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Transgender Persons (Protection of Rights) Act, 2019

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ABSTRACT

In today's society we hear a lot about right and communicate in the language of rights loud often. People belonging to some special communities are often denied to their entitlements in name of religion, race, sex, caste, etc. they have to settle according to needs of the society and engage in the struggle. There are many occasions in the past history where the transgender community has been let down in front of the whole society. Transgender community is an essential part of our society and they are part of our community and citizens of India. They have equal rights as do we have. Regardless of all the constitutional measures they are often denied their basic fundamental rights like right to equality, right to dignity, freedom of expression etc. Even though the law has been passed by the country to protect the community.

Keywords: *Transgender, Discrimination, Rights, Sexual Identity.*

I. INTRODUCTION

In today's society we hear a lot about right and communicate in the language of rights loud often. People belonging to some special communities are often denied to their entitlements in name of religion, race, sex, caste, etc. they have to settle according to needs of the society and engage in the struggle. There are many occasions in the past history where the transgender community has been let down in front of the whole society.

Transgender community is an essential part of our society and they are part of our community and citizens of India. They have equal rights as do we have. Regardless of all the constitutional measures they are often denied their basic fundamental rights like right to equality, right to dignity, freedom of expression etc. Even though the law has been passed by the country to protect the community and provide them their equal rights but then also they are entangled in various legal formalities.

II. HISTORICAL EVOLUTION

India is one of the most religious country with distinctive culture. The term "Hijras" or

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transgenders is not very new concept. They have been perceived in our old history too. Also, in the Hindu mythology and other religious texts, they have a solid historical presence. The writing named “Kama Shastra” the old Hindu content where they have been alluded as “tritiyapakriti” or the third sexual orientation has been a necessary piece of Vedic and puranic written works. Also, in Hindu folklore, “Bahuchara Mata who is a Hindu goddess is considered as the support of the hijra people group in India. According to the census held in 2011, the transgender population of India is 4.88 lakhs. They have faced a series of unjust laws and never been treated equally from the beginning of the British era.

III. SERIES OF AMENDMENTS IN THE LAWS RELATED TO TRANSGENDERS

Telangana Eunuchs Act, 1919- the act was the demonstration of the criminal Tribes Act, 1871 that was abolished after the independence. This law empowers the state to aggrieve the Transgender community on premise of their sexual personality. It additionally engaged the police to keep an eye and capture them based on their cross dressings and their movement.

The lawfulness of this act was tested under the Steady gaze of Hyderabad high court in *Vyjayanti Vasanta Mogli and Ors. V. Territory of Telangana and Ors*². Case. In this case the court passed an order to remain the activity of the act under definite hearing. This was an instrument to understand the reason behind the discrimination towards the transgender community .

IN 2013, the Indian government setup an expert committee to understand the problems faced by the transgender community.

In 2014, in the case of *National Legal Services Authority v. Union of India*,³ the court declared the transgender people to be the “Third” gender and affirmed that the all the fundamental rights are equally applicable to them and gave them the right to self-identification of their gender.

In 2014, a private member bill, the rights of transgendered persons, was introduced in the Rajya Sabha and this bill approached to a range of entitlements of transgender people in the fields of health, education, skill development.

In 2016, the government introduced its own bill in Lok Sabha and was referred to a Standing committee. The committee made many recommendations for the transgender people such as defining of the term persons with intersex variations, reservations, partnership, adoption, etc. But the bill lapsed as the 16th Lok Sabha dissolved.

² Vyjayanti Vasanta Mogli and Ors. V. Territory of Telangana and Ors writ petition no. 74/2020

³ National Legal Services Authority v. Union of India and Ors. AIR 2014 SC 1863

Section 377 of IPC- “Unnatural offences”

The Supreme Court has decriminalized the Section 377 of IPC to provide the equivalent status to LGBT people in India. It also guarantees their entitlement to wedding and have a family.

In 2019, the **Transgender Persons (protection of Rights) Bill, 2019** was passed by the Rajya Sabha on 26th november 2019 during the winter session and after getting approval from President of India, it was made into a law.

On 18th April 2020, the ministry of social justice and empowerment gave the Draft **Transgender Persons (protection of rights) Rules, 2020** under the Transgender Persons (protection of Rights) Bill, 2019 for suggestions and recommendations by the public. It involves the suggestions by the transgender people in india to enhance the laws and clauses in the bill.

IV. THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) BILL, 2019

The Transgender Persons (Protection of Rights) Bill, 2019 was introduced in the Lok Sabha by Mr. Thaawarchand Gehlot (minister for social justice and empowerment) on 19th July, 2019 and was passed on 05th august, 2019. The main purpose of the bill is to safeguard the rights of the transgender people in India. The law was enacted after analyzing the transgender persons (protection of right) bill, 2018 and Transgender persons (protection of rights) bill, 2016.

