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Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

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A CRITICAL ANALYSIS OF LEGAL AVENUES FOR TRANSGENDER EMPOWERMENT IN INDIA

AUTHORED BY - SWETA KUMARI & ADITYA GUPTA

ABSTRACT

Transgender individuals in India have long faced marginalization, isolation, exploitation, discrimination, and exclusion. Despite being a large democracy with a constitution that guarantees justice, equality, liberty, and non-discrimination based on sex, as well as rights against exploitation and the right to life, the transgender community struggles to fully access these rights. Although the Indian Government has taken steps towards their upliftment, such as the Transgender (Protection of Rights) Act, 2019, and various supportive schemes, and despite the empathetic stance of the judiciary, exemplified by the landmark *NALSA v. Union of India [(2014) 5 SCC 438]* case, transgender individuals still face significant challenges, including discrimination, abuse, and violence.

This paper aims to critically analyze the condition of the transgender community in India, focusing on constitutional and statutory provisions. It will explore the historical context from the Mughal era through the British period to identify the root causes of their continued suffering even after post-independence. Furthermore, it will examine the contemporary situation, highlighting the persistent obstacles in employment despite a 57.06% literacy rate and unequal treatment in education, health, and security. The paper will also delve into the constitutional rights of transgender individuals and provide a critical analysis of the Transgender (Protection of Rights) Act, 2019. Finally, it will assess the role of the Indian judiciary in recognizing and supporting the transgender community through various judicial pronouncements.

KEYWORDS: Transgender, Empowerment, Constitution, Equality, Discrimination, Judiciary.

1. INTRODUCTION

Transgender individuals are those whose innate sense of gender does not align with the gender assigned to them at birth. This Transgender community includes individuals who identify as transmen and transwomen. Transwomen are individuals who were assigned as male at birth but have undergone gender-corrector surgery to express their feminine identity, while transmen are individuals assigned female at birth who have transitioned to a masculine identity through similar procedures. Various terms such as Hijra, Kinnar, and Arvani are used to describe transgender individuals, though they often face social stigma, discrimination and always viewed as unacceptable parts of society. Regrettably, they are marginalized and subjected to exploitation due to societal biases surrounding gender identity.

This paper will focus on transgender people and the author will critically analyse the legal avenues that are available to them. For this, the author will look at the history of this community starting from old Hindu mythology, through the Mughal era, and lastly up to British rule in India.

The author will discuss the different spheres of discrimination faced by transgender people in the contemporary period. These people are discriminated against in the fields of education and employment. They are not able to avail quality health services and they also feel insecure in society which raises their security concern.

The author will also analyse the fundamental rights of the Indian Constitution which are available to all irrespective of gender identity. Fundamental rights related to equality, freedom, life, liberty, and the right against discrimination and exploitation are also given to the transgender community. This paper will also critically analyse the Transgender Persons (Protection of Rights) Act, 2019. Under this, the author will try to find out the major loopholes of this act that will hinder the upliftment of this community.

At last, the author will discuss the role played by the Indian Judiciary in protecting and uplifting the transgender community. The author will through light on some of the major judgments of the Supreme Court that majorly affect the transgender community.

2. HISTORICAL BACKGROUND AND UNDERLYING FACTORS OF TRANSGENDER RIGHT EVOLUTION

Transgender individuals have a rich historical presence in India, dating back to ancient Hindu mythology and continuing through the Mughal period. During these times, they held a respected position in society. However, with the advent of British colonial rule, their status began to decline. Despite their longstanding presence in Indian civilization, they are now often marginalized and stigmatized in contemporary society.

The historical evolution of transgender people is discussed below:

2.1. Transgenders in Hindu mythology

India is regarded as one of the world's most diverse nations, with a wide range of customs, castes, ethnicities, religions, and usage. The fact that these cultures, customs, castes, traditional usage, and social norms persist in today's world is fascinating since they have long served as symbols of the habits and behaviors that were prevalent in that ancient period.

