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"THIRD GENDER: JOURNEY FROM RIGHTS TO REALITY"

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ABSTRACT

We all are well aware about LGBTQ community who are nothing but just like us. The thing is they belong to the other gender, just like male and female. That's why they are called the third gender. It becomes very simple for us if we accept this thing but what we are doing is to segregate them from the mainstream of society. This article talks about their rights which are conferred to them, which are the result of judgment of several cases. Also, it contains problems which are still faced by them despite this modern era. They are still lacking the basic nitty-gritty of life. We usually talk about gender parity, gender equality only in respect of a female to a male. But the term gender includes all genders, and we ignore this fact time and again. We offer a candle march when a girl is raped, but what we do when a transgender is raped. Are they not human beings? So, we should have to change this mentality. That's why I am writing this article. There is an urgent need for awareness about this topic in society.

Most of the time everyone talks about women empowerment , women harassment , equal rights but very few people talk about the rights and sufferings of one another gender which resides in the same society and become prey to many such crimes. When a child is born he is told about male and female and the difference between these two but no one told him about the third gender. So in this article we will talk about the third gender which is often known as **LGBTQIA+** community.

WHAT LGBTQIA+ STANDS FOR?

Here, **L** stands for "Lesbian", **G** stands for "Gay". These two sometimes called as "homosexuals". **B** stands for "bisexual", **T** stands for "transgender", **Q** stands for "queer" , **I** stands for "intersex", **A** stands for "asexual" .And the sign of {+} means that there are still some more gender which are not recognised yet.

ROLE OF SOCIETY

The community has to faced severe discrimination and harassment. The very first discrimination starts from the family, when the family denies to accept them. They become an object of ridicule for the whole society. Why can't the parents understand that a child is only a child and for parents there must not be any gender of child. It should not have any effect, if he/she is born as a third gender,they must be treated in the same manner.

GOVERNMENT & LGBTQ

The government talks about reservation for backward class, i.e. the section of people which is socially and economically backward in the society. But the reality is that the most backward and socially and economically weaker section in the society is none other than this LGBT community which is never considered.

The question arises, Are they not the citizens of India? Then why they are lacking of such opportunities and has to face discrimination? We call a girl as a girl and a boy as a boy, then why a transgender is call by diiferent names like hijra, kinner, aravani, and many other names ?

All these questions get solved, when we confer some rights to this third gender and also teach our child that there exist not two genders but three genders in the society.

WHAT ARTICLE 377 OF INDIAN PENAL CODE SAY?

They sometimes had to hide their identity in order to escape from being a prey of harassment and oppression. A ray of hope emerged when Article 377 of Indian Penal Code was repealed.

Talking about this article, it was inserted in the British Colonial era in 1861 which states that "whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished. This section criminalised the act of private consensual homosexual sex. It was violative of Article 14 (Right to Equality), Article 15 (Right against Discrimination), Article 19 (Right to freedom of speech and expression), and Article 21 (Right to privacy and Right to live with dignity).

However the section was declared to be unconstitutional. But this did not happen a sudden. It comes along with several cases and triumphs in these cases.

EVOLUTION OF LGBT RIGHTS.

In the landmark case of *Naz Foundation v.s. Government of NCT Delhi, 2009*,¹ which was decided by a two-judge bench of the **Delhi High Court**. It was for the first time that Section 377 of IPC declared to be unconstitutional. It was held that treating consensual homosexual sex between adults as a crime, is a violation of fundamental rights as protected by the Indian Constitution.

This then gave an enormous kind of joy to the community. They were now allowed to disclose their identity. They can now freely express their feelings without having fear of getting convicted or arrested.

But this freedom did not last long due to the coming of dark years for rights of LGBTQ in India. Again in the case of *Suresh Kumar Kaushal v.s. Naz foundation, 2013*,² which was decided by the panel of two judges of **Supreme Court** which overturned the judgement of Delhi High Court and re-criminalise homosexuality. It was held that Section 377 of IPC is not violative of the Constitution of India and also LGBT constitute a minuscule fraction of country's population. So, it is inaccurate to distress to protect the rights of this community's people.

Till 2013, they were denied self-determination and were forced to ascribe themselves as either male or female. But a major change brought in the case of *NALSA v.s. Union of India, 2014*.³ In this case major decision has taken place, where **Supreme Court** has recognised transgender as "third gender". The Court recognised that third gender persons were entitled to fundamental rights under the Constitution and under International Law. For the first time Transgender People were recognised as the citizens of this country. It was also held that no third gender would undergo any medical examination or biological test which would breach their fundamental right to privacy. Furthermore, it was declared that Article 14, 15, 16, 19, and 21 of Indian Constitution are gender - neutral in nature.

In another case related to Right to Privacy was *KS Puttaswamy v.s. Union of India, 2017*.⁴ It was held that the Fundamental Right of Right to Privacy to be integral and must be extended

¹naz foundation vs nct

²kumar kaushal v naz foundation

³nalsa v union of india

⁴KS Puttaswamy v.UOI

to every individual irrespective of their gender and sex.

