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A STUDY ON DISCRIMINATION AGAINST TRANSGENDERS AT WORKPLACE AND LEGAL PROTECTIONS

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ABSTRACT

Transgender are those whose gender identity differs from the sex they were assigned to birth. In India, transgender people have faced marginalisation for centuries, encountering discrimination across various aspects of society, including social, economic, and physical realms. Transgender often experience transphobic harassment, characterised by negative attitudes, fear, anger, and hatred which can result in discrimination and stigma against them. This bias hinders their ability to participate in society. As the employers are not willing to hire them due to such a discrimination, it results in lack of employment opportunities for them. This makes them to begging, to do sex works. Therefore, it is necessary for inclusion of transgenders at workplace.

To address these discrimination and challenges faced by transgenders, the government had enacted the various legislations and also many judicial pronouncements have been passed. These aimed at protecting them from discrimination and the inclusion of transgender in society which in turn will result in inclusion of transgenders at workplace. In the landmark case NALSA v. Union of India the transgenders were recognised as a third gender. This made a significant change in the society leading to accept the transgender. The Transgender Person (protection of rights) act, 2019 was enacted to prohibit the discrimination and includes provisions related to employment opportunities. Another act Employment Standing Order Act, 1946 was passed. this article studies the discrimination faced by transgenders at workplace and laws passed to prohibit these.

Keywords: *Transgender, Discrimination, Workplace, Transphobia, Harassment*

INTRODUCTION

Transgender in India have faced discrimination from ancient period itself. They have faced challenges in all aspects of life, i.e. lack of family support, discrimination in education, healthcare, public places, employment. Discrimination faced by transgender at workplace is one of the major issues hindering their inclusion and growth in the society. The employers in the workplace are not willing to appoint transgenders because of the stigma present in the society. They have been facing bias in hiring process. If so, they are appointed only in low paying jobs and exploitative jobs such as sex work and begging and they also face sexual harassment in the workplace. This hesitates the transgenders from including themselves in the society. This study explores the various discrimination faced by transgenders at workplace and the laws and cases related to prohibition of discrimination and inclusion of transgenders at workplace.

TRANSGENDER – DEFINITION

Section 2(k) of the Transgender Persons (Protection of Rights) Act, 2019 defines “transgender person” means a person whose gender does not match with the gender assigned to that person at birth and 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.¹

¹ The Transgender person (protection of rights) Act, 2019 No.40 of 2019, section 2

DISCRIMINATION FACED BY TRANSGENDERS AT WORKPLACE:**1) EMPLOYMENT DISCRIMINATION**

Discrimination in hiring the transgenders is the most significant barrier faced by them at the workplace. Employers having transphobic attitudes believes that having transgender may disrupt the workplace and there needs to special accommodation to be provided to them. Not only the employers are having transphobic attitudes, some client will also have such attitudes against transgenders. This may lead to the negative reactions from some clients. There are facing discrimination from the beginning of the hiring process itself. i.e. from submission of application to interview. This makes the transpeople to hesitate to enter into the workplace. National Human Rights Commission conducted a survey in 2018 states that 96 percentage of transgenders in India faces employment discrimination and 92 percentage are denied to employment.

2) SEXUAL HARASSMENT

Transgenders are vulnerable to various forms of sexual harassment at workplace. It can be verbal harassment such as passing inappropriate comments regarding their appearance, body and asking for sexual favours. It can also be physical harassment in form of unwanted touching, they may face physical intimidation such as threatening gestures in places like restrooms, etc. This arises due to the gender stereotypes, societal stigma and lack of inclusive protection in the workplace. The impact can erode self-esteem, make emotionally weaker and leads to hostile environment.

3) INADEQUATE FACILITIES

Lack of gender-neutral restrooms is the main problem faced by transgenders at the workplace. As there are only restrooms for men and women this will cause difficulty for them and it will prone to risk of harassment and discomfort for them to use such restrooms. There is no proper training provided for the other colleagues on how to treat transgenders which leads to misgendering, misunderstanding and which in turn leads to creation of hostile and uncomfortable environment.

