



## HUMAN RIGHTS AND TRANSGENDER

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### ABSTRACT

Transgender community consists of those people who have dissimilar sex and gender. They can be born as a male or female but they feel as if they are part of the “wrong body”. This paper follows an investigative pattern of research as it explores issues faced by transgenders. The 2014’s judgement and its effects on all communities having issues with gender have also been discussed to critically analyse the implementation of new laws and directions given by the Supreme Court on the transgender society of India. Further, human rights are taken into consideration to provide the “third gender” with these basic rights without any discrimination and the conflict between gender and class in India today has also been thoroughly discussed. This paper strives to bring into notice the real struggles of transgenders in general as well as in law and how to overcome them by taking small steps towards equality.

*Keywords- Transgender, 2014 judgement, Human Rights, Third Gender, Struggles*

### INTRODUCTION

Over the years, the transgender population in the world has increased. Rigid laws are made and several actions are taken to provide the transgender community with the same rights as normal people. Some countries were successful but many still lag. Even after

passing judgements where basic human rights were granted to transgenders and applying firm values like Yogyakarta principles the transgender were still overlooked and the discrimination was unmistakably evident.

In India, A landmark judgement was passed by the Supreme Court of India which recognised transgender as a third gender. It was passed on 15th April 2014 and was called National Legal Services Authority v. Union of India. Here several rights were given standardised for transgenders which ultimately went against them. This judgement also violated the basic nature of the institution which will be discussed further.

Transgender community face gender struggles because of the lack of public acceptance and does not get any respect in the society. They face internal conflicts and uneasiness with others and laws which are not in favour are not helping the situation. Some general problems faced are lack of clinical training and shortage of transgender support groups so their psychological problems aren’t deal with.

### REVIEW OF LITERATURE

Relevant literature have been assessed and evaluated in harmony with the present paper. Earlier the term “trangerenderist” was used in a cross dresser movement in United States of America (Virginia Prince, 2008)<sup>1</sup>. The amount of discrimination faced by Trangender was explained in Environment by Corrine Munoz, Sandra C. Quinn, Kathleen A. Rounds (Volume 85). Then, transgender

<sup>1</sup> Plato.stanford.edu. 2020. *Feminist Perspectives On Trans Issues (Stanford Encyclopedia Of Philosophy)*. [online] Available at:

<<https://plato.stanford.edu/entries/feminism-trans/#Ter>> [Accessed 2 May 2020].



was determined as a “third gender” in 2014 and was included in socially and economically backward class by Supreme Court (NALSA v. Union Of India).<sup>2</sup> Before transgender being included in class it was defined as “a homogeneous section of the people identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion” not mentioning gender in it (State of Andhra Pradesh and Another v. P. Sagar)<sup>3</sup>. Later in 2016, In the case Navtej Singh Johar v. Union of India a “transgender just because of his gender cannot be denied basic human rights”<sup>4</sup> and here there was no mention of Lesbian, Gay, Bisexual and they were excluded from this framework.

### RESEARCH OBJECTIVES

This paper is an attempt to analyse the transgender community in accordance with Human Rights, discuss the operation of laws and judgements made in India for transgendered humans, examine the affects of transgender status under socially and economically backward, scrutinise the issues and discrimination against transgendered people in regard to the leading judgement.

### RESEARCH METHODOLOGY

This paper probes into the actual issues faced by transgender by using primary and secondary data throughout the paper. The primary data have been taken from legitimate government sources. Constitutional rights of transgender is analysed and obtained from the constitution of India, and section 377 of Indian penal code 1860 is discussed which

denied fundamental rights to transgender but later in 2018 some provisions by supreme court altered it; The various judgments related to transgender has been taken from Manupatra and SCC especially the leading judgement i.e. NALSA v. Union of India and census data of transgender has been taken from government websites. The secondary data include the Transgender Persons (Protection of Rights) Act, 2019 which has been taken from prsindia, an independent organization and other secondary sources like previous researches, National Human Rights Commission reports, State Human Rights commission reports, legal journal and newspapers. The problems faced by transgender has been analysed by reading various newspaper articles from Indian Express, The Times of India and The Hindu.

