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THE CONCEPT OF EQUALITY AND REFLECTION OF INDIAN JUDICIARY ON TRANSGENDER COMMUNITY

AUTHORED BY –

SANGRAM JADHAV

Justice is the end of any legal system. Justice is understood¹ in two senses i.e in the wider sense and in the narrow sense. In a wider sense justice is synonymous with morality and the same is given natural law interpretation by Aquinas and Augustine who claim² that “*unjust law is no law*”. In a narrow sense, justice means impartiality or equality. It entails the fair and equal treatment of all. It was supported by Aristotle who maintained³ that “*like should be treated as alike*”. Equality as a term implies being equivalent. It is a complex political and philosophical idea that assists us with comprehension and to improve the world around us. Equality is characterized as the condition of being equivalent, particularly in status, rights etc. Salmond defines⁴ it as “*giving every man his due*”. The idea of equity does not, subsequently, expect that things or individuals are precisely the equivalent or clones of one another.

It⁵ has rightly viewed that all men are not created equivalent. This statement appears improper even immoral as modern liberal thought has set up the inherent, equivalent worth of each individual. Be that as it may, true equality among individuals can be accomplished in light of the fact that there are certain natural inequalities among us. We perceive that one individual may have greater innate literary or talent than another. Sen⁶ also famously argues that “Equal consideration for all may demand very unequal treatment in favour of the disadvantaged”

In 1950, the Indian constitution included a provision that guaranteed equal protection under the law. Articles 14 through 18 of India's constitution protect the right to equality. Article 14's main goal is to guarantee equality of status and opportunity to all persons, citizens and non-citizens, as stated in our constitution's preamble. Article 14 prohibits all forms of discrimination and ensures that everyone is treated equally under the law. Following articles have made different provisions to accommodate specific discriminatory circumstances due to the vagueness of the general concept of equality enunciated in article 14. Discrimination against citizens on the basis of race, religion, sex, caste, or place of birth is prohibited under article 15. In regards to public employment, India's citizens are guaranteed equal opportunity under Article 16. Untouchability is abolished in Article 17 and titles other than military and scholarly distinction are abolished in Article 18. Even so, for decades, the concept of equality has remained a distant goal for the transgender community. Gender has been interpreted

¹ Rohinton Mehta, 50 Lecture on Jurisprudence (Snow White Publication 2000).

² *Ibid.*

³ Paridhi Gupta and Subhadeep Chowdhury, Equality: Sameness and Difference, IGNOU (2020).

⁴ Rohinton Mehta, Supra note 63.

⁵ Nicole Lillibridge, The Promise of Equality: A Comparative Analysis of the Constitutional Guarantees of Equality in India and the United States, volu.13, William and Mary Bill of Rights Journal (2004-05).

⁶ S Sarath Mathilal de Silva, the concept of Equality: Its Scope, Developments and International Legal Regime, volu.16, Royal Asiatic Society of Sri Lanka (2016).

narrowly in the past, causing individuals to be overlooked and subjected to various sorts of harassment in society.

In 2017, a nine-judge bench of the Supreme Court unanimously established the right to privacy as a fundamental right, which encompasses the ability to make choices and the freedom to express self, in the Puttaswamy decision⁷. There has been a violation of Article 21 of the Indian Constitution, as the transgender community's "right to life with human dignity" has been infringed. The freedom of identification and expression, as well as "expressing oneself in varied forms, freely moving about, mixing and co-mingling with fellow human beings," are all part of the notion of dignity.⁸ Gender is an important component of a person's identity, and our Constitution ensures that it is legally recognised⁹. The right to privacy is described as the "right to be left alone; the right of a person to be free from unwarranted publicity; the right to exist without unwarranted public involvement in things with which the public is not necessarily concerned."¹⁰

The legendary Krishna Iyer, J. noted in *Maneka Gandhi v. Union of India & Anr*¹¹ that life is a unique opportunity for an emerging personality, and it must be remembered that the dignity of all is a basic human right, and that without dignity, a person's being lacks its considerable value. As a result, in order to progress toward a truly holistic paradigm, we should inject new power into the existing socio-legal structure on a global scale, weeding out various criminal laws and family laws that perpetuate the institutional discrimination of – anti gender identities.