In the ancient Vedic period, Sanskrit, the world's oldest language, divided gender into three categories: purusha-prakriti (male), stri-prakriti (female), and tritiya-prakriti (third gender).¹ This third category, also known as "napuṃsakaliṅga," encompasses individuals who are neither masculine nor feminine but carry a mixture of physical, mental, and psychological characteristics and, lacking the capacity for procreation² and possess a distinct identity. In the revered Hindu epic "Ramayana," during Lord Rama's exile, a group of individuals, identified as transgenders, remained devoted to him in the forest.³ Impressed by their loyalty, Lord Rama bestowed upon them the authority to bless individuals auspicious occasions. The epic "MAHABHARAT" carries two major instances of transgender people—one, *Aravan*, and two, *Shikhandi*. Aravana was the son of Arjuna and Ulupi (Nagakanya), who was prepared to sacrifice his life to goddess Kali in order to ensure the Pandavas' triumph in the Kurukshetra battle. But he wanted to spend his last night as a married man, knowing that he would pass the next day. No woman was ready to marry him. So, Lord Vishnu transformed into a lady named "Mohini" and married him. Thus, the Tamil Nadu Hijras refer to themselves as Aravanis and view Aravan as their ancestor.⁴ In addition, Princess Amba had pledged herself to take revenge on Bhishma for kidnapping her and refusing to marry her. Amba changed her sex to become Shikhandi when she was reincarnated as

¹ Mona Mehta, "Why purush and prakriti are gender-neutral" *The Times of India*, Jan. 2, 2024.

² *NALSA v. UOI*, (2014) 5 SCC 438.

³ Jeffrey Gettleman, "Peculiar Position of India's Third Gender" *The New York Times*, Jan. 5, 2018.

⁴ Somasundaram O., "Transgenderism: Facts and fictions" 51(1) *IJP* 73-75(2009).

Shikhandini.⁵ When Shikhandi appeared in Arjuna's chariot and helped Arjuna kill Bhishma with his arrows, Bhishma dropped his weapons in recognition of Shikhandi as Shikhandini during the Kurukshetra War and refused to fight with a "woman." Thus, Shikhandi's character proved essential to the Pandavas' triumph.⁶ Furthermore, Jain literature discusses the concept of "psychological sex," emphasizing an individual's psychological makeup over their sexual characteristics.⁷

2.2. Mughal period

During the medieval period (15th to 19th centuries), transgender individuals, particularly Hijras or Eunuchs, held considerable influence, particularly under the rule of Muslim leaders in the Mughal Empire.⁸ These rulers demonstrated notable generosity towards them. Hijras played various significant roles such as political advisers, administrators, managers, guardians of harem,⁹ and even wielded authority as tax collectors.¹⁰ Due to their reputation as being clever, trustworthy, and highly dedicated, as well as their unrestricted access to all areas and demographic groups, they played a significant role in the legislative matters of the Mughal era and had been awarded many times because of their close relations with both the King and Queen. Their presence was also found at Muslim religious institutions, i.e., Macca and Madina, as protectors of that site. During those periods, they were also known as Hijra, Kothis, Jogappas, Shivshakti, Khwaja Sara, Eunuchs, and Aravani.¹¹

The Mughal period marks the beginning of their declining conditions as they were posted at the job of lower categories like guarding Herems, keeper of the bed, etc. Being a harem guard or keeper of the bed does not seem like a prestigious job, and hence, their conditions started deteriorating.

2.3. British time

During the early British colonial period, transgender individuals in the Indian subcontinent

⁵ Shiva Prakash Srinivasan and Sruti Chandrasekaran, "Transsexualism in Hindu Mythology" 24(3) *IJEM* 235–236(2020).

⁶ Aribha, "A brief history of India's transgender community" *The Indian Express*, Jan. 1, 2024.

⁷ M. Michelraj, "Historical Evolution of Transgender Community in India" 4 *ARSS* 17-19(2015).

⁸ Serena Nanda, *Neither Man Nor Woman: The Hijras Of India* 13, 23, 30-31, 41, 144 ([Wadsworth Publishing Company](#), US, 1999).

⁹ Almut Hofert, Matthew Mesley, et.al. (eds.), *Celibate And Childless Men In Power: Ruling Eunuchs And Bishops In The Pre-Modern World* 16 (Routledge, UK, 2017).

¹⁰ [Hijras and the legacy of British colonial rule in India](#), available at: [Hijras and the legacy of British colonial rule in India | Engenderings \(lse.ac.uk\)](#) (last visited on May 17, 2024).

