

“The Transgender Persons (Protection of Rights) Act, 2019: Impact on LGBTQ”

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Abstract: - *The object of the researcher is to go through the legal protection afforded to the persons belonging to the transgender community in India. The researcher explains the nature of Transgender, Lesbian, Gay, Bisexual, Transgender and queer (LGBTQ) person, violation of their rights on the basis of sex. Currently, this proposed law prohibits the unequal treatment against the Transgender Community in India. This Act aware the Transgender person about their rights also prescribes various provisions in the Act i.e. no discrimination on the ground of sex to get education, employment and health care etc. However, the issue still remains unaddressed and the legislation seems to be a half-baked cookie. Whenever the discussion going on about the marginalised sections of the society. It includes minorities group such are senior citizens, poor, physically or mentally challenged person, Schedule Caste or Schedule Tribe people etc. But no one talks with reference to Transgender, Lesbian, Gay, Bisexual, Transgender and queer (LGBTQ) they are the marginalized sections of the society and they need upliftment in the society. This is a serious issue, which needs to be address at a global level.*

Keywords: - Transgender person, Identity, Discrimination, Human rights, Society, Problems, Employment and Punishment.

➤ **Introduction**

The institution of marriage in society is commonly recognised only to male and female relationships. Even in the most of the marriage statutes mentioned such things. The same sex marriage is legally recognised in few developed countries despite this an individual level they have to face criticism from people who do not believe in such things. Though, the same sex marriage is not legally recognised in many countries because of this homosexual partners are denied in many of the legal and economic rights. In society at large many of the benefits are accessible to heterosexual partners but not available to same sex partners.

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After the judgement of *Navtej Singh Johar v. Union of India*², India recognised the same sex partners. But such person still has to face problems in society like social inequality, where the Individuals or groups are kept on the edges of the Society. Being a part of marginalized section implies inexplicable hardships to millions of people around the world. Sometimes, the term ‘outsiders’ is used for those individuals. The people, who are from the marginalised section around the world, have little access over their lives and resources. This makes them incapable to contribute in the development of society. It is a complex problem and there are many factors that cause marginalization in the society.

➤ **Historical Background**

Before the 19th century the problems relating to the Lesbian, Gay, Bisexual, Transgender and queer (LGBTQ) community was very confined but during the 19th century the LGBT minorities raised their voice against their basic human rights violation. Such kind of problems comes forward due to the effort of various civil society organisations in India. The *Bombay Dost* was the first gay magazine in India. In Delhi, after 1980's called *Sakhi* magazine started express the problems faced by LGBTQ community in public forum. Since then the movement regarding the LGBTQ rights started and eventually increased. The major development regarding the LGBTQ community can be seen in the South African Constitution that which expressly prohibit the discrimination against the sexual orientation³.

These people are marginal in the society. They suffer from various problems like not social acceptance by family, discriminations and exploitations. It is kind of social exclusion from the society. Such groups are still marginalized in Country like India where opportunities are denied for them & they are forced to live at the margin of the society while having laws to enhancing the opportunities⁴.

➤ **Nature of LGBTQ**

For researcher it is very hard to telling that about the rights of Lesbian, Gay, Bisexual, Transgender and queer (LGBTQ) person is morally or ethically right or wrong.

² Navtej Singh Johar & ors. v. Union of India (2018) 1 SCC 791.

³ Available at <http://www.allresearchjournal.com/archives/2016/vol2issue6/PartG/2-4-128-110.pdf> (last visited on March 11, 2020).

⁴ Available at <https://www.researchgate.net/publication/327237865> (last visited on March 11, 2020).

The terms Transgender, Lesbian, Gay, Bisexual, Transgender and queer (LGBTQ) are used since these are English terms and most commonly used in the International Human Rights documents. Transgender person are those whose gender is different from the one when they were born. The transgender person is that who may be identity as male or female or neither any of them. Such person's internal feelings may be of male, female or transgender. Transgender people may recognise as lesbian, bisexual, gay or heterosexual. They commonly have known as LGBTQ people.

