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# INTERPRETATION OF LABOUR LAWS OF TRANSGENDERS IN INDIA

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## ABSTRACT

*“You may have to fight a battle more than once to win it.”*

- Margaret Thatcher<sup>1</sup>

She elicited the transgender community’s underlying battle to affirm their presence, place, and potential in today’s society. Their origins are as old as man and woman, yet their acceptance in society remains an outlier belief. The supreme *lex loci*, which guarantees “justice, liberty, equality, and fraternity to all its citizens,” empowered state governments to protect and uplift the status of this community through Articles 14 and 21. Still, subsequent governments have failed to realize the true potential of these two Articles in protecting transgender people.

Throughout recorded history, trans individuals have existed in every race, class, and community. In the mid-1990s, a grassroots community of gender-different people coined the term “transgender.” In India, trans persons are divided into a variety of socio-cultural groups, including hijras, kinnars, and other identities such as shiv-shaktis, jogtas, jogappas, and so on. Despite recent progress for the LGBTQAI+ community, many transgender people believe there is still much more work to be done in the struggle for equality.

The paper highlights the discrimination faced by Trans persons in employment and provides an analysis of the labour laws enacted in favour of transgender employees.

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<sup>1</sup> Former Prime Minister of the United Kingdom.

## INTRODUCTION

The term transgender was coined by Psychiatrist John F. Oliven of Columbia University in 1965.<sup>2</sup> The term transgender gained popularity with various definitions by transgenders and transsexuals. Transgender people have been found in all social groups, races, and castes. However, their success has always come at a price, with an added difficulty. From social equality to social rights, education, and employment, the trans community has been a victim of society's contradictory attitude toward them, in which they are both shunned and respected. Particularly in the sphere of employment, trans persons have traditionally faced additional challenges. According to a survey report by the National Human Rights Commission in 2018, 96% of transgender people are denied employment and are forced to engage in low-paying or demeaning jobs such as badhais, sex work, and begging to make ends meet. According to the first-ever study on transgender rights, around 92 per cent of transgenders in the country are denied the right to participate in any type of economic activity, with even competent transgenders being denied employment. Around 89 per cent of transgender people stated there are no jobs for them, even if they are qualified. According to the report, 50-60% never went to school and those who did face significant discrimination. According to the NHRC, 52% of transgender students were harassed by peers, and 15% were bullied by teachers, prompting them to drop out of school.

Only 6% of transgender people worked in the commercial sector or for non-governmental organizations back then, and only 1% of transgender people earned more than Rs.25,000 per month; the rest, 26.35 per cent, earned between Rs. 10,000 and Rs.15,000. According to the report, around 23% are forced to engage in sex work that carries significant health hazards, putting trans people 49 times more at risk of contracting HIV than the general population.

## LEGISLATIONS

For a long time, Indian laws were strictly binary in terms of gender recognition, acknowledging only men and women. In this sense, the absence of recognition is referred to as a non-liquet or a legal lacuna. However, the transformation in global attitudes about transgender people has coincided with a similar development in India. The Supreme Court's decision in National Legal

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<sup>2</sup> *Sexual Hygiene and Pathology: A Manual for the Physician and the Professions.*

Services Authority v. Union of India,<sup>3</sup> in which the Court proclaimed transgender people to be distinct from binary genders and affirmed their identities as the third gender under our Constitution, was the first notable example of this movement.

On a global level, the Discrimination (Work and Occupation) Convention of 1958<sup>4</sup> requires ratifying countries to declare and implement a national policy promoting equality of opportunity and treatment in employment and occupation. This includes enacting legislation, implementing educational programmes, abolishing any laws that are incompatible with the above-mentioned policy, and ensuring that it is followed under the supervision of a national authority. India has ratified this international agreement and, as stated in the opening line, is making progress in the right direction. However, there are still many grey areas that need to be resolved in order to give transgender people the same rights and benefits as cisgender workers.

**The legislation dealing with the labour rights of transgenders are:**

### **The Transgender Persons (Protection of Rights) Act of 2019**

The Transgender Persons (Protection of Rights) Act of 2019 is a new law that protects transgender people's rights enacted by the Parliament. It was passed by the Rajya Sabha on November 26, 2019, and the 17th Lok Sabha on August 5, 2019.

