajit Chatterjee, Problems faced by transgender community in India: some recommendations, International Journal of Creative Research Thought, Volume 6, Issue 1, January 2018.

⁴ Retrieved from <https://www.hrc.org/resources/transgender-children-and-youth-understanding-the-basics> last visited on April 17, 2020

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feel like they are somewhere in between or have no gender⁵.

As per the information sheet, prepared by Australia Psychology Society, for parents, caregivers and families of transgender and gender diverse (TGD) children Transgender children are those children whose gender differs to what society would typically expect of their gender assigned at birth. A transgender child generally refers to a child who was assigned as male at birth but is female, or a child who was assigned female but is male. To understand the meaning of transgender child, knowledge of the following terms is also required:

- i. **Cisgender Child:** A cisgender child refers to a child who identifies with the gender they were assigned at birth.
- ii. **Gender Diverse Child:** A gender diverse child refers to a child who may have a range of gender identities and practices, combine different genders, or identify as having a non-binary gender. Gender diverse children may express themselves in many different ways.
- iii. **Non-Binary Child:** It refers to a child who may not be exclusively male or female. They may use pronouns to signal their non-binary gender, such as 'they'.
- iv. **Gender Dysphoria:** Gender dysphoria is the distress some transgender or gender diverse people feel when their body differs from other people of their gender.
- v. **Intersex Variation Child:** A child with an intersex variation is a child who was born with chromosomes, genitals, and/or reproductive organs that do not fit into the narrow ideas of what constitutes 'male' or 'female'. Intersex children are different from transgender or gender diverse children.
- vi. **Sexual Orientation:** It refers to who you are attracted to sexually. Gender is different from sexual orientation. Someone who is transgender or gender diverse may be heterosexual, gay, lesbian, bisexual, pansexual or asexual.

The Transgender Persons Act,2019 defines Transgender in the following words:

“Transgender person means a person whose gender does not match with the gender assigned to that person at birth and includestrans-man or trans-woman (whether or not such person has undergone sex reassignment surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra,aravani and jogta.”

Above definition makes it clear that transgender is that person who has features of both genders and their behaviour and lifestyle tend to deviate from the prescriptive gender roles.

⁵Jason Rafferty, Gender-Diverse & Transgender Children, Available at <https://www.healthychildren.org/English/ages-stages/gradeschool/Pages/Gender-Diverse-Transgender-Children.aspx> last visited on April 17, 2020

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3. POSITION OF TRANSGENDER CHILDREN IN THE SOCIOLOGICAL CONTEXT

In India there are a multitude of socio-cultural groups of transgender community including children like hijras/ kinnars, and other transgender identities such as eunuchs, Kothis, Aravanis, Jogappas, Shiv-Shakthis etc. They are subjected to unfair treatments like verbal abuse, physical and sexual violence, and denial of share in their ancestral property, services, and admission to educational institutions as well as victimization in numerous settings like family, educational institutions, place of work, health care settings and public spaces like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are marginalized and treated as untouchables.⁶

A child needs love and care. However, in India this love and care is not given to a transgender child. India is a country where incidents of female foeticide and infanticides are frequent; Girls are killed if they marry any person out of their castes because everything is seen as connected to the family's esteem. In such sociological conditions, birth of a transgender child is considered as a curse. Most of the families want to get rid of them and often at their tender age they are handed over to the transgender groups.

The transgender community is a highly marginalized and vulnerable one and is seriously lagging behind on human development index mainly in the area of education. Majority of this community is illiterate or less educated due to which they are not able to participate fully in social, cultural, political and economic activities. Actually educational Institutions are very much gendered place. Stigmatization of gender-nonconforming and transgender children and youth is amplified in the educational system, which mirrors the rest of society in reinforcing strictly binary and patriarchal gender norms. According to Indian Census 2011, the population of transgender is around 4.9 lakh in the country. Census data also reveals that this community has low literacy rate, just 46 percent transgender are literate, compared to 74 percent literacy in the general population. The community recognized as “disadvantage group” defined by the Right to Education Act. It means these kids will be eligible for 25 percent reservation under the economically weaker section for admission. There are many factors responsible for the low level of education of this community but main reasons are exclusion from family/society, poverty, social stigma and discrimination, insensitive attitude of teachers/staff, violence and sexual abuse⁷.

4.CHILD RIGHTS VERSUS TRANSGENDER CHILD RIGHTS

Indian Constitution has acknowledged the vulnerable position of children including third gender children and guaranteed the endorsement as well as protection of their rights through

⁶ <http://trans-gnc-resources.com/mdocs-posts/fact-sheet-gender-diversity-and-transgender-identity-in-children/>

⁷Vasant More, "Problems of Transgender Community in India", *VivekResearch Journal Special Issue*, 2018, P91

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various provisions in the Fundamental Rights and Directive Principles of State Policy by following mechanism:

The Article 15 (3) empowers the state to make special provisions for children; the Article 21A makes provisions for the free and compulsory education to children with the age of 6 to 14 years. Furthermore, the Article 23 lays down the provisions for the prohibition of trafficking of human beings (including children) and forced labour; the Article 24 make illegal employment of children in any factory or mine or any other hazardous employment less than 14 years of age. Under Article 39(f): children are given opportunities and facilities to develop in healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation, moral and material abandonment. As per the provisions of Article 45, the state shall effort to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children, until they attain the age of fourteen years, whereas the Article 47 affirms that the state shall raise the level of nutrient food and the standard of living among children. Apart from this, Article 51A; eleventh Fundamental Duty states that it shall be the duty of every citizen of India “who is parent or guardian, to provide opportunities for education to his/her child or ward between the age of six and fourteen years”.⁸

Additionally, the Transgender Act, 2019 provides that no child will be separated from parents or close family on the ground of being a transgender except under the orders of a competent court if it is in the interest of the child. However, where any parent or a member of his immediate family is unable to take care of a transgender person, the person is to be placed in a rehabilitation center, on the orders given by the competent court⁹.

5. EPILOGUE

In spite of the constitutional-legal provisions which are particularly concerned toward the rights of children but the acute proportion of population are still not taking advantages such provisions. Among population the most vulnerable section i.e. third gender children as passive victim of society are depriving their rights such as right to name, dignity & status, right to parental care, right to healthy environment, right to recreational and leisure

⁸Durga Das Basu, *Introduction to the Constitution of India*, Sixth Edition, New Delhi: Prentice Hall of India, 1976.

⁹Sec 12 of the Transgender Act, 2019:

12. (1) No child shall be separated from parents or immediate family on the ground of being a transgender, except on an order of a competent court, in the interest of such child. (2) Every transgender person shall have— (a) a right to reside in the household where parent or immediate family members reside; (b) a right not to be excluded from such household or any part thereof; and (c) a right to enjoy and use the facilities of such household in a non-discriminatory manner.(3) Where any parent or a member of his immediate family is unable to take care of a transgender, the competent court shall by an order direct such person to be placed in rehabilitation centre.

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activities, right to education, right to proper medical health facilities, right to nutrition diet etc. Their rights of violation started from their home by family members such ill treated, partially attitude toward third gender children in the context of providing basic needs compare others kids. The negative attitude of community/society also pinches such children. These children always realized the feeling of detachment from family and home. In milieu of the rising incidents of violations of third gender children rights, it is mandatory for each citizen to ensure that third children should have the opportunity to grow up in loving, heartening and social atmosphere, assuming the ultimate intention of the humanity as harmonious development of the third child's personality.