Gender identity defines that where person perceives own identification with male or female sex as evident in appearance, behaviour etc of person's life⁵. Where two individuals of same sex involves an emotionally or psychologically and physically to each other, it's known as homosexual orientation. Where two individuals of opposite sex involves an emotionally or psychologically and physically to each other, it's known as heterosexual orientation. Where an individual emotionally or physically attracts for opposite sex or same sex person, it's known as Bisexual.

➤ **Problems faced by Transgender Person**

The transgender people have to face many problems in their life like lack of education, family, facilities, unemployment and discrimination in the society. Right to get education, livelihood, employment etc. are basic human rights provided under Constitution of India⁶. The difficulties or problems faced by them are:-

- They are exploited on the basis of their gender identity.
- In most of Islamic countries, the homosexuality is crime.
- Such kind of person has to face many difficulties in their life; they become drug addicted due to the loneliness in their life.
- State fails to protect them from exploitation. It can be seen in many instances where the LGBTQ people discriminated, abused and not protected from discriminatory actions.
- At workplace, they face many problems like not equally treated by colleagues.

⁵ Available at <https://www.sciencedirect.com> (last visited on June, 11, 2020).

⁶ The Constitution of India, Art.16- No citizen shall be discriminate on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them for any employment or office under the State and Art- 21- No person shall be deprived of his life or personal liberty except according to procedure established by law

- There is lack of communication between parents and the LGBTQ children; it increases the confliction between them. In the fear of social stigma parents don't understand them.

➤ **Legal Status of Homosexual in India**

In 19th Century the law related to homosexuality was adopted by the British, given in Indian Penal Code (1860)⁷. In the case of *Suresh Kumar Kaushal v. NAZ Foundation*⁸, the Supreme Court of India held that, Sec-377 of IPC (1860) is constitutionally valid and does not violate any of the fundamental rights⁹.

But this Judgement has overruled by the Supreme Court in the case of *Navtej Singh Johar & ors. v. Union of India*¹⁰, gave landmark verdict that decriminalised the homosexuality between the consenting partners. From this Judgement India recognise the same sex partners but not mentioned in any law about the same sex marriage in India. The other elements of this Sec-377 are related to sex with minors, non-consensual sex & with animal shall be punishable.

➤ **Salient Features of Transgender Persons (Protection of Rights) Act, 2019**

The second largest populated country in the world is India. India is democratic country which gives equal rights to the people of India. Part-III of the Constitution of India gives right to the people which are protected by law (if rights infringed). Equal rights and opportunities in public employment have been given to people without discriminating on the ground of religion, race, caste, sex, descent, residence or place of birth¹¹. When concern is about the Transgender, they are discriminated or can say actually marginalized section of society where by the society do not accept them by saying that they do not fit in the society of male and female.

⁷ Indian Penal Code (1860), Sec-377- Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

⁸ (2014) 1 SCC 1

⁹ The Constitution of India, Art.14,15,19 and 21

¹⁰ *Supra* note 1

¹¹ The Constitution of India, Art.16- No citizen shall be discriminate on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them for any employment or office under the State

*National Legal Services Authority v. Union of India*¹², popularly known as *NALSA* case; this was the landmark case in the history of India, Supreme Court of India, recognises the transgender person as Third Gender which also acknowledge the fundamental rights guaranteed in the Constitution of India will be equally exercisable to transgender person.

Initially, Transgender Persons (Protection of Rights) Bill was proposed in 2016 had to face criticism from the Transgender community, lawyers and activist. Then on 19 July 2019, it was proposed in Lok Sabha and passed by the Rajya Sabha on 25 November and the President of India gave assent on 05 Dec 2019. As of now the Transgender persons (Protection of Rights) bill becomes an Act, Which protects the rights of the transgender but yet to be notified in the Official Gazette for its date of applicability.

This Act is the first Act in the Indian history which protects the rights of Transgender people, their welfare and prohibit against discrimination of unfair treatment in educational establishment, employment or occupation or health care etc¹³.

