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Equity at Work: Paving Way for Transgender Inclusion in Indian Labour Laws

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ABSTRACT

The Transgender Person (Protection of Rights) Act, 2019 represents a notable advancement in acknowledging and safeguarding the rights of transgender individuals. However, it falls short of comprehensively tackling the entrenched discrimination that has persistently afflicted this community over the course of several decades. This paper focuses on the gaps in labour law that need to be addressed to ensure true inclusivity and protection of rights for transgender persons. The lack of recognition of benefits for transgender individuals is a significant issue that perpetuates their deprivation of rights. Many transgender individuals face challenges in accessing basic benefits such as health insurance, retirement benefits, and social security. This lack of recognition of benefits not only denies them access to essential services but also reinforces the stigma and discrimination they face in society. The paper also discusses on ICCPR which guarantees the right to non-discrimination on the basis of gender identity. Furthermore, it addresses employer's responsibility to ensure a zero-discrimination environment under their authority is crucial in achieving this objective. However, the current legal framework does not provide clear guidelines on how employers can fulfil this responsibility. The objective of the Transgender Person (Protection of Rights) Act, 2019, will only be fully achieved when the long-standing tradition of discrimination against transgender individuals truly ends.

Keywords: *Transgender, Labour Law, ICCPR, Discrimination, Inclusivity.*

I. INTRODUCTION

The World Health Organization describes 'transgender' as a general term for individuals whose gender identity differs from the gender they were assigned at birth. The Transgender Persons (Protection of Rights) Act, 2019 was an important milestone in recognizing the rights of transgender people in India. However, the Act is not comprehensive enough to address all the discrimination faced by the transgender community, particularly in the areas of labour laws

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and employment.² However, the Act did not fully address the lack of acknowledgement of transgender individuals in Indian law, which had previously been binary and only recognized men and women. The Act's provisions for change of gender and the issuance of a certificate of identity, as well as the recognition of transgender persons' rights in various sectors like education, employment, healthcare, and access to public places, were aimed at addressing some of the issues faced by transgender individuals. However, there are still areas where more work is needed, such as addressing the lack of accountability in the legal system and ensuring that transgender individuals are not subjected to forced or bonded labour or denied the use of public places.³

Gender justice in labour law is a critical legal study that examines the intersection of gender, sexuality, and labour rights. This field of study is particularly important when considering the experiences of transgender individuals in the workplace. Transgender people often face unique challenges and discrimination in the labour market, and understanding the legal frameworks that govern their inclusion is essential for promoting equal opportunities and protecting their rights. The year 2014 will be remembered in India's history in contexts of transgender rights, with its ultimate success occurring in 2019. In identifying the status of Transgender Persons in the country, the Judiciary referred to them as the "third gender" in the NALSA Judgment (2014).⁴ "The Transgender Persons (Protection of Rights) Act, 2019" was enacted by the Indian Parliament in response to a guideline.⁵ Consistent efforts have also been made at the international level to respect, secure, protect, and realise the rights of transgender individuals, as evidenced by the suggestions and remarks of UN Charter & Treaty-based bodies. Many believed that the announcement of the Act of 2019 marked the end of centuries of stigmatization and discrimination experienced by the Transgender Community. However, it was and continues to be faced with opposition from Transgender Activists, resulting in the continued hardships of the community as it refuses to accept a number of the essential NALSA recommendations. The legislation does not adequately address civil and political rights, notably overlooking the perspectives of transgender individuals, the very group it aims to protect. Despite these shortcomings, the law should not be deemed a failure. It represents a significant step forward by introducing measures to combat discrimination and enhance social welfare support for this community.⁶

² The Transgender Persons (Protection of Rights) Act, 2019, No. 40, Acts of Parliament, 2019.

³ *Id.*

⁴ National Legal Services Authority v. Union of India, (2014) 5 SCC 438.

