

TRITYA PRAKRITI- RIGHTS OF TRANSGENDERS

ISSUES AND CHALLENGES

Written by *Pranav Kaushal*

3rd Year BALLB Student, Bahra University Shimla Hills

ABSTRACT

It has been said that all human beings are “*born free and equal in dignity*”. It is the duty of the state to protect the rights of individual irrespective of caste, creed, colour, religion, sex, birth etc. But really the above given concept is followed in the 21st century where all individuals are running before success.

Does the word “*we*” in the Preamble of the constitution of India include LGBT? This is the question in the minds of people who had been discriminated on the basis of their sex. Do these people have no right to claim Justice, Liberty, Equality and Fraternity? If we clearly see the life of LGBT one can find that these people are discriminated in schools, public places and always given place outside the human society. It clearly gives us the idea that in spite of human advancement in each and every field a human being has not been able to advance its thought process.

According to Locke, human being is born “with a little title to perfect freedom and uncontrolled enjoyment of all the rights and privileges of the law of nature” and every human being has by nature a power “to preserve his property- that is life, liberty and estate, against the injuries and attempts of other human beings”.¹

In this article I will be dealing with each and every aspect of the life of LGBT and problems faced by them in the modern world of “*HUMAN BEINGS*”

Keywords: LGBT, Rights, Human Beings, Dignity, Freedom

¹ Extracts from Locke, Two treaties of Government

INTRODUCTION

The Preamble of the constitution of India says;

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN, SOCIALIST, SECULAR, DEMOCRATIC, REPUBLIC and to secure to all its citizens;

JUSTICE, social, economic and political

LIBERTY of thoughts, expression, belief, faith and worship;

EQUALITY of status and opportunity; and to promote among them all,

FRATERNITY assuring the dignity of individual and unity and integrity of the Nation:

Does the word “*we*” in the Preamble of the constitution of India include LGBT? This is the question in the minds of people who had been discriminated on the basis of their sex. Do these people have no right to claim Justice, Liberty, Equality and Fraternity? These people had always been given place outside the “so called human society”. Why this kind of discrimination is still in existence in the society. Human being has advanced itself with the modern technology and reached to the moon but has never invent such technology that can read a human brain, human feelings and emotions. A human being has advanced its brain but never tries to advance its heart and thought process. It has been said that human being is the creation of god. Does LGBT are not included within the ambit of the definition of human being? Does the people who are LGBT do not have nose to smell, ear to hear, eyes to see, mouth to eat and tongue to taste. Indeed they have all senses like human being but they do not possess the thought process just like a human being.

What is a “***HUMAN BEING***”? If we look into the dictionary we will find the meaning of “human Being” as a man, woman, or child of the species *Homo sapiens*, distinguished from other animals by superior mental development, power of articulate speech, and upright stance. Does the word “human being” only include man and woman and nothing else? There have no mention of LGBT within the definition of human beings. What are LGBT? LGBT is an acronym connected with human sexuality.² It means lesbian, gay, bisexual, and transgender,

² Swain, Keith W. (21 June 2007). "Gay Pride Needs New Direction". *Denver Post*. Retrieved 2008-07-05.

but it can refer to a community of people who are not heterosexual.³ The word was used in the year 1990's and replaced the earlier word LGB and Gay community. People who are LGBT are romantically and sexually attracted towards their own gender which is also known as sexual orientation. Before the sexual revolution that was in the year 1860's there was no as such words for the people who were not heterosexual. The word "third gender" came in the year 1860's for the people who are not heterosexual.⁴ The word "homosexual" was used a great amount in America to describe sexual orientations that were not heterosexual, as it still is today. However, this word began to have bad connotations, and therefore the word "homophile" was used instead⁵ of homosexual. In today's world we are talking about equality, humanism, fraternity, brotherhood, integrity, justice, liberty, etc. are these objectives have ever been attained by the constitution of India? These objectives have been written down in the Preamble of our constitution. But these objectives till now have not been attained. Does our law provide equality to all races of human beings? Perhaps not because India is still struggling to become a developed country, Developing means change in the technology, change in the thought process. Well this would be attained or not that would depend on time, but whether people of India are subjected to be treated with equality or not. People in India are belonging from different caste, creed, colour, religion, sex but there is group of people who has always been insulted and exploited by the masses that is people who has been referred as "Third Gender or Transgender". These people have been referred with the word "Hijras". But now the word that is used is "Third Gender". Transgender people are those individuals who are of any age or sex and whose appearance, personal characteristics, or behaviors differ from stereotypes about how men and women are supposed to be. This term is used to describe a wide range of identities including but not limited to transsexual people; male and female cross-dressers; inter-sexed individuals; and men and women, regardless of sexual orientation, whose appearance or characteristics are perceived to be gender atypical. In India there are a socio – cultural groups of transgender people like hijras/ kinnars.⁶ Such kind of discrimination in our Indian society even after 70 years of independence is still in existence.

