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GENDER AND IDENTITY: THE CONTEMPORARY POSITION OF TRANSGENDER IN INDIA

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ABSTRACT

Gender discrimination is a menace in India, and one of those is transgender people who suffer violence and discrimination in society. Transgender are individuals who differ in stereotypes and their appearance. Being different in society, they suffer social oppression. The problems include education, employment, health facilities, and so on. Moreover, people are categorizing gender into two, but they forget there is another gender, which we call the 'Third Gender.' They are also the citizens of the Country and should have equal status and respect, which other citizens are getting. Then, why are they discriminated in society? These people are the creations of God. And the most significant gift is 'Humankind.'

After the judgment passed in 2014 (NALSA Case) and 2018 (Navtej Singh Johar Case) by the Supreme Court, the situation will improve, but some people's minds are not yet. The Constitution has provided fundamental rights to every citizen of this country, but they shall not be judged based on gender. The Transgender Persons (Protection of Rights) Act, 2019 was passed to protect their dignity and societal rights. But still, the implementation of the Act is lacking somewhere for their recognition in society. Today also, transgender people are facing atrocities due to their sexual orientation. For example, the abrogation of Article 370 in the Country where Kashmiris transgender people have faced a lot of challenges due to their double marginalization (Muslim and non-conforming gender). They have suffered a lot and are required to stay in confined places. Therefore, there is a need to recognize such people with respect and dignity.

The researcher will conduct doctrinal research. The researcher's main aim is to analyze various forms of discrimination against transgender and the present scenario after the judgment and the legislation passed for the upliftment of third genders in society. Lastly, the researcher will provide a conclusion and suggestions.

Keywords: Transgender, Equality, Discrimination, Justice, Identity

1.1 INTRODUCTION

“Gender is given too much importance. We should be able to see humans just as humans because ultimately the soul has no gender.”

-DENIS M. AJETO

Gender, in simple terms, means the state of being male or female. The question arises of whether only males and females are under gender. Then, what about the third gender, i.e., transgender, who is residing with us in the Country? Who are they? What is their identity? Under which gender do they come? These questions are still in debate and are still unanswered.

“Transgender people” are those people who have different stereotypes in their appearance by birth. These people include Hijras, Kinnars, Aravanis, Kothis, Shiv-Shaktis, and Jogtas/Jogappas. These are the transgender terminologies that are used in different names in different parts of the States in the Country. With a population of over five lakhs, transgender community forms an integral part of our society. The community has been facing a lot of discrimination, harassment, and abuse for a long time. The life of transgender people is a battle as society does not accept such people, and they are always ignored and excluded. They have to fight in every battle of their lives and face a lot of discrimination from society. Thus, they been vulnerable, marginalized and deprived community in the society.¹

1.2 STATUS OF TRANSGENDER COMMUNITY IN INDIA

One of the most vulnerable groups is the transgender society. They have to deal with a lot of disrespect in almost every part of their lives, including their health, schools, employment, and sense of entitlement. Extreme social rejection makes people feel less responsible for their actions and lowers their self-esteem. The community should be a part of the country's growth plan and should be safe from all kinds of abuse and exploitation. Transgender people are anyone of any age or sex whose appearance, personality traits, or actions don't match up with ideas about what men and women are supposed to be like.

¹ Prof. Shilpa Khatri, “The Socio-legal Exploitation of Third Gender in India” 21 *IOSR* 12-18 (2016)

The recent Transgender Act, says that a “*transgender person is someone whose gender does not match the gender they were given at birth. This includes transgender men and women (whether they have had surgery, hormone therapy, laser therapy, or another type of therapy), intersex people, gender queer people, and people with cultural identities like kinner, hijra, and aravani*”.²

1.2.1 Recent scenario of Transgender in India

The Abrogation of Article 370 was a good step, but the transgender Kashmir has faced a lot of problems due to their double marginalization. All of Kashmir, at that time, used oppressive measures, but these people were required to stay in confined places.

