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A CRITICAL ANALYSIS OF THE LGAL INCLUSIVENESS OF SEXUAL MINORITIES IN INDIA

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Abstract

The world over it has been recognized that for the rights of transgender and intersex persons to be recognized, one of the first things needed is legislation that would recognize their right to gender identity without medical or psychological documents. A transgender or intersex person shall not be required to provide proof of a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychiatric, psychological or medical treatment to make use of the right to gender identity. The Yogyakarta Principles were adopted in 2007 are principles on the application of International Human Rights Law in relation to Sexual Orientation and Gender Identity. Principle 3 of the Yogyakarta Principles talks about the Right to Recognition before the Law. It states that each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity. It also provides that States shall take all necessary legislative, administrative and other measures to fully respect and legally recognize each person's self-defined gender identity and ensure that

procedures exist whereby all State-issued identity papers which indicate a person's gender, including birth certificates, passports, electoral records and other documents reflect the person's self-determined gender identity.

Key Words: Gender, equality, sexual minority, dignity, self-determination.

INTRODUCTION

God has created human beings as equal without any discrimination as to their skill power, will power, grasping power, intellect etc. It is human beings who discriminate, misuse and abuse the human being and treat them as objects. The fault lies only on the selfish nature of the human beings. Pt. Jawaharlal Nehru, in his speech, moving objective Resolution in Constitution Assembly on December 13, 1946, said that the House should consider the Resolution not in a spirit of narrow legal wording but rather look at the spirit behind that Resolution⁹⁷³. The words are magic things often enough, but even the magic of words sometimes cannot convey the magic of the human spirit and of a Nation's passion. The Resolution seeks very feebly to tell the world of what we have thought or dreamt of so long and what we now hope to achieve in near future is collusiveness. The Indian constitution reflects this value deeply ingrained in Indian society and nurtured over several generation. The inclusiveness that Indian society traditionally displayed in every aspect of life is manifested in recognizing a role in society for everyone. That perceived by the majority as deviants or different is not that which totally can be excluded or ostracized. Where society can display inclusiveness and understanding the sexual minorities can be assured of a life of dignity and none discriminate to one. It cannot be forgotten that discrimination is anti-thesis of equality and that it is the recognition of equality which will foster the dignity of every individual.

⁹⁷³Constituent Assembly Debate on 13 December, 1946: Available on: <https://indiankanoon.org/doc/548244/> Last visited on 08.01.2022.

In the case of **Maneka Gandhi v. Union of India**⁹⁷⁴ the Supreme Court of India expanded the scope and ambit of the right to life and personal liberty enshrined in Article 21 and sowed the seed for future development of the law enlarging this most fundamental of the fundamental rights. In **Kharak Singh v. State of U.P.**⁹⁷⁵ the Supreme Court held that though our constitution did not refer to the right to privacy expressly still it can be traced from the right to life protect under Article 21 of the Constitution. It is clear that no aspect of one's life may be said to be more private than that of sexual relation or sexual preferences within individual personality and lie easily at the core of private space. They are inalienable component of the right to life. In *Dudgeon v. United Kingdom*⁹⁷⁶, and *Norris v. Republic of Ireland*⁹⁷⁷ the criminalization of homosexual activities was deemed a violation of the privacy protection under Article 8 of the ECHR. Various International Covenants and Conventions has also recognized the right to equality and privacy of people. Another issue is that homosexuality has always been visited with social, legal and religious disapproval. It is said that homosexuality menaces the health of society and homosexual behavior has a damaging effect on family life. Gay supports this on various grounds but by and large society is not in favor of allowing homosexuality but public morality or public disapproval of certain acts is not a valid justification for restriction on the fundamental rights. If there is any type of morality that can pass the test of compelling State interest, it must be Constitutional morality and not public morality. This aspect of Constitutional morality was strongly insisted upon by Dr. Ambedkar in the Constituent Assembly⁹⁷⁸. To stigmatize or to criminalize homosexuals only on account of their sexual orientation would be against the constitutional morality. The overall function fixed by criminal

