



TRANSCENDING BINARY CONSTRAINT: LEGAL BINARISM AND ITS RAMIFICATIONS ON TRANSGENDER EMPLOYMENT IN INDIA

*Harssh Bhargava**

Abstract

Transgender People (Protection of Rights) Act, 2019 provides a back to Indian laws for the protection of the interests of transgender people. Many laws are made to protect transgender people from exploitation and therefore it is important to look into loopholes in these laws. The Factory Act, of 1948 needed some changes regarding the welfare and protection of transgender people so that these acts also included inclusivity and equal protection of transgender people. Though menstrual leave in India is not of that great importance and as a third-world country these issues are mostly ignored therefore Indian lawmakers need to understand that it is better to know their grey areas and work on them. Many transgender men do not undergo sex reassignment surgery therefore still on their menstrual periods. These lawmakers should know how and why it is important to include transgender people in such acts, inclusivity is not something that we can achieve within one or two days it is the collective effort of everyone. This paper focuses on the Labour codes which are not out yet so what changes do they need and how binary forms of laws can be more inclusive

*

Student BA LL.B 6th Semester, Rajiv Gandhi National University of Law, Patiala,
Punjab. E-mail: harshwardhanbhargava@gmail.com

and provide protection to a non-binary section of society, also what major changes have been observed after the 2014 NALSA judgment in India?

I Introduction

TRANSGENDER PEOPLE have long been barred from participating in socioeconomic activities and decision-making processes. So much so that it wasn't until the 2011 census that data on their employment, literacy, and caste was obtained for the first time. According to a 2017 survey performed for the National Human Rights Commission of India by the Kerala Development Society, 96% of transgender participants (including qualified and talented individuals) reported being discriminated against and denied work prospects in the formal sector.¹

Transgender individuals are recognized as the third gender in India, and they are legally protected under the Transgender People (Protection of Rights) Act, 2019².

The Act forbids transgender individuals from being subjected to discrimination in the workplace and assures that transgender people have equal opportunities in education, employment, and civic activity. Transgender people are not allowed to be treated differently by businesses in any way, especially when it comes to employment, advancement prospects, or working conditions. This policy is prohibited.

Furthermore, the Act requires the development of a transgender people's welfare council, which will be responsible for the formulation of policies, initiatives, and projects that are particular to transgender

¹ Resham Jain, Transgender Law: A step towards an inclusive workplace, *available at*: <<https://www.psalegal.com/transgender-law-a-step-towards-an-inclusive-workplace/#>> (last visited on 12th February, 2024).

² The Transgender People (Protection of Rights) Act, 2019).

individuals. An additional requirement is that every public or private sector employer with more than one hundred employees must have access to medical facilities that are capable of performing gender reassignment surgery.

Yet, despite legislative protections, transgender people in India continue to endure job harassment and marginalization. Many employers are unaware of the legal safeguards for transgender people and fail to establish an inclusive work environment for them.

Transgender people in India are protected by many laws, including the Factory Act of 1948.³ The Factory Act governs factory working conditions and tries to protect workers' health, safety, and welfare.

To address these concerns, businesses, employees, and the general public must acquire further knowledge regarding transgender rights. A greater number of affirmative action programs, such as targeted employment quotas, are required if we want to see an increase in the number of transgender people who are employed.

According to Section 2(m) of the Factory Act⁴, a "worker" is any person engaged in a factory who is not principally employed in a management or administrative position. This term is gender-neutral and includes transgender people who work in a factory.

Section 23 of the Factory Act⁵ contains provisions concerning worker health and welfare. It requires the workplace to offer workers facilities for washing, changing clothes, and storing clothing and personal possessions. The clause is gender-neutral and applies to all employees, including transgender people.

³ The Factory Act, 1948.

⁴ *Ibid* at S. 2(M).

⁵ *Ibid* at S. 23.

Section 44 of the Factory Act⁶ addresses the welfare benefits that a factory must provide to its employees. The provision contains provisions for medical services, canteen services, and bathrooms. The provision is likewise gender-neutral, and it applies to all employees, including transgender people.

Furthermore, the Rights of Transgender Persons Act of 2019⁷ protects transgender people's rights and forbids discrimination against them. The Act also states that transgender people have the right to work and to be treated fairly in the workplace.

Finally, transgender people are protected in India under the Factory Act of 1948,⁸ and companies are required to offer a safe and non-discriminatory workplace for all employees, including transgender individuals.