³ *Shankle, Michael D. (2006). The Handbook of Lesbian, Gay, Bisexual, and Transgender Public Health: A Practitioner's Guide To Service. Haworth Press. ISBN 1-56023-496-2.*

⁴ Kennedy, Hubert C. (1980) The "third sex" theory of Karl Heinrich Ulrichs, *Journal of Homosexuality*. 1980–1981 Fall–Winter; 6(1–2): pp. 103–1

⁵ Esterberg, Kristen (September, 1994). "From Accommodation to Liberation: A Social Movement Analysis of Lesbians in the Homophile Movement." *Gender and Society*, 8, (3) p. 424–443.

⁶ Available at <http://iasscore.in/national-issues/transgender-rights-in-india>

CONCEPT OF BASIC RIGHTS IN INDIAN CONSTITUTION

Article 14 of the Constitution of India secures to the People of India the first fundamental right that is the right to equality. “Right to equality is contained under Article 14 to 18. It has been said that Article 14 to 21 read with the Preamble, which prohibit discrimination on the basis of caste, creed, colour, religion or gender forms, the Heart and soul of the constitution.”⁷

*In Indira Nehru Gandhi v. Raj Narain*⁸ the Supreme Court held that “Right to equality:” is a basic structure of the constitution and an essential feature of democracy and rule of law. Article 14 says “the state shall not deny to any person equality before law or equal protection of law within the territory of India”. Whether Article 14 is being provided as a fundamental right to each and every citizen of India? Whether LGBT are being treated equally in all places, if not then what is the reason behind this? Does anybody tried to ask whether LGBT are living life of comfort? Who should be blame God or Men? God have created them or it is the thought of men which he does want to change for LGBT. Why they are fighting for their rights? Does our Constitution provide a single right for LGBT? Perhaps it provides right to human being, now who are human being it is clear from the above definition.

The obligation imposed on the state by Article 14 is for the benefit of all persons, within the territory of India. The benefit of Article 14 is therefore, not limited to citizens. Every person whether natural or artificial, whether he is a citizen or an alien, is entitled to the protection of Article 14.⁹

*In National Legal Services Authority v. Union of India*¹⁰ the Supreme Court observed that the word “person” in Article 14 is not restricted to male and female, but includes even Hijras/ Transgender persons. Such persons, who are neither male nor females, are also held entitled to equal protection of laws and equality in all spheres.

Article 15 of Indian Constitution is titled as “Prohibition of discrimination on grounds of religion, race, sex or place of birth”, contains provisions for a particular application of the general principle of “equality of treatment” embodied in article 14. It prohibits discrimination

⁷ I.R Coelho V. State of Tamil Nadu AIR 2007 SC 861; State of Maharashtra v. Indian Hotel and restaurants association AIR 2013 SC 2582

⁸ Indira Nehru Gandhi v. Raj Narain AIR 1975 SC 2299

⁹ Som Prakash v. Union of India, AIR 1981 SC 212

¹⁰ National Legal Services Authority v. Union of India AIR 2014 SC 1863

against citizens on the grounds only of religion, race, sex, place of birth, or any of them.¹¹ Clause (1) of article 15 provides; “The State shall not discriminate against any citizen on ground of religion, race, caste, creed, sex and place of birth or any of them. If we look the modern scenario what is happening all around the world we all aware of that. LGBT are discriminated by the society and the thing is that they are not treated as “Human being”. Article 14 of the Indian constitution clearly says that person includes male, female and transgender but still they are discriminated and are being exploited by human society. Article 15 of the Indian constitution provides the prohibition of discriminations of all sorts but still the LGBT are discriminated. Whether the Articles enshrined in our constitution have any practical application or they have been laid down just to show that we are providing people of India with these so called “fundamental Rights”.

