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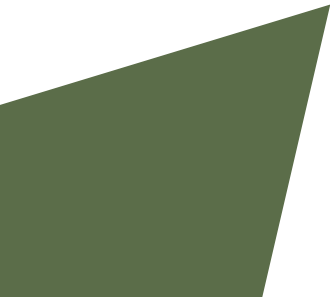
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**Transgender in India: Problems and Analysis of the Transgender Persons
(Protection of Rights) Act, 2019**

Prateek Pandey, Friyana Damania

ABSTRACT

The research paper is about the Transgender in India and an analysis of the Transgender Act, 2019. The author and co-author are going to write about the challenges faced by the transgender community. The paper is about the history of Transgender in India and till now what problems they have faced. The author also wrote analysis of the NALSA Judgement regarding the Transgender Community in India with the chapter wise analysis of the new Transgender Act, 2019 and also the criticism of the act.

INTRODUCTION

Definition-Transgender is an umbrella term which defines the third type of gender other than male and female.¹ Under this type, the sex which is originally is of the person naturally while taking birth is different from its characteristics, such as – a person born as male child but has all characteristics of a female or vice versa or a person born without any type of reproductive organ (neither male or female) or it includes those people who have undergone surgery to match with their physical and hormonal characteristic are known as transsexuals and comes under the umbrella term of transgender.

In India, the transgender community is also known as Hijra, sakhi, kinnar and chhakka etc. The presence of transgender as a community in India can be seen from the past history period and we can see their mention in the books of Hindu Mythology such as Mahabharata in which there was one character known as Shikhandi who was transgender. Also during Mughal Rule the transgender were appointed as guards of Harems for the queens and other ladies of the kingdom. In India, whenever some auspicious function such as marriages or baby is born, the transgender people come, dance and give blessings and take money in return of those blessings.

The problems faced by the transgender in India are one of the most important issues that have to be looked after. They have to be given equal rights like other citizens of India, like to education, job facilities and there upliftment in the society. The other problems faced by this community are lack of parenting and due to lack of jobs these people are forced into prostitution and drugs smuggling and other illegal activities.

COMMUNITY OF TRANSGENDER AND THEIR EVOLUTION²

The presence of Transgender as a community is seen from way back in the Indian context. In India, according to Hindu Mythology, the mentions of transgender have always been there. The Hindu god Ardhanarishwara who depicts half male and half female which in modern sense is known as transgender. Another mention we can see in the Ramayana where the King Ila spent his life in two different segments in which half of his life he lived as man and another half as woman. In Mahabharata, the main hero of the epic who was Arjuna also spent one year of his

¹ Transgender rights in India. (n.d.). Retrieved February 8, 2019, from <https://iasscore.in/national-issues/transgender-rights-in-india>

² Nambiar, S. (2017, January 01). A Brief History of Hijra, India's Third Gender. Retrieved February 8, 2019, from <https://theculturetrip.com/asia/india/articles/a-brief-history-of-hijra-indias-third-gender/>

life as a transgender due to one of the curse he received from a saint. There was a King Bangasvana who was changed by lord Indra into a woman because he had offended lord Indra.

First publication of transition from male to female marked in the year 1932 the person who undergone the surgery was Lily Elbe's who undergone five surgeries including ovarian and uterine transplant and died due to rejection by the body of himself. Sir Harold Delf is also known as father of Modern Plastic Surgery and he performed first sexual transition surgery in the year 1945. The community of transgender in India consist of different types of transgender such as Kothis, Eunuchs, Aravanis, Jogappa, Shivshakti.

PROBLEMS OF TRANSGENDER IN INDIA³

In India, we have always seen gender biasness, in which male community is always preferred over female, but these transgender in India are always sidelined in all prospects. They are not even considered as gender and face many problems which the other two genders never ever faced in their life time. Some of the problems are listed out as follows:

- 1. Discrimination and Ostracization:** the transgender are completely abandoned and isolated by the society. They have their own community formed, where they all live and earn together. They are just called for dancing and giving blessing on the auspicious occasions. They have always been sidelined as a gender and always been treated differently as compared to male or female. Not only this, but they are also discriminated when it comes to education, employment, justice etc. They have no rights for adoption.
- 2. Disrespect:** In India the genders like male and female are called and seen with respect but when it comes to transgender, they are never been respected even people are abused with the word like Chakka, Kinnar etc. which is disrespectful for their community as a whole. Also, there are so many people who will laugh on their appearance, while their begging in the trains or near the signals. No matter how hard they try to earn and live a normal life, but they are always looked down by the society.
- 3. Prostitution:** Due to less job opportunity and less respect, the people from the transgender community are forced into Prostitution and to earn their livelihood they work as prostitutes. In Mumbai and Delhi it is very much prevalent to see transgender people in the night working as sex workers.