Because of their unusual identity, transgender people were previously not seen as an indivisible part of society, but their presence has been felt since ancient times. Shikhandi, a character in myths such as the 'Mahabharata,' represents the heroism and presence of the transgender minority in our civilization. Despite their continuous existence, this community had waited far too long for legal recognition in the eyes of society. The Supreme Court celebrated the presence of the transgender community in the landmark case of *National Legal Service Authority v. Union of India*⁹ by admitting and proclaiming it as the "Third Gender" under the Indian Constitution.¹⁰

The Court finally recognised their rights under Article 16 and acknowledged the transgender community's discriminatory treatment in

⁶ *Supra* note 3 at S. 44

⁷ *Supra* note 2.

⁸ *Supra* note 3.

⁹ *National Legal Service Authority v Union of India*, AIR 2014 SC 1863.

¹⁰ The Constitution of India, 1950.

various aspects of life, particularly employment. The Court ruled that this sex discrimination is unconstitutional and protected their right to liberty, privacy, and dignity under Article 21.¹¹

II Reality after NALSA judgment

Before going into the murky waters of our realities, it is important to acknowledge the country's successes and developments. The case of *NALSA v. Union of India*¹² (hereafter "NALSA"), in which the Hon'ble Supreme Court declared the right to one's gender identity and sexual orientation to be included within the right to live with dignity and autonomy, was the first ray of optimism. Furthermore, the case of *K.S. Puttaswamy v. Union of India*¹³ illuminated the freedom to freely identify one's own gender and not be restricted by society's conceptions of distinct sexual orientations. This resulted in the repeal of Section 377 in *Navtej Singh Johar*¹⁴, which established how citizens were stigmatized based on their identities.

The Transgender People (Protection of Rights) Act, 2019¹⁵ (hereafter "TPR Act") additionally states that no private or public entity shall discriminate against the third gender in hiring or promotion. Any form of discriminatory treatment or termination is forbidden. The TPR Act has two crucial provisions: first, the construction of critical amenities (such as toilet access); and second, the appointment of a complaint officer and, as a result, a proper grievance redressal procedure. Transgender workers are now included in the Occupational Safety, Health, and Working Conditions Code, 2020.¹⁶ It also requires employers to maintain safe and healthy working conditions, as well as to provide

¹¹ The Indian Constitution, Arts. 21

¹² *Supra* note 9

¹³ *K.S. Puttaswamy and Anr. vs. Union of India*, (2017) 10 SCC(1).

¹⁴ *Navtej Singh Johar VS. Union of India*, Writ Petition (Criminal) No. 76 of 2016.

¹⁵ *Supra* note 2.

¹⁶ Working Condition Code, 2020.

adequate latrine facilities for male, female, and transgender people, as well as similar facilities for bathing areas and locker rooms.

III Provision related to the safety of workers under industrial law

Women working in the workplace do not need to protect themselves by lubricating the moving elements of the machinery. This is done for their safety. The only person who should be doing this is an adult male worker who has had the appropriate training and safety gear and is outfitted in protective gear.

Section 22(2) of the Act¹⁷ expressly states that no woman or young person may clean, lubricate, or modify any portion of the machinery while it is in motion. This provision attempts to protect women from potentially dangerous injuries caused by such moving parts.

Nothing about transgender persons is mentioned in this passage. The protection of young people and women is the sole topic that is discussed in this section. Though Working Condition Code, 2020 it requires employers to maintain safe and healthy working conditions, as well as to provide adequate latrine facilities for male, female, and transgender people, as well as similar facilities for bathing areas and locker rooms but in general these provisions are not there in the Factory law, which question on how protective our laws are relating to the transgender people of India.

Section 27 of the Act makes it clear that it is against the law to use "cotton openers" near children or women. The only exception to this rule is that women and children are not permitted to enter the portion of the plant where the cotton is being pressed together. That is, unless the distance between the feed end and the delivery end is greater than a

¹⁷ *Supra* note at S. 22(2).

particular height, in which case the Act gives the Inspector the authority to grant permission.

Section 34 of this Act¹⁸ empowers the state government to establish rules governing the maximum weight that men, women, adolescents, and children can lift, carry, or move in the factory. It is a statutory requirement that no one is employed to carry a weight that could injure them.

IV Provision concerning the welfare of workers

Section 42 of the Act¹⁹ requires separate and suitably screened facilities for washing to be provided for the well-being of female workers in order to protect their privacy.

According to Section 48 of the Act²⁰, when there are more than 30 women workers, the factory owner is required to provide and maintain a suitable room/crèche facility for the use of such mothers' children under the age of six years. This provision indirectly boosts the efficiency of female workers by allowing them to care for their children while working. Such rooms should give appropriate accommodation, ventilation, and lighting, and they should be supervised by a woman who is capable of caring for such children.