### ABOUT HUMAN RIGHTS

In recent decades Human rights have become popular and people are getting more aware about it. Human Rights are those rights which an individual enjoys rights from the birth. These are inherent to all individuals without any discrimination based on race, sex, nationality, ethnicity, language, religion or any other status. Human Rights include the right to work, right to education, right to life and liberty, freedom from slavery, etc. Human Rights are an indispensable part of society. Everyone is entitled to these rights without discrimination. Human rights law obliges governments to do some things and prevents them from doing others. Some frequently cited characteristics of human rights are: internationally guaranteed, oblige state, and cannot be waived and universal.

<sup>2</sup> Munoz-Plaza, C., Quinn, S. and Rounds, K., 2002. Lesbian, Gay, Bisexual and Transgender Students: Perceived Social Support in the High School

Environment. *The High School Journal*, 85(4), pp.52-63.

<sup>3</sup> AIR 1968 AP 165

<sup>4</sup> 2018 (10) SCC 1



Without Human Rights no person can develop its personality fully. Human Rights are recognised to ensure the physical, moral, and mental development of every individual. Human Rights are an essential component of sustainable development goals<sup>5</sup>, in the absence of human dignity, sustainable development can't be achieved. Human Rights are driven by progress on all sustainable development goals, which are determined by advancements on Human Rights.

Universal Declaration of Human Rights sets out for the first time Fundamental Human Rights which are to be internationally protected. It integrates some important components i.e. all human beings are born free and equal in dignity and rights.<sup>6</sup> They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood it prohibits slavery and slave trade in all forms. Other recognised rights under this declaration are right to nationality, right to seek asylum, right against arbitrary arrest, etc.

Human Rights were derived from two types of international source the 'customary international law' and 'treaty law'. Customary international law is developed from general and consistent practice of States and treaty law is set out in various international agreements and all of these instruments are fully binding on states that are party to them.

In the context of India Human rights, they are needed because India is a vast country with huge religious and cultural diversities as well as financial and social disparity among different communities. It has a history of religious, caste, and gender discrimination i.e. rich and poor weren't even allowed to drink water from the same vessel and untouchables weren't permitted to enter into a temple as they were considered to be impure.

However, the constitution of India provides certain basic rights to all citizens in the form of Fundamental Rights in the constitution. Part III of our constitution provides for these rights. It covers all the traditional, civil and political rights enumerated in the universal declaration of Human Rights. Dr. Ambedkar defined fundamental rights as the most "citizen" part of the constitution. These fundamental rights ensure to every citizen the right to equality, freedom, right against exploitation, right to freedom of religion, and cultural and educational rights not taking into account their gender, religious inclinations, age, caste or ethnicity.

In 1993 the Indian Parliament enacted the Protection of Human Rights Act to effectively protect, promote, and fulfill the Fundamental Rights guaranteed by the Indian Constitution. Therefore the act has created various Human Rights. The central one is the National Human Rights Commission which

<sup>5</sup> Sustainable Development Goals and Human Rights" (OHCHR)

<<https://www.ohchr.org/EN/Issues/SDGS/Pages/The2030Agenda.aspx>> accessed April 29, 2020

<sup>6</sup> Stand up for Human Rights, ARTICLE OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS |

STAND UP FOR HUMAN RIGHTS | UN HUMAN RIGHTS OFFICE,

<https://standup4humanrights.org/en/article.html> (last visited Apr 28, 2020).



has been established in 1993<sup>7</sup> as a statutory body to promote and protect the Human Rights of an individual. It is a watchdog of Human Rights in India. It looks after the rights related to life, liberty, equality, etc. It has been established in compliance with the Paris Principle of Human Rights in 1991 which was endorsed by the United Nations General Assembly in 1993.

