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Perpetuating Discrimination through Legislation: A Study of the Transgender Persons (Protection of Rights) Act, 2019

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The Transgender Persons (Protection of Rights) Act, 2019¹ which was released in the interest of the transgender community fails to meet its objective as is evident from the widespread discontent of the transgender community. The law through this Act is reconstructing society in its own perception and confirming the normality of the idea of the gender binary, thus, creating a gap between the impact of the law and the intention of the legislators.² This Act is a form of indirect institutional discrimination as it only deals with the symptoms of the discrimination faced by the transgender community rather than understanding them and addressing the cause of their discrimination.³ This paper analyzes how the Transgender Persons Act fails to ensure equality and is ineffective in protecting transgenders against discrimination, in the light of legal pluralism and the intersections between the 'social' and 'legal' dimensions of social life.

Keywords: *self-determination, reservation, sensitization, hijras.*

INTRODUCTION

¹ Transgender Persons (Protection of Rights) Act 2019

² Reza Banakar, 'Sociology of Law' [2011] Sociopedia.isa 3

³ Jeanine Cunningham & Ryan Light, 'Institutional discrimination' [2007] Blackwell Encyclopedia of Sociology 1

Transgender refers to people who do not identify themselves within the binaries of male and female and within this definition comprises a wide spectrum of gender identities like crossdressers, Hijras, Eunuch means an intersex person who has ambiguous external genitalia, Kothis refers to biological males identifying in varying degrees of femininity, and males and females who feel trapped in their respective biological bodies and identify as the other gender.⁴ Transgenders have been facing social exclusion for centuries since the onset of British Rule and since have been treated as criminals, or as people with deformities or mental disorders and being misunderstood and laughed at.⁵ They have also been facing human rights violations in the educational, healthcare, and employment sectors. Part II of this paper looks at the incongruity of the interpretation of rights between the landmark NALSA judgement and the Transgender Persons Act 2019 focusing on their right to self-determination, reservation in educational and economic institutions, and sensitization of the healthcare personnel. Thereupon Part III of the paper talks about the impact of the Act on the Hijra culture and denies them the right to marriage and adoption.

RESEARCH METHODOLOGY

I have incorporated the *NALSA v UOI* (2014)⁶ judgement to compare it with the Transgender Persons Act and show how it fails to uphold the 2014 landmark judgement. I have also analysed the NHRC report on transgenders in addition to some news coverages and stories to reflect the opinions of the transgender community in India regarding the 2019 Act and how it discriminates against them. I have further included secondary data to analyse and understand this data in the light of sociological theories.⁷

⁴ Johari Arefa, 'Hijra, Kothi, aravani: a quick guide to transgender terminology' (*Scroll.in*, 17 April 2014) <<https://scroll.in/article/662023/hijra-kothi-aravani-a-quick-guide-to-transgender-terminology>> accessed 22 August 2022

⁵ *Ibid*

⁶ *National Legal Services Authority v Union of India* (2014) SCC 5 438

⁷ *Ibid*

FINDINGS/DISCUSSION

CONTRADICTIONS IN THE NALSA JUDGEMENT AND THE TRANSGENDER PERSONS ACT 2019

David Sugarman in his theory on legal pluralism describes state law as plural because the law and legal institutions can mean different things to different people, for example, there can be tensions between local and central regulations, their conceptions of legality, discretionary practices, and enforcement of judgements, etc.⁸ This kind of legal pluralism can be seen in this situation where the decision of *NALSA v UOI*, a landmark judgement on the rights of transgenders, was not completely upheld in the enactment of the Transgender Persons (Protection of Rights) Act 2019.

Gender identity and the Right to self-determination

The Supreme Court in *NALSA v UOI* held that “Gender identity is a person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body which may involve a freely chosen modification of bodily appearance or other means and expressions of gender, including dress, speech, mannerisms and thus Gender identity refers to an individual’s self-identification as a man, woman, transgender or other identified category”.⁹ The court further specified that “Each person’s self-defined gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity, and freedom and no one shall be forced to undergo medical procedures as a requirement for legal recognition of their gender identity”.¹⁰

This self-defined gender identity which is considered to be the most important aspect of the right to self-determination by the court was not maintained by the state in the Transgender Persons Act 2019. Although the Act mentions in Sec 4(2)¹¹ that a transgender shall have the right