¹¹ Preeti Sharma, "Historical Background and Legal Status of Third Gender In Indian Society" 2 *IJRESS*, 12 (2012).

received protections and privileges from various Indian states. These privileges included land grants, food provisions, and monetary assistance from local agricultural households. However, the British administration revoked these privileges, citing that the land was not passed via blood relations.¹² Witnessing transgender individuals holding esteemed positions in the Mughal royal court, the British expressed disdain and subsequently embarked on efforts to criminalize and deprive them of their basic freedoms and civil rights. This led to the enactment of the Criminal Tribes Act of 1871, which categorized transgender individuals engaged in certain activities such as kidnapping, infant mutilation, and public performances as criminals, subject to immediate arrest. Additionally, the British-drafted Indian Penal Code of 1860 included Section 377,¹³ akin to the British Buggery Act of 1533, criminalizing non-procreative sexual behaviors. While not explicitly targeting transgender individuals, Section 377 had a significant impact on them as a marginalized group, contributing to their societal persecution.¹⁴

3. DISCRIMINATION ENCOUNTERED BY TRANSGENDER PEOPLE IN THE CONTEMPORARY PERIOD

After India gained Independence in 1947 one of the initial actions done by the government was to repeal the Criminal Tribes Act, 1871 which categorized Transgender as criminals. Despite being abolished in 1952, the Act's legacy continues with several local laws reflecting prejudices against certain tribes, like the Hijras, Eunuchs, Kothis, etc. Like the Criminal Tribes Act, 1871, the Karnataka Police Act, 1964 was also amended in 2012 to "*provide for registration and surveillance of Hijras who indulged in the kidnapping of children, unnatural offences and offenses of this nature*" (Section 36A)¹⁵.

Society is considered one of the most important places for the survival of human beings. Transgender people are most vulnerable to discrimination in society because of their non-binary character. Transgender individuals encounter discrimination in many aspects of their lives due to their non-conformity to societal gender norms. It is seen that every transgender person has experienced physical, sexual, and verbal abuse at least once in their lives. The main cause of this kind of prejudice and violence against them is because of the transphobia which exists in society. Transphobia is basically the Hatred, disbelief, dread, fear, or mistrust that exists toward transgender people. Today, these social and ideological changes exist in Indian society because

¹² Ash Kotak, *Hijra* 92 (Bloomsbury Publishing, London, 2000).

¹³ The Indian Penal Code, 1860 (Act 45 of 1860), s. 377.

¹⁴ *Dr. Akkai Padmashali & Ors. v. Union of India*, (2014) 5 SCC 438.

¹⁵ The Karnataka Police Act, 1964, (Act 4 of 1964), s. 36A.

of their attribute to British colonial rule. Some of the areas where transgender people still face abuse are:

3.1. Education

Formal education which is considered a fundamental right of every person, is not getting equally implemented on the ground for all classes of genders. The Universal Declaration of Human Rights states that *“Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit”*. But, Transgender individuals are among those who face lots of discrimination in reality. As per the 2011 Indian Census report, the percentage of literate transgender individuals was 56.07%, whereas the overall population's literacy rate was 74%.¹⁶ According to the NCRB report, the reason for their lower literacy rate is that they left school due to fear of being judged, discriminated and harassed by peers and teachers. This ultimately results in less participation of transgenders in higher education. The expert committee on the issues related to transgender persons on 20th October 2014 directed all the universities operated through UGC to include a column for transgender persons in the application form.

3.2. Employment

Employment is considered most important for the survival and livelihood of human beings. Article 16 of the Indian Constitution guarantees that *“No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.”*¹⁷ This article provides that the state cannot discriminate against any citizen on the grounds of sex (i.e. transgender) in public employment. The government through major initiatives of the 11th Five-Year Plan also provides employment opportunities to transgender individuals through Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA). Despite, these schemes and fundamental rights transgender people still face difficulties in obtaining suitable employment and the work of their choice. As a result, they end up in the work as prostitutes, begging, and dancer in bars.¹⁸

3.3. Health services

Health issues pertaining to transgender individuals are not at the top of the government's priority list. Transgender individuals encounter significant disparities in health status globally and

¹⁶ Rema Nagarajan, “First count of third gender in census: 4.9 lakh” *The Times Of India*, Jan. 13, 2024.

¹⁷ The Constitution of India, art. 16(2).