law in this field is to preserve public order and decency and to protect the citizen from what is offensive or injurious. In *Lawrence v. Texas*⁹⁷⁹ the Court held that the moral disapproval is not by itself a legitimate State interest to justify a statute that bans homosexuality and sodomy. Since 1967 the process of change has started to inform to legal fraternity about the legal attitude of sexual orientation. This Process has culminated in the decriminalization of sodomy in private between consenting adults in several jurisdictions. The legislative history indicates that the first records of sodomy as a crime at common law in England were chronicled in the Feta, 1290, and later in the Britton, 1300. Both texts prescribed that Sodomit should be burnt alive. Acts of sodomy later became penalized by hanging under the Buggery Act of 1533 which was re-enacted in 1563 by Queen Elizabeth I. After which it became the charter for the subsequent criminalization of sodomy in the British Colonies. Oral-germinal sexual acts were later removed from the definition of buggery in 1817. In 1861, the death penalty for buggery was formally abolished in England and Wales. The Wolfenden Committee recommended that homosexual behavior between consenting adults in private should no longer be a criminal offence. The contemporary trend is clearly towards greater tolerant of homosexuality. Many American States have legalized it. In West Germany homosexuality is legally permitted with due protection afforded to minors. In the case of **Naz Foundation v. Government of NCT of Delhi**⁹⁸⁰ the Court has struck down Section 377 of IPC, which classified homosexuals as criminals. Section 377 of IPC, criminalizes the acts of sexual minorities particularly men who have sex with men and gay men. The provision runs counter to the constitutional values and the notion of human dignity which is considered to be the cornerstone of our Constitution. Its application to sexual act of consenting adults in privacy discriminates a section of people on the

⁹⁷⁴ AIR 1978 SC 597.

⁹⁷⁵1963 AIR 1295, 1964 SCR (1) 332

⁹⁷⁶ (1982) 4 EHRR 149, IHRL 31 (ECHR 1981)

⁹⁷⁷ [1984] IR 36, [1983] IESC 3.

⁹⁷⁸ Constitution Assembly Debates, Vol. VII November, 1948, Page 38.

⁹⁷⁹ 538 US 558 (2003). Urofsky, M. I. "Lawrence v. Texas" Encyclopedia Britannica, June 19, 2021. <https://www.britannica.com/topic/Lawrence-v-Texas>. Last visited on: 09.01.2022.

⁹⁸⁰ 160 Delhi Law Times 277.

ground of their sexual orientation. The sexually minorities which are popularly referred as LGBT are also part of the society and they have equal right for everything as humans which are available to all other persons. Their class and gender makes them one of the most disempowered groups of society. They are deprived of various human rights like, right to marry, right to vote, and to take personal decisions relating to marriage, family relationships, child rearing and education etc. They also faced the problems of discrimination, unemployment, education, homelessness, HIV care etc. By criminalizing private the consensual same-sex conduct, Section 337 IPC serves as the weapon for police abuse such as detaining and questioning, extortion, harassment, forced sex, payment of hush money and perpetuates negative and discriminatory belief towards them. Consequently, sex relations of same sex persons and sexual minorities remains hidden and it drive the activities of gay and sexually minority's persons underground. These hidden and underground activities adversely affect the HIV/AIDS prevention efforts. Sexual minorities represent a segment population that is extremely vulnerable to HIV/AIDS infection. National Aids Control Organization (NACO) has been identified to sexual minorities as high risk group of acquiring and transmitting HIV infection. It happens due to a high level of risky behaviour and insufficient capacity or power for decision making to protect themselves from infection. The HIV/AIDS prevention efforts were found to be severely impaired by discriminatory attitudes exhibited by State agencies towards gay community or transgender individuals and they were subjected to abuse, harassment, and assault from public and public authorities. Thus, by criminalizing the same sex activities a group of individuals of society is forced to dirt the core of their identity and vital dimensions of their personality. The legislative objective of penalizing unnatural sexual act has no rational nexus to the classification created between procreative and non- procreative sexual acts and is based upon stereotypes and

