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JUDICIARY'S APPROACH TOWARDS NON-BINARY GENDERS IN INDIA: A CRITICAL ANALYSIS OF CONSTITUTIONAL RECOGNITION AND LEGAL CHALLENGES

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Abstract:

Non-binary gender identities as a constitutional development in India is an illustration of the dedication of the Indian judiciary towards equality, dignity, and autonomy. In cases such as National Legal Services Authority v. Union of India (2014), Justice K.S. Puttaswamy v. Union of India (2017), and Navtej Singh Johar v. Union of India (2018), the Supreme Court of India has increasingly expanded the scope of fundamental rights in a way to cover the right to protection of gender identities beyond the traditional binary system. Although judicial developments have helped to improve the situation of non-binary people in India, there remain several difficulties that non-binary people have to face, including gaining legal recognition, accessing healthcare services, employment, and facing institutional discrimination. This paper critically examines the relevant constitutional provisions, cases, and the Transgender Persons (Protection of Rights) Act, 2019 in an attempt to evaluate the position of the Indian judiciary regarding the rights of non-binary genders. The study, which uses doctrinal research methodology that relies on primary legal sources and secondary literature, argues that while judicial activism has created a solid constitutional foundation for gender inclusivity, its practical realization has been hindered due to the lack of legislation and administration.

Keywords: Non-Binary Gender, Constitutional Rights, Judiciary, Gender Identity, Equality, Human Rights, India.

INTRODUCTION

Gender identification as an important aspect of personal autonomy and dignity constitutes one characteristic of contemporary constitutional law. In the past, gender has been identified within a binary system, namely, male or female. However, this perception has been challenged by increased realization of gender diversity. People who identify themselves as non-

binary have faced exclusion from society and discrimination in institutions for a number of years since their gender does not fall within the categories of being male or female. They have been denied access to public services, healthcare facilities, employment opportunities, education, and other constitutional rights due to non-recognition of their gender identification in law.¹

The Indian Constitution enshrines equality, non-discrimination, freedom, and dignity through Articles 14, 15, 16, 19, and 21. With time, the Supreme Court's evolving interpretation of these provisions has expanded the scope of fundamental rights to cover the right to protect personal autonomy and gender identity. Through the adoption of values such as constitutional morality, substantive equality, and human dignity, the court has assumed a transformational role in protecting the rights of people of diverse gender without adequate legislative protection.²

"The decision made by the Supreme Court of India in the *National Legal Services Authority v. Union of India*, which protected all citizens' right to identify one's own gender and recognized the transgender community as distinct from both male and female and described them as 'third gender,' was an important milestone in this constitutional journey."³ Further legal backing for the protection of gender identity could be provided through other decisions such as *Justice K.S. Puttaswamy v. Union of India* and *Navtej Singh Johar v. Union of India*.⁴ However, non-binary people are confronted by substantial barriers in gaining recognition and accessing public services, among others.

Therefore, this paper seeks to examine how the Indian judiciary has handled non-binary genders through court decisions, constitutional norms, and challenges within the law which hinder the realization of rights of such individuals. Through the application of a doctrinal research approach, drawing from primary sources of law and secondary academic sources, this research will demonstrate that the judiciary has been quite instrumental in advancing constitutional recognition of gender plurality, but true equality can only be attained via legislative amendments.

¹ Universal Declaration of Human Rights art. 1, G.A. Res. 217 A (III), U.N. Doc. A/810 (Dec. 10, 1948); International Covenant on Civil and Political Rights arts. 2, 26, Dec. 16, 1966, 999 U.N.T.S. 171.

² INDIA CONST. arts. 14, 15, 16, 19, 21.

³ *National Legal Services Authority v. Union of India*, (2014) 5 S.C.C. 438 (India).

⁴ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 S.C.C. 1 (India); *Navtej Singh Johar v. Union of India*, (2018) 10 S.C.C. 1 (India).