The Transgender Persons (Protection of Rights) Act, 2019 ('Transgender Persons Act') aims to recognize transgender people's identities and prohibit discrimination in areas such as education, employment, healthcare, property ownership and disposal, public and private office holding, and access to and use of government services and benefits.

The provisions of the Act include:

- Prohibition of discrimination against transgender people in the workplace or in their occupation.<sup>5</sup>
- Prohibition of the denial of employment as well as discriminatory termination.<sup>6</sup>

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<sup>3</sup> 2014 5 scc 438

<sup>4</sup> Convention (No.111)

<sup>5</sup> Section 3 (b), The Transgender Persons (Protection of Rights) Act of 2019.

<sup>6</sup> Section 3(c), The Transgender Persons (Protection of Rights) Act of 2019.

- Prohibition on employers from discriminating against transgender people in employment-related areas such as recruitment, promotion, and other issues.<sup>7</sup>
- Imposition of a legal obligation on businesses to comply with the law's provisions and provide appropriate facilities to trans people.<sup>8</sup>
- Requires any institution with more than 100 employees to appoint a compliance officer to handle complaints about Act infractions.<sup>9</sup>
- Lays punishments and penalties in case of dangers to life, safety, health, including both mental and physical health, of a transgender person with a punishment of imprisonment not less than six months going up to two years and fine or both. The section also makes sexual, physical, verbal, economic, and emotional abuse punishable.<sup>10</sup>

### **Transgender Persons (Protection of Rights) Rules, 2020**

The Transgender Persons (Protection of Rights) Rules, 2020, were promulgated by the Ministry of Social Justice and Empowerment on September 25, 2020. The Rules were enacted in accordance with Section 22 of the Transgender Persons (Protection of Rights) Act 2019 (the "2019 Act"). The following points have been addressed in the Rules:

- Welfare measures:

Mandatory establishment of a Welfare Board to facilitate access to government programmes and welfare measures aimed at protecting transgender people's rights. The Rules further provide that the government must assess all existing social, educational, and healthcare programmes to ensure that transgender people are included, as well as develop new programmes that are transgender-friendly, non-stigmatizing, and non-discriminatory. Within two years of the Rules taking effect, they require the installation of infrastructures such as separate human immunodeficiency virus (HIV) sero-surveillance centres, separate wards in hospitals, washrooms in establishments, temporary shelters, and short-stay residences.<sup>11</sup>

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<sup>7</sup> Section 10, The Transgender Persons (Protection of Rights) Act of 2019.

<sup>8</sup> Section 11, The Transgender Persons (Protection of Rights) Act of 2019.

<sup>9</sup> Section 12, The Transgender Persons (Protection of Rights) Act of 2019.

<sup>10</sup> Section 18 (d), The Transgender Persons (Protection of Rights) Act of 2019.

<sup>11</sup> Rule 10, Transgender Persons (Protection of Rights) Rules, 2020.

- Non-discrimination Provisions:

The Rules include provisions to ensure that transgender people are not discriminated against in public life. The Rules, for example, mandate the establishment of a Transgender Protection Cell under the supervision of the District Magistrate and the Director-General of Police to monitor transgender-related crimes.

- Equal Opportunity in Employment:

Rule 11 requires all organizations to provide a safe environment and equal chances for transgender people by including infrastructure improvements, recruitment, employment perks, and promotion. It is a legal requirement for all businesses to disclose their Equal Opportunity Policy.

- Grievance Redress:

The rules require the government to establish a grievance redress procedure within one year and implement a complaint tracking system. Furthermore, Rule 13 mandates the appointment of a complaints officer. They shall investigate complaints within 15 days of receiving them and resolve grievances within 30 days of filing.

- National Council:

The National Institute of Social Defense is required under the Rules to provide secretarial assistance to the National Council for Transgender Persons in order to enable the fulfilment of its tasks.

## **LOOPHOLES IN EXISTING LABOUR LAWS**

### **Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013**

A defining provision of the Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013, strives to clarify essential terminology and avoid any ambiguity about their construction and interpretation. As a result, one useful step an employer may take is to define the term transgender person in their policy in accordance with the Act's

meaning. Employers can take it a step further by defining terminology like transman, transwoman, non-binary/genderqueer, intersex, and so on to assist employees in comprehending the differences.