³ Supra note 1

4. **Lack of Educational Facilities:** As this community is third gender, due to lack of facilities such as in many schools they are not admitted as students also, due to other factors such as lack of washroom facilities for transgender etc makes this gender as less educated or illiterate. Since they lack education, they face many health issues like HIV, basic care and hygiene, how to tackle with problems like depression, which will further leads to problems like tobacco, alcohol and drug abuse.
5. **Separation from Parents:** As soon as they take birth they are separated from their parents and the communities of transgender take them away and make them live with them which makes them parentless and they lacks the parenting which makes there life full of sorrow and pain.
6. **Illegal Business:** In recent times it has been seen that the involvement of Transgender in illegal businesses such as drugs and human trafficking which is because they lacks the job opportunity as compared to other two genders.
7. **Other Problems:** In 1994, the transgender got their voting rights but the problem which they faced was that the government authorities could not issue them voter ID cards because of the question whether they are male or female. They also face problem in accessing the public toilets because there are no public toilets available for the third gender.

Many parents torture their children, especially when their male child behaves and dresses up like a female. Or some may simply disown their children and leave them with the transgender community just because they belong to the third gender. The societies have to understand that this is something very natural and they don't have to be ashamed of, if the child belongs to a third gender. It is not in anyone's control. They are born in this way. It is not their fault and they don't deserve to be treated with disrespect or looked down by the society. The transgender children after getting hatred from their parents and society run away from their home and join the community because over there they are accepted and loved. Due to this they lack confidence in themselves, and are not able to ask for their basic fundamental rights. Like right to vote, property rights, education etc.

The transgender community are also ill treated by the policy. There is no proper justice given to this community. And since they are not protected by the policy, other people take advantage of them like- it become easy for the ruffians to target them for extortion and using them as a sexual objects.

According to the recent report, there are around 43% transgender who do not feel safe on the road and around 32% transgender who don't feel safe to travel in public transport.⁴

LEGAL STAND ON TRANSGENDER

Right to Equality⁵: Article 14 and 15 of the Indian Constitution, it gives equal rights to every citizen of India irrespective of their caste, class, gender, race etc. So for transgender also this right is available as they are the citizen of India and being a citizen of India, our constitution empowers them with fundamental rights and they should be treated equals among all other genders and this right is given to them by our constitution. The transgender deserve equality and they should be given equality in every aspect be it jobs, education, respect in the society and in other aspects also.

Right to Freedom⁶: Article 19 of the Indian Constitution speaks about the six freedoms given to every citizen of India such freedom of speech and expression, to reside and settle in any part of India and to practise any profession, hence these rights are applicable and given to transgender also but irrespective of these rights they live in society far away from other two gender, they can profess any profession because they face huge humiliation in the society, school, offices because of being Transgender and also they lacks facilities which is important for their sustenance such as Special toilets for transgender etc which makes there life more miserable and due to all this pressure and problems they can't profess any profession, instead of this they just become beggars or dancers and earn their livelihood. Article 21 of the Constitution provides Freedom of person which includes right to privacy and dignified life but the transgender are deprived of this right also, they can't live dignified life till the time they are not doing what they want to do but they are doing what they are forced to do such as dancing, begging which is not dignified for those who don't want to and the transgender are doing this due to societal pressure, less education and no jobs for them, which results that even after having all rights they are deprived of their rights.

⁴'Transgender people face casual discrimination up to 60 times a day'. (2017, October 17). Retrieved February 8, 2019, from <https://www.amnesty.org.au/transgender-people-face-casual-discrimination-up-to-60-times-a-day/>

⁵ The Constitution of India

⁶ Supra note 6

GOVERNMENT INITIATIVE FOR TRANSGENDER

In the judgement of National Legal Services Authority vs. Union of India (2014) the court recognized transgender as third gender and after that the transgender people got recognition but still no strong and effective steps have been taken by Central government or state government for the welfare of transgender community. There are some states which came forward with the initiative of welfare for the transgender community.

