

IMPACT OF NALSA DECISION ON THE TRANSGENDER COMMUNITY IN INDIA

Dr. Pawan Kumar*
Raghav Acharya**

ABSTRACT

Gender is a pervasive facet in all aspects of social life. Socially and biologically gender is pre-determined into two categories, Male or Female. Gender is a distinct category that describes particular human characteristics. The most important thing about gender is that its meaning is created by society and people are expected to behave and express themselves in a certain way that are consistent with the socially pre-determined gender role associated with their sex. Transgender means- a category of people who are considered as being neither men nor women, such as transgender and intersex people. Transgender also knows the name of Hijra, Kinar and Transgender etc. Despite recent liberalization and legal progress towards protecting gender and sexuality identification, India's hijra community continues to live on the margins of society.

Keywords: Social Life, Biologically Gender, Human Characteristics, Pre-Determined Gender, Liberalization.

Introduction

The word "hijra" is an umbrella term used to describe the socio-religious group of typically transgender women and intersex people who have long been part of South Asia's cultural tapestry. During colonial rule in India, imposed Victorian morality introduced ruthless policing on what colonial authorities deemed aberrant gender and sexual expression, thereby villainizing and ostracizing the hijra community. A transgender literally means someone who is in transition from one gender to another. Looking at the Indian context they are addressed by many names, for example Hijras, Kinnars, napunsak, and in everyday slang chakkas. The word 'Hijra' has the root in the Urdu word 'Hijar'. A Hijra is thus, indicated to those people who left their community. Thus, a Hijra is one who has walked out of the usual ascribed order of men and women and joined a community of Hijras.

The NALSA judgment, like several preceding policy documents, oscillates between a broad definition of 'transgender' as an 'umbrella term' for a variety of gender non-conforming identities and practices, and a more restricted definition based largely on hijra and trans women identities. As activists and community members from trans masculine communities have argued, trans men and trans masculine identities have been insufficiently represented the judgment as well as the preceding MSJE report. Further, the NALSA judgment, like the preceding MSJE report, demonstrates contrary tendencies between an attempt to grant self-determination of gender identity (i.e. the ability to elect one's legal gender identity without having to meet external criteria such as surgery or hormonal transition), and the bureaucratic adjudication and imposition of gender identities.

* Assistant Professor, DIET, Karkardooma, (SCERT, Education Department, Govt of Delhi), New Delhi, India.

** Resource Person/BRP, DIET, Karkardooma, SCERT, Education Department, Govt of Delhi), New Delhi (ORCIDiD: 0009-0004-6895-3606), India.

The Supreme Court, in these judgements, has recognised that gender identity forms the core of one's personal self and is based on self-identification, not on surgical or medical procedure and recognised the right to self-determine one's gender identity. Even though, the transgender persons are prejudiced on the basis of their gender identity and rundown of their access to basic rights and legal recognition unless they can produce proof of sex reassignment surgery through medical certificates proving their 'trans-ness' or asked to undergo medical examination. The Transgender Persons (Protection of Rights) Act 2019, a law purported to be enacted for the Trans and intersex community, also mandates the requirement of medical certification if a transgender person wishes to change their gender to male or female.

Research Questions

Whether the latest bill which the legislature drafted will be able to successfully cater the needs of the transgender community?

Whether the minority of transgender community has been accorded protection against violation of their laws of in the country by court's jurisprudence?

Do the transgender community enjoy the right to equality after the NALSA verdict

Hypothesis

This research is based upon the following hypothesis as:

- The NALSA ACT pertaining to the minority communities of transgender fulfill the needed demand and recognize their legal rights.
- The transgender community is happy with the existing laws provided by the government as the protecting the rights of the transgender community against the discrimination.

Objective

- To assess the knowledge and benefits after the NALSA act in the life of transgender.
- To ascertain the measure of impact of NALSA ACT in the present scenario and the lives of transgender community against the discrimination.

Legal Response to Transgender Issues - An International Perspective

South Africa

South Africa has been on the forefront to give its people constitutional protection against the gender identity discrimination activities which is in contravention to the fundamental human rights.

- **Rights under the Constitution of South Africa**

It protects the person from any kind of discrimination which is based on the grounds of sex or gender identity or sexual orientation.