### **Maternity Benefit Act of 1961**

There was debate about whether transsexual employees were eligible for maternity benefits under the Maternity Benefit Act of 1961. This is because the Act utilizes the term ‘woman’ throughout and defines it as a woman working for remuneration in any establishment, whether directly or through any agency.<sup>12</sup> Under certain situations, transgender men, who were born with the female gender assigned to them, are capable of giving birth. As a result, there was confusion in terms of compliance, as the employer, in this case, was unsure about the supply of benefits as well as procedural standards such as the different Forms under the Act that only apply to women, and this confusion persists.

### **The Transgender Persons (Protection of Rights) Act of 2019**

The understanding of equality of opportunity is not understood or instilled in the legislation. There will be no structural changes as a result of the policy. Similar to the underwhelming responsibility imposed under Section 3, this duty fails to account for indirect discrimination because it imposes no tangible obligation on businesses to review their policies or change their hiring and promotion criteria. As a result, the legislation goes beyond NALSA’s mission, removing the reservation and replacing it with a requirement to publish a simple policy detailing firm practices under the guise of “equal opportunity.”

The powers of the complaint officer are not defined in the Act. Second, the continuous reliance on a personalized model is a source of increased concern.

### **Prohibition of Nightwork and Provisions for Separate Urinals**

There are various laws which prohibit the working of women during the night, and some of them are:

- According to the Factories Act, 1948, no woman is required or allowed to work in any

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<sup>12</sup> Section-3(o), Maternity Benefit Act of 1961.

factory except between the hours of 6 a.m. and 7 p.m.<sup>13</sup>

- The Beedi and Cigar Workers (Conditions of Employment) Act, 1966 states that no woman is required or allowed to work in any industrial premise except between 6 a.m. and 7 p.m.<sup>14</sup>
- The Mines Act, 1952 prohibits employment of women in any mine above ground except between the hours of 6 a.m. and 7 p.m.<sup>15</sup>

Provision for separate latrines and urinals for female workers exists under the following:

- Rule 53 of the Contract Labour (Regulation and Abolition) Act, 1970.
- Section 19 of the Factories Act, 1948.
- Rule 42 of the Inter-State Migrant Workmen (RECS) Central Rules, 1980.
- Section 20 of the Mines Act, 1952.
- Section 9 of the Plantations Labour Act, 1951.

The aforementioned provisions only deal with the safety of women and fail to mention the situation of transwomen. Furthermore, The Code on Occupational Safety, Health and Working Conditions, 2020 imposes a responsibility on employers to ensure transgender persons have separate washroom facilities, bathing places, locker rooms, and shelters. But the same code fails to define the term 'transgender', which makes space for ambiguity. Furthermore, the Code on Social Security, 2020 and the Industrial Relations Code, 2020, fails to deal with transgenders specifically under any of their provisions.

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<sup>13</sup> Section 66(1)(b)

<sup>14</sup> Section 25

<sup>15</sup> Section 46(1)(b)

## JUDICIAL PRONOUNCEMENTS

### NALSA V. UNION OF INDIA<sup>16</sup>

The National Legal Services Authority of India (NALSA) has filed a petition to acknowledge those who do not fall into the male/female gender dichotomy, such as those who identify as ‘third gender.’ The Supreme Court combined two writ petitions brought to defend the transgender community’s rights and identity.

The facts of the case in brief are:

1. That the petitioner claimed to be a transgender; whose gender does not match with the gender assigned to her biologically by birth.
2. That the birth certificate of the petitioner declared her as a male and named her ‘Clafid Claudy Lobo’
3. At a very young age, the petitioner identified herself as a female and underwent a gender reassignment surgery on 26-07-2018, at Namaha Hospital, under the medical supervision of Dr Umang Kothari.
4. The petitioner thereafter changed her name from ‘Clafid Claudy Lobo’ to ‘Christina Lobo’ by executing an affidavit dated 31-10-2019.
5. The petitioner holds an AADHAAR card and a passport with the aforementioned name and gender female.
6. The respondent authorities have denied acknowledging the gender identity of the petitioner and further rejected the claim of changing the personal details over the university and pre-university certificates.
7. The petitioner has sought a writ in the nature of mandamus directing respondents and; the Department of Pre-University Education and the Karnataka Secondary Education Examination Board, Bengaluru, to issue a revised certificate in addition to the setting aside of order passed by the respondent; Central Board of Secondary Education,

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<sup>16</sup> (2014) 5 SCC 438



Chennai and issue revised CBSE mark sheet showing her name as 'Christina Lobo'. Further, the petitioner prays to issue a writ of mandamus against the respondent and; Rajiv Gandhi University of Health Sciences and Father Muller Medical College, Mangalore, to change her name and gender in the MBBS mark sheet and thereby grant revised educational records.

