RESERVATION OF TRANSGENDER: A SOCIO-LEGAL PERSPECTIVE

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ABSTRACT

A Transgender is a person who belongs to a particular sex anatomically but is psychologically obsessed with a desire to change to the other sex which, according to him, is his rightful gender here, covered under the term of transgender. There are a number of people in this community who are deprived of their basic rights and considered outcaste. This is discussed in detail regarding each issue they face thereby suggesting a constitutionally valid measure.

This paper aims at addressing the issues relating to the transgender Community. It gives a socio legal perspective of the issues faced by the transgender at large. The main aim of this paper is to explain the concept of Reservation with regard to the transgender community as a suggestive measure to the legal issues faced by them. This paper does not deal with aspects relating to Section 377 of the IPC, instead it gives a completely different perspective regarding transgender rights i.e. ‘Transgender Right to Reservation’. It clarifies the position of the category of reservation that is suggested here, i.e. to explain that the transgender should be given reservation as OBC’s provided all the required constitutionality is obtained.

It further analyses the Constitutional validity of reservation and its provisions with regard to the transgender community. This paper is suggestive in its approach thereby analysing the necessity for reservation of transgender. It takes into account the position of Transgender’s in India alone.

Keywords: Transgender’s Right; Constitutional Validity of Transgender; Transgender Community
BRIEF BACKGROUND

Transgender’s have not been living a life with dignity as they are subjected to constant sexual exploitation and societal humiliation every now and then. They are not given an opportunity to get included into the mainstream society. They are required to perform menial jobs due to lack of educational opportunities given to them.

It is very essential to uplift the transgender community. Mere decriminalization of homosexuality is not adequate, they are deprived of their basic Rights of existence. Thus, Reservation acts as a powerful tool of inclusion of the transgender into the mainstream society.

TRANSGENDER TO BE CONSIDERED AS OBC’S

It was held in various cases that there are various criterions that need to be fulfilled in order to be considered as a Backward Class. Article 16 has this interpretation of Backward Classes. In so far as the Other Backward Classes are concerned, two tests should be conjunctively applied for identifying them for the purpose of reservations in employment and education: One, that they should be comparable to the Scheduled Castes and Scheduled Tribes in the matter of their backwardness; and two, that they should satisfy the means test such as a State Government may lay down in the context of prevailing economic conditions, both these tests are compatible if applied to the transgender community. Article 15 talks about social and educational backwardness.

The Government laid down that classification of socially and educationally backward classes should be made on the following basis: (1) economic condition; and (2) occupation. Thus, identification of a group or collectivity by any criteria other than caste, such as, occupation cum social cum educational cum economic criteria ending in caste may not be invalid. In the matter of their backwardness; and two, that they should satisfy the means test such as a State Government may lay down in the context of prevailing economic conditions.

These cases clearly state that it is essential to identify a class as backward class provided that it fulfills the requirements under Article 14, 15, 16 and DPSP 46 of the Indian Constitution which therefore can be applied in case of transgender who can be identified as OBC’s.

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1 Vasanth Kumar v State of Karnataka, AIR 1985 SC 1499.
3 Indra Sawhney v. Union of India & Others, AIR 1993 SC 477.
4 K C Vasanth Kumar v. state of Karnataka 1985 AIR 1495, 1985 SCR Supl. (1) 352.
TRANSGENDER TO BE CONSIDERED AS SOCIALLY AND ECONOMICALLY BACKWARD SECTION OF THE SOCIETY

Here it is suggested that transgender can be granted reservation as they are not only socially and educationally but also as economically backward. Transgender can be considered as socially and economically backward, thereby granting them reservation by giving them the status of OBC’s. It is evident that other communities in our country consider transgender relationships as a taboo and people with deviant sexual orientation are ill-treated. Social backwardness - it may be reiterated - leads to educational and economic backwardness. Thus transgender can be considered as socially backward and thereby granted reservation. The expression “weaker sections” can also take within its compass, individuals who constitute weaker sections or weaker parts of the society. The Transgender can be treated as weaker section of the society not merely because they are a considerable minority but also because of their voice not being heard and due to fear of non-inclusion in the societal mindset.

Social Backwardness here clearly refers to the societal humiliation and non-inclusion of the transgender in the society and treating them Outcaste. The aspect of economic backwardness is evident as they are denied employment in various institutions. If the principles used in the above cases are applied to the transgender Community then it is clearly established that they constitute a weaker class of the society who as explained as socially and economically backward.