Article 19 of the Indian Constitution guarantees to every Citizen of India the six fundamental freedoms¹²-

1. Freedom of Speech and Expression.
2. Freedom to assemble peacefully and without arms
3. Freedom to form associations or unions or cooperatives societies
4. Freedom to move freely throughout the territory of India
5. Freedom to reside and settle in any part of the territory of India
6. Freedom to practice any profession, or to carry on any business on any occupation, trade or business.

Does all these freedom only belong to “human Being” and not to “LGBT”? Whether LGBT cannot claim such freedoms or they have no right to have such freedom. Whether they having right of speech and expression, to assemble peacefully, to form associations, to move freely and to carry out their business. If yes they why they have been struggling for their rights and freedom.

In Romesh Thapar v. State of Madras¹³, Pantanjali Sastri C.J observed that; Freedom guaranteed under Article 19 lay the foundation of all democratic organizations, for without free

¹¹ General manager v. Rangachari, AIR 1962 SC36

¹² The right is recognised internationally as a “Human right” under the universal declaration of human rights 1948 and also under the International Convent of Civil and Political rights under Article 19. Also the right is identical with the 1st amendment of U.S Constitution, 1791.

¹³ Romesh Thapar v. State of Madras AIR 1950 SC 124

political discussion no public education, so essential for the proper functioning of the popular government, is possible.

Article 21 of the Indian constitution provides, “**No person shall be deprived of his life or personal liberty except according to the procedure established by law**”. This right has been held as the “heart of the constitution” the most organic and progressive provision in our living constitution, the foundation head of our laws. The right to life does not merely mean the continuance of a person’s animal existence, but a quality of life. It means ‘the fullest opportunity to develop one’s personality and potentiality to the highest level possible in the existing stage of our civilization. Inevitably, it means the right to live decently as a member of our civilized society. It is to ensure all freedom and advantages that would go to make life agreeable. The right implies a reasonable standard of comfort and decency.¹⁴ Whether LGBT have the right to have a dignified life? Are they supposed to provide the quality life which provides fullest opportunity to develop themselves to the fullest extent? Yes all individual irrespective of any discrimination is entitled to have a dignified life as well as quality life full of opportunities to develop them to the fullest extent.

CONCEPT OF RIGHTS OF LGBT IN INTERNATIONAL SCENARIO

Article 1 of Universal declaration of Human Rights 1948 says, “All human beings are born free and equal in dignity and should act in furtherance of brotherhood. Article 2 provides “that all human beings are entitled to such rights without any discrimination”. These two articles of Universal declaration of Human Rights provide to treat each and every person with equal dignity and provide all such rights without any distinctions. But what a human being is doing? Are they providing right to each and every individual of the society. Perhaps no, if they would be providing right to each and every community then there would be no demand for “Legislation for the rights for LGBT”. These people are struggling for their rights, they have been deprived of basic fundamental rights, they are insulted, they are exploited and deprived of all freedoms which a normal human being posses.

¹⁴ K.T. Shah’s “Note on fundamental Rights”, B. Shiva Rao, The framing of India’1967, 41