Though Section 48 of the Act talks about suitable rooms for women separately it does not provide special rooms for transgender people. There is a lot of concern when we talk about transgender men. The Act should provide a special room for both transgender men and transgender women to protect their privacy and to protect them from any harassment.

¹⁸ *Supra* note 3 at, S. 34.

¹⁹ *Ibid*, at S. 42.

²⁰ *Ibid*.

V Provision concerning working hours

According to Section 66 of the Act,²¹ for the safety and well-being of the female gender, working hours in a factory shall be limited to 6 a.m. to 7 p.m. This Section further states that no shifts shall be changed unless there is a weekly or another holiday.

Subsection 2 of Section 66²² further states that the State Government may make Special Accommodations for fish curing or fish canning enterprises where the employment of women beyond specific hours is required to prevent damage to any raw material.

The Act clearly states that for the safety and well-being of the Female gender, working hours in a factory shall be limited to 6 a.m. to 7 p.m. Act only considers the female gender's safety and not the safety and well-being of the transgender people. These discriminatory sections which only talk about cis-gender women's protection only do not provide any safety to transgender people.

Furthermore, it is unclear whether a trans woman who adopts a kid is eligible for the Maternity Benefit Act of 1961. (Maternity Act)²³. After the Supreme Court's historic decision in *Navtej Singh Johar v Union of India*²⁴, the third gender's rights to marriage and partnerships have acquired more recognition in India. As a result, the Bill must include measures requiring employers to give Maternity Act benefits to transgender (particularly trans-women) employees. And not only transgender women but transgender men who wants maternity benefits will get it or not. These discussions question how protective our laws are towards transgender people.

²¹ *Supra* note 20 at S. 66.

²² *Ibid.*

²³ The Maternity Benefit Act, 1961

²⁴ *Supra* note 14

Needless to mention, because trans males may be subjected to sexual harassment or face the same difficulty when adopting a kid, it remains to be seen whether such individuals will be granted specific benefits through changes to existing laws or the introduction of new provisions/regulations.

VI The maternity benefits act, 1961

There was confusion over whether transgender employees are entitled to maternity benefits or not. The act use term 'women' throughout and defines it under Sec- 3(o). This is one of the major problems for those transgender men who are capable of giving birth. This is one of the major grey areas of the labor industry where because of terminology transgender people are not included. There are not many changes after the 2014 NALSA judgment, filling of form 'D' under the Equal Remuneration Act 1976²⁵, which requires workers' personal details like their gender. The only lacuna is that they only have two columns pertaining to the number of men employed and the number of women employed. This makes non-inclusive labor law laws even after the 2014 NALSA judgment. In India, it is very hard to include transgender people in the standard employment because from the very beginning society has been prejudiced against the transgender community. This is the reason why in Indian society employment is based on your gender. This is the major reason why transgender people in India are not allowed in NCC (National Cadet Corps). The Transgender Persons (Protection of Rights) Act, 2019, recognized their right to a dignified existence and prohibited discrimination, according to a bench led by Justice Anu Sivaraman. As a result, the requirements of the National Cadet Corps Act cannot restrict the implementation of the Transgender Rights Act, 2019, it stated. Hina Haneefa, a trans woman and a student at Thiruvananthapuram University College, filed the case, which challenged

²⁵ Equal Remuneration Act, 1976.

Section 6 of the NCC Act, which allows only men and females to join the Corps. These binary forms of laws create less inclusive workplaces for the transgender community and therefore transgender people even having good education stick to their traditional jobs.

VII Legal framework outside india

Title VII of the civil rights act

Title VII protects employees against employment discrimination based on race and color, national origin, gender, and religion; it applies to companies with 15 or more employees. Private-sector organizations (including employment agencies and labor groups), as well as state and local governments and the federal government, are among the employers obliged to comply with Title VII.²⁶

Although official rulings on complaints of transgender employee discrimination have varied over the years, the United States Supreme Court ruled on June 15, 2020, that sexual orientation and gender identity or expression are included in the definition of "sex," and thus employers may not discriminate against transgender individuals in employment. In addition to federal views of what constitutes sex discrimination under Title VII, state and municipal legal safeguards for transgender employees are emerging.

State and anti-discriminatory laws

Around the United States, several states and municipalities have passed legislation explicitly prohibiting job discrimination based on gender identity and expression. Workers working in such states are protected by these laws, regardless of where the company is located.