State Government of Kerala is one of the first state governments which came up with the initiative of giving them education so that this will increase their progress. The new policy for transgender will be applied for all government colleges of Kerala in which two seats will be reserved for the Transgender students. The Kerala Government announced the jobs for transgender people in the state's metro system and also implemented other welfare plans for the upliftment of this community⁷.

The government of Tamil Nadu also started initiatives for the upliftment of the transgender community. The state government announced proper access of transgender to education, health care, social security and other non discrimination initiatives for transgender.⁸

The government of Maharashtra is a second state in India to set up a welfare board. The Maharashtra is first state to set up a cultural institute for the transgender. The welfare board is set up to provide proper education, employment and self – employment opportunity, health programmes and free legal aid to the community⁹.

States like Odisha, Karnataka and some more states have started taking consideration for the welfare of the transgender community now and it's a good sign that state government are coming forward to take responsible steps for the upliftment of the transgender community in their states and in whole India.

⁷ Gupta, S. (2018, July 16). Indian state takes a step forward for transgender rights. Retrieved February 8, 2019, from <https://edition.cnn.com/2018/07/16/health/india-kerala-transgender-laws-bill-intl/index.html>

⁸ Supra note 9

⁹ A Development Agenda for Transgender in Maharashtra. (nod.). Retrieved February 8, 2019, from <http://www.in.undp.org/content/india/en/home/sustainable-development/successstories/a-development-agenda-for-transgenders-in-maharashtra.html>

THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019¹⁰

The Transgender Persons (Protection of Rights) Act, got President's Assent on 5th December 2019, and became an act. The act is made in accordance to provide a mechanism for the protection of rights of Transgender persons and their welfare and to provide them social, economic and educational rights, so that they do not feel less than any other gender in India.

Salient Features of the Act:

The act provides the fully fledged definition of Transgender people.

Chapter II of the Act deals with the Right of Transgender regarding Prohibition against any type of discrimination. Under this chapter, the Act prohibits discrimination such as denial of admission of transgender in the educational institution, unfair treatment in the work or denial of the work, denial of proper healthcare facility, denial of usage of public good and services, denial of holding public and private office and denial of rent/purchase/occupy the property. All of this is prohibited and they have equal rights same as given to other genders.

Chapter III of the Act deals with the Recognition of Identity of Transgender Person, under this , The District Magistrate is been authorised to give or issue an identification certificate to the Transgender, and to avail benefits given to Transgender this certificate is mandatory. The person has to apply with proper application in the DM office, then after examining documents the DM will give the certificate. Also if the person wants to recognise as male or female he has to go for Sex Reassignment Surgery and then get the approval of DM by showing the medical certificate issued by the Chief Medical Officer and only after that the person can be recognised as male or female.

Chapter IV of the Act deals with the Welfare Measure by the Government for the Transgender People, under this, the government will take measures for the more number of participation of Transgender people and the inclusion of transgender in the society. The government will ensure welfare measure for the rights and interests of the transgender community. The government will ensure policies for the protection of the transgender, their rescue and Rehabilitation of Transgender people and the government will take measure to involve the transgender people in cultural and recreational activities.

¹⁰ The Transgender Persons (Protection of Rights) Act,2019

Chapter V of the Act deals with the Obligation of the Establishment and Other Person, in which it is mentioned that No establishment can discriminate against any transgender in the matter of employment which includes recruitment, promotion and other related issues, The Transgender people should get the compliance facilities in every establishment in which a Compliant officer should be there in every establishment who will deal with the complaints of the above mentioned issues. This part also gives right to Transgender, to reside with their family and enjoy the facilities and in case family is not able to take care of the child, then the by the court order of the competent court, the transgender child will be sent to rehabilitation centre.

Chapter VI of the Act deals with the Education, Social Security and Health of Transgender Person, under this the Government emphasises on the education as it mandates all educational institutes which are aided and funded by the government to provide educational opportunities for transgender persons which will help them for their inclusion and include them in sports and recreational activities without discrimination. The government emphasise on the making of welfare schemes which will include vocational courses and training to make transgender person self employed and financially strong. Under Healthcare, the government is proposing to setup Sero-surveillance Centres, medical facilities for Sex Reassignment Surgery and also the coverage of expense involved in the Sex Reassignment Surgery with the help of insurance and include therapies in the insurance cover for transgender persons.