⁵ Transgender Persons (Protection of Rights) Bill 2019 Passed by Parliament, Press Information Bureau, Govt. of India (Nov. 27, 2019, 06:23 PM), <https://pib.gov.in/newsite/PrintRelease.aspx?relid=195089>.

⁶ Angel H Syiem & Dr Priya Ranjan Kumar, *Trans- Rights Are Human Rights: An Evaluation of Law on the*

Identifying the third gender was just a first step for them to be recognised in this world. But getting only recognized does not solve the problem. The real problem lies when these laws are applicable in real life situation. Labour law is still silent on the rights of transgender. Labour market findings for men and women have already been thoroughly studied in the past. However, existing studies do not directly compare variances in the labour marketplace between transgender & non-transgender individuals. But through study of various available research, it can be concluded that transgender individuals are less possible to be hired than non-transgender individuals & are further inclined to be paid lower wages.⁷ This is because they are faced with a numerous kind of discrimination. Human rights law includes “gender identification” as well as “gender expression” as explicitly protected against discrimination grounds in an attempt to safeguard transgender non-conforming individuals. Included in these safeguards is the right to employment. One way to remove discrimination in employment is to provide employers with concrete steps they can take to make workplaces more trans-inclusive.

This paper explores the key legal issues surrounding gender justice in labour law, with a special focus on the inclusion of transgender individuals in labour industry. The paper addresses the legal frameworks that govern workplace discrimination, the hurdles met by transgender people in getting into employment & the role of legal remedies in promoting gender justice in labour law. It examines various questions such as (1) Whether the Act of 2019 made for transgender was competent enough to remove discrimination? (2) Whether the inclusivity is a major factor for discrimination faced by transgender? (3) How can the employer contribute to remove discrimination in workplace? And after examining these questions and observation this research paper also gives some suggestions to make labour industry a transgender inclusive workplace.

II. INCLUSIVITY OF TRANSGENDER IN THE WORKPLACE

(A) A Distant Dream

A transgender person when compared to other genders, are the most marginalized, neglected, and impoverished segments of Indian society. They also experience violence and prejudice. Following the historic NALSA ruling,⁸ the transgender community was overjoyed and satisfied. It was anticipated that the ideal change in society’s perspective of the community would occur, however the outcomes are unenthusiastic. They are still struggling against

Protection of Transgender Rights in India, Vol. 30 No. 1 IJLJ 207, 212 (Mar. 2022).

⁷ Klavs Ciprikis, Damien Cassells & Jenny Berrill, *Transgender Labour Market Outcomes: Evidence from the United States*, 27 GENDER, WORK & ORGANIZATION 1378 (2020).

⁸ National Legal Services Authority v. Union of India, (2014) 5 SCC 438.

discrimination and are not accepted in society because that judgment has not been put into practice.⁹

People should feel safe in the workplace so they can concentrate on their task. However, this is not always the case.¹⁰ Diversity, which can be described as the recognition, appreciation and celebration of differences, is considered to be advantageous at work.¹¹ According to the findings of one of the International Journal of Manpower's research papers transgender people's self-confidence and self-esteem are strengthened by policymakers' positive efforts to boost workplace inclusion. Moreover, transgender persons feel more welcomed, appreciated, and trusted by the government as a consequence of these acts. The research indicates that a lack of equal opportunity in the workplace can be deleterious to the self-esteem of transgender individuals. However, if the responsibilities of each employee are regarded as realizing the role of transgender individuals, this might be accepted and can result in increased self-esteem. ##

Paraphrased Response

The research suggests that the goal of the 2015 workplace guidance is to prevent transgender individuals from being restricted in their self-expression, as this could potentially contribute to issues with their self-esteem. The guidance aims to ensure that transgender employees are able to freely express their identity without facing limitations that could negatively impact their sense of self-worth.¹²

Concealing one's gender identity at work can be emotionally taxing for transgender individuals, causing significant harm to their mental health, job satisfaction, and dedication. This burden is amplified by the stigma and rejection that many transgender people experience, which often requires them to align their gender expression with others' expectations. These experiences can lead to a range of psychological reactions that negatively impact their mental well-being, career prospects, and overall commitment to their work.¹³ For example while filling Form 'D' in the Equal Remuneration Act of 1976 which mandates to maintain database of employees information on their compensation and personal details, including gender,

⁹ Sireesha Jaddidi & Gunjan Sharma, *Position of Transgender in Contemporary India: An Analytical Study*, 4 INT'L J.L. MGMT. & HUMAN. 2754 (2021).