¹⁸ Pallav Das, “Higher Education of Transgenders in India: Opportunities and Challenges”, 2 *IJRESM*, 2(2019).

encounter obstacles in obtaining suitable medical treatments. When it comes to HIV infections, transgender individuals are more vulnerable to sexual assault and harassment as compared to other general populations. The likelihood of experiencing mental health problems, which frequently lead to depression and an increased propensity to suicidal attempts, steadily rises.

Healthcare professionals discriminated against transgender populations, and many health insurance programmers refused to pay for transgender-related services. The incidence of HIV prevalence among trans people was 8.82% in 2015–16, according to the National AIDS Control Organization (NACO), the second highest among high-risk categories¹⁹. In order to improve transgender people's access to social, legal, and health services, the government came up with the 'Pehchan' project initiative works within 18 Indian states.²⁰

3.4. Security

Transgender people often face discrimination in accessing security. Because of their identity, they are more vulnerable to violence such as sexual assault, physical abuse, and other forms of violence. The number of violent crimes against these individuals is even higher because many of them go unreported. Statistically, "52% of [transgender people] are facing harassment from the police. 70.3% are not confident to face the police, and 96% do not raise complaints against violence because of their gender identity."²¹ The majority of the violence they experience comes from their own friends, family, and partners. The government gathers NCRB data each year that demonstrates crimes against persons, however offenses against transgender people are not specifically mentioned.

4. CONSTITUTIONAL PROVISIONS

The Indian Constitution is not biased against this community. Both the Preamble and the Constitution of India, consider everyone equal and declare that "*We, the people of India...*" own the country and its laws. It not just includes certain groups of people but transgenders also. The preamble is also known as the soul of the constitution and it promises "*Equality*" to all its citizens; "*Justice*" (for social, economic, and political matters); "*Liberty*" of thought, and expression; and "*fraternity*" which will ensure the dignity of individuals.

¹⁹ Government of India, Annual Report of Department of Health and Family Welfare, (Ministry of Health and Family Welfare, 2015-2016).

²⁰ S. Shaikh, "Empowering communities and strengthening systems to improve transgender health: Outcomes from the Pehchan programme in India" 3 JIAS 19 (2016).

²¹ State Policy for Transgenders in Kerala, available at: <https://translaw.clpr.org.in/reports-and-policies/state-policy-for-transgenders-in-kerala-2015-2/> (Last visited on May 17, 2024).

Following are gender-neutral and equal status granting provisions to all its citizens of India:

4.1. Right to equality

Every person in India has been given equal protection under the law and equal status before the law.²² Here, "*any person*" refers to any individual without distinction on the basis of caste, creed, religion, sex, or any other characteristic. In India, a transgender person is included under the definition of "*any person*" and has the same status as that of all cisgender people.²³

4.2. Equality of opportunity and right against all forms of discrimination

The keyword with regard to the protection of transgender under articles 15, and 16 is the term "sex" which plays a crucial role in protecting transgender from discrimination. It says "*No citizen shall be discriminated on grounds of religion, race, caste, sex, place of birth or any of them, at any shops, public restaurants, hotels and places of public entertainment, etc.*"²⁴

*"No citizen shall be discriminated on the grounds of religion, race, caste, sex, descent, place of birth, residence or any of them, for employment or office under the State."*²⁵

The Supreme Court in the landmark case noted that biological attributes and gender are two separate aspects of "sex". Genitalia, chromosomes, and secondary sexual features are examples of biological characteristics; but, gender attributes include a person's self-perception, a strong psychological or emotional sense of sexual identity, and character. "Sex" refers to a wider range of individuals not only biologically male or female but also include those who consider themselves neither male nor female.²⁶

4.3. Fundamental freedom

Article 19 gives "*Protection of certain rights regarding freedom of speech, etc.— (1) All citizens shall have the right— (a) to freedom of speech and expression*"²⁷, By availing this right transgender can easily express themselves in whatever way they want such as by wearing sarees, putting makeup on their face and the way of talking, etc.

4.4. Right to life

The fundamental right to life under Article 21 includes the right to live with human dignity and

²² The Constitution of India, art. 14.

²³ *supra* note 2, at 47.

²⁴ The Constitution of India, art. 15(2).

²⁵ The Constitution of India, art. 16(2).

²⁶ *supra* note 2.