RESERVATION AS A REMEDY TO THE TRANSGENDER COMMUNITY

Reservation is a remedy or a cure for the ill effects of historical discrimination. The very purpose of reservation is to protect the weak category against competition from the general category candidates. The only justification for reservation is social justice. It is necessary that the benefit of reservation should reach the poorer and weakest section of the backward class and that the transgender community can be considered as socially and economically poorer section of the

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5 WRIT PETITION (CIVIL) NO.604 OF 2013.
6 Indra Sawhney v. Union of India & Others, AIR 1993 SC 477.
7 Ibid at 31.
8 Id.
9 MP JAIN, INDIAN CONSTITUTIONAL LAW 1000 (Lexis Nexis 7th Ed. 2014)
10 Ibid at 1002.
society and thus Reservation can be granted to the transgender community as they comply with the above mentioned aspects.

It is generally believed that reservation is given to the minority category for their benefit. It cannot be denied that transgender belong to the unprivileged class which is a marginalized section. These transgender, even though insignificant in numbers, are still human beings and therefore they have every right to enjoy their human rights. Thus granting them reservation stands justified under the Article 14, 15, 16 and DPSP Article 46 of the Indian Constitution.

**GRANTING RESERVATION TO THE TRANSGENDER IS CONSTITUTIONALLY VALID**

This can be explained in a phased manner, it goes on to explain that there has been violation of fundamental rights of the transgender in the current scenario and how reservation is the key solution to the violation of the rights claimed in a long term. There has been violation of article 14, 15 and 16 which has been faced by the transgender since time immemorial, yet it has been neglected as it was not considered to be a great issue to be dealt with, however off-late the issues of transgender have been discussed in every aspect of life, thus reservation helps them overcome societal discrimination

**RESERVATION OF TRANSGENDER IS FOR EQUAL PROTECTION OF LAWS**

It is evident that the transgender community is facing identity crisis as their gender identity has not been recognized. They have been deprived of their right to choose. Transgender people, as a whole, face multiple forms of oppression in this country. Thus the Yogyakarta principles have stated in one of the points that:
It may be noted that the right to equality has been declared by the Supreme Court as the basic feature of the Constitution. Every person is entitled to equality before law and equal protection of laws. Where the State is bound to protect every human being from inequality.

They are ill-treated for the mere fact that they possess a deviant sexual orientation and this violates his right to equality under Article 14 of the constitution. Among others, the concept of equality before the law contemplates minimizing the inequalities in income and eliminating the inequalities in status, facilities and opportunities not only amongst individuals but also amongst groups of people, securing adequate means of livelihood to its citizens and to promote with special care the educational and economic interests of the weaker sections of the people, and to protect them from social injustice and all forms of exploitation. Thus this explains the principle of positive discrimination that the state is entitled to give to the citizens by way of reservations.

Equality postulates are not merely legal equality but also real equality. This is to say that equality can be practically achieved only by providing reservation to the transgender community to bring them on par with the other citizens of the state.

**TRANSGENDER CAN BE CONSIDERED AS SOCIALLY AND EDUCATIONALLY BACKWARD CLASS UNDER ARTICLE 15 OF THE CONSTITUTION.**

Transgender can be classified as socially and Educationally Backward Class (SEBC’s). They have also not been afforded special provisions envisaged under article 15(4) for the advancement of the socially and educationally backward class (SEBC) of the citizens, which they are, hence legally entitled and eligible to get benefits of SEBC. There are various tests or criterions that are applied to determine whether a class comes under SEBC’s. However here, the contention is not just that the transgender are socially and educationally backward but that they are also economically backward. The present clause qualifies the word by words ‘socially and educationally’. Other classes may be included within the fold of Art 15(4) provided they are socially and educationally backward.

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13 Id.
14 Supra note 11, at 1384.
15 WRIT PETITION (CIVIL) NO.604 OF 2013.
backward. There are no specific tests as such but decided according to cases and circumstances. Social backwardness is an ultimate result of poverty. This thereby establishes that economic backwardness also forms a main source. Constitution makers, gave emphasis to the fundamental right against sex discrimination so as to prevent the direct or indirect attitude to treat people differently, for the reason of not being in conformity with stereotypical generalizations of binary genders.  

