
AFFIRMATIVE ACTION FOR TRANSGENDER COMMUNITY

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ABSTRACT

“*I am what I am, so take me as I am*” - The iconic words of Johann Wolfgang von Goethe, the renowned German thinker, mentioned in Navtej Johar’s case¹ lead us to reflect on our traditional interpretation of the term "Gender." The restricted interpretation of gender has kept a major portion of the public at bay, especially the transgender community, resulting in incomprehensible forms of harassment and discrimination in the society. The transgender community² is estimated to number around five million people. The Miniscule Fraction Principle was used at one time in *the Suresh Kumar Koushal vs Naz Foundation case*³, but it was rightfully overturned in the Navtej Singh Johar case. In a variety of methods and forms, this small group of people has been subjected to various sorts of social and cultural ostracization. In the past, Section 377 was routinely abused. It is best understood by referring to the case of *Queen Empress vs Khairati*⁴, in which the session judge expressed his concern about authorities exploiting section 377 against innocent transgender people. As a result of the abrogation, homosexual relationships are no longer illegal, and self-determination rights take precedence over all other laws. The decision has received worldwide acclaim and has given the community hope amid the stereotypical world of binaries. However is this sufficient? This paper claims that transgender community deserve reservation in true sense. They shall be declared as entitled to reservation.

¹ Navtej Singh Johar & Ors v. Union of India & Ors. (2018) 10 SCC 1.

² Office of the Registrar General & Census Commissioner, India, <https://www.censusindia.gov.in> (last visited: 28th May, 2021, 04:35 PM).

³ Suresh Kumar Koushal vs Naz Foundation, AIR2014SC 563.

⁴ (1884) ILR 6 All 204.

Introduction

In kaliyuga, hijras will become rulers and rule the world. That is the thing that the Hindu god Rama proclaimed millennia back when he blessed this community. But the important question that is pertinent to understand has been raised by the author Gayatri Reddy⁵ “When is that time going to come?” It is really difficult to provide an answer to this question. Transsexual is the condition of one's sex character or sex articulation which doesn't coordinate with ones allotted sex at birth. There are nearly 490,000 Transgender⁶ in India. The social-political life of transgender people in India is difficult.

A glimmer of hope showed up in 2014 as the Indian Supreme Court did the unimaginable: with its milestone choice in *NALSA v. union of India*⁷ (hereafter referred as “The NALSA case”), the Court recognized a “third sex.” The issues of transgender has started discussing. Many states has taken positive action for uplifting transgender community like the author G KARUNANITHI⁸ have examined the case of the state of Tamil Nadu. The author praised the efforts of the state. He pointed out that Tamil Nadu is the first state to accord a gender status (third sex) to this community. The Social Welfare Department set up an uncommon government assistance board for them (the Tamil Nadu Aravanigal Welfare Board). In 2019 the apex court⁹ took a bold and progressive stance when it read down Section 377 of the Indian Penal Code (“IPC”), but the truth was not all that sort. Although these decisions denoted an unmistakable change in the courts mentality towards LGBTQ rights, the government at large was slow to react. One of the direction of NALSA case is to provide reservation to the community but the same has not been complied.

Reservation for Transgender Community: Vertical or Horizontal

The Supreme Court of India unequivocally said in *M.R. Balaji v. State of Mysore*¹⁰ that determining backwardness is the duty of the state because there are various sociological and commercial elements that come into play in solving this complex problem. Following the

⁵ Gayatri Reddy, "Men" Who Would Be Kings: Celibacy, Emasculation, and the Re-Production of Hijras in Contemporary Indian Politics, Vol. 70, Johns Hopkins University Press (2003).

⁶ Prosenjit Naskar, An assessment of Quality of Life of Transgender Adults in an Urban Area of Burdwan district, West Bengal, International Journal of Community Medicine and Public Health (2018).

⁷ (2014) 5 SSC 438.

⁸ G Karunanithi, Transgenders and the Mainstream, Vol. 50, Economic and Political Weekly (2015).

⁹ Navtej Singh Johar & Ors v. Union of India & Ors. (2018) 10 SCC 1.

¹⁰ 1963 AIR SC 649.

landmark Mandal Commission case, the Supreme Court ordered the establishment of a continuous body to judge backwardness, advising the different governments for inclusion and objections of over or under inclusion in the Backward Classes list. In 2014, the National Commission for Backward Classes (“NCBC”), following a thorough investigation of the subject and in accordance with the aforementioned statutory authority, recommended that “transgender” be classified as a socially and educationally backward class (SEBC’s)¹¹.