misunderstanding which render it arbitrary and unreasonable under Article 14 of the Constitution. The expression "sex" as used in Article 15 of the Constitution cannot be read restrictive to gender. The equality on the basis of sexual orientation is implied in Article 15 against discrimination. In New York, on 10th December, 2008, the U.N. General Assembly presented a statement endorsed by 66 States of the world calling for an end to discrimination based on sexual orientation and gender minority. On 26th March, 2007 a group of Human Rights experts launched the Yogyakarta Principles on the application of human right law in relation to sexual orientation and gender minorities. The expression 'dignity of individual' finds specific mention in the Preamble to the Constitution of India. The 'dignity' is a difficult concept to capture in precise terms⁹⁸¹. At least, it is clear that Constitutional protection of dignity requires to acknowledge the value and worth of all individuals as member of our society.

Oliver Wendlle Holmes said that the life of law has been logical; it has been experience⁹⁸². Now we can say that that the life of law is not just logic or experience. The life of law is renewable based on experience and logic, which adapted law to the new social reality. In the process of legal inclusiveness, the Supreme Court has recognized⁹⁸³ transgender as third gender in law. This is a recognition of their right of equality enshrined in Article 14 as well as their human right to life with dignity, which is the mandate of the Article 21 of the Constitution. They have constitutional right to self- identify their gender. Further the Court directed to Union and State to make the provisions for the transgender

⁹⁸¹ Egan v. Canada [1995] 2 SCR 513 as observed by L' Heureux-Dube, J. Available on https://en.wikipedia.org/wiki/Egan_v_Canada#L'Heureux-Dub%C3%A9. Last visited on: 09.01.2022.

⁹⁸² Elizabeth R. Purdy, The First Amendment Encyclopedia, presented by the John Seigenthaler Chair of Excellence in First Amendment Studies. Available on <https://www.mtsu.edu/first-amendment/article/1337/oliver-wendell-holmes-jr> Last visited on 17.05.2022.

A compilation of Holmes's Harvard lectures was published in 1881 as The Common Law. The Common Law, considered by many scholars to be the best book written on the American legal system, expounded Holmes's legal philosophy, which he based on the notion that law is derived from human experience rather than logic.

⁹⁸³ National Legal Services Authority v. Union of India, para 121 at 120. <https://main.sci.gov.in/jonew/judis/41411.pdf>

persons to have the reservation in public education and employment⁹⁸⁴. The Supreme Court declared⁹⁸⁵ that Hijras, Eunuchs be treated as “third gender” for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by the Parliament and the State Legislature. Transgender persons have right to decide their gender. Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender. It was also directed by the court that Centre and State must take appropriate step to treat them socially and economically backward class of society and the benefit of reservation for appointment in public employment and for admission in educational institutions must also be extended. Centre and State Governments should seriously address the problems being faced by Hijras, Transgenders such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma, etc. To provide medical care to transgender proper measure should also be taken by center and State Government. Separate public toilets and other facilities should also be provided to them. Centre and State Governments should also take steps for framing various social welfare schemes for their betterment. Centre and State Governments should take steps to create public awareness so that the transgender may feel that they are also part of this society and they are not untouchables. Centre and the State Governments should also take measures to regain their respect.

Following the judgement of National Legal Services Authority v. Union of India, the Transgender Persons (Protection of Rights) Bill, 2016 was introduced in the Parliament which became Transgender Persons (Protection of Rights) Act, 2019 and came into force on 5 December 2019. The effort has been made for legal inclusiveness of transgenders through

legislation. The main feature of the Act are as follows⁹⁸⁶.

