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PROTECTION OF RIGHTS OF TRANSGENDER PRISONERS IN INDIA: CONSTITUTIONAL PROSPECTIVE

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Abstract

A transgender Prisoner is a person whose gender does not match with the gender assigned to that person at the time of birth and includes i.e., Trans-man, Trans-woman, Person with inter-sex variations, Gender-queer persons, Persons with socio-cultural identities. A transgender becomes a prisoner either convict or undertrial prisoner, most of their rights are restricted. They lose only a part of the rights are the necessary consequences of the confinement and the rest of the rights are preserved. Transgender rights in India are now gaining significance, and the courts have played an important role in bolstering the recognition of equality on the basis of gender identity. The rights of transgender prisoners have become a burning topic and so it is very much essential to study about the protection of transgender prisoners. A transgender person being a prisoner, cannot be deprived of all his rights by the authority, even though they are convicted, having fundamental rights guaranteed by the Art.21 of the Constitution and protected by the Supreme Court and High Courts under Art.32 and Art.226 of the Constitution and other laws for the time being in force. A suitable system should be established for coordination among the three organs of the criminal justice system i.e. the police, the judiciary and the prison and correctional administration, for the effective prevention of crime and treatment of offenders. The supreme aim of punishment was to be the protection of society through the rehabilitation of offender. The providing legal assistance is state obligation to the transgender prisoners. To provide Legal assistance to a poor or indigent transgender accused, transgender arrested is a constitutional right and not only by Article 39A but also by Articles 14 and 21 of the Constitution.

Key words: Transgender Prisoner Rights, Gender Identity, Legal Assistance.

INTRODUCTION

A man on becoming a transgender prisoner, whether convict or under trial, does not cease to be human being. Though the prisoners can't be treated as animals yet the barbarous treatment sometimes given to them in prisons is not qualitatively human compared to the one given to the caged inmates. The grim scenario of prison justice assumes inhuman misanthropic fragrance when the intellect of prisoners is blemished. Personhood of prisoner is fortified and they are forced to lose their integrity and individuality and thereby compelling them to become the rightless slaves of the state. It becomes gruesome indeed and calls for interference of judicial power as constitutional sentinel, when the jurisprudence of prison justice becomes an escalating torture and the violent violation of the human rights is perpetrated by agencies of the state. The rights of transgender prisoners have become a burning topic and so it is very much essential to study about the protection of transgender prisoners.

The penal reforms in India during the past few decades have brought about a remarkable change in the attitude of people towards the transgender. The emphasis has now shifted from deterrence to reformation of the criminal. The age-old discriminatory and draconian punishments no longer find place in the modern penal system. Indian penologists are greatly impressed by the recent Anglo-American penal reforms and have adopted many of them in the indigenous system. A prison today serves three purposes which may be described as custody, care and correctional. Though the last of these which concerns the use of imprisonment as a form of legal punishment, now takes the primary place, it is in historical perspective a comparatively new conception, not all the implications of which have yet been worked out. In its origin prison served only the custodial functions; it was a place in which an alleged offender could be kept in lawful custody until he could be tried, and if found guilty punished. In India, the Central Government constituted number of committees on transgenders and introduced the reformation and rehabilitation methods for the transgenders, providing rights to them. A transgender person being a prisoner, cannot be deprived of all his rights by the authority, even though they are convicted, having fundamental rights



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guaranteed by the Art.21 of the Constitution and protected by the Supreme Court and High Courts under Art.32 and Art.226 of the Constitution and other laws for the time being in force.

TRANSGENDER RIGHTS

A transgender Prisoner is a person whose gender does not match with the gender assigned to that person at the time of birth and includes i.e., Trans-man, Trans-woman, Person with inter-sex variations, Gender-queer persons, Persons with socio-cultural identities. This section covers the judgments on the substantive rights and entitlements guaranteed to transgender persons, including equality and non-discrimination, right to self-determination, right to equality in marriage and consensual relationships, right to equal opportunities and reservations in employment, right to life and access to healthcare, right to freedom of expression, right to education and reservation in education, right to privacy and right to dignity. It also covers judgments on issues concerning the applicability of criminal laws to transgender persons as well as cases looking at access to social security benefits and welfare measures for transgender persons. If a person does not identify themselves with the gender that they are assigned during birth, they can choose to identify with some other gender. This choice is made when a person understands their internal and individual experience of their body, bodily appearance, speech, mannerisms, etc.