These people were also excluded at the time the NRC database in Assam was put in place, putting them in danger of detention and deprivation of citizenship. Thus, the State always fails to take into consideration with respect to transgender people, and the burden of proving their identities is always upon them.

Thus, people think that one of the main reasons that these transgender people are left out because their gender status is not recognized. They have been denied services, harassed, beaten up, and mistreated in public places, at work, and when looking for homes. Thus, they have a lot of problems in their daily lives, with the law, with policies, and even with their health.

1.3 RIGHTS GUARANTEED UNDER INDIAN CONSTITUTION

The Constitution is "sex blind," which means that the idea of equal rights and treatment before the law.³ It never mentions that fundamental rights are only available to men or women. It has always been said that every person in this Country has Fundamental Rights. Every person doesn't exclude transgender people. They also come under every person. But the situation is that these people face lots of problems regarding employment, education, and respect in society.

² The Transgender Persons (Protection of Rights) Act, 2019 (Act 40 of 2019)

³ Mahendra Pal Singh, V.N. Shukla's *Constitution of India* 894 (Eastern Book Company, New Delhi, 13th edn., 2017).

1.3.1 Article 14 – Equality before law

The foremost basic right is *Right to Equality*⁴ which says that, the first expression “equality before the law”, means that no person, whatever his rank or position, is not above the law. In other words, everyone will be treated equally before the court of law.⁵ Whereas, the second expression “equal protection of the laws”, which means that equal protection will be secured for all persons within the country and they will enjoy their rights and privileges without any discrimination.⁶

In *Indra Sawhney v. Union of India*,⁷ held that “right to equality is the basic feature of the Constitution”.

It is important to note that no two human beings are the same; rather, they are all different. The principle of equality states that equal treatment is given in similar fields and different treatment in different fields. In the same manner, transgender people, though having different traits and appearances, shall be treated equally in society.

In *Shivani Bhat v. State of NCT of Delhi & Ors*,⁸ the present petition demonstrates that Transgender people have long lived on the edges of society, often in poverty, because of their gender identity. Their fundamental rights have been taken away from them badly. The Court held that transgender people were always treated with respect, and they are talked about in great detail in old Hindu texts and epics.

It is important to remember that discrimination based on gender is wrong. All people, even those who are different, have the right to be treated equally. The government must not only not treat people unfairly but also take steps to make sure that no one is mistreated. It's true that "Humans are the best gift." Everyone is born a human, so treat everyone like a human and not like they are less important than animals. Transgender people are not different from other people just because they are transgender. They were only born as humans, so they should be treated the same way everyone else is treated in society.

⁴ The Constitution of India, 1950, art. 14

⁵ Dr. J.N. Pandey, *Constitutional Law of India* 321 (Central Law Agency, Allahabad, 59th edn., 2022).

⁶ *Id.* at 6

⁷ AIR 2000 SC 498

⁸ W.P. (CrI.) No. 2133/2015

1.3.2 Article 15 – Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

This Article prohibits “*the State from discriminating against citizens on the grounds only on religion, race, caste, sex or place of birth*”.⁹ Both clauses focus on the word 'only,' which implies the differentiation on one or two grounds; only then is the law invalid. The Constitution guarantees these rights to every citizen. However, the transgender community has been discriminated against in society to enjoy such rights.

Transgender people have been mistreated because of how they identify as a gender. As stated in Article 15, the word "sex" refers to more than just males and females. It can also refer to a third gender. There are also no special rules for these people under Article 15(4)¹⁰ for the “*advancement of the socially and educationally backward classes*” (SEBCs) of citizens, even though they are officially entitled to and can get the benefits of SEBCs.

In *Nain Sukh Das v. State of U.P.*,¹¹ invalidated a law passed by the state legislature that set up separate voting districts for people from different faith groups. This meant that if discrimination is shown “*on any of the grounds under Article 15, then the law must be struck down and declare as unconstitutional*”.