Chapter VII of the Act deals with the National Council for Transgender Person, under this the Central Government will form a National Council in which the members will be Union Minister, Minister of State, Secretary and Joint Secretary of Social Justice Ministry, then one representative from ministries like Health, Family, House and Urban Affair, Human Resource and Rural Development Ministry. One representative from National Human Right Commission, one representative each from state ministries from North, South, East , West and North East Zones and Union Territories. Five representative of Transgender Community and Five Experts from NGO and will be nominated by the Central Government. The term of the members will be 3 years from the date of nomination. The Council will help the Government in making policies for the welfare of the Transgender community and the council is there for the grievance redressal related to the Transgender community.

Chapter VIII of the Act deals with the Offences and Penalties where the government explains the type of offenses such as if forced labour is done by transgender then the employer will be punished and any type of abuse which include physical, mental, sexual or any other abuse done

to a transgender, it will be a criminal offense and the person will be punished in the form of imprisonment from six month till two years and fine or both.

Chapter IX of the above Act deals with other miscellaneous things which could not be categorised in above chapters.

ANALYSIS OF THE ACT

The act is been criticized by the Transgender community in which they have argued that the act is vague and is not good for their community. As the Act speaks about the Certificate of Identity which is criticized as the power is conferred to the District Magistrate, and the community always wanted the right of self determination, if the power is given to District Magistrate then again they may face humiliation while getting certificate, and as being male or female does not need any certificate why is there a need to get a certificate of being transgender. It also violates the Judgement of Supreme Court related to Transgender in NALSA Case where Supreme court did not mandate the ID card instead they gave right of self determination.

The sex reassignment surgery is now mandated if one want to recognised as male or female which is also been criticized, as it their personal choice to be whatever they want to be , there should not be any mandatory requirement such as Sex Reassignment Surgery.

The Criminalization part is also been criticized as if the physical, sexual and mental abuse happens with the gender like male or female, the minimum imprisonment is given of 7 years but for transgender it is only 2 years and that to maximum which makes itailable offense.

If the Trans child is not maintained by the parents then that child will be sent to Rehabilitation centre which is totally discrimination against the transgender as no male or female child is sent to rehabilitation centre no matter what but the transgender child will be sent to rehabilitation centre.

There are no provisions of reservation anywhere in the Act, as right now in the present time, the Transgender people need reservation to compete with other two genders but there are no provisions of reservation for them which is also a loophole of this act.

In many ways this Act is not which was needed for the welfare of the Transgender communities. The Act itself discriminates between different genders and is not completely for the welfare of the Transgender people. It looks like the act is just made for the sake of making it, and no one is

going to get any benefit as the Transgender people are only opposing it so, the government should bring amendment and make the act more strong and appropriate.

CASE STUDY ON NATIONAL LEGAL SERVICES AUTHORITY (NALSA) VS. UNION OF INDIA¹¹

Parties- The National Legal Services Authority of India (NALSA) was the petitioner. Poojya Mata Nasib Kaur Ji Women Welfare Society, a registered society and NGO, and Laxmi Narayan Tripathy, a renowned Hijra activist.

Bench- The case was heard in the Supreme Court by two-judge bench, Justice K.S. Panicker Radhakrishnan and Justice Arjan Kumar Sikri.

Introduction –This case was decided on 15th April, 2014. It is a landmark case for seeking redressal grievances of transgender community. Who are fighting for their rights and their identity, which violates article 14, 15, 16 and 21 of the Constitution of India, Since transgender in India face lot of problems and are considered as untouchables by the society. The transgender should be given equal right and dignity as any other citizen of India. They should have their right to choose their own gender irrespective of the gender they are born with.

Facts- There were two writ petitions filed to protect the right and dignity of the transgender community. The NALSA filed a writ petition numbered as 400 of 2012. Poojya Mata Nasib Kaur Ji Women Welfare Society, also filed writ petition No 604 of 2013, regarding similar grievances, related to transgender in India. Laxmi Narayan Tripathy, a known Transgender Activist questioned that under Article 14 and 21, the non recognition of transgender as an identity is a violation of right to equality and right to life.