### ABOUT TRANSGENDER

In 2014 judgement *Nalsa v. Union of India* the term “Transgender” was given as a blanket term for ‘hijras’, ‘kothi’, ‘shivshakti’ and ‘aravani’<sup>8</sup>. A transgender is a person whose gender is different from their sex. Sex is the label of a person by birth and gender is the behavioural norms decided by society considered suitable. These two are different orientations as sexual orientation is a person’s emotional and romantic on the other hand, gender orientation is the expected behaviour or activities by a person. Transgenders are born as male or female but they feel as if they are into a “wrong body”. Sometimes transgenders are also confused with people having intersex conditions. They may be similar but the difference is that people with intersex conditions have to change their gender identity at some point in time; however this isn’t necessary for transgender. Also, transgender include cross-dressers in India.<sup>9</sup>

Universally, several terms are used to denote transgenders. One of them is cross-dressers. Crossdressers are those who traditionally wear clothes which are worn by the other gender in the society. There are various terms used for transgenders. Drag queens refer to men who dress as women. They usually entertain in events. Another one of them is Genderqueer. Genderqueer are those who is neither a man nor a woman; they fall between the quantum of both and want to be called as a “zie”. There are other categories too like multi-gendered, third gender, and more. They come from all cultures, communities and all walks of life<sup>10</sup>.

The basic rights of transgender are usually denied and they face a severe identity crisis. Transgender issues are not only faced by people who identified themselves but those people too who are perceived as a transgender by the society. 96% of transgender are denied jobs, 60% of them are deprived of education and most of them are unwanted by society. Various legislative measures were taken to establish equality between all but they didn’t bring much difference apart from establishing transgender as a third gender.

In *Nalsa judgement India*, the fact that whether lesbian, gay, bisexual were included in the term “transgender” or not was very vague. However, after seeking clarification in regard with the problem it was held that transgender does not include those terms.

<sup>7</sup> About the Organisation, NATIONAL HUMAN RIGHTS COMMISSION INDIA, <https://nhrc.nic.in/about-us/about-the-Organisation> (last visited Apr 28, 2020).

<sup>8</sup> AIR 2014 SC 1863

<sup>9</sup> Sari L. Reisner et al., COMPARING IN-PERSON AND ONLINE SURVEY RESPONDENTS IN THE U.S. NATIONAL TRANSGENDER DISCRIMINATION SURVEY: IMPLICATIONS FOR TRANSGENDER HEALTH

RESEARCH MARY ANN LIEBERT, INC., PUBLISHERS (2014), <https://www.liebertpub.com/doi/abs/10.1089/lgbt.2013.0018> (last visited Apr 24, 2020).

<sup>10</sup> AMERICAN PSYCHOLOGICAL ASSOCIATION, <https://www.apa.org/topics/lgbt/transgender> (last visited Apr 24, 2020).



This became a major difficulty as transgender were already being provided with reservation under “other backward classes” but lesbian, gay, bisexual did not receive it. Not just this, other problems like time-consuming certification process without which access to various places were prohibited and transgender who leave their houses has to go to rehabilitation centers also came into existence. The bill supports ‘right to self-identification’ and prohibition of discrimination in education and medical but has no mention of jobs.<sup>11</sup>

Transgender rights are still being violated across the country and the world. Laws and governmental actions are not able to minimise discrimination against them.

## LAWS AND CONSTITUTIONAL RIGHTS OF TRANSGENDERS

Transgendered humans have to follow the same due process of any law as any other citizen. But this definition of transgender brings them into conflict between society and state. For example, they demand to be recognised as a different gender in all public aspects of life. Transgender also demands for legalising intercourse between same-sex in a marriage or without marriage, which is opposed by many. And also if a person wants to be seen as a different gender our laws and society do not allow so i.e. a voter card needs to have the gender of a person to be termed as either male or female. This applies to different licenses or permits that need to be obtained from the government. The main

issue being the right to self-identification as being of another gender is provided by all.

The Preamble of the Indian Constitution gives Social, Economic, and Political Justice to every Citizen which means that Transgender community also has fundamental rights under Article 14, 15, 16, 19, 21, and 23.

