
TRANSGENDER RESERVATION

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ABSTRACT

The 2011 census has reported that 4.3 million people of India are transgenders. Transgender is a word relating to being a person whose gender identity differs from the sex the person had or was identified as having at birth. The literacy rate of transgender in India is 56.07% as per the 2011 census.¹ 96% of the transgender in India are not employed and are thereby pushed to the brink to take up low paying or discreditable and humiliating work for their subsistence according to the national human rights commission in 2008. 50-60% of the transgender have never been to school. NHRC has submitted that 23% of the transgender are forced to work as sex workers in a report. The right to life and liberty, the right to equal opportunities in the matter of public employment and right to equality has not reaped in the case of transgenders, so an additional statute was introduced exclusively to protect the rights of the transgenders, the transgender persons (protection of right) act, 2019. Education and employment help one to uplift themselves economically and socially. Education plays the major role to meet the needs of the job one has. Employment helps one to fetch daily bread needs, develop the demand of quality goods and services and also helps in the overall growth. Employment decreases the social gap of a person and also improves the status of persons welfare in the long run. Therefore, separate reservations for the transgender persons are essential as the education and employment of a person only helps to uplift oneself and also to uplift one's society.

¹ See, <https://www.gktoday.in/question/what-is-the-literacy-rate-of-the-transgenders-of-i> (last visited on Feb. 06, 2023)

Introduction

The national center for Transgender Equality² has defined the term transgender as people whose gender identity differs from the assigned gender at birth by the medical professional. Trans is the shortened term which is used instead of transgender.³ The primary certainty of a person to be a male, female or other gender is called as “gender identity”.⁴ On top of that, the United Nations⁵ has expounded the word transgender as “an umbrella term that is used to describe a wide range of identities whose appearance and characteristics are perceived as gender-atypical- including transsexual people, cross-dressers (sometimes referred to as “transvestites”), and people who identify as the third gender”.⁶ The legal recognition for these people were limited till the 1980s. As part of legal recognition provided to the trans people varies far and wide throughout the world. Currently, numerous countries have legally recognized reassignment of sex of an individual by permitting change of the legal gender in the birth certificates.⁷ India is called “the unity in diversity”, because of it having diverse geographical land, languages, cultures, religions etc. in addition to that India also has different genders. But only two genders are well recognized that is the male and female. The transgenders called third genders are not neglected and are not recognized, unfortunately. They are disregarded, unloved, abused, disrespected and ignored. They are economically and socially downtrodden or persecuted. Education and employment help one to uplift themselves economically and socially. Education⁸ plays the major role to meet the needs of the job one has. Employment helps one to fetch daily bread needs, develop the demand of quality goods and services and also helps in the overall growth. Employment⁹ decreases the social gap of a person and also improves the status of persons welfare in the long run. The important crux of the constitution is that the citizens should enjoy their life with equality and equal opportunity

² See, *Frequently asked questions about Transgenders*, national center for transgender equality, (July 9, 2016) <https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people> (last visited on Feb. 06, 2023)

³ See Beth Sissons, *what does Transgender mean*, MedicalNewsToday (September 24, 2012) <https://www.medicalnewstoday.com/articles/what-is-transgender#definition> (last visited on Feb. 06, 2023)

⁴ See, <https://www.apa.org/news/press/releases/2015/11/psychology-transgender#:~:text=Bockting%3A%20%22Transgender%22%20refers%20to,gender%20questioning%2C%20gender%20nonconforming> (last visited on July 5, 2022)

⁵ See, <https://www.un.org/en/> (last visited on July 5, 2022)

⁶ See, definitions, UN free and Equal, <https://www.unfe.org/definitions/> (last visited on Feb. 06, 2023)

⁷ See Taylor, J.K, Hayder-Markel and D.P, *Transgender rights and politics*, Michigan press, https://www.press.umich.edu/4883502/transgender_rights_and_politics (last visited on Feb. 06, 2023)

⁸ See, <https://www.worldvision.ca/stories/education/why-is-education-important> (last visited on July 5, 2022)

⁹ See, *Employment Generation*, United States Institute of Peace, <https://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/sustainable-economy/employment-g> (last visited on Feb. 06, 2023)

established in the Article 14,15,16,17,18 and 21¹⁰ of the Constitution of India. This equality could be attained by the mode of reservation in the education and employment. Reservation in India is a positive discrimination backed by the constitution of India.¹¹ This signifies that, reservations for the transgender persons are essential for the elevation of their status in our society.