A transgender becomes a prisoner either convict or undertrial prisoner, most of their rights are restricted. They lose only a part of the right are the necessary consequences of the confinement and the rest of the rights are preserved. A transgender Prisoner is a person who is deprived of liberty against their will. The transgender prisoner can be by confinement, captivity, or by forcible restraint. The term applies particularly to the on trial or serving a prison sentence. Prisonization symbolises a system of punishment and also a sort of institutional placement of under trials and suspects are during the period of trial. The transgenders are protected by the rights guaranteed by the International Conventions and Constitution of India, statues enacted by the legislatures like prison laws, Bharatiya Nagarika Suraksha sanhita, 2023, the transgender persons (protection of rights) Act, 2019 and Model prisons and correctional services Act, 2023. The rights are protected and interpreted by the Judiciary, the transgender is not ceased as a human being like slave or banded labour, even though the person is in prison, all protections and rights are guaranteed but the laws are not specifically classification regarding to the transgender prisoners. The transgender prisoners across the India 108 members, as per the Prison statistics, 2023 issued by the National Crime Records Bureau.

CONSTITUTIONAL PROSPECTIVE

Transgender rights in India are now gaining significance, and the courts have played an important role in bolstering the recognition of equality on the basis of gender identity. The landscape of transgender rights has been shaped by the decision of the Supreme Court in **National Legal Services Authority v. Union of India ("NALSA") in 2014**. In NALSA, the Court for the first time recognized the right of transgender persons to self determination of gender identity to be protected under the rights to life, liberty and equality, and the freedom of expression guaranteed under Articles 21, 14 and 19 of the Constitution. NALSA was followed by the enactment of the Transgender Persons (Protection of Rights) Act, 2019. Since then, transgender persons and civil society groups have approached High Courts and Supreme Court on issues of the day-to-day challenges and constitutional rights violations faced by them, leading to several important decisions. These judgements and decisions play a significant role in shaping the jurisprudence on transgender rights and are an important resource for advocating for these rights. The Courts have also passed important interim orders in some ongoing cases which have been covered. The judicial decisions where the rights of transgender persons have been protected and upheld, and also a few cases where the court decisions have not been positive. This is to ensure that the significant court decisions that can help advance the rights of transgender persons while also raising awareness about the negative rulings of the courts so that steps can be taken to overcome the barriers resulting from those decisions. The Supreme Court upheld in several cases for the protection of transgender rights.



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The constitution of India instituted equally, provides right to freedom of speech and expression, peaceful assembly, freedom from arbitrary arrest, protection of life and liberty right against exploitation, freedom of conscience and free profession, practice and propagation of religion and educational and cultural rights. It also provided teeth to those rights by making them enforceable by direct access to the Supreme Court of India. In the comprehension of the Supreme Court the right to life and liberty includes, right to human dignity, right to privacy, right to speedy trial, right to free legal aid, right to be transgender to be treated with dignity and humanity, right to bail, right to compensate for custodial death, right of workers to fair wage and human conditions of work, right to security, right to education and right to health environment. The Supreme Court of India interpreted Art 21 of the Constitution and shows much interest on transgender reforms. The Supreme Court upheld the rights of transgenders through by interpreting the fundamental rights of constitution of India.

The Constitution of India is the founding document in which all the rights and protections for each individual are provided. Part III of the Constitution contains the fundamental rights. Article 14 guarantees equality and equal protection of the law and Article 15 (1) prohibits discrimination on the grounds of religion, race, caste, sex or place of birth. The Supreme Court for the first time in 2014 in its decision in the case of **National Legal Services Authority v. Union of India ("NALSA")** interpreted the ground of 'sex' under Article 15 (1) to include gender and gender identity. The court held that Article 15(1) would include prohibition of non-discrimination on the ground of gender identity and sexual orientation as well. This was a watershed moment for transgender rights, as the Supreme Court held that all persons have the right under the constitution to self-determine their own gender identity as male, female or transgender and this right is protected under the right to equality guaranteed under Articles 14 and 15 (1). The right to freedom of expression under Article 19 (1) (a) and Article 21 of the Constitution guaranteeing the right to life and autonomy were also expanded to include the right to express one's gender identity and gender expression. Thereafter in **Navtej Johar and Others v. Union of India**, the landmark decision decriminalising consensual same-sex relationships in India, the Supreme Court upheld the right to decisional autonomy over and the freedom to decide one's sexual orientation and choice of partner. The constitutional jurisprudence that has emerged from these landmark decisions has laid the foundation for protection of transgender rights and have been significant in shaping the judicial discourse on the constitutional rights of transgender persons. The constitution of India recognises several rights of transgenders who are minor set of the people in the society and the Supreme Court of India interpreting through the Art.21 Right to life and personal liberty of constitution of India.