This Act recognised the individuality of Transgender people on the basis of their Certificates of identity which will be issued by the District Magistrate. This Act provides the significant right to transgender person that if transgender person go through the process of surgery to change their gender either as male or female then that person has to make an application to District Magistrate¹⁴ with Certificate issued by the Medical Superintendent then revised certificate will be issued by District Magistrate¹⁵. Exception is that change in the gender or revised certificate issued by authority will not affect adversely on the right of that person under this Act.

For the protection of transgender of person, like rehabilitation; Government will work for them¹⁶. To protect interest of Transgender person, framed welfare schemes by the government to the transgender sensitive which are about the non- stigmatic, non-discriminating and take appropriate measure to encourage them to take part in the cultural and recreational activities.

¹² (2014) 5 SCC 438

¹³ The Transgender persons (Protection of Rights) Act 2019, S.3

¹⁴ *Id.*, Sec-6

¹⁵ *Id.*, Sec-7

¹⁶ *Id.*, Sec-8

Education¹⁷ will be provided to the transgender person by Government funded institution without any discrimination and opportunities for their employment¹⁸. Medical facilities and its expenditure of the transgender person to reassignment surgery, counselling etc will be given by the appropriate Government¹⁹. Separate human immunodeficiency virus Sero-Surveillance Centre will be established by Govt. for them as per the rules and regulations issued by the National AIDS Control organization.

The Act says that the National Council for the transgender persons will be established²⁰. Along with the Chairperson, Vice Chairperson, member, each representatives from the National Human Rights Commission & National Commission for women and five representatives of the Transgender Community from each state and Union Territory, e.g. each from North, South, east, west and North East region by rotation, appointed by the Central Government and five from Non-Governmental Organisations (NGO's) which works for them.

National Council will perform various functions to like resolve the grievances of transgender people, making policies, programmes, analyse and keep the checks on the policies which are made for transgender persons to get the status of equality in this society²¹.

Who so ever obstruct the transgender person to enter into public place or compel him to vacate the house, village, injured him or cause abuse etc²² that will be punishable with imprisonment up to two years with fine.

This Act is made up for giving safeguard to transgender but this act is silent about to give reservation to transgender person in government or private organisation if really wants to uplift the Transgender community then they require reservation in the education and employment sector as well. The Act explicitly states about the rights of transgender people not with regard to other section of society i.e. Lesbian, Gay or Bisexual.

Begging is crime, but punishment for begging by transgender person is not explicitly mention in the Act. Punishment for rape is given in the IPC (1860) but such criminal activities done

¹⁷ *Id.*, Sec-13

¹⁸ *Id.*, Sec-14

¹⁹ *Id.*, Sec-15

²⁰ *Id.*, Sec-16

²¹ *Id.*, Sec-17

²² *Id.*, Sec-18

by Transgender or such crime happened with them; not mentioned in this Act²³. This Act does not prescribe other rights of Transgender person i.e. Marriage rights, property rights or adoption rights.

➤ **Conclusion**

To ascertain the safeguard of fundamental rights of LGBTQ persons, this Act has been made by legislature but not notified yet. There is need to notify the Act for its implementation with some modifications by removing the short-coming of the said Act. It is welcome move from legislature to protect them from humiliation. Majority must understand that minority groups are distinguished from them and should accept them. In this modern era where individual require to focus on kindness not go with the thought process of gender discrimination and society needs to respect them. Art-15(1) of Constitution of India prohibits the discrimination²⁴. LGBTQ persons in India still has to struggle for their basic fundamental rights.

²³ The Indian Penal Code, 1860 (Act 45 of 1860), S.375- Section 375 of the Indian Penal Code defines rape as "sexual intercourse with a woman against her will, without her consent, by coercion, misrepresentation or fraud or at a time when she has been intoxicated or duped, or is of unsound mental health and in any case if she is under 18 years of age." and Sec-376, who commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the women raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

²⁴ The Constitution of India, Art.15 (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.