LEGAL RECOGNITION OF IDENTITY OF TRANSGENDER PERSONS

The object of the Act is to provide for the formulation and implementation of a comprehensive national policy for ensuring overall development of the transgender persons and for their welfare to be undertaken by the State⁹⁸⁷. Provisions regarding recognition of identity of transgender persons are given under Chapter three, Sections four to seven of the Act.

PROVISIONS REGARDING INCLUSIVE EDUCATION FOR TRANSGENDER PERSONS

Under Section 2 (d) of the Act, the term “inclusive education” is defined and it means a system of education wherein transgender students learn together with other students without fear of discrimination, neglect, harassment or intimidation and the system of teaching and learning is suitably adapted to meet the learning needs of such students⁹⁸⁸. Under Section 2 (e) of the Act the term “institution” is defined and it means an institution, whether public or private, for the reception, care, protection, education, training or any other service of transgender persons⁹⁸⁹. Further, under section 2 (k) of the Act the term transgender person is defined. Transgender person means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other

⁹⁸⁶ South Asian Trans Law Data Base, Available on: <https://translaw.clpr.org.in/legislation/transgender-persons-protection-of-rights-act-2019/>

⁹⁸⁷ Preamble, Transgender Persons (Protection of Rights) Act, 2019.

⁹⁸⁸ SECTION 2 CLAUSE (D), THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019.

Available on:

<https://www.argus>

[https://www.argus.com/uploads/km_updates/download/1606196456_Implementation_Of_The_Transgender_Persons_\(Protection_Of_Rights\)_Act_And_Rule_For_All_Establishments.pdf](https://www.argus.com/uploads/km_updates/download/1606196456_Implementation_Of_The_Transgender_Persons_(Protection_Of_Rights)_Act_And_Rule_For_All_Establishments.pdf)

. Last visited on 23.05.2022.

⁹⁸⁹ SECTION 2 (E), Id.

⁹⁸⁴ Id.

⁹⁸⁵ Id, para 129 at 127. <https://main.sci.gov.in/jonew/judis/41411.pdf>

therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta⁹⁹⁰. On reading of these three definitions, it is clear that law seeks inclusiveness of transgender person in area of education which is very much important aspect for the development of human beings. Education to transgender persons is to be provided in inclusive manner. It is also mandated that the system of education will be developed in such a manner which is suitable for the needs and requirement of the transgender persons. They will be given education together with all other students of society without any kind of discrimination or fear in mind. Even private schools or institutions are not allowed to make any discrimination against transgender persons. Section 3 prohibits various act which are discriminatory to transgenders. The object of section 3 seems to promote the inclusiveness of transgenders in India.

PROHIBITION AGAINST DISCRIMINATION

Section 3 of the Act prohibits the discrimination against a transgender person, including denial of service or unfair treatment in relation to (i) education; (ii) employment; (iii) healthcare; (iv) access to, or enjoyment of goods, facilities, opportunities available to the public; (v) right to movement; (vi) right to reside, rent, or otherwise occupy the property; (vii) opportunity to hold public or private office; and (viii) access to a government or private establishment in whose care or custody a transgender person has been kept.

RIGHT TO EDUCATION AND INCLUSIVENESS OF TRANSGENDERS

Education is very important for human race. Education is considered as pre condition for the establishing a just and fair society. The principal of equality and social justice the society can only be reconstructed through healthy education. In earlier ages the right to education

was confined only to higher class of Indian society especially for men and not for women. With the passage of time, we fought for the right to education for all classes of society irrespective of their gender, caste, creed or religion. Dr. Ambedkar said that education is something which ought to be brought within the reach of everyone. Education not only ought to be brought within the reach of everyone but it must be chippiest in all the possible ways. Today's, we are living in 21st century and the situations are not much better. Under Section 3 of the Act, any discrimination such as denial, discontinuance or unfair treatment in educational institutes or services provided by them on the ground of being transgender person has been prohibited⁹⁹¹. It is a positive sign and appreciable effort for curving discrimination against transgenders in educational institutes. It will be helpful for suppressing victimization in admission and educational institutes. Discrimination in educational institutes against transgender may have very tyrannical impact on the life of transgenders. Educational institutions funded or recognized by the relevant government shall provide inclusive education, sports and recreational facilities for transgender persons, without discrimination.