Transgendered people have the right to equality as provided under Article 14 that they are treated the same as normal citizens and should be given the same rights as each citizen, Article 15 talks about the prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. these are the foremost and most important rights that they deserve. Being a citizen of India they should not get discriminated against based on sex, gender, etc. Article 16 talks about the Equality of opportunity in matters of public employment. Transgender should also be treated equally concerning opportunity in matters of public employment. If we see their employment in the public or private sector then they have very minimal or negligible share. Article 21 talks about the Right to life and personal liberty which enlightens that transgendered mankind have their liberty and as per K.S Puttaswamy v. Union of India's<sup>12</sup> Right to life and personal liberty includes the Right to privacy and the right to privacy includes the right to consensual sex. Self-determination of gender is part of this right. Article 23 talks about the Prohibition of traffic in human beings and forced labour.

<sup>11</sup> Supreme Court Case Analysis: NALSA v. Union of India and Ors. By: Lavina Bhargava, LATEST LAWS, <https://www.latestlaws.com/case-analysis/supreme-court-case-analysis-nalsa-v-union-of-india-and-ors->

transgenders-rights-case-by-lavina-bhargava/ (last visited Apr 24, 2020).

<sup>12</sup> (2017) 10 SCC 1



Section 377 of Indian Penal Code states that<sup>13</sup> “Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine”. It was an anarchic law that prevented the lesbian, gay, transgender, bisexual community from enjoying their fundamental rights. It harmed their dignity and discriminated against them. But Supreme Court in 2018 has decriminalised section 377 of the Indian penal code. Supreme Court observed the section 377 as irrational and arbitrary. The community including transgender also possesses the same rights as other ordinary citizens. It observed that sexual orientation if an individual should be protected and it is a matter of privacy, which has now also been declared a fundamental right, and protection of sexual orientation lies at the core of fundamental rights which was guaranteed by article 14,15 and 21. Respect for a person’s choice is an essence of liberty under law.

In NAZ Foundation v. Govt. of NCT Delhi<sup>14</sup>, the question was raised that whether section 377 should be removed or not, the court has dealt with this case in two angles, firstly the court states that without dignity and privacy no person can enjoy Right to Life under Article 21 and secondly they talked about Article 14 and Article 15. Section 377 violates Article 14 because it does unreasonable discrimination as it considered homosexual as a class and criminalises their consensual sex. And Article 15 which says

discrimination based on sex is prohibited. The court stated that sex is not only a biological sex but also includes sexual orientation and in this case, Delhi High Court said that the part of Section 377 which criminalises the homosexual act should be declared unconstitutional.

In Suresh Kumar Koushal v. NAZ Foundation<sup>15</sup>, two arguments have been raised, firstly, that homosexuality is a criminal offence and the only parliament can decriminalise it without any interference by the courts and lastly, you cannot extend the right to privacy to that extent that you start committing an offence in that. So right to privacy will not cover homosexual acts. Several international organisations have declared this step backward. Those who started disclosing their identity and expressing their sexual orientation freely after 2009, they were seen as criminals after this case.

In NALSA v. Union of India and ors<sup>16</sup>. A loophole was highlighted that all existing Indian Laws are Binary Gender which means that they focus only on males and females and rights of transgender are not protected in any provision and on this basis transgender community is getting discriminated. In dealing with this loophole Supreme Court has recognised multi-facet rights, first that every person’s right is protected under Article 14 and include all men, women, and transgender, second that gender-based discrimination is prohibited under Article 15 and Article 16 so if discrimination is done based on sexual orientation then is in violation under Article 15 and 16. Third that

<sup>13</sup> Indiankanoon.org. 2020. *Section 377 In The Indian Penal Code*. [online] Available at: <<https://indiankanoon.org/doc/1836974/>> [Accessed 29 April 2020].

<sup>14</sup> 160 Delhi Law Times 277

<sup>15</sup> (2014) 1 SCC 1.

<sup>16</sup> AIR 2014 SC 1863



privacy, gender identity, integrity all are included under Article 19(1)(a) and last that Right to live with dignity (Article 21) includes the right to choose gender identity and there is a need of bringing those provisions which focus on present-day needs. Because of this case, Self-identity and Gender identity got legal recognition

In *K.S. Puttaswamy v. Union of India*<sup>17</sup> it was given that Right to Privacy is a Fundamental Right and in this case, Justice Chandrachud has rectified the mistake of Suresh Kumar Koushal case, he said that sexual orientation is an essential attribute of privacy and this attribute is protected by Article 14, 15 and 21

The bench consisting of 5 judges bench in *Navtej Singh Johar v. Union of India*<sup>18</sup> 2018 case decriminalised all consensual sex among adults in private.