⁸ Merry Sally, ‘Legal Pluralism’ (1988) 22(5) Law & Society Review 885

⁹ *National Legal Services Authority v Union of India* (2014) SCC 5 438

¹⁰ *Ibid*

¹¹ Transgender Persons (Protection of Rights) Act 2019, s 4(2)

to self-perceived gender identity however under Sec 6¹² of the Act demands the issuance of a certificate of identity for a transgender person from the District Magistrate.¹³ Through this, the Act discriminates against transgenders by taking away their right to self-determination as it forces them to go through a medical exam and prove their identity to a district magistrate who will ultimately decide their gender.¹⁴ This inequality drawn between the transgenders and cisgenders reflects the state's lack of understanding as it framed the Act from the perception of common gender norms accepted by society and perceives gender in a generalized manner.¹⁵

The discontentment of the transgenders was evident from the protests and a hashtag that also got the trending name of #stoptransbill when the bill was waiting for the assent of the President for instance this online news website shared the people's opinion about the Bill, one person emphasized on the point that the Bill legalizes humiliating transgenders by asking them to get a certificate of their gender under the garb of acknowledging them and is also indirectly making sure that they do not get equal rights, dignity, and freedom.¹⁶ Dan, a primary school teacher from Thane said "My life will end if this Bill becomes law. I've been waiting to change my name and gender for so long now, what if the District Magistrate isn't convinced that I am trans?¹⁷ The Bill says nothing at all about how quickly or slowly the DM will process our papers. This Bill has to go back. The government needs to get off my body."¹⁸

Making the issuance of a certificate compulsory, specifically for transgenders by a DM proves the point that what law does is it idealizes a particular type of legal subject which tends to erase the natural subjects' individualities which come under the social discourses like gender, heterosexuality, etc. that are not acknowledged by the formal law and the legal subject is thus

¹² Transgender Persons (Protection of Rights) Act 2019, s 6

¹³ *Ibid*

¹⁴ Mahaseth Harsh & Vanshika Agarwal, 'The Transgender Persons (Protection of Rights) Act, 2019 and the continued protests: What changes are required?' (2021) 10(2) *Bharati Law Review* 155

¹⁵ *Ibid*

¹⁶ Sasha R, 'Trans Bill 2019: Why India's transgender community is opposing a Bill which is supposed to protect their rights' (*Social Story*, 30 November 2019) <<https://yourstory.com/socialstory/2019/11/stoptransbill2019-india-transgender-community-rights>> accessed 22 August 2022

¹⁷ *Ibid*

¹⁸ *Ibid*

based on a rationalized, neutralized sameness.¹⁹ The Act is incompatible with the plethora of plural identities that are there within the transgender community by defining them with a gender certificate.²⁰

Reservations for Transgenders

The Court in *NALSA v UOI* also noted that the Transgenders despite being discriminated against, marginalized and disadvantaged for centuries have not been provided special provisions like reservation under Art 15(4)²¹ which stipulates for the advancement of the socially and educationally backward classes of citizens and therefore they are legally entitled and eligible to get the benefits of SEBC in addition to this the state was bound to take some affirmative actions for the elevation of the transgenders (*NALSA v UOI 2014*).²² However, the Act fails to uphold the judgement in providing reservation in educational institutions, economic activities, government jobs, or some kind of other affirmative action policies.²³

According to the NHRC Report on transgenders, around 29.11% transgenders in Delhi and 33.11% in UP have never attended school and about 45% in Delhi and 48% in UP have not even studied till class 10th, moreover, transgender persons are denied the right to education despite the execution of Right to Education Act 2009²⁴.²⁵ Although the Act in Sec 13²⁶ stipulates to provide inclusive education to transgenders, it fails to understand that they are not on an equal footing as the other genders and need necessary benefits.²⁷ Not just educational institutions but some affirmative action is also needed in the field of economic activities as the NHRC report

¹⁹ Davies Margaret, 'Pluralism and Legal Philosophy' (2006) 57(4) Northern Ireland Legal Quarterly 592

²⁰ *Ibid*

²¹ Transgender Persons (Protection of Rights) Act 2019, s 15(4)

²² *Ibid*

²³ Mahaseth (n 14)

²⁴ Right to Education Act 2009

²⁵ Kerala Development Society, 'Study on Human Rights of Transgender as a Third Gender' (*National Human Rights Commission*, 2017) 23 <https://nhrc.nic.in/sites/default/files/Study_HR_transgender_03082018.pdf> accessed 22 August 2022

²⁶ Transgender Persons (Protection of Rights) Act 2019, s 13

²⁷ *Ibid*

reflects that 92% of transgenders are devoid of the right to participate in any form of economic activities because of their low level of education and social exclusion.²⁸

Moreover, 96% of the transgenders reported that they were denied employment in the market/workplace and 89% of qualified and skilled transgenders were still not given employment opportunities.²⁹ Thus, it can be inferred that before ensuring inclusion in institutions, entry into such institutions is a necessary first step, and a lot more is needed for the advancement of the transgender community.³⁰ The discrimination they face, social exclusion, and lower economic status, have to be taken into account under this legislation for the advancement and social inclusion of the transgender community.³¹