(A) Objectives of the Transgender Persons (Protection of Rights) Bill, 2019

- 1. Definition of Transgender Person:** The bill defines the transgender person as the person whose gender does not match with the gender that was assigned to him at the time of birth. It includes trans-men, trans-women, persons with intersex variation, gender queers, and the person with socio culture identities such as kinnars and hijra.
- 2. Prohibition against Discrimination:** Prohibits the discrimination towards the transgender people on the grounds of denial, employment, healthcare, etc.
- 3. Certificate of Indentity:** The transgender people would be provided with a certificate of identity by the District Magistrate’s Office to provide the right to self-perceived gender identity.
- 4. Right of Residence:** The person has the right to live with their parents or any immediate family member.
- 5. Welfare Measures By The Government:** The bill provides that the government will make schemes for the welfare of the transgenders and shall provide education and recreational facilities to them

6. National Council For Transgender Person (NCT): The central government will setup the NCT.

7. Penalties For Violation Of Law: extreme punishment of 7 years for the offence of rape, assault or utilization of criminal power. Also, punishment for a limit of 2 years for violence against transgender people.

V. CRITICAL ANALYSIS

The act fails to incorporate the principles in line with the Supreme Court judgement in the case of National Legal Service Authority v. Union of India ⁴in 2014 such as the right of transgender people to declare their self-perceived identity without going under sex reassignment surgery and reservations in jobs and educational institutions.

VI. ISSUES AND RECOMMENDATIONS

- Poor understanding of gender and sexual identity: the bill does not differentiate between the transgender, transsexuals, intersex persons and the gender-queer
- The legislation does not provide any reservation for the transgender people and should be granted in public employment
- The bill is progressive in allowing the self-perception but regress by mandating that each person would have to be recognized as 'transgender' on the basis of the certificate provided by the District magistrate. There are no open avenues for appeal if the magistrate refuses to grant the certificate.
- The bill has not addressed the issue of non-consensual sex reassignment surgery. There should be strict penal provisions to deal with it.
- Lack of enforceability dilutes provisions.
- Does not recognize the same sex marriage
- Punishments for sexual abuse are not adequate
- Differential treatment of transgenders in prison
- Sensitization of police personnel to deal with transgenders

Apart from these there are a lot of steps that the government should take and to recognize the rights and the identity of the transgenders. These recommendations should be taken into consideration in order to remove the social stigma against the trans-community.

⁴ National Legal Services Authority v. Union of India and Ors. AIR 2014 SC 1863

VII. JUDICIAL RESPONSE

The Supreme Court observed the term “transgender” as, “transgender is generally described as an umbrella term for persons whose gender identity , gender expression or behavior does not conform to their biological sex. Persons who don’t identify with their sex assigned at the birth, which include hijras/eunuchs and they do not identify as male or female ⁵.” As per the court the term “transgender” includes pre-operative, post-operative and non-operative transgender people. The Supreme court has entered to fill the gaps of the society by giving the recognition to the transgenders be treated as third gender to protect their rights under the Part III of Indian Constitution. Also, the state governments were directed to give the legal recognition to such people such as male, female or others.

Supreme Court has decriminalized Section 377 of IPC and has declared discrimination based on sexual orientation to be violation of Article 14, 15 and 16 of the Indian Constitution.

VIII. CONCLUSION

The Transgender Act suffers from a lot of infirmities and it is important to reframe the policy and the legislation. There is a need to adopt the progressive nature towards the transgender people and uphold the constitutional rights of transgenders. Even though the bill has been passed by the legislation but still there are many loopholes and gaps that need to be filled and make a decent attempt to incorporate the third sexual orientation in the public arena.

As described by Kelson in his pure theory of law that “every norm derives its validity from a larger norm”. the Indian judiciary pointed this theory in the case of *Indra Nehru Gandhi v. Raj Narayan*⁶ and held that every law in India derives its validity from the Constitution. The Transgender Act 2019 failed to uphold the values. The LGBT community has struggled a lot to get their basic rights and the freedom if the government and the state does not fulfil their responsibility to provide them with their rights, they will continue to suffer and struggle for years to come.

The bill is not only the violation of the ruling of the Apex court in the NALSA case but also fails to address major issues and matters like the marriage of transgenders, adoption etc. according to ancient and medieval study and evidence, india has a liberal , mainly latitudinarian , humanistic and diverse spectrum of attitudes towards the sexes , including homosexuality. Nonetheless Indian society maintains a conservative attitude about homosexuality which stems

⁵National Legal Services Authority v. Union of India and Ors. AIR 2014 SC 1863

⁶ *Indra Nehru Gandhi v. Raj Narayan* 1975 AIR 865

from british notions that “gay marriages and relationships are not compatible with the nature and are not natural”. As a result, Indian society continues to regard it as immoral and are unable to accept the things because of their preconceived opinion that such relationships were not recognized in old Indian society.

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