The NALSA case 2014 paved the way for the introduction of transgender bill 2014. But it didn't pass. However the modified version of the bill has come twice i.e., in the year 2016 and 2019.

The key provisions of the transgender person (protection of rights) bill, 2019

The definition of transgender was given by this bill that a person whose gender does not match the gender assigned at birth. It includes trans-women, persons with intersex variations, other with socio-cultural identities and trans-men. Intersex variations are defined to mean "a person who at birth shows the variation in his or her primary sexual characteristics, external genitalia, chromosomes, or hormones from

the normative standard of the male or female body"<sup>19</sup>

Any person who compels a transgender person into bonded labour, evicting a transgender from his/her place of residence, causing abuse in physical, social, verbal, economic, or in any manner can be penalised with imprisonment of not less than 6 months and extend up to two years. It also prohibits discrimination against transgender persons.

Bill stated that gender identity certificate can be perceived by the transgender person and this certificate of identity can be obtained by the office of District Magistrate and revised certificate if sex is changed.

Bill provides that a transgender person shall have the right to reside with his parents and family members.

Bill provides that the government will make welfare schemes and programmes for transgenders.

Bill provides that the Government will facilitate sports, education, and recreational facilities for transgendered humans.

Separate HIV prevention centres and sex reassignment surgeries will also be provided by the government.

National Council for Transgender Person (NCT) will be set up by the Central Government.

The transgender protection bill has some limitations too i.e. it does not promise any rights and reservations to the transgender, it failed to differentiate between intersex and

<sup>17</sup> (2017) 10 SCC 1

<sup>18</sup> 2018 (10) SCC 1

<sup>19</sup> PRSIndia. 2020. *The Transgender Persons (Protection Of Rights) Bill, 2019*. [online] Available

at: <<https://www.prsindia.org/billtrack/transgender-persons-protection-rights-bill-2019>> [Accessed 29 April 2020].



transgender, there are no other amendments in relation to marriage, property, etc. This bill does not provide about the awareness programmes for transgender and it has lack of clear mechanism.

Yogyakarta principles is a document about human rights in context of gender identity and sexual orientation<sup>20</sup>. It is a result of an international meeting of human rights groups in Yogyakarta, Indonesia, in November 2006. Most of the principles proposed are similar to the fundamental rights of our constitution but are related to Lesbian, Gay, Bisexual, Transgender community. Yogyakarta principles:

1. The right to form a family.
  2. Right to privacy.
  3. The right to participate in public affairs.
  4. Right to universal enjoyment of human rights.
  5. Right to equality and non-discrimination.
  6. Right to recognition before the law.
- These principles are important because the Supreme Court has also referred this while ruling on cases that are related to transgenders and the extended community.

Even at International level a variety of initiatives have been taken:-

- The United Nations LGBTI core group has been established in 2008 which is an informal group of United Nations Member States to focus on LGBTI rights.

<sup>20</sup> Yogyakartaprinciples.org. 2020. *The Yogyakarta Principles – Yogyakartaprinciples.Org*. [online] Available at: <<http://yogyakartapinciples.org/principles-en/>> [Accessed 29 April 2020].

<sup>21</sup> Joint UN statement on Ending violence and discrimination against lesbian, gay, bisexual, transgender and intersex

- A resolution was submitted in 2011 in United Nations Human Rights Council by South Africa to study on discrimination and sexual orientation. This was the first time that UNHRC approved the resolution and recognized the rights of LGBTQ people.
- United Nations Human Rights Council passed a resolution in 2016 to appoint an independent expert to locate grounds of violence and discrimination against LGBTQ people due to their gender identity and sexual orientation.
- The United Nations High Commissioner for Human Rights had released a report in 2011 which found that violence against LGBTQ people remains a common phenomena and confirmed that around 76 countries have laws that criminalises people on the basis of gender and sexual orientation.
- The Joint UN Statement was released in 2015<sup>21</sup> on ending violence, discrimination and mistreatment against Lesbian, Gay, Bisexual, Transgender and Intersex individuals.