¹⁰ Richard A Prayson and J Jordi Rowe, *LGBTQ Inclusivity and Language in the Workplace*, 12 CRITICAL VALUES 28 (2019).

¹¹ Kelli A Green and others, *Diversity in the Workplace: Benefits, Challenges, and the Required Managerial Tools*, Vol. 10 I-4 ENTERPRISING RURAL FAMILIES (Apr. 2014)

¹² Vasiliki Bozani and others, *Workplace Positive Actions, Trans People's Self-Esteem and Human Resources' Evaluations*, 41 International Journal of Manpower 809 (2020): The outcomes suggest that trans people's self-esteem and self-respect are enhanced by policy makers' positive actions to promote inclusivity in the workplace.

¹³ *Id.*

discrimination can be seen.¹⁴ Due to the fact that Form ‘D’ only contains columns for the number of men and women employed, a great deal of ambiguity developed. Employers were confused of how to classify their transgender employees because Form ‘D’ did not include an option for this. Underneath the Maternity Benefit Act of 1961, there was uncertainty surrounding the eligibility of transsexual employees for maternity benefits. This is because the term ‘woman’ is used throughout the Act, and Section 3(o)¹⁵ specifies it as a woman who seems to be directly or indirectly employed in a for-profit establishment. Under certain conditions, transgender men or individuals assigned the female gender from birth can also become pregnant. The initial issue arose due to confusion from a compliance standpoint, as the employer in question was uncertain about the benefits provided and the procedural standards, such as the Act’s Forms that only refer to women. To address this, Form ‘D’ could be modified by including a column for transgender employees, ensuring that their information is accurately reported. The second problem necessitates determining whether the transgender individual in question is capable of reproduction. Under the aforementioned Act, most state regulations require the submission of a Form signed by a physician attesting to the presence of a pregnancy. As a result, the current structure lacks the necessary mechanism to acknowledge transsexual pregnancies.

The lack of gender-neutral washrooms and locker rooms/changing rooms is a significant challenge faced by many employers in ensuring a safe and inclusive workplace for transgender individuals.¹⁶ Transgender individuals who are compelled to use men’s restrooms are frequently humiliated. In addition to male and female restrooms, providing gender-neutral washrooms in places of work is a simple solution.¹⁷ To ensure the convenience of transgender individuals, locker rooms and changing rooms can be modified similarly.

III. TRANSGENDER LABOUR RIGHTS & ICCPR

When considering the government’s affirmative action paperwork to ensure the uplift of this community, a glimmer of hope emerges. India ratified 1948 Universal Declaration of Human Rights, which states: “*All are equal before the law and have the right to be treated equally without discrimination.*”¹⁸ Adopted in 2016, Human Rights Council Resolution 32/2 guarantees protection against discrimination on the grounds of gender identity and sexual

¹⁴ EQUAL REMUNERATION ACT, 1976, No. 25, Acts of Parliament, 1976.

¹⁵ The Maternity Benefit Act, 1961, No. 53, Act of Parliament, 1961.

¹⁶ ST Whittle et al., *Trans-Inclusive Workplaces – A Guide for Employers and Businesses is a Toolkit and Call for Action*, TRANSGENDER EUROPE (2017).

¹⁷ Susannah Taylor et al., *Effectively Facilitating Gender Transition in the Workplace*, 23 EMPLOY RESPONS RIGHTS J 101 (2011).