4) HOSTILE ENVIRONMENT

Misgendering and bullying can create hostile environment for transgenders at the workplace. Employers and co employees may deliberately use the incorrect pronouns or names of

transgenders which can emotionally abuse them. This also includes the calling them by their birth names which they have changed as a part of their transition. Bullying involves use of offensive language and includes spreading of false information which can damage their reputation in the workplace. As we saw earlier, sexual harassment and passing out inappropriate comments will also create hostile environment for transgenders.

5) RETALIATION

Retaliation against transgenders refers to the adverse action taken against transgenders in case of reporting discrimination, asserting their rights. This can be in various forms dismissal, harassment, demotion. It also involves social isolation where they are excluded from meetings and so on. This has effect on the mental health leading to stress, depression, anxiety and this can affect the job performance, career development. This can deter others from coming forward due fear of retaliation.

LEGAL FRAMEWORK FOR PROTECTION OF TRANSGENDER AT WORKPLACE:

The measures taken to abolish and prevent the discrimination against transgenders at workplace both by the legislature and judiciary are as follows:

1) CONSTITUTION OF INDIA

ARTICLE 14 – RIGHT TO EQUALITY

State shall not deny to any “person” equality before law and equal protection of law within the territory of India. The term person means not only applies to men and women as it has not been specifically mentioned, therefore the term person also includes the transgenders and it is a gender-neutral term. Hence transgenders are entitled to protection in all spheres of the state activities including healthcare, education and employment.

ARTICLE 15 – PROHIBITION OF DISCRIMINATION

It prohibits discrimination on the grounds of religion, race, caste, sex or place of birth. The expression sex is not limited to biological sex of male or female but includes the people who is neither male or female. This mentions that discrimination against transgenders violates their fundamental right.

ARTICLE 16 – EQUALITY OF OPPURTUNITY IN PUBLIC EMPLOYMENT

There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the state. No one can be discriminated on the grounds of sex. This means there should be providence of equal opportunity to the transgenders in the public employment.

ARTICLE 19 (1) (a) – FREEDOM OF SPEECH AND EXPRESSION

Every citizen has the freedom of speech and expression. It includes the freedom to express one's gender identity. State cannot prohibit or restrict the transgender's expression of their personality. It can be expressed by their behaviour. Therefore state has to protect their rights.

ARTICLE 21 -RIGHT TO LIFE AND PERSONAL LIBERTY

It states that every individual including a transgender has a right to life and personal liberty. This includes the right to express one's gender identity. The transgender as a citizen of India should have the right to protect their life and liberty². In the case of Nangai v. superintendent of police, madras high court stated that compelling a person to undergo medical examination of violates article 12³.

2) LEGAL RECOGNITION OF GENDER**NATIONAL LEGAL SERVICE AUTHORITY V. UNION OF INDIA**

NALSA had filed a public interest litigation in 2012. This was followed by filing of writ petition by poojya Mata Nasib Kaur Ji women welfare society. Lakshmi Narayan Tripathi has also approached the court. Their main aim is to recognise transgender officially as a third gender which would help in preventing discrimination against transgenders both socially and legally.

The issues raised were

- Whether a person who is born of one sex, changing their sex through surgery should be identified as the other gender
- Whether there should be an inclusion of a third gender to categorise the transgender community.

² Constitution of India 1950, Article 14,15,16,19,21

³ 2014 4 MLJ 12

The judgment was given on April 15, 2014 by divisional bench constituted by justice K.S. Radhakrishnan and justice A.K. Sikri. the judgment was based on the precedents of many foreign courts including Australia, New Zealand, Malaysia and common law.

The court distinguished between psychological sex and biological sex and emphasised psychological sex rather than biological sex.

TRANSGENDERS were recognised to be THIRD GENDER and are entitled to full rights guaranteed by the constitution.

The state and central government must grant full recognition to ensure full access to education and healthcare without any discrimination.⁴

THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

This act was enacted to protect the rights of transgenders.

CHAPTER II- SECTION 3 – prohibition against discrimination

No person or establishment can discriminate against transgender person in the following grounds:

- a) Educational establishment
- b) Unfair treatment in *employment or occupation*
- c) Denial or termination from *employment or occupation*
- d) Healthcare

CHAPTER V – OBLIGATION OF ESTABLISHMENT AND OTHER PERSONS

This chapter deals with the employment of transgenders in the establishment and prohibition of discrimination against transgender,

SECTION 9- states that the establishment should not discriminate transgenders in the matters of employment, recruitment, promotion.