THE TRIUMPH OF RIGHTS:

Finally, the struggle for rights saw a welcome judgment in the *Navtej Johar v.s. Union of India, 2018*,⁵ the five judge bench overruled the Kaushal judgement and decriminalized homosexuality which ultimately struck down Section 377. It also denied the concept of minuscule minority and held that this cannot be the basis to deny the right to privacy to LGBTQ community.

Subsequently, in *Arun Kumar v.s. Inspector General of Registration, Tamil Nadu, 2019*,⁶ of **Madras High Court**, held that Bride can include Transwomen.

THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS)

BILL, 2019

In 2019, The Transgender Persons (Protection of Rights) Bill was passed in the parliament. The act defined Transgender person under **Section 2(k) as**: *"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 therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta."*

Similarly **Section 3(c)** of the same act *Prohibits against discrimination on the denial of, or termination from, employment or occupation*. But the law requires a certificate of identification to be issued by DM to transgender people. Now, at this point it was again violative of Article 21 Right to Privacy by the case *K.S. Puttaswamy vs Union of India*. This problem did not end here only but there was another problem: what if the DM denies to issue certification as this law doesn't provide any redressal mechanism for this problem. So, again it became a hurdle here.

So, a Committee was appointed named **Screening Committee under transgender Bill 2016**, and this provision get removed from transgender persons bill 2019.

Now, here are some problems which are faced by LGBTQ community in today's contemporary

⁵navtej singh johar v. UOI

⁶arun kumar v inspector general

world and also LGBTQ which must get resolved immediately.

PROBLEMS FACED BY LGBTQ IN TOADAY'S TIME

- **The Sexual Harassment at work place, 2013 Act** provides protection to women only. As *Section 2(a)*^{7]} of the act specifically has mentioned the word "aggrieved women".
- Now the transgender people become an easy prey to risk of sexual harassment due to lack of security. According to the data less than **6%** of LGBTQ community works in formal sector. The survey conducted by "*The Guardian*" in 2019 shows that **70%** of LGBT are sexually harassed at work place.⁸
- Another data by "*Indian LGBT Workplace Climate Survey in 2016*" shows that more than half of the LGBT are fired for being belong this community and **87%** of them do not have access to formal LGBT Employee Resource Groups. These data are only released and nothing is done to improve it. Due to the problems faced by them they didn't find a better job and are far behind in contributing to our economy.
- In 2020 Karnataka government had released a notification excluding transgender from recruitment to the police. However, in July that year the government agreed to provide **1%** reservation for transgender persons in State Police Recruitment.
- Talking about Transgender Persons (Protection of Rights) Act, 2019 then **section 18(d)**⁹ of the act mentions offences and penalties regarding mental, physical, sexual abuse of transgender persons which states the penalty of imprisonment from 6 months to 2 year and a fine. This when compared to gender specific offences like rape is quite less.
- Also, in IPC except section 377 all are gender specific. Are these crimes not committed on persons belonging to LGBTQ community?
- There are many such problems like if we talk about social problems then we can see that in public washrooms we see one for men and one for women but there are no separate washrooms for transgender persons.
- In the pandemic COVID -19 there was no discussion about transgender However, this is most affected community as the main source of their income was performing at marriages.
- **Labour Laws** of India mandate women to not work between 7 p.m. to 6 a.m. But whether this right is extended to transwomen is uncertain.

⁷ section 2 a of sexual harassment at workplace 2013

⁸ the guardian 2019 data on lgbt

⁹ section 18 transgender person (protection of right) act 2019

- The **2017, Guidelines on Blood Donor Selection and Blood Donor Referral** which was issued by the *National Blood Transfusion Council*, prohibits transgender persons from donating blood.
- The same sex marriages are still prohibited in India.
- According to **Hindu Adoption and Maintenance Act 1956**, the law denied LGBTQ from adopting children. Now, we can see here an irony that the law can abandon a child to be raised as an orphan without both the parents rather than being brought up by homosexual and trans couples. This is a satire on our legal system and society as society also contributes equally by not accepting this community as a part of it.
- **The New Surrogacy Bill** states that single people and LGBTQ couples are prohibited to have their own children through surrogacy.

There is also some development in providing rights to this community.

WAY FORWARD

The **Right to Marriage** is recognised at international level in the Human Rights Charter under the heading of *Right to have a family*.

In **2018 the Kerala High Court had** delivered a judgement reiterating that the right to freedom of speech and expression guaranteed by Article 19(1) bring within its ambit the right of the transgender community to live as a transgender.

CONCLUSION

The need of time is to encourage Comprehensive sexuality education which aims to give students knowledge, skills and values to make appropriate choices in their sexual choice. As it's time to educate the youth of society then only this kind of discrimination will be eradicated from the society.

The legislature should also contribute in eradicating the hurdles of this LGBTQ community by amending the 2013 Act of Sexual Harassment at workplace to change the definition from "aggrieved women" to "aggrieved persons".

Some initiatives should also take by society by accepting them as they are not try to change them or segregate them as after all they are human.