²⁷ The Constitution of India, art. 19(1).

all those which are included under this, namely the bare necessities of life²⁸. This Article covers and protects this feature as it represents the most fundamental human right i.e. the right to life which the State must safeguard against infringement. One of the most crucial features of Article 21 of the Indian Constitution is the right to have a dignified life for the transgender communities. Their right to dignity is upheld when their gender identification is acknowledged, and it is violated when it is not. They are free to express themselves and go about their lives fearlessly. Furthermore, the right to reputation is also included under this provision.²⁹ In contemporary culture, transgender people are rarely treated with respect; instead, they are frequently ridiculed and physically assaulted by powerful individuals, which has damaged their standing and diminished their importance.

4.5. Right against exploitation

Many cruel actions, such as human trafficking and begging, are considered crimes and are prohibited by the Indian Constitution. Article 23 broadly, covers all forms of discrimination.³⁰ Every individual has the right to personal development, but this can only be guaranteed through laws that protect them from exploitation and foster a free and secure environment for them. Transgender persons are the biggest victims of exploitation because of their lower status in society, which leads them to participate in prostitution and other immoral activities. They are also frequently seen as social outcasts. This article aims to safeguard the independence of an individual identity by resisting the exploitation of men by other men.

5. CRITICAL ANALYSIS OF THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

For the first time in 77 years of independence, the Indian Parliament has seen a bill concerning the rights of transgender individuals. The Right of Transgender Person Bill, 2014 was presented as a private member's bill by parliamentarian Tiruchi Shiva. Although it was approved by the Rajya Sabha, there was no debate on the bill, and it is currently awaiting consideration in the Lok Sabha. Meanwhile, a petition was submitted to the Supreme Court of India advocating for the rights of transgender individuals. The Supreme Court of India in the case of *National Legal Service Authority v. Union of India*³¹ has directed “the government to frame legislation on the rights of transgender people, and in pursuance of these directions, the government has appointed an expert

²⁸ *I.R. Coelho v. State of Tamil Nadu*, AIR 2007 SC 861.

²⁹ *State of Maharashtra v. Public Concern for Governance Trust*, AIR 2003 SC 223.

³⁰ The Constitution of India, art. 23.

³¹ *supra* note 2.

committee in August 2013 and that committee has submitted their report in January 2014". According to the report, the Indian government introduced the Transgender Person (Protection of Rights) Bill, 2016 (Bill No. 210 of 2016), in August 2016.³² However, this bill received criticism from numerous activists, legal professionals, and particularly from members of the transgender community due to its perceived backward provisions. Subsequently, in September 2016, the government referred this bill to the Standing Committee, which then presented its report in July 2017.³³ As a result, a new version of the bill was introduced by the Minister of Social Justice and Empowerment and passed by both houses of the parliament on 26 November 2019 and came into effect on 10 January 2020.

The Transgender Persons (Protection of Rights) Act, 2019 was approved by Parliament without undergoing any discussion or debate. The Act largely ignored the recommendations put forth by the majority of the Standing Committee, and the government also overlooked the Supreme Court's verdict in the *National Legal Service Authority v. Union of India*³⁴. There are many problems associated with this act. These are:

5.1. Inclusion of intersex with transgender

This legislation classifies two categories under the umbrella of transgender: transgender individuals and intersex individuals. The former refers to those whose gender identity differs from the one assigned to them at birth, encompassing both trans men and trans women.³⁵ The second group includes persons with intersex variation, genderqueer, and persons having such socio-culture identities as *Kinner*, *Hijra*, *Aravani*, and *Jogta*.³⁶ In this legislation, an intersex individual is grouped under the transgender category, which raises concerns as it overlooks the distinct identity of intersex individuals. Research indicates that when intersex people are merely considered a subset of transgender, their specific needs are often neglected or marginalized. Therefore, it's problematic to conflate intersex and transgender identities, as they may not necessarily align, and both deserve recognition in their own right.

5.2. Identity and certificate

The legislation acknowledges transgender identity by authorizing District Magistrates to issue certificates confirming gender identity. Section 5 stipulates that transgender individuals can obtain identity certificates by submitting applications to the appropriate authority, typically the District

³²The Transgender Person (Protection of Rights) Bill, 2016 (Bill No. 210 of 2016).

³³ *Id.*

³⁴ *supra* note 2.