SECTION 11 provides for the establishment of grievance redressal mechanism to solve the disputes of the transgender persons in the establishment.

CHAPTER VII – NATIONAL COUNCIL FOR TRANSGENDER

⁴ AIR 2014 SC 1863

SECTION 16 provides that central government by notification shall constitute council for transgender.

SECTION 17 deals with the functions of the council.

Advise central government to formulate policies for transgenders

Monitor and evaluate the policies

Redress the grievance of the transgenders

CHAPTER VIII- OFFENCES AND PENALTIES

SECTION 18- Whoever,

Compels transgenders to indulge in forced or bonded labour

Harms, injuries, endangers the life of transgender and cause mental, physical, sexual abuse

Shall be punishable with imprisonment not less than 6 months extended to 2 years with fine. ⁵

3) **CODE ON WAGES, 2019**

Section 3 of this code states that there shall not be any discrimination in any establishment in paying wages to the employees based on gender by the same employer in respect of same work or in similar nature done by any employee. This means that transgenders must be paid as same as men and women. Section 5 states that there should be providence of minimum wages to the employees. This reduces the wage gap paid to the transgender employees and can encourage transgender to enter into work in an establishment.⁶

⁵ The Transgenders persons (Protection of Rights) act,2019

⁶ Code on wages, 2019, Section 3,5

THE OCCUPATIONAL SAFETY, HEALTH, WORKING CONDITIONS CODE, 2020

SECTION 24 (1) (ii) the employer has to provide and maintain his establishment welfare facilities for the employees which includes bathing places and locker room separately for the transgender employees.

Other facilities are also impliedly provided in provisions for transgender such as sitting arrangements, facilities of canteen, adequate first aid services.⁷

CASE LAWS**1) K. PRITHIKA YASHINI V. CHAIRMAN, TAMIL NADU UNIFORMED SERVICES RECRUITMENT BOARD, 2015**

K. Prithika Yashini was a transgender woman applied for the post of sub-inspector. The application form for the selection did not account for third gender applicants. She approached the court to appear for written test and she was not qualified for next round of selection. She was disqualified from physical test on the basis of 1.11 second delay. Court stated that 1.11 second should not become an obstacle for employment. The court paid attention to the discrimination faced by transgenders and significance of public employment opportunities for transgender persons.⁸

2) GRACE BANU GANESHAN & Ors. V. UNION OF INDIA, 2020

Grace Banu, a transgender woman filed writ petition to access reservations in public education and public employment to ensure that there is representation from the transgender community and they are also able to participate in the society. The Hon'ble madras high court directed the state and central government to treat transgender as socially and educationally backward classes and to provide them reservation in public education and public employment.⁹

⁷ Occupational safety, health and working conditions code, 2020, Section 24

⁸ 2015 8MLJ 734

⁹ W.P. NO. 406 OF 2020

SUGGESTIONS

Despite the legal measures there is still discrimination against transgenders, sexual harassment and deprivation of their rights are prevailing in the workplace. According to me, the legal framework has to be more strict and strengthened. Punishments must be more strict for those who are committing violence against transgenders at workplace. Awareness campaigns and transgender inclusive programmes have to be conducted. The employers and co-employees should be made aware of the rights of transgenders and no one should not deprive such rights. The achievements made by the transgenders have to be celebrated and encouragement and bonus should be provided for them, which can motivate them to participate freely in the workplace.

CONCLUSION

India's legal framework has made significant change in the employment of transgenders at workplace. The recognition of transgender as a third gender in NALSA V. UOI case had made a most important impact on the transgenders. Various legislations have been enacted to prohibit discrimination against the transgenders and also for the protection of their rights in the workplace. Such as providing employment opportunity, prohibition of discrimination in employment process which starts from the recruitment to promotion and provision of separate restrooms in the workplace can make the transgenders feel comfortable at workplace and motivates more transgender persons to work in the organisation without any hesitation. The provisions not only prohibit the discrimination but also protect the transgenders from the various forms of harassment such as verbal, physical, mental and sexual harassment. However, there is still discrimination prevailing against transgender which is due to not strict enforcement or implementations of laws.

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