Rights to Equality (Art.14): No one can deny any "person" equality before the law or equal protection of law. Using the term "person" shows that no discrimination is done on the basis of sex or gender identity. Transgender Persons cannot be subjected to unfair treatment in any where including prison.

Prohibition of discrimination on various grounds, including gender (Art.15): Prohibits any sort of discrimination on the basis of race, religion, caste or sex or any of them. This implies that discrimination or ill-treatment of Transgender Persons infringes their basic fundamental right. In the case of **Mx. Alia SK v. The State of West Bengal and Ors.(2019)**, the court held that Transgender persons have the right to seek admission into universities. The judgement is important because it signified the role of courts in ensuring that special accommodations and adjustments are made to include transgender people in the process of public university applications and admission process where none exist. The transgender prisoners cannot discriminate basing on their identity in prison instead of the prison authorities having responsibility to provide.

Freedom of speech and expression (Art.19): This right grants every citizen the freedom of speech and expression. This includes the freedom to express your gender identity publicly. The right to equality has been the foundational basis for the development of the law on transgender rights in India, as the landscape of transgender rights has been significantly shaped by Court rulings on issues of equality and non-discrimination based on an individual's gender identity.

Right to life and personal liberty (Article 21): Article 21 which deals with the protection of life and personal liberty states that no person shall be deprived of his life and personal liberty except according to the procedure of law. This right states that every individual including a transgender person has the right to life and personal liberty. The transgender



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person being a citizen of India should have the full right to protect their life and personal liberty. The prison is used as an institution to treat the criminal as a deviant; there would be lesser restrictions and control over him inside the institution. The modern progressive view, however, regards crime as a social disease and favors treatment of transgender prisoners. Whatever be the reaction of society to towards the transgender prisoners in prison gives rise to several problems of correction, rehabilitation and reformation which constitute vital aspects of prison administration. The judiciary must therefore adopt a creative and purposive approach in the interpretation of Fundamental Rights and Directive Principles of State Policy embodied in the Constitution with a view to advancing transgender prisoner rights. The promotion and protection of transgender Rights is depends upon the strong and independent judiciary. The main study here would be given wide coverage to the functional aspect of the judiciary and see how far the Apex judiciary in India has achieved success in discharging the heavy responsibility of safeguarding transgender rights in the light of our Constitutional mandate.

A prison, jail or correctional facility is a place in individuals are physically confined or detained and usually deprived of a range of personal freedom. These institutions are an integral part of the criminal justice system of a country. There are various types of prisons such as those exclusively for adults, children, female and transgender, convicted prisoners, under trial prisoners, detainees and separate facilities for mentally ill offenders. The concept of protection of transgender rights of the people accused of committing crime and rights of transgender prisoners in the administration of criminal justice has been continually changing and developing over time. The Supreme Court of India, by interpreting Article 21 of the Constitution, has developed transgender rights for the preservation and protection of transgender prisoner's rights to maintain human dignity. Transgender prisoners' rights also become an important item in the agenda for prison reforms. This is due essentially to the recognition of two important principles. Firstly, the transgender prisoner is no longer regarded as an object, a ward, or a slave of the state, the law would leave at the prison entrance and who would be condemned to civil death. It is increasingly been recognized that a citizen does not cease to be a citizen just because he has become a prisoner. The Supreme Court has made it very clear in many judgments that except for the fact that the compulsion to live in a prison entails by its own force the deprivation of certain rights, like the right to move freely or to practice a profession of one's choice, a transgender prisoner is otherwise entitled to the basic freedoms guaranteed by the Constitution. Secondly, the transgender convicted persons go to prisons as punishment and not for punishment. Prison sentence has to be carried out as per courts orders and no additional punishment can be inflicted by the prison authorities without sanction. Prison authorities have to be, therefore, accountable for the manner in they exercise their custody over persons in their care, especially as regards their wide discretionary powers.