Articles 15(4) and 16(4) are gender-neutral provisions, and any reservation based on gender will indeed be constitutionally dubious. These rules assume a group of individuals who have historically been discriminated against in society due to caste-based dynamics. The Supreme Court in numerous decisions has recognised that a social class is "an identifiable segment of society that may be internally homogeneous (based on occupation, caste, or residency)"¹² As a result, while identifying them as SEBCs, homogeneity is a requirement for a class, as is their social and educational backwardness.¹³

The notion of constitutional morality¹⁴ encourages state authorities to protect society's diversity and to prevent the majority from usurping the rights and liberties of a smaller or infinitesimal segment of the population.¹⁵ The Hon'ble Court pointed out that in Articles 15 and 16, the term "sex" includes gender as a unique component. The Supreme Court addressed the entire reservation issue in *Indra Sawhney*¹⁶. Reservations can be given in two ways, according to the Constitution of India: horizontal reservation and vertical reservation.

Article 16(4) provides for a vertical reservation in favour of ST, SC, and OBCs. Because of the discrimination encountered by a homogeneous class as a result of social backwardness in society, this type of reservation is also known as social reservation. Backwardness in education and economics can impact social backwardness.

Horizontal reservation, on the other hand, stems from Article 16(1) in favour of women, people with disabilities, liberation fighters, project displaced people, and so on. This reservation is

¹¹ Anubhuti Vishnoi, Centre likely to treat transgenders as OBCs to give them education quota, (22 July, 2021 2:25 PM) <https://economictimes.indiatimes.com/news/politics-and-nation/centre-likely-to-treat-transgenders-as-obcs-to-give-them-education-quota/articleshow/7928988>.

¹² *Id.*

¹³ *Triloki Nath v. State of Jammu & Kashmir*, (1969) 1 SCR 103.

¹⁴ *Naz Foundation vs NCT of Delhi*, MANU/DE/2785/2018.

¹⁵ *Supra note.1.*

¹⁶ 1992 Supp (3) SCC 217.

considered a unique reservation since it crosses the vertical reservation category, resulting in interlocking reservations. To put it another way, unique reservation (horizontal reservation) is offered under the current category of social reservation (vertical reservation) to recognise the junction of several identities and the vulnerabilities that follow. Seats can be distributed in two ways under the horizontal category: compartmentalised or general reservation. An example can help understand this. If a transgender person is designated as SC, he/she will be assigned to the SC reserved seat. Compartmentalized reservation is the term for this. Horizontal reservations have the advantage of allowing reservation not just on the basis of one identity, such as gender or disability, but also on the basis of multiple identities, such as caste and disability, all within the bounds of the equality principle. Backwardness is a symptom that can be produced by a number of different factors, including social, economic, cultural, educational, and even political factors. Another issue that may develop is the requirement to use the creamy layer idea when providing reservation under Article 15(4), which will be troublesome and will defeat the purpose of providing reservation. Furthermore, if Dalit transgender people fall into the OBC category, they will forfeit the benefits of the SC/ST group. Upper caste transgenders, likewise, will not want to be acknowledged under the OBC Quota¹⁷. Horizontal reservations are executed as a “minimum guarantee,” as opposed to vertical reservations, which are executed as a “set aside.” If such persons are given social reservation in the vertical category, gender discrimination, which is one of the most common causes of harassment in this group, will be eliminated. The vertical reservation is mainly relied on past discrimination against a class of people, primarily on the basis of caste, but the transgender community is a typical symptom that has experienced gender discrimination as a result of their gender identity, and thus they should be given horizontal reservation.¹⁸ Our Constitution is an organic and living text with radical qualities for transforming a stratified system into a contemporary and equitable society. The transgender community has long been on the periphery of society, subjected to assault and harassment not only from the authorities but also from well-educated members of society.¹⁹ If we consider the nature of hijra life in India, they face atrocities akin to scheduled castes and untouchables.²⁰ In welcome development, the Karnataka government has just extended horizontal reservation to the transgender community, which is a great move. The Karnataka

¹⁷ Aniruddha Dutta, *Contradictory Tendencies: The Supreme Court's NALSA Judgment on Transgender Recognition and Rights*, JOURNAL OF INDIAN LAW AND SOCIETY (2014).

¹⁸ *State of Kerala and Anr. v. N.M. Thomas and Ors.*, AIR 1976 SC 490.

¹⁹ *Supra note.1.*

²⁰ *Supra note.12.*

government has decided to recruit 1 percent of seats in every service or job by the State government from transgender people in every category of general merit, SC, ST, and OBC²¹.