#### ISSUES FACED BY TRANSGENDERS

According to the 2011 census the transgender community constitutes 0.04 per cent of the total Indian population<sup>22</sup>. They are visibly invisible population of the country. Though our constitutional fathers have put equality as a fundamental right in our constitution which declares equality for all but unfortunately transgenders are mostly discriminated and they are not treated equally as others. The transgender community is the most

people. (n.d.). Retrieved May 02, 2020, from <https://www.ohchr.org/EN/Issues/Discrimination/Pages/JointLGBTIstatement.aspx>

<sup>22</sup> Census2011.co.in. 2020. *Transgender/Others - Census 2011 India*. [online] Available at: <<https://www.census2011.co.in/transgender.php>> [Accessed 29 April 2020].



differentiated and disempowered in India. The discrimination against them has been a perennial issue for long. Though we achieved independence in 1947 but the transgender community is still caught up in the clutches of societal pressure and even today they haven't attained independence. They have been considered as the most socio-economically marginalised community in the country. They face challenges in every aspect of their life. Challenges such as:

1. **Social Acceptance:** They face challenges since their birth. Even their own family disowns them, let alone society because of the attached stigma and taboo. Society doesn't consider them as a part of the mainstream. These children live their life journeys alone or in search of individuals of their kind. Their journey is marked by hardships and abuse throughout their lives.
2. **Health Issues:** People from the transgender community don't get proper health treatment. They are being discriminated in health facilities as people ignore them and find ways to not treat them so they avoid going to hospitals and let their health deteriorate.
3. **Education:** Most members of the transgender community are school dropouts. The alienation and discrimination force them to leave education. When they go to school and colleges they face challenges from their peers. Soon, they start losing their self-confidence and feel depressed due to which their mental health depreciates. Proper education isn't received by them which forces them to beg and turn into a sex worker to make a living. The lack of basic schooling is often the direct result of bullying and hence transgender communities are forced to leave schooling. School education remains incomplete for most of them harming their family.
4. **Transgender community is one of the most vulnerable and neglected group of people.** Proper government measures are important to be taken to tackle those problems faced by them but unfortunately there are none at the moment making their depression escalate day by day.
5. **Although the government of India has come up with a transgender protection bill, 2016 to alleviate some pains of transgender.** The bill has defined transgender and arrested the practice of abandonment by family by making a right of a transgender to reside in his/ her parent home. The same bill also laid down the provisions for a center.
6. **Lack of Job opportunities/ Unemployment and Poverty:** Transgendered people don't get jobs easily and always get denied for employment because of being trans and this avoidance in getting jobs leads to poverty in the nation and they are not able to provide themselves with the necessary living which increases both internal and external conflicts.
7. **Civil Rights:** -Acceptance and recognition of civil rights is very essential for transgender because their legal needs stretch many conditions of life. These needs include the ID proof which directly informs about their identity, who they are and they get protection from discrimination in respect to employment and rights of immigration
8. **There is a lack of political participation by them and their representation is almost negligible.**



Since the 19th century they are being pushed to the margins of society, they have lost their socio-cultural position which they enjoyed once. They face extreme forms of social ostracisation and exclusion from human rights and dignity<sup>23</sup>. They face gender-based violence. The transgender person might be victims of sexual assault or rape as the Indian Penal Code recognises rape of man and woman as perpetrator and victim respectively.

Although the government of India has taken some steps such as Transgender protection bill 2016 to alleviate some sufferings of transgender, the bill includes the definition of transgender and prohibits discrimination against them<sup>24</sup>, the bill tries to arrest the practice of abandonment by family by giving several rights to transgender i.e. right to live with their parents, the bill lays down the rules for the center and state to form a trust for transgender. Etc but the bill has left out many things which are essential to uplift transgender. It doesn't give the provision of reservation for transgender and the principles of Yogyakarta (right to self-determination of gender) which harmlessly help transgender live a better life aren't included.