Status of Transgender

In India, transgenders are treated as outcasts in the modern society. Anyway, on the other hand they are an ancient social group who are recognised at-least 4000 years back. But during the colonial period there were laws established against them. This contributed major portion of the reasons for their backward position they are in now. After the independence also the transgender community's status barely enhanced.¹² The national human resource commission in 2011 has reported that 4.8 million Indian people are identified as transgender via census. The transgender population in Uttar Pradesh is 28.18%, Andhra Pradesh is 8.97%, Bihar is 8.37%, west Bengal is 6.22% and Tamil Nadu is 4.58% as per the 2011 census data.¹³ The national human rights commission has reported in 2018 that 96% of the transgenders are denied of work and are constrained to work for low payments.¹⁴ They are also pushed to take-up undignified jobs like sex-work, begging etc. to win daily bread. 92% of the trans people are deprived from participating in any form of the economic activities in the country.¹⁵ 50-60% of the transgender people have never attended primary education.¹⁶ Upon that, the NHRC has added that 52% of the transgenders were abused by their classmates and 15% by the teachers

¹⁰ Constitution of India, 1950

¹¹ See Sujoy Paul, *Reservation in India*, Legal services India Law Journal, <https://www.legalserviceindia.com/legal/article-7730-reservation-in-india.html> (last visited on Feb. 06, 2023)

¹² See Ankur Gupta and Ananth Govind Rajan, *The socioeconomic status of transgender people in India*, The Tech, (August 25, 2016) <https://thetech.com/2016/08/25/hijra-community> (last visited on Feb. 06, 2023)

¹³ See Neethu Naik, *Transgenderism in India: Insights from current census*, <http://paa2019.populationassociation.org/uploads/191100#:~:text=It%20is%20just%20that%20they,as%20well%20as%20economic%20difficulties>. (last visited on Feb. 06, 2023)

¹⁴ See, *The transgender and unemployment in India*, OutlookIndia, (February 16, 2022) <https://www.outlookindia.com/national/transgender-and-unemployment-in-india-news-182617> (last visited on Feb. 06, 2023)

¹⁵ See, *The transgender and unemployment in India*, OutlookIndia, (February 16, 2022) <https://www.outlookindia.com/national/transgender-and-unemployment-in-india-news-182617> (last visited on Feb. 06, 2023)

¹⁶ See, *The transgender and unemployment in India*, OutlookIndia, (February 16, 2022) <https://www.outlookindia.com/national/transgender-and-unemployment-in-india-news-182617> (last visited on Feb. 06, 2023)

which lead to dis-continuing their education.¹⁷ 56.07% is the literacy rate of trans community in India.¹⁸

Problems faced by the trans community

There are many problems that the trans people face. The main issues are marginalization, social exclusion, educational backwardness, discrimination in workplace, homelessness, mental distress etc.¹⁹ The trans people face varied forms of marginalization by means of racism, homophobia, poverty etc. marginalism leads to social exclusion. This affects the mental health of the transgenders. Marginalism leads to minimal access and exposure of the trans community to medical service, education, employment, legal service etc. the inclusion of TG into institutions is a Himalayan task, use of disrespectful names, lack of family support, lack of restroom facilities, less financial assistance etc leads to the educational backwardness of the transgenders.²⁰ Restroom access, hiring discrimination and work place abuse are the most common issues faced by them in the workplace.²¹ Most of the transgenders are excluded from their family due to the prevailing social stigma leading to their homeless state. All these together leads to the mental stress of the transgender community. This infringes the constitutionally established fundamental rights that every citizen acquire by birth.

Importance of Reservation

Reservation in India, is nothing but reserving seats affirmatively to particular section of population by the government in the government jobs and in educational institutions.²² Reservations are given based on the socio-economic conditions, historical discrimination and

¹⁷ See, *The transgender and unemployment in India*, OutlookIndia, (February 16, 2022) <https://www.outlookindia.com/national/transgender-and-unemployment-in-india-news-182617> (last visited on Feb. 06, 2023)

¹⁸ See, <https://www.gktoday.in/question/what-is-the-literacy-rate-of-the-transgenders-of-i> (last visited on Feb. 06, 2023)

¹⁹ See Dr Vasant, *problems of transgender community in India: A sociological study*, Vivek research journal special issue, (March 18, 2021) [http://vivekresearchjournal.org/current_issue/nmarch2021/15%20PROBLEMS%20OF%20TRANSGENDER%20COMMUNITY%20IN%20INDIA%20\(1\).pdf](http://vivekresearchjournal.org/current_issue/nmarch2021/15%20PROBLEMS%20OF%20TRANSGENDER%20COMMUNITY%20IN%20INDIA%20(1).pdf) (last visited on Feb. 06, 2023)