Analysis:

Article 14- According to article 14 of the Indian Constitution, it states that no state shall deny “ANY PERSON” his/her equality or equal protection of the laws. Therefore everyone including transgender should enjoy equal rights and equal protection of laws and they should not be denied of it. This article does not specify whether a male or a female can only enjoy equality as such. And thus, transgender are equally a part of this article. Also, they should not be discriminated on the basis of their gender.

¹¹NALSA vs. UOI (2014) 5 SCC 438

Articles 15 and 16-article 15 and 16 prohibits discrimination against any citizen of India on the basics of caste, colour, SEX, etc. both articles prohibits all types of gender bias and discrimination based on the basis of gender. The law makers also gave more emphasis on the discrimination based on sex. The term ‘SEX’ which was used in both the articles is not just limited to biological sex of male or female but also includes the transgender people i.e. who considers themselves neither male or female.

Article 21- article 21 is the heart and soul of the Indian Constitution which speaks about protection of life and personal liberty. No person shall be deprived of his/her personal liberty, unless it violets the laws. Moreover right to life is the fundamental right, and no one has the authority to take it away from any citizen of India. Recognition of one’s identity comes under this article and therefore this community should get their right to choose their own gender.

While talking about gender identity and sexual orientation, Justice K.S. Radhakrishnan said that these both are different concepts.

Gender identification is one of the important aspects of life which refers to a person’s internal sense of being of any gender which could be male, female, transgender, queer etc. Gender identity can be defined as to what a person is deeply feeling internally and his/ her individual experience of his/her own gender, which may be different with the sex assigned at birth. Therefore Gender Identification is something which is one’s own identification whether as a male, female, transgender and queer etc.

Judgement¹²:

To safeguard and protect the rights of the transgender guaranteed in the constitution of India, it was declared that:

1. Hijras, Eunuchs, apart from binary gender, must be and clearly be treated as “third gender”.
2. Transgender Community and people have right to decide their self-identified gender is also upheld.

Supreme Court ordered Centre and State Government to:

- Provide legal recognition of their gender identity of their choice such as men, women or third gender.

¹² Bhargava, Lavina. “Supreme Court Case Analysis: NALSA v. Union of India and Ors. By: Lavina Bhargava.” *Latest Laws*, www.latestlaws.com/case-analysis/supreme-court-case-analysis-nalsa-v-union-of-india-and-ors-transgenders-rights-case-by-lavina-bhargava/.

- Take concrete steps to treat them equally as backward classes (socially or educationally) of citizens and provide them all kinds of reservation with respect to admission in educational institutions and for public appointments and jobs.
- Operate and make HIV Sero-surveillance Centres separately as Transgender face several different sexual health issues.
- Seriously acknowledge and address the problems being faced by Transgender such as fear, shame, social pressure, depression, suicidal tendencies, social stigma, etc.
- Take proper steps to give transgender medical care in the hospitals and also provide the transgender separate public toilets and other facilities as different from male and female.
- Take concrete steps for making different and various types of social welfare schemes for the betterment of the Transgender.
- Take measures to create and increase public awareness so that Transgender will feel that they are also part of the social life and not be treated as aliens.

CONCLUSION

Transgender in India have been facing problems right since the beginning. They have been denied of their fundamental rights like right to choose their gender. They face many problems in finding jobs, which leads them to beg, dance in bar, prostitution and many other illegal activities. The disrespect that these people face every day brings their moral support down. It destroys their confidence. They start to feel optimistic. The government came up with this new Act which is a good step towards them but still not sufficient because there are many flaws in the Act itself, which will create more bad as compared with the good. There are many loops still there in the act. Another issue is change of mentality among people. People consider them as they are not the part of the society because since childhood everyone interacted with the transgender only in some ceremonies but no one knows the plight of transgender as what they face. We have always seen the transgender in trains as beggars or dancing during ceremonies, which is why no one is ready to accept them in their society. The important steps as including them in the educational institutes, giving them reservation in the jobs and making them educated and self sufficient can bring the change in the behaviour of the society. We have seen many Transgender, for example Shabnam Mausi as first Transgender Legislator, but the public pressure and the eyes which always degrade this gender, makes the life of transgender worse which should be changed and that can only be changed when the government and people will work simultaneously to increase the standard of the transgender people, then only they will alleviate from their standard and be

happy like other genders and with this only the true equality in the society will come and a large amount of happiness will be seen in the country and in the world.