Supreme Court in NALSA CASE<sup>25</sup> 2014 has recognised transgender as a third gender. Supreme Court also issued a directive, in this case, to extend all kinds of reservations to transgender by considering them as socially and educationally backward class. They should be given reservation under other backward classes of 27%. The national

commission of backward classes also endorsed it in its recommendations to the social justice ministry in 2014 which lead to the successful implementation of this judgement. Even after the implication of this judgement the issues faced by transgender weren't minimised and even after getting the recognition they were discriminated against and the process of this never-ending inequity still went on.

### CONFLICT BETWEEN GENDER AND CLASS

After getting a recommendation from National Commission for Backward classes the transgender was given the status of Socially and Educationally Backward Classes. This judgement undoubtedly was given for the benefit of transgender and diminish the biases in our society but led to the opposite effect.

In 2014's judgement The Supreme Court directed the Centre and the State Governments to take steps to treat them as SEBC and extend all kinds of reservations in cases of admission in educational institutions and for public appointments. However as mentioned before the scope of employment was not mentioned making this judgement unfavourable for transgenders in the job sector.

Further, section 2(g) of Central Educational Institutions (Reservation In Admission) Act, 2006 defines Other Backward classes as "the class or classes of citizens who are socially

<sup>23</sup> The Indian Express. 2020. *Beyond Binaries*. [online] Available at: <<https://indianexpress.com/article/opinion/columns/transgender-people-hijra-community-transgender-persons-bill-world-aids-day-election-commission-5476963/>> [Accessed 29 April 2020].

<sup>24</sup> PRSIndia. 2020. *The Transgender Persons (Protection Of Rights) Bill, 2019*. [online] Available at: <<https://www.prsindia.org/billtrack/transgender-persons-protection-rights-bill-2019>> [Accessed 29 April 2020].

<sup>25</sup> AIR 2014 SC 1863



and educationally backward, and are so determined by the Central Government<sup>26</sup>”.

However, Transgender cannot be considered as a class because “class” as defined in the State of Andhra Pradesh and Another Vs. P. Sagar "class" means “a homogeneous section of the people grouped because of certain likenesses or common traits and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like”. Here there is no mention of gender therefore class cannot be mixed with gender as they both are two different concepts and cannot overlap each other. Also, it was held that all transgenders cannot come under SEBC as they can be of other castes by birth<sup>27</sup>. Here again the definition of class is not abided with as even after having certain ‘common traits’ some of the people won’t be included in the class.

Therefore, By placing Transgenders into Socially and Educationally Backward Classes this judgement has undeniably questioned the judicial pronouncements.

Another one of the concerns include that at the initial stage the term “transgender” wasn’t clearly defined. However, when the clarification was sought in the case, Aslam Pasha v. State of Karnataka<sup>28</sup> to issue further

directions to safeguard the interest of ‘third gender’ the court held that Supreme Court has already decided the case and therefore the petition was dismissed. Nonetheless the government interpreted it and said that in no way transgender can include lesbian, gay and bisexual the mere reason given was that the rest of them depends upon the sexual orientation but transgender depends upon gender identity. This was contemplated to be wrong because universally Lesbian, Gay, Bisexual, Transgender (LGBT) is one term and is determined as one<sup>29</sup> while making laws, rights, duties and other obligations.

Several judgements also came into existence like Navtej Singh Johar and ors. Vs. Union of India and ors it was held that “The discrimination on the ground of “sex” under article 15 and 16 includes discrimination on the ground of gender identity. It also said that the term “sex” also includes people who are neither male nor female and a very important point highlighted was that a transgender just because of his gender cannot be denied basic human rights. Here, the focus was only on transgenders and lesbians, gays, bisexuals were kept out of the context of coming under articles 15 and 16 of the constitution or having basic human rights.

As a result of the 2014 judgement lesbian, gay, bisexual didn’t make its way to sebc

<sup>26</sup> Mhrd.gov.in. 2020. [online] Available at: <[https://mhrd.gov.in/sites/upload\\_files/mhrd/files/upload\\_document/CEI-ResAdm-2006.pdf](https://mhrd.gov.in/sites/upload_files/mhrd/files/upload_document/CEI-ResAdm-2006.pdf)> [Accessed 29 April 2020].