The promotion of *Equality and Prevention of Unfair Discrimination Act 4 of 2000 (The Equality Act)* was enacted to bring into effect that constitutional right provided under section 9 which prohibits discrimination and violation against the people of transgender community. Various provisions under the Act which supports non-discrimination based on gender identity and sexual orientation are as follows:

- The definition of "sex" in the act includes intersex.
- Section 6 of the act states that "[n]either the State nor any person may unfairly discriminate against any person."
- Section 8 of the act prohibits any form of unfair discrimination on the ground of gender.
- Section 11 of the same act states that "[n]o person may subject any person to harassment¹."

Review of Related Literature

- **Studies Related to the Education of the Transgender/Hijra**

Review of various studies revealed poor educational level of transgender/hijra community and barriers to access education because of discrimination and victimization in educational institutes.

¹ Tracing the legal steps marked for transgenders, The Better India, Available at <https://www.thebetterindia.com/59151/transgender-rights-in-india/>, visited on 12th April 2019

Harris (2005) identified that transgender students have faced verbal harassment four times than other students due to their sexual orientation and gender identity.

Beemyn, B. et. al. (2005) found that the educational institutions are now starting to think about the requirements of transgender students but only some are aware of how to recommend help to them. This article deal with issues and gives recommendations for student relationships professionals.

Rye, et. al. (2007) emphasised on real life experiences for TG students through inclusion of education. stated that perspective about transsexuals may be changed into supportive and compassionate ones by inclusion of transgender in education hence other students can have real life experiences with transgender.

Research Design and Methodology

Table 1

S. No	District / Places (Delhi NCR)	No. of FGD conducted	No. of Transgender participated	Name of NGO	Issues undertaken
1	North	1	20	Abhivyakti Foundation	Human Rights and Impact of NALSA judgement
2	South	1	18	ADENT(NGO)	Human Rights and Impact of NALSA judgement
3	East	1	16	DAMINI (NGO)	Human Rights and Impact of NALSA judgement
4	West	1	18	Bhartiya Navdeep Samiti	Human Rights and Impact of NALSA judgement

Table 2: Stakeholder Respondents Sampling

S. No	Stakeholder	Area / Organisation	No. of Sample
1	NGO head	North Delhi	1
2	Ngo head	South Delhi	1
3	Ngo head	East Delhi	1
4	NGO head	West Delhi	1
5	Advocate	Tis Hazari court, Delhi	1
6	Advocate	Karkardooma court Delhi	1
7	Govt official	Delhi Welfare Department	1
8	Head of Department	Department of Adult Education, DU	1
9	Pradhan	JJ Cluster Nand Nagri	1
10	HIV Counsellor	Hindu Rao Hospital	1
	Total		10

Data Collection Method and Tools for Data Collection

The following research methods and tools were used for data collection:

In-depth unstructured interviewing method – (by using an Interview guide) and Focus Group discussion (FGD) – (by using a Set of Questions)– A detailed in-depth focus group discussion method was used to collect data from primary transgender respondents. In order to be focused on the research objectives and research questions an interview guide was used to conduct the interviews. All interviews were undertaken and a signed consent form was taken from the respondents before commencing the interview. An in-depth unstructured interviewing method was used to collect data from secondary respondents of stakeholders. The secondary sources of information were collected to validate the data and findings through content analysis of judicial judgements and Government Orders (G.O.s) and referring other secondary sources.

Data Analysis

All one-to-one interviews and focus group discussion with both primary and stakeholder from community members were recorded and noted. After completion of interview process, a verbatim transcription of all tapes was done by the researcher. The researcher has previous experiences of and knew the process of transcription and used those skills to transcribe the audio tapes. The audio tapes were transcribed manually. Few telephonic interviews were also administered. All the interviews were conducted by the researcher in Hindi languages. All Hindi language interviews were translated and transcribed in English.

Limitations of the Research Study

There is a dearth of literature on transgenders within an Indian context. One of the major limitations of the study was getting primary respondents for the interviews. The researcher completely relied on the interview tapes of both primary and secondary respondents to understand the field situation. However secondary sources such as newspapers, internet sources, G.O.s, documentary films etc. helped throughout the research study.

Interpretation and Analysis

• NALSA opened new Possibilities in Indian for Transgender Community

An expert committee was constituted in the Ministry of social justice and empowerment regarding an in-depth analysis of issues faced by Transgender community, which submitted its report in 2014. Taking cognizance of which, the government decided to launch an umbrella scheme with five sub schemes with a 75%(Central) 25 %(state) budget allocation¹.