³⁵ The Transgender Persons (Protection of Rights) Act, 2019 (Act 40 of 2019), s. 2(k).

³⁶ *Id.*

Magistrate.³⁷ According to Section 6 of the act, the District Magistrate is obligated to issue identity certificates after adhering to the prescribed procedure.³⁸ This act falls short in outlining the procedures for District Magistrates to follow when issuing identity certificates, highlighting a significant deficiency. The absence of these procedures underscores the insufficiency of the legislation.

Before obtaining an amended certificate, applicants must acquire a surgical certification from the Chief Medical Officer or Medical Superintendent of the facility where the surgery was conducted.³⁹ The District Magistrate can issue the revised certificate only after confirming the accuracy of the Chief Medical Officer's certification. Consequently, the Act entails an implicit and indirect screening process for transgender individuals before they can receive their certificates.

This section implies that the government considers the gender binary as the standard, requiring individuals who don't conform to this system to obtain a certificate to legally identify as transgender. In *Justice (Retd) K.S. Puttaswamy v. Union of India*,⁴⁰ it was further noted that “*the right to privacy protected the freedom to make intimate decisions regarding personhood and autonomy, decisions that brooked minimum interference from the state.*” The Indian Constitution's Article 21, encompassing the right to life and personal liberty, includes the right to privacy as a fundamental aspect.⁴¹ This foundational principle should not be undermined by discriminatory provisions favoring one group over another. Requiring transgender individuals to obtain a recognition certificate from the District Magistrate may potentially compromise this essential notion.

5.3. Right of residence

Section 12(1) of the act states “*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.*”⁴² This provision deprives children of their right to decide which community they want to be a part of. In certain cases, children may face harassment or abuse from their parents or family members, compelling them to seek refuge with the transgender community or in other safer environments.

³⁷ The Transgender Persons (Protection of Rights) Act, 2019 (Act 40 of 2019), s. 5.

³⁸ The Transgender Persons (Protection of Rights) Act, 2019 (Act 40 of 2019), s. 6.

³⁹ The Transgender Persons (Protection of Rights) Act, 2019 (Act 40 of 2019), s. 7.

⁴⁰ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.

⁴¹ The Constitution of India, art. 21.

⁴² The Transgender Persons (Protection of Rights) Act, 2019 (Act 40 of 2019), s. 12(1)

The act includes a provision for establishing rehabilitation centers. However, mandating a transgender individual to reside in such a center would constitute involuntary detention and inadvertently violate their fundamental right to personal liberty guaranteed under Article 21.⁴³

5.4. Inadequate representation

Section 16 of the Act establishes the National Council for Transgender Persons, comprising only five representatives from the transgender community. This raises doubts about the council's credibility and effectiveness in serving transgender individuals. Section 17 outlines the council's role, which is purely advisory. Although the provision mentions addressing complaints from the transgender community, the council lacks the authority to do so. Granting the council the power to utilize civil court powers could empower it to meet the community's needs effectively. Currently, it stands as a symbolic gesture without substantial strength or potential.

5.5. Less penalty

The existing legislation implies that being transgender is considered abnormal while being cisgender is seen as the standard.⁴⁴ Section 18 of the act stipulates a penalty of six months imprisonment, extendable to two years, along with a fine for instances of sexual and physical abuse against transgender individuals.⁴⁵ For cis-gender individuals, both the Indian Penal Code and the recently enacted *Bhartiya Nyaya Sanhita, 2023*, offer more stringent provisions compared to this act. While physical abuse may harm the body of the victim, sexual abuse is described as damaging the very essence of a person's being.⁴⁶ Hence, the act enforces discriminatory treatment by imposing varying punishments based on binary and non-binary identities, which also violates Article 14 of the Indian Constitution.

5.6. No reservation for transgenders

With time, reservation transformed from being an exception to becoming an integral part of equality.⁴⁷ Section 13 mandates educational institutions to offer inclusive education to transgender individuals.⁴⁸ The Supreme Court in the case of *National Legal Service Authority vs Union of*

⁴³ "Many Transgender Community Members Battling Mental, Physical Abuse During Pandemic", *The Tribune India* Aug. 30, 2020.

⁴⁴ Aastha Khanna and Divesh Sawhney, "Legislative Review Of The Transgender Persons (Protection Of Rights) Act, 2019" 24 HRB 3 (2021).