In *NALSA Case*,¹² the court said that Article 15(2) says that TGs have the right not to be disabled, liable, restricted, or conditionally able to enter public places. However, TGs have been consistently denied this right. The court also said that TGs are legally allowed to get the benefits of SEBCs because they are very poor and are shunned by society.

Moreover, the non-recognition of their identities leads to harassment, molestation, rape, and sexual assault and is also ignored in the field of education, employment, hospitals, restaurants, and other public places. Discrimination has lots of layers, such as fear and ignorance, which are the two key

⁹ The Constitution of India, 1950, art. 15.

¹⁰ The Constitution of India, 1950, art. 15(4)

¹¹ AIR 1953 SC 384

¹² *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438

roots of society towards transgender people, and this is the reason these people are not able to come forward.¹³

1.3.3 Article 16 – Equality of opportunity in matters of public employment

The Article 16 provides “*equal opportunities to every citizen in employment and appointment to any office under the State. There shall be no discrimination in the employment on any of the grounds*”.¹⁴ The transgender people face difficulty in finding employment and work accordingly to their choice. Due to discrimination they are sometimes forced for sex workers and are threaten to other violence. It has been seen many a times there is a social discrimination in their employment which is violative of Article 16.

In *Faizan Siddiqui v. Sashastra Seema*¹⁵, a transgender person who applied for the job was given the job, but the offer was taken back because she had said she was female. The district judge noted that the petitioner had said she wasn't required by law to tell a potential employer about her Gender Identity Disorder and, by extension, her male biological sex unless there was proof that her sex was a real qualification for the job she applied for and was offered. If the job offer was taken away because she was transgender, it was said that this would be against her rights under Articles 14, 15, and 16.

However, the main aim of the Government in providing such opportunities to these people is to bring upliftment of the third gender in every possible manner. We are born equally and also equally capable of getting a fair chance in each sphere of society. Article 16 is based on the principle of "equal pay for equal work."¹⁶ This should be applied between persons whether a person is seeking the same employment or has obtained the same employment.¹⁷ This presumes that the rule of law is established in this democratic Country. No one is above the law, and before the law, everyone is equal.¹⁸

¹³ Akanshya Mishra, “Third Gender Rights: The Battle for Equality” 5 *CULJ* 21 (2016)

¹⁴ The Constitution of India, 1950, art. 16.

¹⁵ W.P. (C) No. 7208/2008.

¹⁶ *Id.* at 15

¹⁷ Akhand Sharma, “Identity Crisis for Transgender in India” 12 *HRDC* 157 (2018)

¹⁸ *Id.* at 18

1.3.4 Article 21 – Protection of life and personal liberty

The Right to life is one of the foremost basic right and not even the States have the power to take such right from any of the citizens. This Article clearly states that “no person should be deprived of his life or personal liberty”.¹⁹ Here, the word ‘person’ has been mentioned. It includes not only human beings but also the animals. However, transgender are gender neutral, i.e neither a male nor a female but they come under as humans. Their life and personal liberty should not be deprived just because of their gender identity. Our Constitution doesn’t provide this right, subject to the gender identification.

Right to dignity is an important part of the right to life.²⁰ It has been seen that someone who is transgender doesn't have the same rights and privileges as other people. There is also a lack of social and artistic participation. It's a matter that the Court of law has to decide. Whether people of the third gender don't have the right to live a better life?

In *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*,²¹ the Court held that “the right to dignity is an integral part of our Constitution”. It protects people's total growth and development and includes "expressing oneself in diverse forms, freely moving about and mixing with other human beings."

In *NALSA Case*,²² the court said that “legal recognition of gender identity is an important part of our Constitutional right to freedom and dignity”.

1.3.5 Article 21A – Right to Education

The Article 21A, says that “the State shall provide free and compulsory education to all children of the age of six to fourteen years”.²³ This doesn’t means that transgender are excluded and the education should be provided to them without any discrimination and it is their right to get education.