¹⁸ UDHR, Art. 7.

orientation. India has ratified the International Labour Organisation's "Discrimination (Employment and Occupation) Convention" of 1958, which promotes equal opportunities for employment and occupation. Despite having a strong basis on paper, the law is ineffective because of the lack of support networks described in the next section.¹⁹

LGBT rights have made significant international progress as human rights. The fact that LGBT individuals are not explicitly mentioned inside any international human rights convention does not mean that these conventions do not protect their fundamental rights. According to the arguments in Eric Heinze's monograph, "Those sexual orientation rights that qualify as fundamental human rights are not qualitatively distinct from other human rights. Because of this, we do not need to 'create' sexual orientation rights and then 'add' them to the corpus of existing rights; rather, we can derive them from such a corpus, as implied within it and needed for its fuller realisation."²⁰

Three articles of ICCPR stand out as particularly pertinent. They are - (1) Art. 17 states, "No person will be subjected to unreasonable or unlawful intervention with his privacy, family, home, or correspondence, or to unlawful threats on his honour or reputation." (2) Art. 2 states, "each state pursues to respect and guarantee to all individuals within its land and subject to its authority the rights acknowledged... without difference of any kind, such as sex... or other status."²¹ And Art. 26 which states: "All persons are equal before the law and are entitled to equal protection of the law without any discrimination....the law shall prohibit discrimination as well as ensure to all persons equitable and efficient protection from discrimination on any basis, such as sex or other status."²² Contrary to Article 2, this provision focuses specifically on discrimination and equality before the law. The employment sector is also affected by this discrimination. Due to the incomplete nature of the ICCPR's definition of discrimination, equality of opportunity and equal advantage rights discrimination is also included as a type of discrimination. Lesbian, gay, bisexual, and transgender (LGBT) individuals have been disadvantaged by Article 26,²³ which prohibits discrimination in general, since they are not stated explicitly in the list of groups protected from discrimination in Article 26. Nevertheless, these examples are not exhaustive.

¹⁹ Darshita Shrivastava, *When Will the Fight of Transgenders for Labour Laws Come to an End?* SAMVIDHI FORUM (Jan 28, 2022), <https://www.samvidhi.org/post/when-will-the-fight-of-transgenders-for-labour-laws-come-to-an-end>.

²⁰ Eric Heinze, *Sexual Orientation: A Human Right: An Essay on International Human Rights Law*, 4 Kluwer Academic Publishers (Jan 1, 1995).

²¹ ICCPR, Art. 2. This language relies on the UDHR, although as a signatory of the treaty, India is required to adhere to it. India's compliance with this treaty is monitored by the United Nations Human Rights Committee.

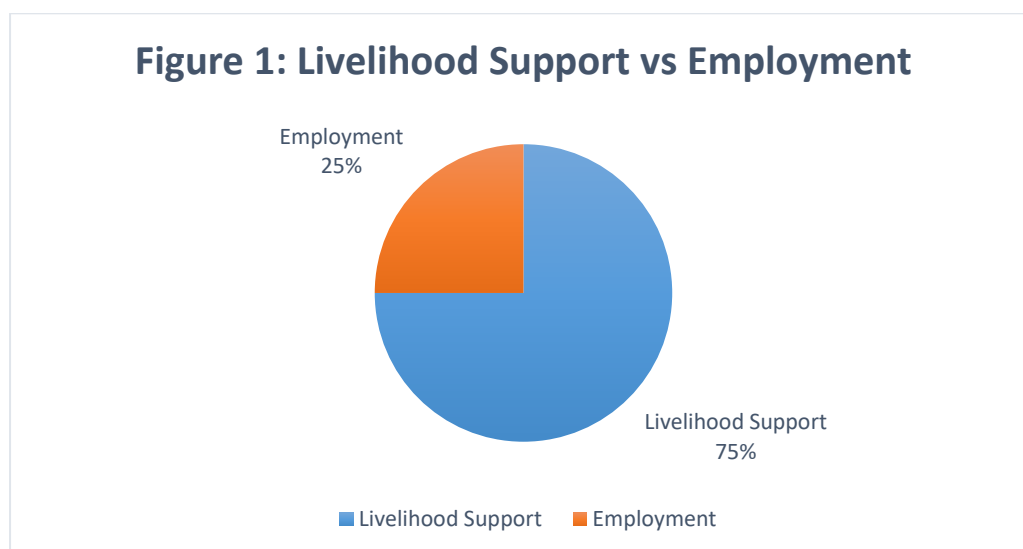
²² ICCPR, Art. 26. The language is grounded in the UDHR and is legally binding in India.