⁴⁵ The Transgender Persons (Protection of Rights) Act, 2019 (Act 40 of 2019), s. 18

⁴⁶ *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384.

⁴⁷ *supra* note 49.

⁴⁸ The Transgender Persons (Protection of Rights) Act, 2019 (Act 40 of 2019), s.13.

India,⁴⁹ has considered the transgender community as part of the socially and educationally backward class, instructing the government to grant reservations in both education and employment. However, Section 13 solely addresses the provision of inclusive education, lacking any provisions for reservation for the transgender community. Consequently, the Transgender Persons (Protection of Rights) Act, 2019, requires resolution of these issues.

6. ROLE PLAYED BY THE INDIAN JUDICIARY

In recent years, the Indian judiciary has played a pivotal role in safeguarding and advancing the rights of transgender individuals. Through interpretation and enforcement of constitutional principles, the judiciary has strived to guarantee equal rights and opportunities for all citizens, regardless of gender identity.

It was in the year 2001 when the writ petition was filed in the case of *Naz Foundation v. Government of NCT of Delhi and others*⁵⁰ in the High Court of Delhi for the constitutional validity of Section 377 of the Indian Penal Code, 1860. Section 377 criminalizes the consensual sexual act of adults in private⁵¹ and it was argued that the said provision was in contravention of the right to equality⁵², the right against discrimination,⁵³ and the right to life and liberty⁵⁴ of the Constitution of India. The high court ruled that section 377 infringes upon the rights stated above, which are guaranteed by articles 14, 15, and 21 of the Indian Constitution, respectively. The court also emphasized that the fundamental rights of the people cannot be restricted on the basis of public morality or general prevailing consensus in society. This decision was widely welcomed and appreciated by the LGBTQA+ community all over the country. The judgment made a positive impact all over India and many people came out in society as lesbian, gay, bisexual, and transgender.

But soon after this decision, Suresh Kumar Kaushal who was an astrologer approached the Supreme Court against the judgment of the high court in the case of *Suresh Kumar Koushal and another v. Naz Foundation and others*⁵⁵. The Supreme Court in this case has struck down the decision of the Delhi High Court. The court held, “Section 377 does not criminalize a particular

⁴⁹ *supra* note 2.

⁵⁰ *Naz Foundation v. Government of NCT of Delhi*, (2009) 6 SCC 712.

⁵¹ *supra* note 13.

⁵² *Supra* note 24.

⁵³ The Constitution of India, arts. 15.

⁵⁴ *Supra* note 46.

⁵⁵ *Suresh Kumar Koushal and another v. Naz Foundation and others*, AIR 2014 SC 563.

person or identity or orientation. It merely defines certain acts which if committed would constitute an offense. Such a prohibition regulates sexual conduct regardless of gender identity and orientation.”

The Supreme Court gave the most important verdict on the rights of transgender people in 2014. The National Legal Service Authority, a statutory body established under the Legal Service Authority Act, 1987, filed a writ petition advocating for the rights of the transgender community in the case known as National Legal Service Authority v. Union of India.⁵⁶ In response to this petition, the Supreme Court constituted an “Expert Committee” to identify and solve the problems related to the transgender community. The committee has made a number of exhaustive recommendations after due research. The Supreme Court has accepted almost every recommendation of the committee.

The NALSA Judgment is significant for the transgender community in many ways. These are:

- I. The Court for the first time legally recognized the non-binary gender in India.
- II. The Court has upheld the following fundamental rights of the transgender community-
 - a. Right to life and liberty⁵⁷ also include the right to dignity. The court has integrated gender identity into the fundamental right to dignity outlined in Article 21 of the Indian Constitution. Transgender individuals cannot be subjected to disgrace in society; they possess the right to dignity as enshrined in Article 21 of the Indian Constitution.
 - b. Right to equality⁵⁸ and freedom of speech and expression⁵⁹ is the fundamental right provided under the Indian Constitution to all irrespective of gender. Consequently, transgender individuals are entitled to the right to equality and freedom of expression. They have the liberty to express their gender identity through attire, speech, conduct, or demeanor.
 - c. Articles 15 and 16 of the Indian constitution forbid discrimination on the basis of sex. The term "sex" encompasses not only biological attributes like chromosomes or genitalia but also includes gender, which represents an individual's subjective understanding of their identity. Therefore, the court has ruled that discrimination based on sex encompasses gender identity as well.