<sup>27</sup> News, I., 2020. *OBC Quota For Transgenders Won'T Cover Gays, Lesbians: SC | India News - Times Of India*. [online] The Times of India. Available at: <<https://timesofindia.indiatimes.com/india/OBC-quota-for-transgenders-wont-cover-gays-lesbians-SC/articleshow/52998660.cms>> [Accessed 29 April 2020].

<sup>28</sup> Writ Petition No. 11610 of 2013

<sup>29</sup> Hindustan Times. 2020. *Not All Gays Are Transgender Or OBC, Govt Tells SC*. [online] Available at: <<https://www.hindustantimes.com/india/not-all-gays-are-transgender-or-obc-govt-tells-sc/story-usqB9cbZKgLbr57Z5M7PXJ.html>> [Accessed 29 April 2020].



class and didn't get a similar advantageous as transgender. Hence, the intersection of both gender and class wasn't beneficial anymore and violated the spirit of the constitution.

### SUGGESTIONS AND CONCLUSION

At this point, it is hard to comprehend the real situation of the Transgender community. The NALSA judgement could be considered as an initial step but there can be some serious transformation in the laws and general well-being to support these people.

First, the term "Transgender" should be an umbrella term and include Lesbian, Gay, Bisexual too as across the world it is one term and our given similar or same rights undoubtedly.

Second, the concept of "Gender" and "class" shouldn't be overlapped as they are two different notions and should be considered differently while providing benefits to transgenders and other communities.

Third, Transgender should not be included in other backward classes but there should be the creation of different reserves that do not form part of socially and economically backward class and those should only be provided to people with gender identity and sexual preference issues with reasonable testing or screening.

Fourth, Protection should be given to those people as well who work in the employment sector and has gender recognition and sexual orientation difficulties.

Fifth, these people should be recognised and they should be provided with psychological help to deal with their internal issues and come in terms with their true identity without any societal pressure or prejudice.

Sixth, The National Skill Development mission launched in 2015 by Prime Minister Narendra Modi to train about 40 crore people in India taking into account different skills in which they can specialise and excel by 2022. It is being managed by National Skills Development Corporation of India. The transgender community should be provided skill training under this skill India campaign. It will not only provide skills to them but the campaign also helps in mitigating poverty, empower them socio-economically, reduce social challenges and ensure that they are included in economic growth.

Last, the LGBTQ+ community should be educate about their rights and there should be awareness in addition to sensitisation so they can enjoy their rights fully.

This is the most effective solution as there is a dire need to remove the stereotype behaviour related to the transgender community. Man is a social animal by nature and every individual including transgender is a part of society hence it is essential to create public awareness about the transgender community. There is a need to give equal rights under article 14 of the constitution.

There was a great western political thinker IMMANUEL KANT who said that every individual is equal and unique in him and has human dignity and no one has a right to harm other's dignity. There is a need to create a National Commission for transgender on the lines of the National Commission for SC and National commission for ST.

As transgender faces discrimination in schools and colleges which leads to dropouts. To avoid these consequences and to avoid the obstacles in education for them, there should be transgender educational institutes.



There is less than or equal to 1 percent representation of transgender in government employment. The government should include more and more transgender in the government jobs so that they can have their representation and can actively participate politically.

- Munoz-Plaza, C., Quinn, S. and Rounds, K., 2002. Lesbian, Gay, Bisexual and Transgender Students: Perceived Social Support in the High School Environment. *The High School Journal*, 85(4), pp.52-63.

These small steps can benefit the transgenders enormously and help them lead a successful life with fewer hitches and difficulties.

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Today, transgender still struggle and cope up with the difficulties of their everyday life. Fortunately, there are several organisations like the International Foundation for Gender Education, GATE, and World Professional Association for Transgender Health who are working day and night towards the welfare of transgender and constantly spreading awareness about their human rights.

Amongst all the complexities transgender community is striving every day to make a living and are continuing to fight the battle of discrimination with fortitude, bravery, stubbornness, glory, and most importantly hope for a better tomorrow.

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