¹⁹ The Constitution of India, 1950, art. 21.

²⁰ Dr. Shikha Dimri, Gender and Identity: An Analysis of the Rights of Transgenders, *SSRN*, available at: <https://ssrn.com/abstract=4267907> (last visited on March 25, 2024)

²¹ (1981) 1 SCC 608

²² *supra* note 1 at 13

²³ The Constitution of India, 1950, art. 21A

1.4 JUDICIAL RECOGNITION OF TRANSGENDER IN INDIA

In Naz Foundation case, the Court held that S. 377 of IPC which criminalizes homosexuality is a violative of Article 14, 15 and 21.²⁴

In Suresh Koushal case, the court struck down the Naz foundation case decision and held that homosexuality is condemned and penalized.²⁵

In *NALSA Case*,²⁶ the court said that the petitioners shows that despite there are constitutional rights but then also there are issues facing by the transgender in the society. They are-

- I. Transgender people face significant discrimination everywhere, especially when they try to get an employment, go to school, get medical care, etc., because their identity is not recognized.
- II. Transgender people face a lot of abuse when they try to go to public places like stores, malls, restaurants, and movie theatres.
- III. They also often have a hard time getting into public washrooms, which is another big problem. Since there aren't any different washrooms for them. So they have to use it for guys, which is a place where they could be sexually assaulted or harassed.

Finally, the court said that discrimination based on “*sexual orientation or gender identity*” violates “*equal protection of the law*” and “*equality before the law*”, and it goes against Article 14 of the Constitution.²⁷

In *Navtej Singh Johar v. Union of India*²⁸, the court held that LGBT people have all the rights that the Constitution protects. The court also said that in a democracy with a Constitution based on the rule of law, their rights are important to protect their freedoms and liberties. For everyone to be treated equally, their sexual preference must be protected on an equal level.

²⁴ *Naz Foundation v. NCT of Delhi*, (2009) 160 DLT 277

²⁵ *Suresh Koushal v. Naz Foundation*, (2013) 1 SCC 1

²⁶ *supra* note 2 at 13

²⁷ H.M. Seervai, *Constitutional Law in India* 789 (Aggrawal Law House, Allahabad, 4th edn., 2022).

²⁸ AIR 2018 SC 790

1.5 INITIATIVES AFTER THE NALSA DECISION

- i. The third gender would be recognized on all forms of identification, such as a birth certificate, visa, ration card, and driver's license. It is now possible to choose a third gender on train tickets as well.
- ii. Laxmi Narayan Tripathi fights for the rights of transgender people. In 2002, she became head of the NGO DAI Welfare Society, which was the first group in South Asia to be registered and start working. She was the first transgender person to speak for Asia and the Pacific at the UN in 2008. She talked about the suffering of sexual minorities at the meeting. "People should act more like people." They should treat us with respect as people and think about our rights as transgender people. It is the first time that a transgender Indian person has been chosen for public office.
- iii. The Tamil Nadu and Kerala were the first states who had implemented laws with respect to transgender community. They set up a welfare board for them, and transgender people were appointed as members of that board.
- iv. In November 2017, N. Chandrababu Naidu, said that transgender people would be able to get pension plans. On December 16, 2017, the State Government made the policy of giving each transgender person (above age of 18) a social security income of Rs. 1500 per month.
- v. Transgender people have been given the letter "T" on their AADHAR cards. The government has accepted it as a card that can be used for more than one thing. It can be used for different welfare programs and as proof of photo identification.
- vi. The Pehchan Program is glad that the Indian government has decided to recognize and promote the respect and equality of transgender people across the country.
- vii. For the first time in India, K Prithika Yashini is a police officer and a woman. In 2015, she became the first transgender police officer in Tamil Nadu.
- viii. Six transgender people work to run the Sahaj International School in Kerala. The main goal to provide education to transgender community.

