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Challenges to Transgender Persons Act, 2019 Under the Constitution of India

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ABSTRACT

The Transgender Persons (Protection of Rights) Act 2019 aims to recognize the identities of transgender persons and make it illegal to discriminate against them based on characteristics such as their gender, race, or place of birth, amongst others. In addition to this, it makes an effort to ensure rights in the following areas: access to and use of public services and benefits; employment; equality; healthcare; possession of or disposal of property; and holding public or private office. The Act was created in order to criminalize discrimination against transgender individuals and to respect the identities of transgender people. The legislation, on the other hand, breaches basic rights that are outlined in the constitution of India and is not being enforced in a proper manner. The Transgender Persons Act of 2019 is a contentious topic in this article due of its potential impact on fundamental rights. This study comes to the conclusion that the government has to amend this Act in order to make it more welcoming to transgender individuals and then carry out the provisions of the Act in an efficient manner.

1. Is the maximum punishment for sexual assault against women in Section 376 of the Indian Penal Code, 1860, unreasonably lower than the maximum penalty for sexual assault against transgender individuals in Section 18(d) of the same code? Does the Indian Constitution's Article 14 (which protects the basic right to equality) come into conflict with what we have here?
2. Does the Act have the potential to violate the fundamental rights that are outlined in Article 15 of the Indian Constitution?

Keywords: Transgender, Constitution, Rights, India, Amendments, Fundamental etc.

INTRODUCTION

Verbal and physical abuse is used to discriminate against transgender people in India, even though the country's constitution protects basic rights. Nevertheless, applying the many provisions in the legal system is restricted. Transgender persons have always been a part of every society and culture. However, they have only begun gaining widespread recognition in contemporary society. Even though equality before the law and equal protection under the law are guaranteed by Article 14 of the constitution, discrimination in everyday life is nonetheless rather frequent.



Additionally, it goes against Article 21 of the Constitution of India. The decision that was made in 2014 by the Supreme Court of India in the case *NALSA V. Union of India* (2014) acknowledged "transgender" as the "third gender," which was a significant step forward. This was a significant step forward. The court recognized hijras and eunuchs as a "third gender" to safeguard their legal rights. The court also decided that transgender persons can select the gender they identify with. Although the necessities of education, housing, banking, and pension are the same for persons regardless of sex, access to these services is restricted because of thinking. It also provides all rights under the law, including the ability to marry, adopt, divorce, and succession, among other things.

The rights and advantages of being a citizen of India are being denied to transgender people, in contrast to the treatment of regular citizens. People who identify as transgender are still stigmatized as a group with significant challenges in leading regular lifestyles associated with a binary gender. The government has handled this issue, raising an urgent need for legislation to protect transgender individuals and fix their criminal activity. Transgender people are often the victims of abuse and prejudice, facing major issues such as equality, dignity, respect, etc.

Historical Background and Origin

The notion of transgender people is not recent; they have been acknowledged throughout history. This group has a significant historical presence in Hindu mythology and other holy texts, and they go by various names, including Hijra, eunuchs, Kothis, Aravanis, and Jogappas, amongst others. They are referred to as "tritiyapakriti," which translates to "third gender," in the ancient Hindu literature known as the *Kama Shastra*.

In the epic *The Ramayana*, after Ram had been exiled from the kingdom for fourteen years, his supporters and the city's people eventually returned to Ayodhya. The hijra, among his followers, do not consider themselves bound by the direction and choose to remain with him. They were blessed with the privilege of being invited to happy occasions like the birth of a child, the marriage of a loved one, and the execution of religious ceremonies because Rama was affected by their devotion.

It is said in the *Mahabharata* that Arjun likewise conceals his identity for the same reason: if Kaurav were to see any Pandava, their allotted amount of time would be increased. Consequently, he has lived under a false identity for the last twelve months, posing as the dance instructor of Brihannala. The daughter of King Virat



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was one of the students in this man's dancing and music classes. Urvashi has feelings for Arjun, but he has shown no interest in her. When King Virat discovered the truth about Arjun, he presented his daughter Urvashi to him as a marriage proposal. Arjun accepted King Virat's proposal. Arjun did not take up the offer.

Ila was the child of Vivasvata Manu and Shraddha, who were married at the time of the events of the Mahabharata. However, to fulfill their desire for a son, they paid God money to transform Ila into a man named Sudyumma. One day, as Sudyumma was on his way to the forest, he became afflicted with a curse that caused him to transform into a female. However, Lord Shiv overcame the affliction and allowed him to transform into a man in alternating months. He was granted adulthood at the end of as a result of a gift from Lord Shiv. It is one of the most unusual occurrences in which a female change into a man throughout the alternating months.

According to Hindu mythology, the goddess Bachuchara Mata is regarded as the protector of the Hijra people. She is a deity of the Hindu religion.

According to the myths, during the reign of either Aravan or Iravan, Ali was worshipped as the deity of the transgender people. Even though hijra or transgender people were acknowledged or given prominence in ancient times or places of birth and traditions and practices, the situation was not satisfactory.