The fact that transgender prisoners have higher rates of psychological distress and mental health problems compared to the general population are well established. Needless to say, the rates are much higher in the case of transgender in custody. Although transgender still constitute a small minority of the prison population across the country, the number of incarcerated transgender prisoners is increasing. In addition to the common kinds of distress both men and women experience in prison, transgender are more vulnerable for gender discrimination, neglect, violence, physical and sexual abuse. Studies have documented that relative to their male counterparts, transgender are more likely to have mental disorders and a history of physical and sexual abuse. Despite the magnitude of problems, little attention has been given to the unique health concerns of transgender prisoners. Mental health care and attention to the psychological distress that occurs because of imprisonment of transgender, is almost non-existent. The prison authorities are having responsibility to separate transgender prisoners from the male prisoners and the right of transgender prisoners as per Model Prison and Correctional services Act, 2019. The Court held that the state having responsibility to provide free legal aid and to issue certify copy of judgment to the transgender prisoners as the rights are guaranteed under Art. 39A and Art. 21 of the Constitution.

In India, the transgender prisoners have several rights under various legislations and also the recommendations of the different committees appointed by the Central as well as state Governments. Those rights are guaranteed by the Constitution and protected by the Supreme Court. Transgender individuals are among the most marginalized and treated badly in India's criminal justice system. Especially in prisons, where there is little space for those who don't fit into male or female categories. Even though the Supreme Court of India has made significant strides such as legalizing transgender identity (NALSA V. UOI, 2014) and the government enacted the Transgender Persons (Protection of Rights) Act (2019)



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there is little change inside prisons. In practice, transgender prisoners mostly experience severe issues like being allocated to the incorrect wards according to their birth gender, being addressed by the incorrect gender (misgendered), failing to receive adequate medical treatment, and being made to undergo degrading search processes. Most of them are also subjected to physical or sexual assault, usually with impunity for the attackers. These incidents not only violate fundamental rights guaranteed by the Indian Constitution such as equality, dignity, and personal freedom but also violate international norms in the humane treatment of prisoners.

Decriminalisation of Section 377 of IPC: The Supreme Court in the case of **Navtej Singh Johar v. Union of India(2016)** held that LGBTQ+ people in India are entitled to all constitutional rights, including the liberties protected by the Constitution of India.

Any offence committed by a Transgender Person shall be punished as per the provisions of the Bharatiya Nyaya Sanhita, 2023. The case of **Mrs. X v. State of Uttarakhand (2019)** affirmed the NALSA Judgement and stated that a denial of the right to self-identify one's gender would deny the right to life and liberty. It is especially significant since it is one of the first cases that affirmed the right to self-determination based on the "psyche" of the individual even in the context of the criminal law.

CONCLUSION

A suitable system should be established for coordination among the three organs of the criminal justice system i.e. the police, the judiciary and the prison and correctional administration, for the effective prevention of crime and treatment of offenders. The supreme aim of punishment was to be the protection of society through the rehabilitation of offender. The providing legal assistance is state obligation to the transgender prisoners. To provide Legal assistance to a poor or indigent transgender accused, transgender arrested is a constitution right and not only by Article 39A but also by Articles 14 and 21 of the Constitution. It is a necessary sine qua non of justice and where it is not provided, injustice is likely to result and undeniably every act of injustice corrodes the foundations of democracy and rule of law. The judiciary and the government play an important role in protecting and furthering the rights of transgender inmates within prisons. Acknowledging the special set of challenges presented by transgender inmates variance from discrimination and abuse to the lack of adequate healthcare and risky living conditions the judicial interventions as well as governmental policies have been aimed at establishing dignity, equality, and security within the system of corrections. The Supreme Court was identified certain rights of transgender prisoners in various cases decided and interpreted Art 21 of the Constitution, those rights are Right to dignity, gender discrimination, right to self-identify one's gender would deny the right to life and liberty Right to Free Legal Aid, LGBTQ+ people in India are entitled to all constitutional rights, including the liberties protected by the Constitution of India., etc.. To prepare National policy for the transgender, welfare programmes, special rules and regulation for them and also to co-ordination between police, court and prison authorities, and legal aid to the needy, facilities to the child's of imprisoned transgenders.

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