Therefore, every person should have the same rights, and transgender people should be able to enjoy basic rights that no one can take away from them. Even though they are different, they should stand up and fight for their rights in court. Everyone is equal before the law. Since the 2014 decision, the transgender community has had many chances to come out in society.

1.6 LOOPHOLES IN 2019 ACT

The Transgender Act was a new step in recognizing the identities of such people with dignity and allowing them all their rights. But the Act has some drawbacks. They are-

- i. Though the Act protects the transgender from discrimination in public services, it does not define any penalties for any harassment or violence towards such people.
- ii. The procedure for issuing a certificate for their identity is unambiguous. It does not clearly define what steps need to be taken before a certificate is issued, how to argue if the certificate is denied, or how to fix mistakes in a certificate. It also doesn't say anything about the rights to live there, adopt children, or get married.²⁹
- iii. The Act does not help abuse victims in any way, like by giving them counselling, hormone treatment, etc.
- iv. The offences like rape, murder, and hate crimes; and about rules and punishments that don't depend on gender. The Act doesn't say anything about any rights regarding these offences.
- v. The National Council for Transgender Persons, which was created by an act, does not have a set schedule for regular meetings or yearly updates on areas that need improvement.³⁰

1.7 CONCLUSION

Transgender are the citizens of the Country; they are not different from other citizens. When we say 'WE THE PEOPLE OF INDIA', it means that India is a country where everyone is living as a citizen, without any discrimination or lack of resources. The Country does grow, but not because of economic growth. It grows because of human development. Humans are the best thing in the world. People should never forget how to treat anyone in the society. No matter if someone is male, female, or transgender; there should be no difference between them because they are all people in the end. They're slowly getting over the fear and lack of knowledge they've had for a long time. Governments should try to make awareness and implementation of the rules as well as legislation to make recognition of their identities in the society. Also, people should change their mind and accept them in every sphere of the society. For a few years, they've caused a lot of problems in TG's group. They need to understand that God picked

²⁹ Gunjan Sharma, "Position of Transgender in Contemporary India: An Analytical Study" 4 *IJLMH* 2754 (2021)

³⁰ *Id.* at 29

them. People worship God, but they insult to those that God has made. Therefore, the recognition of transgender had been nowadays seen but today also somewhere they are facing problems which need to be resolved. Hence, they should be proud of themselves and never feel excluded from the society.

1.8 SUGGESTIONS

The transgender community has faced a lot of violence and atrocities in society. In every step of their life, they have been excluded due to their sexual orientation. The judiciary has taken initiatives to uplift them so that they can fight for their freedom and autonomy. The lack of awareness and implementation of the NALSA decision are demerits in society. Even recently, the implementation of the new implementation has not been enough to meet the interests of these people. Therefore, the researcher would like to provide some suggestions which can be recommended to recognize the identities and improve the status of transgender in society are as follows-

- All public and private organizations must make rules about how to portray transgender people. In order for practical steps to be taken against discrimination to be made, they must be adequately represented.
- Young children should learn about gender equality, bias against women, and norms in school so that they can treat people of all genders with kindness.
- Setting up of Organizations, seminars, workshops, and training programs that make authorities more aware of issues will help the community get access to the legal system.
- Reservations in schools and colleges could be a step toward giving people more power. Also, these people can be aware about gender bias by getting more education.
- There is a need to have statistical data for figuring out the current state of data in terms of gender and the economy, crimes against transgender people, representation in schools and colleges, employment and overall growth.
- Implement helpline numbers so people can get help and support. They can offer counseling and keep the victim's name secret.
- To reach the people, the government needs to get in touch with local governments, village councils, and NGOs. At the regional level, give specific instructions on how to react and help any transgender people who are being mistreated right away.
- The privacy of a person identity should be respected at all times. To be seen as human and accepted by society is what transgender people are fighting for. They wanted to be

respected and treated with honor, just like everyone else.

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