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A Review of The Transgender Persons (Protection of Rights) Act, 2019 on Perspective of the Transgender People

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ABSTRACT

As a human being, we all are equally born and have equal human rights. Apart from traditional categorization of gender between men and women there is another category of people called as transgenders and these are not exclusively identify them as a male or female because they have mixed features of both of genders. The transgender persons are treated unequally by our society. Even they are fighting of their separate gender identity. Our Constitution of India provides right to equality to all people by using word persons. Under Constitution every citizen of India has an equal right to live a life with dignity and respect. Yet, transgender people do not find an equal and respectful place for them in our society. Despite a respectful living conditions they are still fighting for their identity. The government for uplifting the living conditions of the transgenders enacted the Transgender Persons (Protection of Rights) ACT, 2019. The transgender community have so many expectations with the Act. Definitely as a primary step the Act provides a hope to the transgender community that government is vigilant about the protection of rights of the community. In this study, we will discuss about the features and major drawbacks of the Transgenders Persons (Protection of Rights) Act, 2019 and a make a critical review of the Act on the point of view of the needs and necessities of the transgender people.

Keywords: Transgender, Equality, Gender, Constitution, Rights.

I. INTRODUCTION

The transgender is another category of gender apart from male and female. The word transgender does not mean to be one single gender but is used to represent various categories of people who does not find himself to be identify only as a male or female. They have equal fundamental rights under the Constitution of India. But there is a negative approach of our society towards these people. They are born free but unfortunately they are not able to freely live a happy or healthy life. The total population of transgender in India is 4.88 lakh as per 2011 census. But there is ratio in education, employment sector is stressful condition. Most of the

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times they denied jobs and if they get any job they face humiliation with by their co-staff members. According to the study of 2018 by the National Human Rights Commission, 96% of transgenders are denied jobs and are forced to take low paying undignified works like sex work, begging and badhais. The study further revealed that about 92% transgenders are deprived of the right to participate in any for of economic activity in our country. The report further revealed that around 23% are forced become sex workers which has high health related risks, which results in transgender people being 49 times more at risk of living with transmitted diseases like HIV AIIDS etc. compared to the general population. It is not only the result of the stereotypical mentality of our society but there is executive failure also there.

Here, we have to appreciate the role of our judiciary to take cognizance about the vulnerable conditions of transgenders. The Supreme Court of India in the judgement in *NALSA vs. Union of India*², recognized that transgender people have distinct identity from binary people and declared them as the third gender under the Indian Constitution and gave instructions to the government to work for the protection of transgenders rights. Further in 2018, the Supreme Court struck down section 377 of the IPC to decriminalizing homosexuality. As a consequence, the parliament passed the Transgenders Persons (Protection of Rights) Act, 2019. This Act defines the word transgender and prohibit discrimination against transgender people in any form and also provide some welfare measures for trans community but as a whole it does not fulfill the expectations of transgender community. The Act is failed to touch the major concerns of transgender people

II. MEANING OF TRANSGENDER

The word transgender is not used for a single category of people but inherit itself different categories of people. The word transgender was derived from two words that are ‘trans’ means ‘across’ and ‘gender’. The etymological meaning of the word transgender is ‘beyond the gender’ which simply means the category of people who does not fit in the male and female gender group. The Supreme Court of India defines the word transgender in their judgement in *NALSA VS. Union of India* that the benefit of ‘third gender’ would be enjoyed by the transgender community comprising “Hijras, Eunuchs, Kothis, Aravanis, Jogappas, Shiv-Shakthis etc”. The Transgender Persons (Protection of Rights) Act, 2019 provides a legal definition of the word transgender. According to section 2(k) of the Transgender Persons (Protection of Rights) Act, 2019 defines the term ‘transgender’ as, “transgender person means a person whose gender does not match with the gender assigned to that person at birth and

² National Legal Services Authority vs. Union of India and others, (2014) 5 SCC 438.

includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta”. It is the legal definition of the word transgender.

III. THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

The wait of the transgender community for a separate law for their welfare and to get a legal recognition of their identity as third gender is over by the enactment of the Transgender Persons (Protection of Rights) Act, 2019. The long struggle of transgender community and judicial activism towards their welfare in the NALSA’s judgement in 2015 by the Supreme Court there was a moral as well as social pressure on the government to take the matter of transgenders rights seriously and provide legal protection to them. The main focus of the Act is to prohibit discrimination with transgender community in any form. As the Supreme Court says, “We therefore, conclude that discrimination on the basis of sexual orientation on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect or nullifying or transposing equality by law or the equal protection of laws guaranteed under our Constitution and hence we are inclined to give various direction to safeguard the constitutional rights of the members of the transgender community”³. The main objective of this Act to uplift the transgender community and provide a sense of legal protection to them against discriminatory behavior of society. But the Act does not completely fulfil its objective as because it has some major issues. In the year 2019, many transgender activists raised their voices against the vagueness of the law. But there are also some significant provisions brought under this Act that are as follows:

➤ Features of the Transgender Persons (Protection of Rights) Act, 2019:

a) Legal Recognition of Transgender people: The Act solve the problem of non-recognition of transgender community identity. These people does not want to identify them as a male or female but they believe they have a separate gender identity that should be recognized. The Chapter III of the Act said that a person who recognized as transgender shall have right to self-perceived gender identity. This provision left a choice on transgender people to be recognized as per their choice of gender. As the Supreme Court stated in NALSA’s case judgement of 2015 “at the birth of a child itself, sex is assigned. However, it is either male or female. In the process society as well as law, has completely ignored the basic human right of transgender community to give them their appropriate sex categorization. Up to now, they have

³ NALSA vs. Union of India, 2014, Writ Petition (civil) No.400 of 2012.

either been recognized as male or female. This is not only improper as it is far from truth, but undignified to these transgenders and violates their human rights”.

b) Certificate of Identity: The Act does not only give choice to be recognized as per the choice of transgenders but also provide a provision of certificate of identity. Section 5 of the Transgenders Persons Act, 2019 provides that to be recognized as third gender person may make an application to the district magistrate to issue a certificate of identity as a third gender person. In the case of minor child his or her parents or guardian make also an application for gender identity certificate. The magistrate after their application issued a gender identity certificate that acts as an official recognition of a person as transgender.

c) Welfare Provisions for Transgenders: As a marginalized group of society transgender community suffered a lot as compared to other weaker sections of society. Because of this fact this Act provides a provision for welfare of transgenders. The Act lays down duty of the government to start welfare measures for these people. As we know that without ensuring the participation of transgender community in education, employment or other levels all efforts for their welfare being waste. So, it is duty of the government to ensure the participation of transgenders in different levels by ensuring a healthy and safer environment for them that will definitely helped for their upliftment.

d) Establishment of National Council: The Act provides a provision for statutory body that is National Council for Transgender Persons. The National Council for transgender person shall establish by Central Government to perform functions such as; giving advice about policy and planning for transgenders, review the impact of policies programs for transgenders. But unfortunately, there is no provision for powers for the council. Without adequate powers the council is like as dead person.

➤ **Drawbacks of the Transgenders Persons (Protection of Rights) Act, 2019:**

a) Lack of Involvement: The major drawback of the Act is non involvement of transgender community in drafting process of the Act and without their representation in the process of drafting the Act is failed to touch the real needs of the transgender community. The people who suffered have not approached by the government to talk about the problems they are suffering and what are expectations of them with the government. Without involvement of transgender community, it is clear that the Act is made on the assumption of the government about their needs, necessities, wants. The views of transgender community should be taken before the enactment of the Act.

b) Conditional Medical Aid: The transgender community has been suffering many health issues. They need a proper health care by the government. The Act is completely silent on the procedure and type of medical aid that will provide by the government to transgenders. The says that the medical aid only provide to them at the time of surgery of sex reassignment. In one side we provide a certificate of an identity as a transgender to them and on the other side we also provide a provision for sex reassignment surgery that is given under section 7 as “After the issue of a certificate of transgender identity under section 6, if a transgender person undergoes surgery to change gender either as a male or female, such person may make an application, along with a certificate issued to that effect by the Medical Superintendent or Chief Medical Officer of the medical institution in which that person has undergone surgery, to the District Magistrate for revised certificate, in such form and manner as may be prescribed”⁴. The point of issue is if we provide a provision of sex reassignment surgery to become male and female and provide medical health only at the time of surgery then what is the value of legal recognition of a person as transgender. Rather than uplifting and helping the transgender the Act is encourage them to reassign their sexual orientation even after the Supreme Court have recognized the transgender as a third gender. This Act only gives the transgenders medical aid if they decide to change their sexual orientation which is completely violating their fundamental right to equality under article 14 and the right to life under article 21 of the Constitution.

c) Marriage: The marriage is a physical as well as psychological need of every person. The right to marry is a comes under fundamental right to life under article 21 of the Constitution as well as the human right provided by Universal Declaration of Human Rights, 1948⁵. The transgender people are also human beings. Just like other human beings they also need an physical as well as emotional support. But the Act is silent on aspects of marriage, adoption, property, social security of transgenders that violates their fundamental right under Article 21 of the Constitution.

IV. CONCLUSION

One of the major problem of India is the absence of gender neutral laws. Most of the laws made either for male or female. But there are a population of 4.8 lakh people of transgender those also have equal fundamental rights under the Constitution but they are neglected to be treated equally. The Transgender Persons (Protection of Rights) Act, 2019 could became a significant Act that solve the major issues of transgender community although the Act have significant

⁴ The Transgender Persons (Protection of Rights) Act, 2019, Act no. 40 of Parliament.

⁵ Universal Declaration of Human Rights, Article 16, United Nation Human Rights.

provisions for welfare of transgenders but actually the Act is failed to deal with real needs of transgenders. The Act was supposed to uplift the level of living of transgenders but instead of helping and uplifting the transgenders the Act is depriving them of their important rights. The government should again take the examination of the Act as per the perspective of the transgender people by taking the suggestions of the transgender community after doing analysis of their suggestions and needs the government should add the provision for fulfilling the then necessities of the transgenders.