The transsexual community faced a great deal of embarrassment and shame. They are not permitted medical, educational facilities, and so forth. They are abused and badgered by individuals. This ultimately prompted the filing of the petition. This case preceded the court when a Public Interest Litigation was documented by the National Legal Services Authority followed by different petitioners too. The real glimmer of hope showed up in this case as the Indian Supreme Court in *NALSA v. union of India*¹², recognized a "third sex". Further in 2019, the Supreme Court eventually adopted¹³ a decisive and radical stance by reading down Section 377 of the Indian Penal Code ("IPC") after a protracted struggle and relentless efforts by LGBTQ rights activists and other social agencies who were the frontrunners in fighting this evil. The said abrogation, even if minimal effect, affects this community progressively.

The judgment in the *NALSA* case was given by Justice A.K Sikri and Justice K.S. Radhakrishnan. The judgment depended on numerous courts of foreign nations, for example, courts of New Zealand, Malaysia, Australia, English and Pakistan courts too. Right off the bat the Court put accentuation on the psychological sex rather than the biological sex. The Court discusses the *Corbett v. Corbett*¹⁴ with its total accentuation on biological sex. The Court denies sexual orientation acknowledgment dependent on biological way and gives full significance to acknowledgment by psychological tests.

⁷ AIR 2017 SC 4161.

⁸ Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 1 SCC 608.

⁹ *Id* at ¶ 14.

¹⁰ Chinmaya Kumar Mohapatra, Hiranmaya Nanda, Right of Privacy: Issues and Challenges, INDIAN JOURNAL OF RESEARCH 344 (2015).

¹¹ (1978) 1 SCC 248.

¹² (2014) 5 SSC 438.

¹³ AIR 2018 SC 4321.

¹⁴ 113 Cal.App. 595, 298 P. 819 (Cal. Ct. App. 1931).

Transgender individuals are stifled and are confronted with separation in different parts of life including wellbeing, business, and so forth. The Court alluded to Part 21 of the United Nations Convention against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment, wherein it is expressed that states are obliged to secure all people paying little heed to their sexual direction or transsexual personality. The Court recognized the way that there is a shortfall of enactment in the country and it was, along these lines, important to follow International Conventions.

The object and intent of providing for special rights and privileges emanates from the premise of the existence of inequality in the society. Such special rights and privileges buttress the guarantee of 'equal protection' contemplated under Article 14. The decriminalisation of homosexuality and the subsequent enactment of this Act challenges the conventional notion of gender binary. Whether a trans-man or a trans-woman be treated at par with a woman? Whether Article 15(3) that allows the State to "positively" discriminate among the citizens in favour of women and children, is broad enough to cover within its sweep the transgenders as beneficiaries of this equitable provision? Answering it, the Honorable Supreme Court has made¹⁵ it is clear that all the expressions such as 'Person' used in Article 14, 21 and the expression Citizen used in Article 15,16,19 of an India Constitution are gender neutral. All those expressions refer to human beings. They include transgender people in their sphere of influence and are not confined to female or male gender only. And therefore, the discrimination based on gender identification is covered by Articles 15 and 16.

Their rights are legitimate rights based on the good constitutional theory of equality, not that established in *Suresh Kumar Koushal v. Naz Foundation*¹⁶. They live in peace and respect. They are the very essence of liberty and equality. The transgender community are compelled to live as second-class residents in their own countries due to systematic and structural unfairness that prevents this minority community from realising equal rights. The community also endure socio-economic disadvantages as a result of their lack of education and limited career prospects. While delivering the NALSA judgement, the highest court of the land made a landmark verdict to correct this predicament. The apex court viewed¹⁷ that the transgender community are in real sense entitled and eligible to get the benefits of reservation. They should be included in the Socially and Educationally backward classes for the purpose of article 15(4) and other backward classes for the purpose of article 16(4). The Madras High Court¹⁸ ordered the state of Tamil Nadu to offer transgender people with post-based reservations in government jobs and educational institutions¹⁹. The state of Kerala has issued an order requiring two additional seats to be designated for transgender students in various courses at universities and associated arts and science institutes²⁰. The Uttarakhand High Court²¹ recognised the right to work of transgender people and ordered the government to develop a thorough policy on transgender people's participation in the reservation system

¹⁵ NALSA, supra note.8 at ¶85.

¹⁶ (2014) 1 SCC 1.

¹⁷ NALSA, supra note.8 at ¶75.

¹⁸ Swapna & Ors. v. The Chief Secretary, W.P. No. 31091 of 2013.