Constitutional Rights and legal status of LGBT

Social, economic and political equality of status has been mandates in the preamble of the Constitution. First and foremost, right that they deserve is **Article 14** of the Indian Constitution which talks about the “**right to equality**” that provides that state shall not deny to its citizens equality before law and equal protection of law to its citizens within the territory of India. **Article 15** speaks about the prohibition of discrimination against the religion, race, caste, sex or place of birth. **Article 16** ensures the equality of opportunity in matters of public employment. **Article 21** is a right which ensures for **Protection of life and personal liberty to all citizens. Article 21A**, guaranteed **Right to education. And Article 23** talks about the **Prohibition of traffic in human being and forced labour**. There are many rights such as right to property, right to privacy, right to have a dignified life, right to medical facilities, right to fair opportunities in public employment, right to reputation, right to security of personal liberty, etc. but the thing is that whether they have been provided with such rights or not. If not then how we can provide them such rights. It has been clearly said in the Preamble to provide the objectives of Justice, Liberty, Equality and Fraternity to all. But still LGBT are fighting for their rights and this is not the problem that LGBT are facing in India But this is the problem which has been faced by LGBT worldwide. The constitutional right is being provided to each and every citizen but still LGBT are being boycotted from the Human society. This discrimination which discriminate a human being from another human being is against the law. The constitution of India provides a fundamental right to equality and tolerates no discrimination on the basis of sex but still LGBT in India are deprived and made to observe all sorts of humiliations. They have been given place outside the so called “Human Society” because they have never been considered as human beings and also they are deprived to cast their votes. Is this how India is going to achieve development where it is going to provide rights to human beings except LGBT? LGBT are deprived of voting, deprived to have fundamental rights and freedom, deprived of education, deprived of employment because they are not fulfilling the aspect of being what real human beings are? In every interview or in any form there has been column either you are male and female. Why there has been no column that whether you possess heart and thoughts like human being?

In *One, Inc. v. Olesenv*¹⁵ The Supreme court of United States first time has made judgment in favour of Homosexuals and has made reference for their rights and freedoms just like other human being posses.

*Hollingsworth v. Perry*¹⁶ The Supreme Court of United states held the marriage of same gender has valid in the eye of law.

*Suresh K. Kaushal v. Naz Foundation case*¹⁷: The proceedings before this Court arose from a judgment of the Delhi High Court holding that Section 377 of the Indian Penal Code, in so far as it criminalises consensual sexual acts of adults in private is violative of Articles 14, 15 and 21 of the Constitution. The Delhi High Court, however, clarified that Section 377 will continue to govern non-consensual penile, non-vaginal sex and penile non-vaginal sex involving minors. Among the grounds of challenge was that the statutory provision constituted an infringement of the rights to dignity and privacy. The Delhi High Court held that:

“The sphere of privacy allows persons to develop human relations without interference from the outside community or from the State. The exercise of autonomy enables an individual to attain fulfilment, grow in self-esteem, build relationships of his or her choice and fulfil all legitimate goals that he or she may set. In the Indian Constitution, the right to live with dignity and the right of privacy both are recognised as dimensions of Article 21”

PROBLEMS FACED BY LGBT'S

LGBT are struggling for their right not in India but this is the problem which they have been faced in each and every corner of the world. In spite of the Universal declaration of human rights 1948 which provides that “All Human beings are born free and equal in dignity and should act in furtherance of brotherhood”, there have still cases of discrimination against LGBT. Our Indian constitution which is the world's largest, lengthiest and bulkiest constitution in the world does not specifically provide rights to LGBT. But the interpretation of judiciary

¹⁵ *One, Inc. v. Olesenv* (1958) 310 US 78 (US)

¹⁶ *Hollingsworth v. Perry* (2013) 111 US 121 (US).

¹⁷ *Suresh K. Kaushal v. Naz Foundation case* AIR 2014 SC 563 (India).

in different case laws has widened the definition of human beings and it also includes the rights of third gender, but in spite of such LGBT have suffering from many problems in India such as

1. LGBT have been abandoned by their family and still there many who are homeless.
2. LGBT have restricted right to have education, employment opportunity, health facility and they have been facing difficulty in exercising their civil and political rights.
3. LGBT feels discriminated in availing facilities to access bathrooms/ toilets in schools, public places, hospitals and prisons.
4. There have been no fair representation of LGBT in sports, politics and this might be the reason that they cannot effectively participate in social and cultural life of their own group.
5. LGBT have been facing problems relating to marriage and adoption of child.
6. Sexual activity between two people of the same sex has been criminalized and punishable offence under section 377 of the Indian Penal Code of 1860.
7. LGBT have been given place outside the human society.
8. LGBT have restricted to claim their fundamental rights and freedom and moreover they are being debarred from the basic human rights and basic amenities.
9. LGBT have been deprived to participate in politics.