RIGHT TO PUBLIC EMPLOYMENT AND INCLUSIVENESS OF TRANSGENDERS

In relation to the employment or occupation any unfair treatment, denial or termination from employment or occupation and the denial, discontinuation, unfair treatment, in healthcare services is also prohibited⁹⁹². No government or private entity can discriminate against a transgender person in employment matters, including recruitment, and promotion. Every establishment is required to designate a person to be a complaint officer to deal with complaints in relation to the Act.

⁹⁹⁰ SECTION 2 (K), Id.

⁹⁹¹ SECTION 3 CLAUSE (A), THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

⁹⁹² SECTION 3 CLAUSE (B) & (C), THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

RIGHT OF TRANSGENDERS FOR ENJOYMENT OF GODDS AND PUBLIC FACILITY

Any kind of denial, discontinuation, unfair treatment regarding access or enjoyment of public goods, services, accommodation, benefits, privilege, opportunity or facilities is prohibited under the Act⁹⁹³. Health care services will be provided to transgender persons without any discrimination. The government must take steps to provide health facilities to transgender persons including separate HIV surveillance centres, and sex reassignment surgeries. The government shall review the medical curriculum to address health issues of transgender persons, and provide comprehensive medical insurance schemes for them.

RIGHT TO MOVEMENT, RESIDENCE AND TO HOLD PROPERTY

Any kind of denial, discontinuation or unfair treatment with regards to the right of movement, right to reside, right to purchase or otherwise occupy any property is prohibited⁹⁹⁴. Every transgender person shall have a right to reside and be included in his household. If the immediate family is unable to care for the transgender person, the person may be placed in a rehabilitation Centre, on the orders of a competent court. The 2019 Act allows the transgender person to be recognised as such and allows to have a self-perceived gender identity. The provisions also look into the issuance of a certificate of identity and issue a certificate stating the change in gender. A transgender person may make an application to the District Magistrate for a certificate of identity, indicating the gender as transgender. A revised certificate may be obtained only if the individual undergoes surgery to change their gender either as a male or a female. Under the Act, the Parliament has

provided following rights to transgender persons.

ROLE OF THE GOVERNMENT FOR THE WELFARE OF TRANSGENDER PERSONS The Government is duty bound to formulate the schemes for the welfare of transgender persons. The government shall take steps to ensure the full and effective participation and inclusion in the society of transgender persons. The government is also responsible for the rescue, protection and rehabilitation of transgender persons to address the needs of such persons⁹⁹⁵. No establishment is allowed to discriminate against any transgender person in any matter relating to employment including, recruitment, promotion and other related issues. The term establishment is defined very broadly. It includes any government or private establishment⁹⁹⁶. It is further provided that every establishment shall designate a person to be a complaint officer to deal with the complaints relating to violation of the provisions of this Act⁹⁹⁷. Transgender child is also protected under the Act. Parents have been prohibited from separating their kids from family on the basis of being transgender person. Every transgender person has right to reside in the household where parent or immediate family members reside⁹⁹⁸. They have right to enjoy and use the facilities of such household in a non-discriminatory manner⁹⁹⁹. For better protection of transgender persons, the Central Government shall constitute National Council for Transgender Persons¹⁰⁰⁰. National Council for Transgender Persons has statutory obligation to

⁹⁹⁵ SECTION 8, THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

⁹⁹⁶ SECTION 2 (b), THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019 Reads as under
“Establishment” means-

(i) anybody or authority established by or under a Central Act or a State Act or an authority or a body owned or controlled or aided by the Government or a local authority, or a Government company as defined in section 2 of the Companies Act, 2013 (18 of 2013), and includes a Department of the Government; or

(ii) any company or body corporate or association or body of individuals, firm, cooperative or other society, association, trust, agency, institution;

⁹⁹⁷ SECTIONB 11, THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019.