²⁰ See Dr Rajkumar, *Education of transgenders in India: Status and challenges*, IJRESS, (November, 2016) <https://euroasiapub.org/wp-content/uploads/2016/12/2ESSNov-4296.pdf> (last visited on Feb. 06, 2023)

²¹ See Scott Raynor, *Transgender issues in workplace: Bathroom access, workplace abuse and hiring discrimination*, everfi, <https://everfi.com/blog/workplace-training/transgender-issues-workplace-abuse-hiring-discrimination/> (last visited on Feb. 06, 2023)

²² See Sujoy Paul, *Reservation in India*, Legal services India Law Journal, <https://www.legalserviceindia.com/legal/article-7730-reservation-in-india.html> (last visited on Feb. 06, 2023)

exclusion from society.²³ Therefore, allotting reservations for the transgender community is essential. In the famous case *NALSA v. UOI*²⁴, the supreme court has ensured the legal and constitutional rights to the transgenders. Additionally, it provides monthly grants, educational scholarships and pension to the trans people.²⁵ Besides this there is another school of people who say that reservations lead to the placement of an unqualified which leads to weakening of the quality. But still, the SC in *Indhira Swahney v. UOI*²⁶, said that article 16(4)²⁷ is a part of the “code of Equality” in the constitution and must be always read along with article 14²⁸.²⁹ One of the facets of equality is equality of opportunity in the matters of public employment, as guaranteed in Article 16(1).³⁰ In 2014, the Supreme Court in the landmark judgement of the National Legal Service Authority of India (NALSA) v Union of India³¹ recognized transgender as the third gender. The Supreme Court also held in this judgement that the fundamental rights guaranteed to all the citizens under Articles 14 15, 16, 19, and 21³² shall be applied without any exception to transgender people. The Court also highlighted that the core principles of International Human Rights included one and all without any discrimination.³³ The important question that prevails is whether to give vertical or horizontal type of reservation. If the reservations are applied separately for each of the section like the SCs and STs particularly by law is called as vertical reservation.³⁴ Horizontal reservations refers to the varied categories of beneficiaries such as women by article 15(3)³⁵.³⁶ Similarly, trans community are socially included by horizontal reservations. Horizontal reservation will not

²³ See, Insightsonindia, (May 19, 2016) <https://www.insightsonindia.com/2016/05/19/1-reservation-transgender-people-government-jobs-educational-institutions-critically-comment/> (last visited on Feb. 06, 2023)

²⁴ See A Sikri, <https://indiankanoon.org/doc/193543132/> (last visited on Feb. 06, 2023)

²⁵ See, Insightsonindia, (May 19, 2016) <https://www.insightsonindia.com/2016/05/19/1-reservation-transgender-people-government-jobs-educational-institutions-critically-comment/> (last visited on Feb. 06, 2023)

²⁶ See, *Indira Swaney v. Union of India* AIR 477 SC, 1993, <https://indiankanoon.org/doc/1363234/> (last visited on Feb. 06, 2023)

²⁷ The Constitution of India, 1950

²⁸ The Constitution of India, 1950

²⁹ See Kailash Jeenger, *The Supreme Court must note that reservation is a Fundamental Right*, Thewire, (July 13, 2020) <https://thewire.in/law/supreme-court-reservation-fundamental-right> (last visited on Feb. 06, 2023)

³⁰ See Kailash Jeenger, *The Supreme Court must note that reservation is a Fundamental Right*, Thewire, (July 13, 2020) <https://thewire.in/law/supreme-court-reservation-fundamental-right> (last visited on Feb. 06, 2023)

³¹ National Legal Service Authority of India (NALSA) v Union of India (2014) Writ Petition (Civil) No. 604/2013

³² The Constitution of India, 1950

³³ See Shubhanshi Suman, *Transgender: identity and rights*, Jus Corpus Law Journal, (June 17, 2022) <https://articles.manupatra.com/article-details/Transgender-Identity-and-Rights> (last visited on Feb. 06, 2023)

³⁴ See Yash Kapadia, *Horizontal and vertical reservations in the light of recent developments in Bihar*, ipleaders, (November 26, 2021) <https://blog.ipleaders.in/horizontal-and-vertical-reservations-in-light-of-recent-developments-in-bihar/> (last visited on Feb. 06, 2023)

