



The Third Gender and Transforming the Workplace

A brief note on the Transgender Persons (Protection of Rights) Act, 2019 and its impact on the Indian Corporate/Workplace Scenario

Authored by: Alok Tewari, Shivika Upadhyay & Vishal Singh, Kochhar & Co.

The golden thread passing through the equality scheme¹ of the Indian constitution is “enjoyment of life by all citizens and an equal opportunity to grow as human beings irrespective of their race, caste, religion, community, social status and gender”.

One of the basic tenets of the equality scheme lies in the recognition and acknowledgement of the “right of choice and self-determination”. Determination of gender to which one belongs and relates to is intrinsic to an individual’s right of self-determination and his/her dignity.

Acknowledging that Indian laws are substantially binary in nature recognizing only the genders of male and female, the Hon’ble Supreme Court of India vide its order dated 15th April, 2014 in the case of *National Legal Services Authority vs. Union of India*² (“*Nalsa Judgement*”), declared **Transgenders**³ apart from binary genders, as the “**Third Gender**” under our constitution and for the purposes of laws enacted by the parliament and state legislatures.

Non-recognition in our legal framework of the Third Gender has resulted in systematic denial of equal protection of law and widespread socio-economic discrimination in society at large as well as the Indian workspace. In wake of the *Nalsa Judgement*, the Indian parliament has recently enacted the *Transgender Persons (Protection of Rights) Act, 2019*⁴ (“the Act”).

Drawing a distinction between the actions that require immediate implementation such as introducing social welfare schemes and actions that require a long term approach such as changing the negative attitude of the

¹ Articles 14,15,16, 19 and 21 form the equality scheme of the Indian constitution.

² AIR2014SC1863

³ Transgenders – as defined in the Act, the term refers to and includes all those persons whose gender does not conform/match with the gender assigned to them at birth and includes trans-man and trans-woman (whether or not such person has undergone Sex Reassignment Surgery (“SRS”) and persons having socio-cultural identities such as *kinner*, *hijra*, *aravani* and *jogta*.

⁴ Transgender Persons (Protection of Rights) Bill, 2019 was introduced in Lok Sabha on July 19, 2019 by the Minister for Social Justice and Empowerment and subsequently, was passed on November 26, 2019 by Rajya Sabha. The Bill received the President’s assent on 5th December, 2019.

general public, the legislature has placed positive obligations on all the concerned Stakeholders⁵ in the form of guarantees (*from Chapter II to Chapter VIII*) such as:

- i. Prohibition of discrimination against Transgender persons⁶;
- ii. Recognition of identity and conferring the right and entitlement to obtain a certificate of identity as proof of recognition from the concerned state authorities;
- iii. Formulation and enactment of welfare measures, schemes, programmes towards education, social security, healthcare, effective participation in the society and facilitating access to such schemes and welfare measures by appropriate state governments;
- iv. Rescue and rehabilitation measures, including right of residence by appropriate state governments;
- v. Obligations of Establishment⁷ - Chapter V obligates Establishments to ensure compliance with the Act and provide facilities as maybe prescribed by the Act from time to time. In matters relating to employment including but not limited to recruitment, promotion and other related issues, no Establishment shall discriminate against a Transgender person and shall provide for adequate grievance redressal mechanism to deal with complaints relating to violations under the Act and at workplace;
- vi. Constitution and establishment of the National Council for Transgender Persons to perform the functions assigned to it under the Act, including but not limited to advising the concerned Stakeholders on formulation of policies, programmes, legislations and welfare measures, to monitor and evaluate the impact of policies and programmes designed for ensuring participation of Transgenders, ensuring redressal of grievances of Transgender Persons and so on;
- vii. Offences and Penalties for offences committed against Transgender persons: whoever, (i) compels or entices forced or bonded labour (excluding compulsory government service for public purposes), (ii) denies the right of public passage or use of public places, (iii) forcefully removes from household, village or other place of residence, (iv) commits an acts or intends to do an act causing physical, sexual, verbal, emotional or economic harm and/or abuse, shall be punished with imprisonment which may vary between six months to two years, with fine.

The Act is not an all-encompassing piece of legislation and is only a precursory step on part of the legislature by affording legal recognition to the Third Gender under our legal framework. The extent to which the concerned Stakeholders will take affirmative steps to necessitate inclusion and attempts to make Transgenders productive members of the society, will be a slow and challenging process. The Act does not lay down consequences of the newly acquired gender status on their rights and entitlements in various spheres and aspects of life and is largely silent on the consequences of non-compliance and accountability on part of the Stakeholders.

Inclusiveness at Workplace: Comments and Key Recommendations: Preparing the Indian workspace for an inclusive approach towards Transgenders is going to be an uphill task, as accommodating societal change of this magnitude has always been a slow process in India.

Upliftment of the Transgender community has to be a collective effort and empowering this community at the workplace would go a long way in reducing social stigmas and also uplift them economically. Although the Act

⁵ Stakeholders include the central government, state governments and establishments (as defined under the Companies Act, 2013).

⁶ From denial or discontinuation of, or unfair treatment in (a) educational establishments;(b) in relation to employment; (c) healthcare services; (d) access to or enjoyment of any goods, accommodation, service, facility meant for public use; (e) right of movement; (f) right to purchase reside, purchase, rent or otherwise occupy property; (g) opportunity to stand for or hold public office and (h) government or private establishment in whose care or custody a transgender person is.

⁷ Establishments – mean any body or authority corporate established by or under a central or state act or any body owned/controlled/aided by the government or any company or body corporate or association or body of individuals, firm, cooperative, other society, trust, agency or institution.

only puts an onus and does not mandate the concerned Stakeholders, in view of the changing dynamic, some of the steps that Establishments / organizations can undertake to create a more equitable and inclusive environment are as follows:

- **Sensitization and Education:** Prior to introducing any change in the system, it would be imperative for organizations to educate its workforce towards gender inclusiveness, assimilation at workplace and greater acceptance for the innate character and personality of Transgenders in the corporate environment.
- **Policy Review:** Organizations must review and update their existing HR, administrative, recruitment and employee benefit policies and manuals. It would be only beneficial to incorporate suggestions of a person from the Transgender community, so as to ensure that the policies reflect the way an organization would approach the Third Gender
- **Sex/Gender Reassignment Surgery (SRS) Transition:** Undergoing SRS transition is not only a cumbersome process but also a very traumatic one both physically and psychologically. Organizations must put in place policies that provide transition support, not only in terms of paid leaves, but also sensitizing the remaining workforce regarding an employee's transition, providing them with rehabilitation support and counselling.
- **Anti - harassment Policies:** Similar to requirements under the POSH Act⁸, organizations must put in place adequate grievance redressal mechanisms to deal with the harassment complaints, while keeping the identity of the complainant anonymous.
- **Gender Neutral Washrooms:** Employees should have access to washrooms that confer with their identity. Transgenders are repeatedly subject to humiliation and harassment as they are forced to use male washrooms.
- **Recruitment:** Organizations must keep in mind that Transgenders have been subject to years of discrimination leading to social, economic and skill backwardness, and therefore recruitment criteria must be revised accordingly. Organizations must also endeavor to provide training programmes to enhance skills.

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Sources:

1. National Legal Services Authority vs. Union of India & Ors. AIR2014SC1863
2. Transgender Persons (Protection of Rights) Act,2019

⁸ The Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Act, 2013