⁹⁹⁸ SECTIONB 12, THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019.

⁹⁹⁹ Id.

¹⁰⁰⁰ SECTIONB 16, THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

⁹⁹³ SECTION 3 CLAUSE (E), THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

⁹⁹⁴ SECTION 3 CLAUSE (F) & (G), THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

give the advice to Central Government for the formulation of policies, schemes and legislation. The Council has to evaluate, monitor and review the impact of policies, programmes and legislations. The council has also been made responsible for better coordination in activities of the various department of government related to transgender persons. The Council shall also act to redress the grievances of transgender persons¹⁰⁰¹.

CRITICAL ANALYSIS OF THE ACT

Section 4 of the Act talks about the right to recognition of identity as third gender person. To this right of identity, the procedure has been prescribed under section 5 of the Act. A transgender person may file an application before District Magistrate for issuing a certificate of identity as transgender person. Any transgender person desirous of obtaining a certificate of identity shall make an application¹⁰⁰². The District Magistrate shall, based on the application, the affidavit attached therewith and the report of psychologist, without any medical examination, issue the certificate of identity¹⁰⁰³. It is argued that this provision is against the right to equality. Generally, a male or female is not required of any such type of certificate from District Magistrate as identity of being male or female. Certificate of identity has to be issued on the basis of affidavit and the report of psychologist. It is discriminatory because, a male or female is not required to file such type of affidavit and the report of psychologist for being male or female. Why the transgender persons are being forced to follow this procedure. Further, they may be exploited for getting report from psychologist. In this regard a simple declaration before concerned authority as usually done by male or female in their daily routine work should be considered sufficient. Section 7 of the Act

provides that a transgender person, through surgical process may change his gender either as a male or female. On the basis of certificate issued by Medical Superintendent or Chief Medical Officer of the medical institution regarding change of gender through surgery, District Magistrate on application filed by candidate may revise the previous certificate. It is said that these provisions violate the right to self-identity of transgender persons because it involves the various authorities in process. Section 18 provides the penalties for certain types of offences. If any person compels to any transgender person for forced or bonded labour or denies the right to access the public place or forces to transgender person to leave the household, village or residence he shall be punished with the imprisonment which shall not be less than six months but it may extend to two years and fine. Further, if someone harms or injures or endangers the life, safety, health or well-being, whether mental or physical, of a transgender person or tends to do acts including causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years and with fine¹⁰⁰⁴. It is clear that section 18 provides three years maximum punishment for sexual abuse but Indian Penal Code provides three years to life imprisonment punishment for sexual abuse of a women. Both the provisions make a discriminatory punishment for same nature of offence of sexual abuse¹⁰⁰⁵.

CONCLUSION

All human beings are equal. Gender has no role to decide the deferential treatment with them. Being a special and neglected class of the society, transgender community needs special protection from the State. Such type of special protection is already given to women and children under the Article 15 (3) of the Constitution of India. Like women and children, the transgender community is not

¹⁰⁰¹ SECTIONB 17, THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

¹⁰⁰² SECTION 3, THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) RULES, 2020.

¹⁰⁰³ SECTION 4, THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) RULES, 2020

¹⁰⁰⁴ SECTIONB 18, THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

¹⁰⁰⁵ Swati Bidhan Baruah v. Union of India WP(C) 51/2020.



constitutionally protected. In NALSA judgement the Supreme Court has accepted the issue that transgender parson has very poor representation in the public employment. It was said that transgender community should be treated as socially and educationally backward class of citizens. They should be given reservation in public employment. This issue has not been addressed in the Act. Thus, transgender community has been recognised as a special class by Supreme Court but for better protection of transgender community, constitutional recognition is also required.