This explains that the transgender community faced sex discrimination and humiliation (non-acceptance from the society) at large and can be categorized as socially backward, due to deprivation of their basic right to education they can be considered educationally backward thereby classifying as SEBC’s under Article 15 of the Constitution. SEBC’s (and economically backward) and can be granted reservation on the grounds contended above.

RESERVATION UNDER ARTICLE 16 OF THE CONSTITUTION

Here the major focus is on Article 16(2) and 16(4) which explains that adequate representation needs to be given to The Backward Classes in order to provide reservation for them. Transgender have not only been denied rights under 16(2) but also have been discriminated against in respect of employment or office under the State on the ground of sex. If one keeps in mind the context in which Article 16(4) was enacted it would be clear that the accent was upon social backwardness. It goes without saying that in Indian context, social backwardness leads to educational backwardness and both of them together lead to poverty which in turn breeds and perpetuates the social and educational backwardness and transgender can be considered backward under this Article.

Transgender’s are also entitled to reservation in matter of appointment, as envisaged under article 16(4) of the Constitution. State is bound to take affirmative action to give them due representation in public services. Thus, if reservation is provided to them under Article 16(4), they can be brought into the mainstream society.

16 Id.
17 Indra Sawhney v. Union of India, AIR 1993 SC 477.
18 Supra note 15.
Article 16 read with Article 46

Promotion and protection of interests of educational and economic interests of SCs, STs, and other weaker sections of the society and to protect them from social injustice and exploitation the expression ‘weaker sections’ in Art. 46 is wider than ‘backward class’\(^\text{19}\). Thus transgender can be given reservation as they come under the category of backward class under these articles even with the help of DPSP’s which are provided in the Constitution.

LACK OF ADEQUATE REPRESENTATION TO THE TRANSGENDER COMMUNITY

On the contrary, various legal scholars have objected it on the ground that there was enough representation of various sections of the society and that the representation of non-minorities was getting less thus causing and imbalance in the society. So long as the backward group is not adequately represented in the state services, reservation should be made. A class is considered to be adequately represented when it is provided facilities by the government by giving them enough representation in State services. However the transgender have not been provided with adequate representation which can be answered in Article 16(4) that permits reservation of appointments or posts in favour of any backward class which is not adequately represented\(^\text{20}\) here, the transgender community.

INCLUSION OF TRANSGENDER UNDER THE OBC CATEGORY WILL NOT ADVERSELY AFFECT THE RESERVATION OF THE ALREADY EXISTING OBC’S

Some researchers have objected transgender reservation on the ground that the inclusion of transgender as OBC would adversely affect their reservation. It is explained that the reservation of TRANSGENDER’s under OBC’s will not adversely affect the reservation of already existing OBC’s because here, the quantum of reservation will remain the same i.e. 50\% and will not affect any criterion of reservation of the OBC’s, it merely pleads inclusion of transgender in the OBC category so that they can also enjoy the facilities provided. It was held in various decisions that

\(^{19}\) INDIA CONST. art. 46.

\(^{20}\) Preeti Srivastava (Dr.) & Anr v. State Of Madhya Pradesh & Ors, AIR 1999 SC 2894.
classification as backward and more backward is permissible within the SEBC’s classification between backward and more backward is permissible\textsuperscript{21}. Thus this explains that these categories or classifications of the backward class helps in segregation of various classes of transgender and there will be no overlap with various other OBC’s and transgender if they are given the status of OBC.

Some have contended that any special status would make transgender more vulnerable as being different from the other persons in the mainstream and that they would face segregation and hence that would amount to discrimination. It is established that granting reservation to the transgender would not make them vulnerable would instead bring them into the mainstream and would guarantee all the facilities that they have been deprived of. Transgender persons may be afforded the right to choose to determine whether to opt for male female or transgender.\textsuperscript{22}

CONCLUSION

Treating the transgender as socially, educationally and economically backward class and granting them reservation is constitutional under Article 14, 15, 16 with the support of DPSP under Article 46. This not only helps them to be included in the mainstream society but also provides them with adequate facilities that they are otherwise deprived of. Reservation of the transgender gives them an opportunity to obtain basic/necessary education and therefore are qualified enough for the job opportunities available. This makes way for the transgender to be included in the society practically and not just theoretically by involving a third gender column in all the documents issued. Reservation is therefore a boon to the transgender.

\textsuperscript{21} Indra Sawhney v. Union of India, AIR 1993 SC 477.
\textsuperscript{22} Supra note 15.