²³ *Id.*

IV. EMPLOYER'S ROLE IN BUILDING AN INCLUSIVE WORKPLACE

It has been seen that transgender people have not only long been excluded from employment opportunity but also from engaging in socio-economic activities and decision-making processes. In such a great extent that in the 2011 census the data regarding their occupation, literacy and caste was gathered for the very first time.²⁴ A study in 2017 commissioned by the NHRC of India and carried out by the Kerala Development Society found that around 96% of transgender participants, including those who were qualified and skilled, faced discrimination and were denied job opportunities in the organized sector. The study highlighted the significant challenges and barriers that transgender individuals continue to encounter when seeking employment, despite their qualifications and abilities.²⁵

Government has initiated many livelihood schemes for transgender community so that they can be uplifted. But the question arises whether these schemes are enough? The possible solution to this question can be determined by the comparison of livelihood schemes with the employment rates.



For this comparison UNDP has published a report with a pie chart data (mentioned above in figure 1) that reveals 75% of economic development programs are aimed at livelihood support, which encompasses income-generating activities, resource access, and crisis resilience. Conversely, the remaining 25% of programs are designed to offer employment opportunities, serving as a more direct strategy for economic recovery and development.²⁶ Hence, giving

²⁴ Resham Jain, *Transgender Law: A Step Towards an Inclusive Workplace*, PSA LEGAL COUNSELLORS (Nov.30, 2020), <https://www.psalegal.com/transgender-law-a-step-towards-an-inclusive-workplace>.

²⁵ Kerala Development Society, *A Study on Human Rights of Transgender as A Third Gender*, NHRC 42-54 (Feb. 10, 2017)

²⁶ Dr. Naresh Goel, *Skilling for Livelihood Opportunities for Transgender in India*, UNDP (2016)

employments which is more direct help can increase the possibility of inclusion of this community rather than mostly supporting through livelihood schemes.

In the transgender community, there are numerous strong leaders who really are determined to alter the Indian social perception of transgender individuals in various fields. From Sathyasri Sharmila, the first transgender lawyer in Tamil Nadu, to Padmini Prakash, the anchor of news channel, to Jyotika Mondal, a number of transgender women have attained prominent positions in their respective fields. India's first transgender individual selected as Lok Adalat judge, transgender individuals have made their strong presence in a variety of fields.²⁷ Nonetheless, their existence and contribution in the workplace remain challenging to quantify.

Parmesh Shahani who is the head of the Godrej India Culture Lab says, "*If your company is not inclusive, it will wither away and die.*"²⁸ Growing consciousness and sensitivity to this topic is gradually starting to close this discrimination gap. Some organizations and companies are actively working hard to implement inclusive policies that will make the workplace a nicer place for transgender people. These include Godrej, IBM, and Infosys. They have put in place inclusive policies and established employee resource groups to support their LGBTQ+ staff members. For example, Infosys, as a signatory to the United Nations LGBTI Charter for Business Addressing Lesbian, Gay, Bisexual, Transgender, and Intersex Discrimination, they are committed to being an inclusive workplace for LGBTQIA+ community members. They have promoted a culture of equality in which employees can be themselves irrespective of their own sexual orientation as well as gender identity. Not only have they made the environment transgender-friendly, but they have also provided their India-based employees with a health insurance plan that includes same-sex, domestic, and civil partners as beneficiaries, gender reassignment surgery, surrogacy coverage, egg freezing procedures, as well as treatments for mental illness.²⁹