CONSTITUTIONAL RECOGNITION OF NON-BINARY GENDER RIGHTS IN INDIA

The idea of transformation in the Constitution, which promises equality, respect, liberty, and non-discrimination to everyone, is the basis for non-binary gender identification under the Indian Constitution. The Supreme Court has taken an interpretative approach towards Fundamental Rights to extend constitutional protection to those individuals whose gender identification does not fit into the traditional male-female category, although gender identification and non-binary genders are not expressly mentioned in the Constitution. This approach makes sure that constitutional rights are responsive to changing social conditions and not bound within a rigid frame.⁵

According to Article 14 of the Constitution, all constitutional rights are granted to “any person” irrespective of his/her gender identity through the provisions for equality before the law and equal protection of the law.⁶ In the case of *National Legal Services Authority v. Union of India (NALSA)*, the Supreme Court reiterated that the constitutional rights cannot be confined to those who are male or female by defining the term “person” in Article 14 to include transgenders.⁷ The Supreme Court recognized that the lack of legal status to non-binary genders was contrary to the constitutional right to equality as it denied them access to institutions and justice system.

Articles 15 and 16 also reinforce this principle through prohibitions on discrimination on the basis of sex and ensuring equal opportunity in government service.⁸ In *NALSA*, it was observed by the Court that “sex” had to be understood broadly to include not only biological characteristics but also gender identity since the latter too enjoys protection from discrimination under the Constitution.⁹ In this way, recognizing that discrimination on the grounds of gender identity involves both biological factors and entrenched social prejudice, the Court's reasoning represents a departure from formal equality.

The protection of gender identity has been secured under Articles 19(1)(a) and 21 of the Constitution as well. Article 19 protects the right to freedom of expression, which also

⁵ INDIA CONST. pmb.; INDIA CONST. arts. 14, 15, 16, 19, 21.

⁶ INDIA CONST. art. 14.

⁷ *National Legal Services Authority v. Union of India*, (2014) 5 S.C.C. 438, ¶¶ 54–60 (India).

⁸ INDIA CONST. arts. 15–16.

⁹ *National Legal Services Authority*, (2014) 5 S.C.C. 438, ¶¶ 62–66.

covers the right to exhibit one's gender identity through behaviors and appearances, including attire.¹⁰ The Supreme Court has always interpreted the fundamental rights guaranteed under Article 21 of the Constitution, right to life and liberty, as the right to autonomy, dignity, privacy, and personal decision-making. The same has been reaffirmed in the case of Justice K.S. Puttaswamy v. Union of India. The Court has observed that "privacy ensures the autonomy of the individual."¹¹

Taken as a whole, such constitutional norms demonstrate that the acceptance of non-binary genders is a natural consequence of the Constitution's concern for equality, respect and individualism. While the process of legal acknowledgment of gender diversity was largely facilitated by the work of constitutional courts, certain legislative steps must be made in order to make the implementation of such constitutional rights a reality. Therefore, the judiciary laid down the constitutional framework for inclusion but translating such constitutional norms into equality remains challenging.

JUDICIARY'S APPROACH TOWARDS NON-BINARY GENDERS IN INDIA

The Indian judiciary has played an important role in ensuring the extension of constitutional rights to cover individuals belonging to various genders. The Supreme Court has interpreted the Constitution of India in the absence of legislative protection and has recognized gender identity as an important factor of equality, autonomy, and dignity. There has been a transition from formal equality to substantive equality where the experiences of individuals whose gender identities are outside the binaries of males and females have been recognized by way of several judgments. Although such judgments have expanded constitutional jurisprudence significantly, there remain several barriers before them.

The judgment of the Supreme Court in *NALSA v. Union of India* was a significant milestone in the recognition of gender diversity.¹² In its appeal, the petition referred to the prevalent discrimination and exclusion faced by transgender people in the fields of employment, education, healthcare, and public life and asked for their protection. The judgment affirmed that all individuals have a fundamental right to recognize themselves as

¹⁰ INDIA CONST. art. 19(1)(a); *National Legal Services Authority*, (2014) 5 S.C.C. 438, ¶¶ 69–72.

¹¹ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 S.C.C. 1, ¶¶ 297–299 (India).

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

male, female, or third gender without being subjected to any form of treatment by the medical and psychological community.¹³

In this case, the court held that transgender and gender variant people enjoy equal rights as enshrined in Articles 14, 15, 16, 19(1)(a), and 21 of the Constitution. Most importantly, this decision extended the constitutional coverage from biological criteria by interpreting the word 'sex' under Articles 15 and 16 to include gender identity.¹⁴ Additionally, the decision directed that the Union and State governments provide separate public amenities, improve health care services, launch public awareness programs to prevent discrimination against transgender people, and categorize them as social and educational backward classes.¹⁵ In other words, NALSA ushered a paradigm shift in terms of recognizing that constitutional equality is not merely about banning discrimination but also about positive actions to remedy past inequalities.