The term 'class' is a strong one²², with significant economic implications that represent relative economic ties between persons in a community²³. The main point of contention is whether a group of people (including transgender/third gender people) can be classified as a "class" based only on their gender. Homogeneity on some level is one of the major requirements for a class to exist. "A class," according to Black's Law Dictionary, is "a group of people or things who share particular characteristics."²⁴ In India only a class, that is, a homogeneous group, can enjoy the benefit of reservation²⁵. Even due to the homogeneity among caste members, the Supreme Court acknowledged caste as a criterion for determining social and educational backwardness in *Indra Sawhney*²⁶. The Supreme Court recently defined social class as "an identifiable division of society that may be internally homogeneous (based on caste or occupation)"²⁷ in *Ram Singh v. Union of India*²⁸. As a result, homogeneity is a requirement for a class, and their social and educational backwardness is required for them to be classified as SEBCs. Although the Supreme Court in the NALSA decision acknowledged that transgender community are facing discrimination and ordered the State to regard them as SEBCs, it faulted in forming a special class for them and without acknowledging the same, the integration of transgender persons in SEBCs is problematic. It not only violates the spirit and terms of the Constitution, but also contradicts earlier Supreme Court decisions.

Further Before adopting a firm stance on the topic of transgender people being classified as OBCs, we must analyse the social and economic context in which the issue is being debated. It is not a stretch to ask, what if someone undergoes sex reassignment surgery in order to take

²¹ Karnataka proposes 1% reservation for transgenders in government jobs, <https://www.thehindu.com/news/national/karnataka/karnataka-proposes-1-reservation-for-transgenders-in-government-jobs/article34858724.ece> (last visited: 27 June, 2021).

²² Prabhat Patnaik, "Notes on the Concept of Class", *Social Scientist* (2000): The author considers class as primarily a Marxist concept and finds that central to the concept of class is that it is always defined with respect to the means of production or has deep economic relations.

²³ Kathleen L McGinn and Eunsil Oh, "Gender, Social Class, and Women's Employment" *Current Opinion in Psychology* (2017).

²⁴ Black's Law Dictionary, <https://thelawdictionary.org/class/> (last visited: June 26, 2021).

²⁵ *E. V. Chinnaiah v. State of Andhra Pradesh*, AIR 2005 SC 162 ; *State of Andhra Pradesh v. P. Sagar*, 1968 SCR (3) 565.

²⁶ *Supra note.128*.

²⁷ *Supra note.87*.

²⁸ *Ibid*.

advantage of the employment reservation?²⁹ Is it possible that such an individual will still be eligible for a reservation? Furthermore, reservation for transgenders in public positions such as police, army, and military³⁰, which restricts their appointment on medical grounds or by policy or, becomes a major problem. This is particularly pertinent in light of a recent example in which the Indian Navy discharged a transgender officer after he endured sex reassignment surgery.³¹

The petitioners in *Swapna v. The Chief Secretary*³² and *Aslam Pasha Urf Chandini v. State of Karnataka*³³, both of whom belonged to the third gender, asked the court to issue a writ of mandamus ordering the respective state governments to give reservation to transgender people. The applications were, however, dismissed by the courts, who stated that the case had already been settled by the Supreme Court, and viewed that the appellants were expecting executive order rather than judicial interpretation, that can only be offered by the legislature, according to the court.

Based on the aforementioned discussion, it can be concluded that the government must complete various gaps in the 'class' and 'gender' debate before granting transgenders a reservation. As a result, there are a variety of choices to consider, and both the federal and state governments must think well before settling on a reservation scheme.

Conclusion

Our Constitution has been referred to as a "transformative" text on numerous occasions. One of the most significant goals of this change is to protect the disadvantaged basic socio economic rights. If a community is driven by transformational constitutionalism, prejudice is discouraged, and the nation is led toward a successful future. The Constitution, in its revolutionary role, encourages us to address gender binaries and sex polarities. The transformative constitution embraces a diverse spectrum of opinions, identities, cultures, and citizens with a scientific temperament. Our ability to endure as a free society will be determined by whether constitutional values can triumph over temporal impulses.

²⁹ State v. Bobby Kinner (Session Case No. 63/2014).

³⁰ Julie H. Davis and Helene Cooper, "Trump says transgender people will not be allowed in the military" The New York Times, (July 26, 2021 9:45PM), <https://www.nytimes.com/2017/07/26/us/politics/trumptransgender->

³¹ Sailor, sacked by Indian Navy after sex change, says she will move court, (June. 12, 2021 5.30PM), <https://scroll.in/latest/853537/sailor-sacked-by-indian-navy-after-sex-change-says-will-move-court#:~:text=The%20Navy%20had%20sacked%20her,recruitment%2>.

³² Writ Petition No. 31091 of 2013, decided by Madras High Court on July 5, 2016.

³³ Writ Petition No. 11610 of 2013 (S-RES/PIL), decided by Karnataka High Court on July 18, 2014.