Justice Venkatesh's in one of his orders³⁰ made reference to this Act and highlighted that this Act applies to every 'establishment', which is defined as "every company or body corporate or association or organization of individuals, firm, cooperative, society, association, trust, authority, institution, and any other body or authority established, purchased, controlled, or assisted by the Central or State Government." This shows that judiciary is also making an effort

²⁷ Saavriti, 10 Transgender People Who Are Breaking Barriers Across Fields, SHETHEPEOPLE (May 22, 2022), <https://www.shethepeople.tv/home-top-video/10-transgender-people-breaking-barriers>.

²⁸ Bhanuj Kappal, *The Year of Trans-Friendly Workplaces*, MINT (Dec. 28, 2018, 04:07 PM), <https://www.livemint.com/Leisure/iRTcQo4LtMIBgg5orMnG3I/The-year-of-transfriendly-workplaces.html>.

²⁹ *Id.*

³⁰ Sushma v. Commissioner of Police, (2021) W.P. NO. 7284 OF 2021.

to give transgender an inclusive place in workplace environment.

V. CONCLUSION

As a growing number of nations extend LGBTQIA+ community protections, India is not far behind. The Constitution requires the state to guarantee that “Everyone is entitled to legal protection against such intervention or attacks. Another pertinent document is Article 26, which states that every person is equal in the eyes and is entitled to equal rights to legal protection without discrimination. In this regard, the law shall prohibit all forms of discrimination and provide all individuals with equal and effective safeguard against all forms of discrimination.” Unfortunately, the ‘Transgender Rights Act’ is the only Indian law that specifically addresses the plight of LGBTQIA+ community members. People who do not match the definition of “transgender person” and also fall elsewhere on the spectrum are only protected by judicial pronouncements of current legislation, such as the judgement written by Justice Anand Venkatesh. Justice Anand Venkatesh’s words may be construed as a precursor to a transformation that will eventually be codified in the future, despite the fact that the decision includes only recommendations to employers.

Individuals can only realise their full potential at task when they feel completely genuine and connected to their organisations. Trans employees aren’t any different. Inclusive workplaces can lead to increased employee loyalty, retention, and productivity. There is a high need of creating inclusive economic growth and quality employment opportunities, which is crucial for marginalized groups like the transgender community. However, few companies have been successful in creating an inclusive workplace for individuals who do not identify with sociological gender norms.

The Incorporation of sensitization and awareness programmes in organizational policies can be a stepping stone to train employees on gender equality and transgender acceptance in the workplace. Regular policy updates and reviews ensure that the HR, managerial, operations, and hiring processes promote diversity. A transgender individual must serve on the Committee responsible for carrying this out function for it to be advantageous. Examples of such actions comprise amending sexual harassment legislation to include complaints from transgender individuals and ensuring that transgender people are included in mechanisms for resolving complaints. Updating employees’ files to make sure that transgender and gender non-conforming people are not mistakenly classified as men or women depending on their gender identity is important. This is one of the additional steps taken to support these persons in the workplace. Modifying dress code rules to be gender-neutral, thereby eliminating gender

stereotypes and ensuring uniform application. These can be incorporated into trans-specific laws which not only acknowledge the distinct character of such individuals, but also account for their specific needs.

The paper will conclude by highlighting the importance of implementing inclusive policies to counteract ongoing discrimination practices. It will also emphasize the need for sensitization training and workshops to raise awareness and foster consideration for the challenges faced by transgender individuals in the workplace. By exploring the existing legal frameworks, challenges, and opportunities, the paper aims to provide a comprehensive understanding of the current state of transgender inclusion in Indian workplaces and the steps necessary to create a more equitable and inclusive work environment.