### **Issues raised**

1. Whether a person who is born as a male with predominantly female orientation (or vice versa) has a right to get himself/herself to be recognized as a female as per his/her choice more so, when such a person after having undergone the operational procedure, changes his/her sex as well;
2. Whether transgenders (TGs), who are neither males nor females, have a right to be identified and categorized as 'third gender'?

### **Held:**

In order to preserve the rights of the transgender under the Constitution of India, it was held:

- Apart from binary gender, Hijras and Eunuchs are classified as "third gender" under Part III of the Constitution.
- Transgender people have the right to choose their gender identification, and the state is required to maintain their legal status as a "third gender."
- It ordered the government to create procedures to protect the rights and well-being of those who identify as "third gender" or "transgender."

### **Nangai v the Superintendent of Police<sup>17</sup>**

The petitioner in the present case applied for the post of a woman police constable.

During the course of her training, she underwent a medical examination. The examination declared her as "transgender" on the basis of chromosomal pattern and genitalia, which

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<sup>17</sup> (2014) 4 MLJ 12

contradicted her birth certificate, medical records, and educational certificates. Later on, The Superintendent ordered her termination from the post of a woman constable. The Hon'ble High Court upheld that the petitioner has the liberty to choose a different gender identity as a third gender in future based on the medical declaration and the impugned order of termination from service issued by the Superintendent of Police, which was set aside by the Hon'ble Court to protect her right as a transgender person.

### **Yashini Prithika v. Tamil Nadu Recruitment Board<sup>18</sup>**

A case in point is one of the few that relates to the subject of occupational discrimination faced by the trans population. The Tamil Nadu government failed to create a separate category for trans people in the announcement for sub-inspectors issued in this case. Prithika took the matter to Court on her own, ensuring her participation in the test. Prithika, on the other hand, failed the second prong of the test, missing the target by 1.11 seconds. She went to Court once more to seek redress. Due to insufficient representation of the trans community in the police department, the Court allowed her to go to the final prong. The result, while admirable, highlights the flaws of the personalized strategy. The Court offered Prithika damages and made no recommendations for structural changes to the recruitment standards to address the lack of trans representation.

### **Moore v Debenhams**

In this case, a woman from Northern Ireland filed a tribunal claim, which was supported by the Equality Commission, claiming she was rejected in an interview because she is a trans woman. The claimant, who was asked for an interview as a temporary sales assistant, thought the interview went well. Still, she was not awarded the position, according to the Equality Commission of Northern Ireland. The claimant said that the tone in the interview altered after she presented her birth certificate, which revealed her gender history. She was later informed, anonymously, that she had failed the interview because she was a trans woman. Debenhams agreed to work with the Equality Commission in Northern Ireland to evaluate its Equal Opportunities policies, practises, and procedures as a result of the case. Debenhams paid her £9,000 in a sex discrimination settlement with no acknowledgement of liability.

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<sup>18</sup> (2015) 8 MLJ 734

**Mackereth v DWP<sup>19</sup>**

In this case, the claimant was dismissed from his role as a health and disabilities assessor at the DWP because he refused to agree that, if required to do so, he would use trans patients' preferred pronouns. He felt he could not do so in good conscience because it would go against his Christian beliefs. His claim for religious discrimination was unsuccessful; it was held that while Christianity is a belief protected under the Equality Act, the claimant had not been discriminated against because he was a Christian. The tribunal held that failure to address a trans individual as per pronouns of their choice would amount to discrimination and harassment. Furthermore, as per the DWP policy, the employees must refer to service users in their presenting gender.