In 2015, the government of Odisha formulated the Department of Social Security and Empowerment of Persons with Disabilities to make proposal regarding the transgender community. The department organized various development schemes on the lines of expert committee recommendations under the scheme SWEKRUTI².

“**Sweekruti scheme** focuses on the following broad objectives:

- To create an enabling environment to ensure equal opportunities, equity, social justice & empowerment of transgender persons of the state.
- To encourage voluntary action and participation of all stake holders for ensuring effective social integration of transgender persons.
- To expand outreach activities for protection of rights and entitlements of transgender persons in the state.
- To promote individual and group endeavors by transgender persons for employment, self-employment and other socio-educational services.
- To strengthen the existing implementation machinery and create facilities for coverage of all transgender persons of the state³.”

Summary and Suggestions

After understanding into the concept of gender, and how the same has been handled in the international and national scenario, interviewing doctors, transgenders and stakeholder of various fields who work with them, and filling up questionnaires with those transgenders, most of them who live in very hard situations, the following conclusions have been arrived at by the researcher. In this research an effort has been made to see the impact of NALSA judgement in the life of transgender. The nature of the issues that surround transgenders in India has been analyzed through interviews and questionnaire, the extent to which these issues have been addressed in the present legal framework of the country has then been analyzed. It has been ascertained that gender balance is necessary in law, there are specific ways in which gender balance has been made in the Indian legal system with respect to women due to similar situations face by them in the past. The time span required is not assessable, as it is an urgent

¹ Umbrella schemes by government, *The Economic Times*, 28th Jan 2016, available at budget allocation for transgender community, available at <https://economictimes.indiatimes.com/news/politics-and-nation/government-set-to-launch-umbrella-scheme-for-transgender-community/articleshow/50749264.cms>, retrieved on 23 March 2019

² (SSEPD) Department, Government of Odisha, Available at <http://ssepod.gov.in/sites/default/files/Scheme%20for%20TG%20-%20Final.pdf>, visited on 29th April 2019

³ The Times of India, *schemes for transgender*, 2019, <https://timesofindia.indiatimes.com/city/bhubaneswar/govt-to-launch-scheme-to-promote-self-employment-among-transgenders/articleshow/67372555.cms> (last visited Feb 18, 2019)

requirement for setting right gender balance with respect to transgender in this legal system. However, care needs to be taken to see that issues are addressed based on the actual problems at hand. The purpose for which earlier gender-based legislations and amendments in existing laws were made, was to address social concerns that are vented against people of particular gender, to safeguard the vulnerable and to prevent social menace.



Amendments to the Constitution of India

The Constitution of India in Articles 15, 16 and 325 uses only the word 'sex'. 'Sex' is a term used to refer the biological physical condition of an individual, however as a result of the study it is clear that the term is not sufficient enough to incorporate the naturally occurring concepts of gender identity and expression and sexual orientation in a human personality. The term 'sex' is sufficient only to describe male and female, but when the term transgender is being used, it becomes important to include the terms "gender identity and expression" and 'sexual orientation'.

Article 16 may be amended and the suggestions added as

No citizen shall, on grounds only of religion, race, caste, sex, gender identity and expression, sexual orientation, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State'. Article 39 may be amended and the suggestions added as 394. Certain principles of policy to be followed by the State.

Article 21A may be amended and the suggestions added as

The State shall, in particular, direct its policy towards securing (a) that the citizens, men and women equally, have the right to an adequate means of livelihood; (d) that there is equal pay for equal work for both men and women; 31A. Fundamental duties. (e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women; Article 24, 30 (2), (3), (4) and (5) may be amended.

Amendments to the Indian Penal Code 1860 as

"Man", "Woman" "The word "man" denotes a male human being of any age; the word "woman" denotes a female human being of any age and whenever necessity arises to denote a transgender/transsexual as defined in 'The Rights of Transgender Persons Bill, 2014' and the term 'girl' could include a trans ender, gender non- confirming or gender variant minor.

Amendments to The Rights of Transgender Persons Bill, 2014

The following amendments and the suggestions added may be brought in Section 2 as

In this Act, unless the context otherwise requires; (a) 'abuse' includes verbal, non-verbal and physical abuse; (c) 'discrimination' means any distinction, exclusion or restriction on the basis of gender identity and expression; and sexual orientation which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field and includes all forms of discrimination, including denial of reasonable accommodation.