²⁶ Civil Rights Act, Title VII.

Protection of workers relating to health issues

The ACA's (Affordable Care Act)²⁷ non-discrimination clause, Section 1557,²⁸ outlaws sex discrimination in health insurance. The bill was intended to change the United States' health-care system by increasing access to health insurance, regulating coverage, and reorganising health-care delivery, including how it is paid for. The United States Department of Health and Human Services (HHS) stated in July 2012 that the law's prohibition on sex discrimination extends to transgender persons.

The HHS Office for Civil Rights released the final rule implementing Section 1557 on May 13, 2016.

Nevertheless, on December 31, 2016, the United States District Court for the Northern District of Texas issued a ruling in *Franciscan Alliance, Inc. et al v. Burwell*²⁹, enjoining the Section 1557 regulation's restrictions on gender identity discrimination and pregnancy abortion on a countrywide basis. The HHS then issued final guidelines on June 12, 2020, deleting anti-discrimination provisions based on gender identity in health care and health insurance.

VIII Global anti-discrimination policies

Numerous nations have put safeguards in place to prohibit various forms of human rights discrimination against transgender people. In the United Kingdom (UK), for example, the 1999 Sex Discrimination (Gender Reassignment)³⁰ Rules apply to all phases of employment. Transgender people in the United Kingdom and Spain can alter their names and gender on official papers without having surgical modifications. A 1996

²⁷ Affordable Care Act, s 1557.

²⁸ *Ib.* at 27.

²⁹ *Franciscan Alliance, Inc. et al v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016).

³⁰ Sex Discrimination (Gender Reassignment Regulation, 1999).

ruling by the European Court of Justice of the European Union extended employment discrimination safeguards for workers undergoing gender reassignment.

South Africa, as well as numerous states and territories in Australia, outlaw transgender discrimination.

The Yogyakarta Principles³¹ were developed by a group of international human rights experts who gathered in Yogyakarta, Indonesia, in 2006 to clarify international norms pertaining to sexual orientation and gender identity. Further guidelines were introduced in 2017 to create the Yogyakarta Principles plus Ten.

IX Why proper restrooms and washrooms are required

Even though India is making strides toward gender equality in virtually every facet of life, there are still a great deal of issues that have not been resolved and will need to be brought to light in the years to come. In the confusing Factory Act of 1948, there is not a single part that makes any reference to the protection of cisgender individuals. There is no discussion of transgender people or those who identify as transgender within the community. Even though it targets anti-discrimination measures and work opportunities, the Transgender People (Protection of Rights) Act 2019 does not include any particular labor restrictions.

The Factory Act of 1948, which was enacted to protect the welfare of women, does not include provisions for transgender people in its provisions. There is a common and significant problem in the workplace that involves a lack of access to appropriate bathroom provisions.

³¹ Yogyakarta Principles

X Gender neutral dress code

Certain companies have stringent gender-specific dress standards, which can be troublesome for transgender persons who are going through the transition process since they may be required to choose between men's and women's attire. Consequently, a policy that mandates a dress code for all employees, regardless of gender, would ensure that transgender individuals are not made to feel uncomfortable and that everyone is allowed to adhere to the guidelines under how they identify.

An inclusive dress code guideline should have as its primary objective the recognition and promotion of diversity in the workplace. In addition to religious affiliation, gender presentation and identification, cultural background, and physical or mental handicap, some other aspects should be taken into consideration.

If the dress code of an organization requires a particular method of clothing or grooming that is incompatible with an employee's religion, gender identity, disability, or any other equivalent quality, the regulation must be considered discriminatory. It is also possible for a dress code to be discriminatory if it puts different restrictions on different groups of people depending on the qualities described above.³²

XI Pronouns and names

There is another way to demonstrate your affection for transgender workers, and that is by making sure to use the names and pronouns that they prefer. There are a significant number of transgender individuals

³² Christian N. Thoroughgood, Katina Sawyer, and Jennica R. Webster, "How to make transgender employees feel valued at work", *available at*: <https://hbr.org/2020/03/creating-a-trans-inclusive-workplace>, Harvard Business Review, March 2020 (last visited on 11th May, 2024).

who identify on the traditional binary scale, as either male or female, and they use pronouns such as he, him, and his. There are a significant number of individuals who identify as "trans" who also use pronouns that are not "they," "them," or "theirs." This encompasses those who identify as genderqueer, gender-fluid, and nonbinary. Names and pronouns are how language is used.