Sensitization of healthcare personnel

The Court in the NALSA judgement enforced the recommendations under the UNDP report which provided for HIV sentinel Sero-surveillance sites in addition to mental health counselling, sex reassignment surgery, and training healthcare staff to be sensitive by implementing stigma reduction measures in various settings (*NALSA v UOI 2014*). These recommendations were incorporated in the Transgender Persons Act 2019 under Sec 15³² which established these recommendations however it left out the sensitization training part which is the most essential for the protection of transgenders. This is because, the stigma and lack of knowledge that surrounds this community have led to further marginalization by the use of conversion therapy which is widespread but, has been completely ignored in the Act.³³ And the healthcare personnel play the most crucial role in promoting misconceptions by pushing alleged treatments and cures for people with different gender and sexual orientations on the families of trans people.³⁴

²⁸ Kerala Development Society (n 25)

²⁹ Kerala Development Society (n 25)

³⁰ *Ibid*

³¹ *Ibid*

³² Transgender Persons (Protection of Rights) Act 2019, s 15

³³ *Ibid*

³⁴ Chandran Vinay & Vyjanti Vasanta Mogli, 'Conversion Therapy Practices in India' [2021] Asia Pacific Transgender Network 7

Healthcare professionals who hold an authoritative and influential power have been routinely conducting such therapies and threaten the transgenders of a bleak future if they did not change coupled with anti-psychotic medication, hormone injections, and the most horrific of these treatments is the usage of electroconvulsive therapy, which involves sending an electric current through the body, to rectify the gender expression.³⁵ This conversion therapy is not just restricted to healthcare as families also compel their transgender children to not only go through Homeopathy and Ayurveda treatment but also get involved with astrologers, local godmen, black magic practitioners, and other religious beliefs, with many of such people believing that trans people are possessed by demons and thus require exorcism, corrective concoctions, and families even trying methods like corrective rape.³⁶

What is important to note here is that “stigma and discrimination are pervasive and part of the healthcare system, because the medical curriculum at the UG/PG level depicts transgenders as sexual perverts with mental and biological disorders, also despite the Act stating hospitals to be inclusive spaces, in reality, they are still segregated into the gender binary and exclude transgenders by forcing them to join male-female lines, toilets and being ridiculed and laughed at, thus what is needed, is a foundational shift regarding the understanding about gender.³⁷ Sensitization is not only needed in the healthcare space but also in educational institutions to reduce the transphobia and stigma that still exists in society.

Therefore, the way the NALSA decision interpreted the constitution and the Fundamental Rights for the advancement of transgenders was not followed in the same way in legislating the Transgender Persons Act 2019. It can thus be inferred that positive law, embedded in a pluralistic social environment is continually recreated by plural legal interpretations.³⁸ As can be seen, how the Act doesn’t go deeper in understanding the plight, the harassment, and the discrimination that the transgenders face, can be correlated to Weber’s theory of formal

³⁵ *Ibid*

³⁶ *Ibid*

³⁷ Shaikh Aqsa & Harikeerthan Raghuram, ‘Discrimination against transpersons plagues India's health care system. It's time to overhaul it’ (*Forbes India*, 7 January 2022) <<https://www.forbesindia.com/article/new-year-special-2022/discrimination-against-transpersons-plagues-indias-health-care-system-its-time-to-overhaul-it-aqsa-shaikh-harikeerthan-raghuram/72791/1>> accessed 22 August 2022

³⁸ Davies Margaret (n 19)

rationalization of law which implies laws being codified, impartial and impersonal by being applied regardless of the personal characteristics of those involved.³⁹

IMPACT OF THE ACT ON THE HIJRA CULTURE

Fitzpatrick states that “Law is an unsettled resultant of relations with a plurality of social forms and in this, law’s identity is constantly and inherently subject to challenge”.⁴⁰ This can be seen here as well where the Transgender Persons Act is in the middle of two different social forms- transphobia and acceptance of the transgender community as they are. But the law isn’t limited to just institutionalised state law,⁴¹ it also lives in the social sphere, among living relationships, and in relation to our everyday life and this is what is meant by legal pluralism.⁴² Moore describes legal pluralism by the concept of the semiautonomous social field which generates its rules and customs and is affected by rules and decisions which emerge from the larger world by which it is surrounded and then explains through this the reason why new laws fail in their intended goal because the new law forces regulations upon the stronger social arrangements.⁴³