Transgenders

Transgender people get their name from the Latin trans, which means beyond and across. People identifying as transgender are those whose gender identification differs from the gender they were believed to be at birth. Individuals who feel different from their biological sex or gender expression because of their gender expression, identity, or behavior while having a male or female bodily type. A transgender person is someone whose gender identity differs from the gender role given to them. It includes Jogappas, Sakhi, Aradhis, and Hijras. These individuals are referred to as transgender persons even if they do not belong to any one group.



DEFINITION

According to Transgender Act 2019 under Section 2(K)- "Means a person whose gender does not match the gender assigned to that person at birth and includes trans-man or trans-woman, a person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta."

Anti-Discrimination Act 1977 under Section 38A – "Transgender people to refer to anyone who identifies as a member of the opposite sex by living or seeking to live, as a member of the opposite sex, or who has identified as a member of the opposite sex by living as a member of the opposite sex."

Transgender Rights under the Constitution of India

The phrase "fundamental rights" refers to the privileges accorded to every member of a society, regardless of that person's gender, sexual orientation, skin tone, or other characteristics. However, prior state policy only recognized two sexes—one male and the other female—and ignored the existence of a third gender or transgender individuals. In addition to other rights, they are denied the chance to vote, get married, own their own home, pursue an education, find employment, and get medical treatment. They were also denied their fundamental rights, including Articles 14, 15, 16, and 21, because society did not value or recognize this group. This is one of the causes behind denying fundamental rights to this community.

Article 14-Equality before the law

The government of India is obligated to see to it that no one is denied the same level of legal protection as everyone else. Before NALSA, persons who identified as transgender had fewer rights than those outlined in Article 14. The term "person" encompasses both transgender and third-gender individuals. Any discrimination against transgender persons, whether it be based on their sexual orientation or gender identity, undermines the legal equality and protection that they are entitled to.

Article 15-Prohibition of discrimination based on religion, race, caste, sex, or place of birth.

Article 15 of the Constitution of India makes it illegal to discriminate based on a person's religion, race, caste, gender, or place of birth.

The word "sex" is not defined by the Supreme Court of India to mean only sexual activity between two adults with their permission. The landmark case of NALSA v. Union of India was only concerned with



issues about gender identity.

Because the community must receive a certificate from the District Magistrate to legally recognize transgender people, there is no question that Section 5 of the Transgender Act 2019 discriminates against those who identify as transgender.

They adhere to the process that is required to earn a certificate. This provides a distinct categorization of gender, likely to result in increased social isolation.

Therefore, those who identify as transgender are subject to discrimination under the Act based on Sex (Article 15), or we may argue that the Act breaches Article 15 of the Constitution of India, which is the fundamental tenet of the constitution.

The distinction between sex and gender lies in the fact that sex is a binary category that consists of just men and females, while gender is more inclusive. Sex does not indicate how a person views themselves; rather, it only indicates how they participate in reproduction. Gender refers to a socially created trait or behavior shown before society. Sex has nothing to do with how a person views it. As a result, a person's sexual orientation does not determine their gender. Therefore, a person's gender is not an interior emotion that arises simply because they possess a certain set of sexual organs.

It is illegal to hurt, injure, or jeopardize a transgender person's life, safety, health, or well-being, regardless of whether the harm or injury is mental or physical, according to Section 18(D) of the Transgender Act of 2019. This offense is penalized by a fine and a period of imprisonment that must not be less than six months but may be as long as two years. Simply, in this case, This clause violates Article 14 of the Indian Constitution since the maximum sentence for sexual assault committed against transgender people is only two years. The maximum punishment for a comparable offense committed against women is three years to life in jail under the Indian Penal Code, 1860 (I. P. C.). The Indian Penal Code classifies sexual assault against women as a serious offense. However, transgender individuals are exempt from this rule.

As a result, it violates Article 14, ensuring everyone has the same access to legal protections. In the Indian Penal Code, 1860 (I. P. C.), for instance, if the criminal or wrongdoers who do the horrific crime of raping someone are condemned to the death penalty, the punishment that is handed out to the person or wrongdoers who commit the crime was enhanced according to the transgression. In contrast to the life sentence that may



be imposed for the same offense committed against transgender individuals, the maximum term for transwomen is only two years in jail. As a result, this violates the rights of transgender persons.

Case-Jayalakshmi vs. State of Tamil Nadu (2007)4 MLJ 849 that while they were employed at the station, police officials sexually assaulted a transgender individual. Nevertheless, even though he was charged with stealing, he was not treated the same way as other alleged shoplifters.

Constitution of India, 1950 NALSA vs. Union of India

Jayalakshmi vs. State of Tamil Nadu (2007)4 MLJ 849

Article 16: Equality of Opportunity in matters of public employment

In this article, there should be no discrimination based on factors such as caste, creed, sex, or place of birth, among other factors. In addition to that, it consists of possibilities and reservations to attend a different class. However, the Transgenders Persons Act 2019 does not consider the transgender community's point of view; rather, it is constructed based on preconceptions about transgender people and their experiences. When there are no restrictions for the reserve of this community's land, it presents a difficulty for job opportunities. It makes it easier for dishonest and wealthy members of society to seize those opportunities for themselves.