¹⁹ Tharika Banu v. The Secretary to Government Writ Petition. No. 26628 of 2017.

²⁰ Correspondent, Kerala announces reservation for transgender students in colleges Hindustan Times, HINDUSTAN TIMES, (Jan 20, 2021 3:30 PM). <https://www.hindustantimes.com/education/kerala-announces-reservation-fortransgender-students-in-colleges/story-qHixW6XIPTExuXkCrrv45K.html>

²¹ Rano & Ors. v.State of Uttarakhand and Ors., W.P. Criminal Nos. 1794 and 1785 of 2018.

within the legal framework. The Calcutta High Court has ordered a public sector bank to also include the transgender people in its hiring process²². The High Court in *Shivani Bhat v State of NCT of Delhi*²³ acknowledged the rights of a 19-year-old transgender man who was imprisoned and harassed by his family.

In India, transgender people are compelled to rely on several illegal activities such as prostitution and drug trafficking, which adds to their social marginalisation. Many transgender people are forced to engage in sex work in their daily lives due to a lack of education and job opportunities. The Hijra community is only visible in the public domain when they are begging or working menial jobs, as a result of which they are discriminated against and subjected to physical and sexual assault. They are treated as second-class citizens whose appearance will cause them rotten experiences and tragedy. As a result, when it comes to ensuring rights, the first step should be to secure economic rights, which can ensure that transgender people can live a dignified life even if they are dumped by their families²⁴. Articles 15(4) and 16(4) set the groundwork for this acceptance, allowing the most deserving people to be included in a society that has been prejudiced along various lines. While quashing the decision that the Jat community be added to the Other Backward Class ("OBC") list, the court noted that:-

*“new practices, methods and yardsticks have to be continuously evolved moving away from caste centric definitions of backwardness. This alone can enable recognition of newly emerging groups in society which would require palliative action.”*²⁵

In the NALSA case, the apex court asserts that article 15(2) to (4) and article 16(4), when read in conjunction with international conventions to which India is a party and the Directive Principles of State Policy, call for social equality, which the transgender can only achieve if all facilities and advantages are granted to them.

The Court in NALSA case expressed that an individual's entitlement to show or communicate sex character through words, dress, activity or conduct is included in Article 19 (right to freedom of expression). Security, self-character and self-sufficiency are fundamental rights ensured by Article 19. The Court likewise held that their right to live a dignified life and enjoy personal liberty is protected by article 21 of Indian Constitution. The Court declared that the Center and State governments should concede and acknowledge them as they are. It was seen that transsexual's require full acknowledgment according to the law. The precious right of self-determination should be made available to this community. It is imperative to take note of the remarks of the apex court on the same: *“Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity”*²⁶

The court in NALSA case made different directions to the Center and State Governments, for example, to have separate HIV Zero-Surveillance Centers, Provision for discrete public

²² Atrikar v. Union of India, 2017 SCC OnLine Cal 3196.

²³ 5(2015) 223 DLT 391.

²⁴ Mousumi Padhi and Purnima Anjali Mohanty, Securing Transgender Rights through Capability Development, 54 ECONOMIC AND POLITICAL WEEKLY (2019).

²⁵ Ram Singh v. Union of India, MANU/SC/0283/2015.

²⁶ NALSA, supra note.8 at ¶18.

latrines and appropriate medical care in hospitals for transgender's, make social welfare awareness plan for the improvement of conditions of the Transgender community, unveil the mindful about the abominations against the Transgender people group and to recover the regard and trust the Transgender people group once appreciated. The court also declare that centre and state government should address the problems faced by the transgender community such as shame, fear, social pressure, gender dysphoria, social stigama and depression etc. In the words of Justice Radhakrishnan: "*Seldom, our society realizes or cares to realize the trauma, agony, and pain which the members of the Transgender community undergo, nor appreciates the innate feelings of the members of the Transgender community, especially of those whose mind and body disown their biological sex. Our society often ridicules and abuses the Transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are side-lined and treated as untouchables, forgetting the fact that the moral failure lies in the society's unwillingness to contain or embrace different gender identities and expressions, a mind-set which we have to change*"²⁷

One can't overlook the way that the Transgender people group for long have endured and gone through torment, embarrassment, and agony. They stayed silent and endured yet at long last through this judgment the state of the transsexual community has improved. The judgment of the NALSA case has had an effect in India as well as all throughout the world. The exclusion of the Transgender people group from involvement in the general public is a major human rights issue. India follows democracy and the popular government incorporates everybody regardless of their twisting, condition, and so forth.