³⁵ The Constitution of India, 1950

³⁶ See Yash Kapadia, *Horizontal and vertical reservations in the light of recent developments in Bihar*, ipleaders, (November 26, 2021) <https://blog.ipleaders.in/horizontal-and-vertical-reservations-in-light-of-recent-developments-in-bihar/> (last visited on Feb. 06, 2023)

change the mindset of the society but could help the trans people to raise their educational status which in-turn leads to the enhancement of the social and economic status. After the landmark judgement on 2014 in *NALSA v. UOI*³⁷, the education ministry has started evaluating ways to allot reservation for transgenders and also says that transgenders will be placed along with the OBC category.³⁸ But placing reservation for trans people with the OBC category doesn't enshrine the purpose of reservation particularly for transgender as the competition is high. In *Saratha v. the member secretary*, justice MS Ramesh criticised the state government to provide combined reservations for women and transgenders as it was violating the *NALSA*³⁹ judgement of the SC and also recommended separate percentage of reservations for the transgender.⁴⁰ The Karnataka police decided to include transgenders in the force, so, the department gave 1% reservations to the transgender community that is 70 posts of reserve sub-inspector (RSI) during recruitment is reserved to TG.⁴¹

The Transgender Persons (protection of rights) Act

The Transgender Persons (Protection of Rights) Act, 2019 was introduced as a result of the landmark case of *NALSA vs Union of India*⁴². In this case, the Apex court was asked to decide whether the persons who do not fall under the binary classification of gender as male or female can be legally identified as 'third gender'. In this case, the Supreme Court recognized the right of transgender persons to identify as 'third gender' and also discussed gender identity at length.⁴³ The purpose of this act is to protect the rights of the transgenders and to provide welfare thereby. The section 3⁴⁴ lays down the prohibition against discrimination. The sections 4, 5, 6 and 7⁴⁵ deals with the recognition of identity of transgender persons. The section 8⁴⁶

³⁷ National Legal Service Authority of India (*NALSA*) v Union of India AIR 1863 (SC, 2014)

³⁸ See BS Web team, *Transgenders in India may soon get reservations in India under OBC category*, Business standard, (November 19, 2020) https://www.business-standard.com/article/current-affairs/transgenders-in-india-may-soon-get-reservation-in-education-under-obc-quota-120111900334_1.html (last visited on Feb. 06, 2023)

³⁹ National Legal Service Authority of India (*NALSA*) v Union of India AIR 1863 (SC, 2014)

⁴⁰ See Shagun Suryam, *Transgender persons must be given separate reservations not clubbed with women reservation: Madras HC*, Barandbench, (March 2, 2022) <https://www.barandbench.com/news/transgender-persons-should-be-given-separate-reservation-not-clubbed-with-womens-reservation-madras-high-court> (last visited on Feb. 06, 2023)

⁴¹ See Harish Upadhyay, *1% reservation for transgender community in primary teachers' job in Karnataka*, News18, (March 19, 2022) <https://www.news18.com/news/education-career/1-reservation-for-transgender-community-in-primary-teachers-jobs-in-karnataka-4887818.html> (last visited on Feb. 06, 2023)

⁴² National Legal Service Authority of India (*NALSA*) v Union of India AIR 1863 (SC, 2014)

⁴³ See, Abhimanyu Charan, *Transgender Persons (Protection of Rights) Act: An analysis*, Jus Corpus Law Journal, (June 17, 2022) <https://articles.manupatra.com/article-details/Transgender-Persons-Protection-of-Rights-Act-2019-An-Analysis> (last visited on Feb. 06, 2023)

⁴⁴ The transgender persons (protection of rights) Act, 2019, No. 40, Acts of Parliament, 2019 (India)

⁴⁵ The transgender persons (protection of rights) Act, 2019, No. 40, Acts of Parliament, 2019 (India)

⁴⁶ The transgender persons (protection of rights) Act, 2019, No. 40, Acts of Parliament, 2019 (India)

deals with the obligation of welfare measures by the government. Sections 9,10,11 and 12⁴⁷ deals with Obligation of establishments and other persons. Sections 13 and 14⁴⁸ talks about the education, social security and health of the trans community. Section 18⁴⁹ deals with the offences and penalties.

Conclusion

Reservation is a positive discrimination which is bought to picture in-between the concept of equality and equity. The transgender persons have been oppressed in the society even during the historical times. So, separate percentage of reservations for the trans community must be allotted in both education as well as in the employment stream to uplift their social, educational and the economic status of them. Though there are statutes and laws that establish the rights of the transgender persons, the implementation of the same is not possible unless the mindset of the citizens changes. Change in a single person's view in society may sow the seedlings of change in the heart of the society and in-turn give a fruitful garden of equality.

⁴⁷ The transgender persons (protection of rights) Act, 2019, No. 40, Acts of Parliament, 2019 (India)

⁴⁸ The transgender persons (protection of rights) Act, 2019, No. 40, Acts of Parliament, 2019 (India)

⁴⁹ The transgender persons (protection of rights) Act, 2019, No. 40, Acts of Parliament, 2019 (India)

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