⁵⁶ *Supra* note 2.

⁵⁷ *Supra* note 46.

⁵⁸ *supra* note 24.

⁵⁹ *supra* note 29.

- III. The court further ruled that awareness campaigns are necessary to combat the stigma that the transgender community faces in society.
- IV. The court has also directed the Central as well as State Governments to take initiatives for the advancement of the transgender community. These are:
 - a. A provision ought to exist for legally acknowledging transgender individuals as a distinct third gender.
 - b. The classification of the third gender as a socially and educationally disadvantaged group should be mandated, entitling them to educational and employment reservations.
 - c. The government should formulate social welfare programs specifically tailored to the needs of the transgender community.
- V. The Supreme Court directed the Ministry of Social Justice and Empowerment to establish an "Expert Committee" tasked with conducting research to identify the requirements of the transgender community and to analyze the root causes of the challenges they encounter.

In the wake of the NALSA Judgment, the LGBTQIA+ Community witnessed another groundbreaking moment in 2018. The Supreme Court's verdict in "*Navtej Singh Johar v. Union of India*"⁶⁰ followed a petition filed by Navtej Singh Johar challenging the constitutionality of section 377 of the Indian Penal Code, citing violations of fundamental rights. The petitioner argued that the provision criminalizing 'carnal intercourse against the order of nature' infringed upon rights such as privacy, freedom of expression, equality, human dignity, and protection from discrimination. The court over-ruled their decision in the case of *Suresh Koushal v. Naz, foundation*⁶¹ and ruled that "*discrimination on the basis of sexual orientation was violative of the right to equality, that criminalizing consensual sex between adults in private was violative of the right to privacy, that sexual orientation forms an inherent part of self-identity and denying the same would be violative of the right to life, and that fundamental rights cannot be denied on the ground that they only affect a minuscule section of the population.*"

In 2022, there was also a landmark Judgement of the Supreme Court in the case of *Deepika Singh v. Central Administrative Tribunal* where the court has widened the definition of 'family' under Indian law. The court has recognized the "typical" families and included queer marriages under this. The court's decision rejects the conventional wisdom that heteronormative unions and family units invalidate the identities and experiences of queer people.

⁶⁰ Navtej Singh Johar vs Union Of India, AIR 2018 SC 432.

⁶¹ *Supra* note 59.

Therefore, the Indian Judiciary from time to time has recognized the existence of transgender people in the society. The directive through these significant judgments has been very impactful for the government in the matter of drafting legislation and framing policies for the transgender community.

7. CONCLUSION

The author through this paper has found that transgender people are still unrecognised and discriminated against in society. The people are not ready to accept them because they consider only men and women as a suitable, natural, and acceptable gender. The concept of the third gender goes beyond the established belief and order of society. Through this paper, the author has critically analysed the legal avenues which are available to the transgender community in India.

The history of transgender goes back to Hindu mythology where they were recognised under the great epic of Ramayana and Mahabharata. At the time of the Mughal Period, they were appointed to a better position like administrator, and personal advisor to the king but when the Britisher arrived, they started criminalizing this community through various legislations. The author found that the arrival of Britishers in India has worsened their living condition in society.

They continue to experience prejudice in the modern day. In addition to that, they are still not receiving a basic education and face discrimination while applying for jobs.

In the contemporary period, they are still facing discrimination. They are not getting basic education, also discriminated against in availing job opportunities. The health service by the government to this community is not enough to cater to their need and they are raped, sexually assaulted in the society. The government also lacks in providing a safe environment for them.

The author also found that there are fundamental rights of equality, freedom to express, life, and dignity enshrined under the Indian Constitution available to them. They have also rights against exploitation and discrimination but these fundamental rights only exist on paper and are still violated.

For the upliftment of this community, the government has introduced Transgender Persons (Protection of Rights) Act, 2019 but the author has found this act problematic on various grounds like identity, residence, and penalties which have to be addressed by the government.

The Indian Judiciary has played a great role in legally recognizing this community. Through their various decision in different cases, the court has always directed the government to take steps for the welfare and development of transgender people. The decision of the Supreme Court in the case NALSA Case is very significant and the government must adhere to this judgement for the progressiveness of this community.