Identifying as a Hijra basically refers to being gender variant, implying that they can take the role of a woman, man, or an in-between self, and being intersex isn’t a prerequisite to becoming a Hijra, thus, the Hijra community is a heterogeneous group of biological, gender identity and sexual variations.⁴⁴ They live in a strictly hierarchal system of gharanas, where the Hijras’ life is governed by their superiors or gurus/mothers who act as policymakers and rule over the community members or chelas,⁴⁵ regulating their life by teaching them their customs like the secret language called Hijra Farsi and being devotees of Mata Bahuchara.⁴⁶ As per traditions, they engage themselves in three forms of livelihood- Badhai, Basti (begging), and Prostitution.⁴⁷

³⁹ Deflem Mathieu, ‘Sociology of Law: Visions of a Scholarly Tradition’ [2008] Cambridge University Press 46

⁴⁰ Merry Sally, ‘Legal Pluralism’ (1988) 22(5) Law & Society Review 884

⁴¹ *Ibid*

⁴² Davies Margaret (n 19)

⁴³ Merry Sally, ‘Legal Pluralism’ (1988) 22(5) Law & Society Review 878

⁴⁴ Mal Sibsankar & Grace Bahalen Mundu, ‘Hidden Truth about Ethnic Lifestyle of Indian Hijras’ (2018) 9(3) Research Journal of Humanities and Social Sciences 622

⁴⁵ *Ibid*

⁴⁶ *Ibid*

⁴⁷ *Ibid*

This guruchela system can be considered as a coping mechanism and a protective family for transgenders after living in fear and being rejected by their own families.⁴⁸

53% of the transgenders live under this guruchela system and 40% live with other transgender groups as acceptance in their biological families is very low.⁴⁹ However, the Act under Sec 12⁵⁰ devalues such kinship bonds by forcing them to reside with their biological families, and through this perpetuates a precarious notion of “family” premised on heteropatriarchy and the denial of marriage and adoption rights for transgenders,⁵¹ the Act further discriminates against them and denies them access to basic civil rights that marriage provides and thus the legislation requires revising the concept of family in terms of its functional aspects rather than following the conventional definition of families.⁵² In conclusion, the Act discriminates against transgenders by devaluing the Hijra culture and denying them the right to marriage, adoption, and form kinship bonds, given to other genders. The law fails to recognize their culture, protect it and ensure their inclusion in society. By not legalizing their marriage, the transgenders who do get married may face problems, they won’t have the protection of the law. By this, the law denies them basic human rights and further instils inequality.⁵³

CONCLUSION

Thus, the Transgender Persons (Protection of Rights) Act 2019, isn’t comprehensive and thorough legislation as it doesn’t solve the root of the problem. In 2021 according to the Ministry of Social Justice and Empowerment, only 1915 transgenders applied for a certificate of identity out of which 220 were dismissed because of insufficient documentation and 85% of the

⁴⁸ Kerala Development Society (n 25)

⁴⁹ Kerala Development Society (n 25)

⁵⁰ Transgender Persons (Protection of Rights) Act 2019, s 12

⁵¹ *Ibid*

⁵² ‘Transgender Bill 2019 is About Disciplining Minorities and Upholding a Patriarchal Family Structure’ (*EPW Engage*, 2019) <<https://www.epw.in/engage/article/transgender-bill-2019-about-patriarchy-family-disciplining#:~:text=Under%20the%20garb%20of%20protecting,to%20the%20patriarchal%20family%20structure>> accessed 22 August 2022

⁵³ *Ibid*

applications are still pending.⁵⁴ There is also a discrepancy in offering punishment against sexual offences between the Act and the IPC,⁵⁵ where the punishment is less for sexual violence against transgenders under the Act and this further disparages their dignity.⁵⁶ This clearly shows how the legislation fails in its objective of, improving the conditions for transgenders and denies them equal rights, and also lacks in recognition of them and their needs in entirety.⁵⁷ Central legislation can take inspiration from the welfare schemes in Tamil Nadu as they provide free sex-reassignment surgery, housing and scholarship, telephone helpline, and much more.⁵⁸ Although a law alone cannot change everyone's mindset, it is still a necessary first step in bringing about change in the conditions of transgenders if framed and executed well.⁵⁹

⁵⁴ Raman Shreya, 'Transgenders can't get state benefits as most official data ignores 'other'' (*Business Standard*, 2021) <https://www.business-standard.com/article/economy-policy/denied-visibility-in-official-data-transgenders-can-t-access-benefits-121061100148_1.html> accessed 22 August 2022

⁵⁵ Indian Penal Code 1860

⁵⁶ Chandran Vinay (n 34)

⁵⁷ *Ibid*

⁵⁸ Kerala Development Society (n 25)

⁵⁹ *Ibid*