The decision in *K.S. Puttaswamy (Retired) v. Union of India* established unequivocally the right to privacy as a fundamental right enshrined in Article 21 of the Indian Constitution, thereby furthering the protection of gender identity under the Constitution.¹⁶ It is clear from the judgment in this case that the right to privacy encompasses the right to individual autonomy and dignity and the ability to choose an identity, even though the focus of the case was on informational privacy. Privacy “protects one’s identities and preferences from arbitrary governmental interference,” observed Justice Chandrachud.¹⁷

Section 377 of the Indian Penal Code, which rendered consensual same-sex relationships between adults illegal, was found to be unconstitutional in *Navtej Singh Johar v. Union of India* one year later.¹⁸ Although this case is primarily about the issue of sexual orientation rather than gender identity, there were important implications for the latter based on the reasoning applied in this case. The Court held that all individuals have a fundamental right to equality, respect, and autonomy and can freely express their identity regardless of the risk of discrimination.¹⁹ Constitutional morality had to prevail over social morality in accordance with the Court’s opinion.

¹³ *Id.* ¶¶ 69–75.

¹⁴ *Id.* ¶¶ 60–66.

¹⁵ *Id.* ¶¶ 129–135.

¹⁶ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 S.C.C. 1 (India).

¹⁷ *Id.* ¶¶ 297–298.

¹⁸ *Navtej Singh Johar v. Union of India*, (2018) 10 S.C.C. 1 (India).

¹⁹ *Id.* ¶¶ 244–247 (per Chandrachud, J.); ¶¶ 116–119 (per Misra, C.J.).

The Supreme Court has recently reviewed various questions of gender identity and LGBTQIA+ rights in *Supriyo @ Supriya Chakraborty v. Union of India*.²⁰ The Court reiterated that queer individuals and transgender persons are on par with others when it comes to the Constitution and that they deserve dignity and autonomy as well as freedom from discrimination, even though the Constitution Bench chose not to recognize the fundamental right to marry someone of the same gender. Many of the Justices pointed out that it is imperative for the State to remove institutional obstacles that affect gender minorities and proposed the adoption of administrative mechanisms to safeguard their rights.²¹

However, a thorough critique reveals that a significant number of individuals with a non-binary gender identity have yet to experience genuine equality due to the constitutional recognition of their gender identity. The presence of inconsistent procedures within the administration, lack of awareness among government officials, inefficacious implementation of welfare measures, and prevalent stigmatization prevent them from achieving legal recognition. Moreover, certain sections of the Transgender Persons (Protection of Rights) Act, 2019 have been condemned by various scholars as being in conflict with the self-identification principle adopted in NALSA, particularly concerning the procedural aspects of legal gender recognition. Hence, although the judiciary has provided an adequate constitutional basis for the recognition of gender diversity, the enforcement of these rights would require effective legislation and social acceptance.

CRITICAL LEGAL CHALLENGES IN THE PROTECTION OF NON-BINARY PERSONS

Recognition of the rights of gender minorities in the constitution has been well supported by the Indian judiciary; nevertheless, ambiguities in the legislature, discrepancies in the administration, and discrimination that still persists in society have made their implementation very difficult. Recognition of non-binary genders is the first step towards equality and needs to be taken through judicial activism. Life experiences of the non-binary genders are completely different from what the constitution provides.

The absence of official documentation and identity itself is two major impediments in

²⁰ *Supriyo @ Supriya Chakraborty v. Union of India*, 2023 SCC OnLine SC 1348 (India).

²¹ *Id.* ¶¶ 187–199 (per Chandrachud, C.J.); ¶¶ 286–292.

this regard. While it is true that the Supreme Court has recognized the right of an individual to identify his/her gender in the landmark case of *NALSA vs. Union of India*, it has been seen that the administrative process of various government organizations differs for the issuance of identity cards. People often find themselves struggling with the process of obtaining various forms of identification such as Aadhaar card, passport, employment, and educational certificates.²²

Access to health care is one of the significant problems today. Because of the absence of proper medical infrastructure, unawareness of health care providers, and lack of policies for inclusive treatment, the members of the transgender community can suffer from discrimination within both public and private health care institutions. Although the provision of mental health care for addressing gender dysphoria and stigma is still not sufficient, the health care provision for gender affirmation is simply not available or unaffordable for some people.²³