However the NALSA judgment has not answered why it took so long to recognize the rights of this community. Further the requirement for separate detention facilities was not mulled over in this judgment. The Court issued nine guidelines in the verdict, some of which appeared to mix up the terms "transgender" and "hijra" by frequently just using expression alternatively, particularly in the fourth and fifth directives. As a result, the decision was seen as just relating to the acceptance of "hijras" as "third gender," effectively obliterating the acceptance of the umbrella terminology. It additionally doesn't beware of the outrages by the Transgender people group by the police who don't tune in and address the complaints of the Transgender community. However fortunately this issue was addressed by the Delhi High court in Harsh Mander case²⁸ wherein the court decriminalized Section 25 of Bombay Prevention of Begging Act, 1959 which is considered as one of the tools in the hands of police for harassing the transgender community. The court declared the provision as arbitrary as it does not make any distinction between those persons who are signing, dancing for begging and those who solicit or receive money. The lines averred by the honorable acting chief justice of Delhi high court Gita Mittal explain the pressing of the issue at hand: "...A society that sees legislating inequality and homelessness into invisibility has unquestionably lost its way..."²⁹

Similarly many other cases were progressively decided by our judiciary for upholding the rights of Transgnerder Community. Like *In Anamika v Union of India & ors*³⁰, The Delhi Police has assured to the Delhi High Court that if cognizable offences under Section 354-A of

²⁷ NALSA, supra note.8 at ¶1.

²⁸ Supra note.19.

²⁹ *Ib.at* ¶1.

³⁰ W.P (CRL) 2537/2018.

the Indian Penal Code are established in relation to sexual harassment allegations leveled by transgenders, the matter will be registered and dealt with as per the law. A division bench of the High Court of Orissa confirmed in *Chinmayee Jena vs State of Odisha*³¹ the right of a transgender man and a woman to be in live-in relationship on August 24, 2020. A habeas corpus petition was filed in this case regarding a live-in relationship between a transgender man, the petitioner, and a woman, the alleged detinue. In summary, the court upheld their right to be in a relationship and required the state to provide them with "all types of protection" to enable them to exercise their right. Further the Madras High Court declared in *Arunkumar and Sreeja v. Inspector General of Registration and Others*³² that a duly solemnised marriage between a trans-woman and a male is legitimate under the Hindu Marriage Act, 1955, and that the Registrar is obligated to register the same. Transpersons now have access to civil rights, particularly those related to marriage, thanks to this decision by the Madras High Court. While the ruling is historic for much of the country, it also opens the door for the LGBTQ community to obtain other civil rights.

Undeniable there is a change in approach of looking at transgender community by our judiciary but is the same with our legislature? The next chapter will address it in detail however apparently it reflects that our legislature even today could not overcome from its discriminatory outlook towards Transgender community and it is somehow evident from reply of central government in *Abhijit Iyer Mitra* case³³ wherein the government viewed that there cannot be any legal right to same-sex marriage as our value system does not recognize them. The court in the NALSA case had given 6 month to the centre and state government to implement those directions³⁴. However it is unfortunate that even after so many years of this judgment, our system could not implement it. Transgender have been and keep on being subject to public and private segregation. They regularly experience issues in making alliances with other bunches by excellence of the presence of broad bias and antagonism coordinated against them. Definitely on the grounds that they are frequently unknown and diffuse (that is not firmly coordinated), they face huge barriers in applying sufficient political impact. Even if so as³⁵ every civilized country including India recognizes the Equal Protection Clause in their respective constitution. It ought to prohibit established boundaries to laws that deny separation or discrimination based on sexual orientation. It³⁶ apperas correct when an article declares that these all are fundamental requests of transgender community which should be acknowledged on a dire premise. Transsexual people in India need to be treated as citizens and this isn't a lot to ask for.

³¹ MANU/OR/0200/2020.

³² AIR 2019 Mad 265.

³³ *Abhijit Iyer Mitra vs Union of India*, W.P.(C) 6371/2020.

³⁴ *Supra note.19 at ¶129.*

³⁵ *Supra note. 28*

³⁶ *The Third Sex: Transgender persons in India want to be treated as citizens. Is this too much to ask for?*, Vol. 48, Economic and Political Weekly (2013).