**Lewis v. High Point Regional Health System<sup>20</sup>**

Plaintiff, a registered nursing assistant, claimed she was turned down for various jobs due to her gender identity. She was anatomically male at the time of her interviews and was getting hormone replacement therapy in preparation for sex reassignment surgery in the future. The employer's petition to dismiss the complaint was denied by the district court because the company had only argued that sexual orientation was not covered by Title VII (which deals with the prohibition of employment discrimination based on race, colour, religion, sex and national origin) and that sexual orientation and gender identity are two different notions. As a result, the Court allowed the plaintiff's Title VII transgender discrimination claim to proceed.

**Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.<sup>21</sup>**

The plaintiff alleged that her employer cancelled her job offer after finding she was transgender and exposed to sex discrimination. The Court denied the employer's motion for summary judgement, concluding that the plaintiff's claim was actionable as sex discrimination under Title VII since she did not conform to the employer's ideas of what a man should look like. A reasonable factfinder might conclude that the employer's assertion that the job offer was

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<sup>19</sup> [2019] ET 1304602/2018

<sup>20</sup> 79 F. Supp. 3d 588 (E.D.N.C. 2015)

<sup>21</sup> 542 F. Supp. 2d 653 (S.D. Tex. 2008)

revoked because she “misrepresented” herself as female conveyed hatred toward those who do not fit gender stereotypes.

### **Tronetti v. TLC Health Net Lakeshore Hospital<sup>22</sup>**

Based on factual allegations that the plaintiff was discriminated against for “failing to act like a man,” the Court ruled that plaintiff’s sex discrimination claims of hostile work environment harassment and discriminatory discharge arising from her transition and sex reassignment surgery were actionable under Title VII.

### **Creed v. Family Express Corporation<sup>23</sup>**

The plaintiff, a transgender woman, claimed that she was fired due to gender stereotypes, stating that she was mistaken for a man by her employer while working as a sales associate and was fired for refusing to portray herself in a masculine manner.

## **CONCLUSION**

*“Self- determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India.”<sup>24</sup>*

India is still adapting to the societal shift of including and embracing transgender people. A societal shift of this size will undoubtedly take time. Social activists, the judiciary, and the legislation are all working together to improve the transgender community’s situation. It is critical to building a trans-inclusive work environment for development and stigma reduction. Although the Act does not make the employment of trans people a legal obligation, it does place a responsibility on companies. Some of the suggestions are as follows:

- Organizations must prioritize creating a **trans-inclusive work climate**. It’s critical that individuals who identify as the third gender feel safe and secure in their jobs. Their

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<sup>22</sup> 03-CV-0375E (Sc) (W.D.N.Y. Sep. 26, 2003).

<sup>23</sup> CASE NO. 3:06-CV-465RM (N.D. Ind. Jan. 5, 2009)

<sup>24</sup> Anuj Garg v. Hotel Assn, of India, (2008) 3 SCC 1

productivity will grow as a result of feeling included and treated as equals, and they will be more loyal to the organization.

- Organizations must encourage members of the transgender community to apply for positions within the company. It must demonstrate its commitment to the community by **promoting job opportunities**, regardless of gender identity.
- Conducting **educational sessions** to enlighten employees about the transition process, dispel myths, and educate them on what constitutes inappropriate and transphobic behaviour.
- As the goal of a trans-inclusive workplace is to give transgender people the same opportunities as everyone else, they should be entitled to the same **medical and insurance** benefits as everyone else. Adoption, maternity, and paternity leave should all be covered under the same policies. Their cohabiting couples should be treated the same as married couples when it comes to health insurance benefits.

In spite of the incremental changes that have come about as a result of international awareness and progressive decision-making by the Supreme Court, the recognition of transgender persons under labour legislation is still in its nascent stages. The Ministry of Labour and Employment must ensure that there is a concerted effort to include transgender persons at all stages of the law-making process and provision for their distinct requirements under the Codes as well as the supplementary rules.

## **BIBLIOGRAPHY**

### **Websites**

1. [www.eeoc.gov](http://www.eeoc.gov)
2. [www.cms-lawnow.com](http://www.cms-lawnow.com)
3. [www.simpliance.in](http://www.simpliance.in)
4. [Labour.gov.in](http://Labour.gov.in)
5. [www.scconline.com](http://www.scconline.com)
6. [Casetext.com](http://Casetext.com)

### **Legislations**

1. Factories Act, 1948
2. Maternity Benefit Act of 1961
3. Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013
4. The Transgender Persons (Protection of Rights) Act of 2019
5. Transgender Persons (Protection of Rights) Rules, 2020