Moreover, social and economic participation of non-binary individuals remains constrained due to employment discrimination. Employment remains constrained due to workplace discrimination, lack of diversity programs, and the lack of enforcement of anti-discrimination laws, even though it is guaranteed by the Constitution through Articles 14 and 16 as well as guidelines given in *NALSA*. Non-binary individuals continue to face difficulties in their recruitment, promotion, and integration at workplaces, leading to economic exclusion.²⁴

Another continuing problem is that of the gap between court orders and government action. The positive steps that included reservations, welfare schemes, awareness drives, and institutional changes were all included in the directives of the Supreme Court in the case of *NALSA*. However, there has not been an even implementation of these directives as several of the recommendations made by the court have not been completely adopted. Furthermore, certain aspects of the Transgender Persons (Protection of Rights) Act, 2019 are being criticized as failing to incorporate the idea of self-identification accepted by the Supreme Court.²⁵

The above-mentioned problems clearly indicate that systemic discrimination cannot be

²² *National Legal Services Authority v. Union of India*, (2014) 5 S.C.C. 438, ¶¶ 69–75 (India).

²³ Transgender Persons (Protection of Rights) Act, No. 40 of 2019, §§ 3, 15, India Code (2019).

²⁴ INDIA CONST. arts. 14, 16; *National Legal Services Authority*, (2014) 5 S.C.C. 438, ¶¶ 129–35.

²⁵ Transgender Persons (Protection of Rights) Act, No. 40 of 2019, §§ 4–7, India Code (2019); *National Legal Services Authority*, (2014) 5 S.C.C. 438, ¶¶ 69–75.

uprooted merely through constitutional acknowledgment. Undoubtedly, court decisions that emphasize the importance of equality and dignity of individuals from diverse genders have made a difference in constitutional discourse in India. Yet, responsive laws, proper administration, and the continuous struggle against societal discrimination are required for these decisions to be implemented. The Constitutional commitment to substantive equality will remain unfulfilled in the absence of systematic actions.

CONCLUSIONS

The Indian judiciary has made important contributions towards the development of the rights of gender-diverse individuals under the Constitution by interpreting the same in light of the principles of equality, dignity, liberty, and autonomy of individuals. The apex court of the country has recognized gender identity as a crucial aspect of personhood that requires constitutional protection through landmark judgments such as *National Legal Services Authority v. Union of India*, *Justice K.S. Puttaswamy v. Union of India*, and *Navtej Singh Johar v. Union of India*. Such judgments have fortified the notion that constitutional rights extend to all equally, irrespective of their gender identity, and have expanded the scope of fundamental rights beyond the traditional binary concept of gender.²⁶

Substantive equality, however, was not achieved merely due to the recognition by the judiciary. There remain problems with regards to legal documentation, healthcare, employment, access to services, and discrimination that prevent the effective implementation of their rights according to the constitution. There has been an important piece of legislation in the form of the *Transgender Persons (Protection of Rights) Act, 2019*, yet the gap remains between the execution of the legislation and judicial precedents. Hence, legislative actions, administrative enforcement, and societal acceptance are equally critical factors as judicial decisions in the matter.²⁷

It is necessary for the government to establish a legal framework which clearly defines how to recognize the non-binary individuals in all documents and to ensure that there is strict implementation of anti-discrimination legislation in areas like education, employment and

²⁶ *National Legal Services Authority v. Union of India*, (2014) 5 S.C.C. 438 (India); *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 S.C.C. 1 (India); *Navtej Singh Johar v. Union of India*, (2018) 10 S.C.C. 1 (India).

²⁷ *Transgender Persons (Protection of Rights) Act, No. 40 of 2019*, India Code (2019).

healthcare in addition to ensuring that welfare legislations include individuals of all genders to bridge this gap. In order to remove the discrimination and promote equality, it is essential to have programs of sensitization on a regular basis for the public officials, educationists, health care practitioners and employers. The legislative reforms should be in accordance with the principles of the Constitution as defined by the Supreme Court.

In summary, through the reinforcement that equality consists of dignity, autonomy, and actual inclusion and not mere legal status, the Indian judiciary has laid down a solid constitutional framework for the safeguarding of the rights of non-binary individuals. Nevertheless, without the support of legislative change and responsive governance to ensure this transformation, the constitutional guarantee of equality would continue to be an empty one. Hence, alongside the acknowledgment of diverse identities, the assurance that these guarantees lead to real equality in practice is equally crucial for the future of non-binary rights in India.