Article 21: Protection of life and personal liberty

No one may be deprived of their life or freedom unless the legal procedure is followed.

By passing this Act, the State is extending its authority over a decision, which by its very nature is profoundly personal. This Act violates the rights to bodily integrity, privacy, and personal autonomy because it makes it more difficult for people to claim something as private as their gender identity and because Section 7 forces transgender people to undergo medical treatment to identify with the gender of their choice. To assert anything as private as gender identity, this Act forces people to subject themselves to red tape.

Case - K. S. Puttuswamy vs. Union of India

The right to privacy is an essential part of personal liberty. According to a panel of nine judges, it should be preserved as such. It determined that personal privacy is vital to a diverse society where individuals can



freely express their opinions and beliefs. Individuals can make choices that find an expression in their personalities and are protected in their decisions about their bodies, beliefs, and, in this particular instance, their gender when they have the right to privacy.

Needs for amendments

The Constitution of India provides rights to transgender persons because, in the previous era, the community was deprived of their rights, or we can say that this community has its own space and no one is treated equally. The Transgender Persons Act of 2019 gives transgender people a platform to advance globally, showcase their skills, seize opportunities, and leave their imprint on society. For the benefit of all transgender persons, I believe some reforms need to be implemented. One example is that the penalty stipulated in this Act carries a lighter sentence than it ought to or is insufficient to provide justice, both violations of Article 14. Therefore, there is a need for revisions to key articles that are essential for the protection and growth of transgender persons.

Case-K. S. Puttuswamy vs Union of India

Suggestions

The transgender group or individual was denied the rights guaranteed by the Indian constitution due to these gaps. The rights guaranteed by the constitution are those that are beneficial to living a life and to which no one is denied them. After doing quick research on transgender people, it is clear that the laws need to be amended. A few new sections, such as those governing adoption, property, marriage, and so forth, need to be added. Furthermore, no transgender person should be denied their fundamental rights.

Conclusion

Everyone in the community should be held accountable to the same laws, notably those included in India's Constitution. No discrimination in India threatens the democratic and secular framework given by the constitution of India based on caste, sex, religion, or any other element. This is because there is no caste system in India. This clause has been put in place to guarantee that India would continue to exist as a secular nation.



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Because of a part of their sexual orientation beyond their control, the transgender population is susceptible to discrimination. This is one of the reasons why the transgender community is so marginalized. Even though the law may potentially lead to discrimination among persons, the real situation is slightly different from what has been presented. These problems lead to violations of basic rights, which adds to an overall imbalance in society. Sadly, the Act does not in any way, shape, or form effectively assure that members of the community will not be exposed to harassment or unfairness in any manner, shape, or form. In order to ensure that the laws are applied appropriately, society must first come to grips with the fact that there is a transgender population. Then, it must make any required alterations or amendments to the laws.



References:

- Gupta, Nikhil K. "Ruptures and resurgences: Marking the spatiality of transgender identity in India since the enactment of Transgender Persons Act 2019." *Frontiers in Political Science* 4 (2022): 963033.
- Bhattacharya, Shamayeta, Debarchana Ghosh, and Bandana Purkayastha. "'Transgender Persons (Protection of Rights) Act' of India: An Analysis of Substantive Access to Rights of a Transgender Community." *Journal of Human Rights Practice* 14.2 (2022): 676-697.
- Biswas, Anamika, and Nandini Soora. "Education of Transgenders in India: Status & Challenges." *Issue 5 Int'l JL Mgmt. & Human.* 4 (2021): 415.
- Das, Pallav. "Higher education of transgenders in India: Opportunities and challenges." *International Journal of Research in Engineering, Science and Management* 2.2 (2019): 371-375.
- Philip, Joby, and Devi Soumyaja. "Workplace diversity and inclusion: policies and best practices for organisations employing transgender people in India." *International Journal of Public Policy* 15.3-4 (2019): 299-314.
- Ganguli, Dibyendu. "A STRATEGY ANALYSIS OF TRANSGENDER INCLUSIVITY IN THE EDUCATION SYSTEM IN INDIA: CONFRONT ISSUES AND CHALLENGES." *DEVELOPMENT, ENVIRONMENT & EDUCATION: THE INDIAN PERSPECTIVE*: 45.
- Gomes de Jesus, Jaqueline, et al. "Mental health and challenges of transgender women: A qualitative study in Brazil and India." *International Journal of Transgender Health* 21.4 (2020): 418-430.
- Banerjee, Debanjan, and TS Sathyanarayana Rao. "'The graying minority': lived experiences and psychosocial challenges of older transgender adults during the COVID-19 pandemic in India, a qualitative exploration." *Frontiers in Psychiatry* 11 (2021): 604472.