TRANSGENDER PERSONS (LGBT) (Protection of Rights) Bill 2016

The Transgender Persons (LGBT) (Protection of Rights) Bill 2016 is expected to bring a social, educational and economic development as well as reform to the LGBT community. To a community that has been criticized and discriminated for so long, this Bill could mean a chance to provide a life of dignity and equality to LGBT Community within India.

This Bill makes it illegal to force a transgender person to leave residence or village, force them into begging or any kind of bonded labour. These acts will be punishable with up to two years of imprisonment, along with a fine.

The Bill also criticized denying a transgender person access to any public place and causing them any physical or mental harm within and outside the home. It guarantees OBC status to all

transgender not born as SC or ST, and entitles them to reservation under the respective categories.

This bill also ensures the right to equality, right to life and dignity and personal liberty as guaranteed by the Constitution of India to the Transgender. All government institution shall provide inclusive education and shall not discriminate against any transgender student and also provide transgender students with scholarship.

The Transgender Persons (Protection of Rights) Bill aims at ensuring that transgender persons enjoys a life of dignity and equality as an Indian citizen, and guarantees a basic human right that had been denied to them and have been boycotted from society for so long- right to identify as a member of our community.

This has been an effort by the government to provide the LGBT with their rights so that they can live a life with dignity as has been guaranteed under *Article 21 of the Indian Constitution* “*No person shall be deprived of his life except according to the procedure established by law.* Moreover the bill also aims to provide equality as has been guaranteed under *Article 14 of the Indian constitution* “*The State shall not deny to its person equality before law and equal protection of law within the territory of India*”.

LGBT’S RIGHTS

- Firstly, the Court ruled that fundamental rights are available to the third gender (LGBT) in the same manner as they are to males and females. Further, non-recognition of third gender in both criminal and civil statutes such as those relating to marriage, adoption, divorce, etc is discriminatory to the third gender.
- Secondly, the Court states that they prefer to follow the psyche of the person and use the ‘Psychological Test’ as opposed to the ‘Biological Test’. They also declare that insisting on Sex Reassignment Surgery (SRS) as a condition for changing one’s gender is illegal.
- Thirdly, the court states that the Centre and State Governments have been directed to take proper measures to provide medical care to Transgender people in the hospitals.

Further, they have been directed to operate separate HIV/ Sero-surveillance measures for LGBT.

- Lastly, the Centre and State Governments have been directed to provide the LGBT community various social welfare schemes and to treat this community as socially and economically backward classes. They have also been asked to extend reservation in educational institutions and for public appointments.

CONCLUSION

It would be the high time to have discussion on the legislation for the rights of LGBT. This is the particular group which has been discriminated and exploited long in different countries. Whether these people are not supposed to be regulated with the same law as the other human beings are? Are they not supposed to have fundamental freedoms and rights that have been provided to other human beings? Apart from this they are also “human Being” but still placed outside the “so called Human society” and have been discriminated and debarred of education, employment, civil, political and cultural rights. Such discrimination, in spite of having well developed society give, an outline that a man has advance itself but not is thought process. Where a man has stepped into mars with his inventions but has left the people who still are living life full of discrimination and not having any essence of dignity. Are LGBT not supposed to live a life full of opportunities and dignity? If yes than why they have been stopped to avail all facilities like other human being.

All Human beings in this universe tends to have different nature and have different roles to perform so I think it would be wrong to discriminate a human being on minuscule basis.

Hindu religion is always against Homosexuality but it is fact that Ardhanarishwar means half male and half female, aspects of Lord Shiva and Lord Vishnu as Mohini exists. This is profound in Vedas. It is fact that Vedas and Manu Smriti are against Homosexuality but still the Vedas has accepted Homosexual people.

All Human being are born free with different character, nature and Prakritis.

“Need for the legislation of the rights of LGBT is not the subject matter of black and white answer but they are the people whose life of expression is “TRITYA PRAKRITI”.