For instance, if you have unintentionally called a co-worker by the incorrect pronoun after they have gone through a transition, this mistake may be interpreted as an honest mistake. After offering an apology, it is essential to go on with one's life and strive to perform more effectively the next time. Some people may be surprised by the relevance of regularly using the right pronouns and names. As a response to our inquiry regarding courageous co-workers who had battled for the rights of transgender employees, several of our participants recalled an instance in which a cisgender co-worker advised others on the proper usage of pronouns. The statement "Katie uses 'she' as a pronoun" or a little modification such as "Do you know where he is?" would be appropriate. "Indeed, I did see her in the meeting room."

When it comes to addressing this issue, there are several strategies that businesses may choose from. To begin, they may keep a record of the names and pronouns that employees have chosen to communicate with one another. This will be helpful with administrative and personnel problems, such as making sure that directories, business cards, and email addresses include the appropriate wording whenever it is possible to do so. Second, it is recommended that a policy be implemented in which all workers are forced to use the desired name and correct pronouns in their email signatures and name badges. In addition to assisting persons in learning these names and pronouns, this will also promote understanding of the many gender identities that the individuals with whom they work may have. Third, ensure that all employees are aware that the use of appropriate pronouns is an

essential component in the process of creating the workplace a welcoming and supportive environment for all individuals. This may be accomplished by including this message in training programs, activities that are part of the on boarding process, and the employee handbook. A corporation such as Goldman Sachs is an example of a company that has recently initiated an internal initiative to promote awareness about the relevance of pronouns and to encourage employees to actively express their pronouns to their co-workers.

XII Transitioning and employment

It is up to the individual to choose how long the transition will take and what kinds of measures they will take when they decide to transition. Surgery is one of numerous options available to transgender people throughout the transition process; however, not all transgender people choose to undergo surgery. Certain persons are gender-fluid and spend their whole lives moving between and within multiple gender expressions. This is because they are continually reinterpreting and redefining who they are. Employers should work on developing a comprehensive plan for dealing with gender changes within their workforce. The employee should be the focal point of this approach, and it should also try to provide a working atmosphere that is understanding and accommodating of the shift.

Helping transitioning workers to pay for medical treatments and ensuring they have gender-specific health insurance can reduce the emotional toll of coming out at work. Transgender workers feel valued by this dedication.

Ask staff how they want their transitions handled and what they need now. If employers listen and cooperate with employees, they can avoid "outing" them without their consent or at the right time.

Third, an HR manager may provide therapy options, organizational support groups, and more to an employee. They can also aid employees with work/life issues. If the employee is comfortable, involving their direct supervisor in these meetings may create empathy and assist in establishing well-informed, adaptive methods. Similar initiatives are run by Google, Cigna, and Chevron.

The fourth and most important aspect is that leaders and managers should actively promote workplace friendliness. Transitioning people are more likely to encounter social marginalization and peer pressure to disguise who they are, which increases their risk of suicide, despair, and anxiety. The surgical team will also question transgender people considering surgery if they have support networks, as gender-confirming surgeries require them. Thus, Trans employees are simpler to care for with supporting policies and procedures.

XIII Conclusion

The Transgender People (Protection of Rights) Act, 2019, would safeguard the rights and interests of transgender individuals. This brings the topic back to the legislation that is in place in India. When it comes to the protection of transgender people from being abused, it is of the highest significance to do a study on the vulnerabilities that exist within the legislation. In 1948, the Factory Act required a few amendments to bring about the intended effects. These amendments were necessary to ensure the health and safety of transgender persons. To guarantee that transgender people are offered equal protection and participation, one of the objectives of these amendments was to put into effect. Even though menstruation leave is not a large issue in India and third-world nations frequently neglect concerns of this sort, it would be prudent for legislators in India to accept their shortcomings and strive toward fixing them. Because they have chosen not to have sex reassignment surgery, the vast majority of transgender males continue to suffer menstrual

periods. This continues to be the case. More than a day or two will be required to accomplish the goal of inclusion, and the participation of all individuals will be necessary to make it happen. The importance of involving transgender persons in such events, as well as how this might be done, should be brought to the attention of legislators from time to time. Indeed, transgender people are afforded protection under the international regulations that govern the employment of transgender people. The reason for this is that transgender persons are well-informed about the history of the restrictions and the consequences that come with transgender people breaking those restrictions. There must to be a POSH committee in every business and industrial region, and that committee ought to include at least one person who identifies as transgender. It is strongly suggested that these committees ought to be established. Fixing the ambiguous areas and doing research are both necessary steps to take to guarantee that these regulations do not discriminate against individuals who do not identify as cisgender.