

# The Other Side of Transgender Issues

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## Abstract:

Across the globe voices have constantly risen for LGBT, but India has been much slower to join this bandwagon. Only in the recent past has our Supreme Court recognised Transgender as Third Gender and directed the Government to accord them their basic rights, in the *NaLSA Case*.<sup>1</sup> Based on this judgment our parliament has drawn up *The Transgender Persons (Protection of Rights) Bill 2019*.<sup>2</sup> In this article, I seek to look at the various issues faced by people across the globe in relation to LGBT rights and used that as a touchstone to check the adequacy of the Bill in its present form.

## Ancient India and Transgenders :

Transgender, Transsexuality and homosexuality were not frowned upon in ancient India. We can even see numerous festivals in India celebrating transsexuals, where prayers are held for *gender-variant deities* such as *Aravan Festival* in Tamilnadu, *Bahucara Mata Festival* in Gujarat and *Yellamma Devi Festival* in Karnataka.<sup>3</sup> More importantly, Hindu God Siva, in one of his many avatars is represented as *Ardhanari* – male female combination. Hijras also played a prominent role in the royal courts Mughal Empire.<sup>4</sup> Only, after British Invasion due to colonial mindset, transgender position and place in society slowly started down the path of deterioration. In Northern India Britishers viewed Hijras as *ungovernable population*, rather than trying to assimilate them into the society they were ostracised and sought to be eliminated. The project for this elimination was formalised under Part II of the 1871 Criminal Tribes Act and involved shocking provisions such as for:<sup>5</sup>

- Prevention of the physical (reproduction) of Hijras through enhanced prosecution for castration.
- Interference in discipleship and successorship practices.
- Removal of children from Hijra households.
- Reduction of Hijras's means of livelihood.
- Cultural elimination through prohibition of performance and cross dressing in female attire in public.

This steady social fall of Hijras- transgender went unchecked until serious though in this direction was given by our Supreme Court in *National Legal Services Authority V Union of India*.<sup>6</sup> In this case, the Supreme Court observed that even though historically transgender played prominent role in India, with the advent of colonial rule they had a rapid social downfall. We as a country have finally started to move away from the colonial era hang-ups and *NaLSA case* is a right step towards setting to rights centuries of abuse and neglect Hijras were made to face.

We are at a juncture where we need to exercise abundant caution so that we don't end from one end of the spectrum to the other end, by giving unchecked rights to any section. India is in a very unique position to look at the legislations enacted across the Western world to protect transgender rights and mould her own laws taking into account the various grey areas and lacunas in the Western legislations. By doing so India can save herself from the soup the Western culture has landed itself into, we must strive to strike a balance between guaranteeing rights of transgender as well as putting in place correct checks and balances so that the very laws that protect the transgender don't end up harming one and all. Some of the areas where the current Bill can be found lacking in clarity are

<sup>1</sup> *National Legal Services Authority V Union of India*, (2014) 5 SCC 43.

<sup>2</sup> Bill No 169 of 2019.

<sup>3</sup> <https://www.speakintree.in/allslides/what-do-vedas-say-about-homosexuality/130720>, last accessed on 8/11/2019.

<sup>4</sup> *National Legal Services Authority V Union of India*, (2014) 5 SCC 43

<sup>5</sup> *Governing Gender and Sexuality in Colonial India: The Hijra, c.1850-1900*, Jessica Hinchy, Pg-93.

<sup>6</sup> (2014) 5 SCC 43

- Right to Self Determination
- Minimum Age Limit for Self Determination and Sex Reassignment Surgery
- Refusal of Services

## Right to Self Determination

In NaLSA case<sup>7</sup> Supreme Court directed transgender to be treated as Third Gender. The Transgender Persons (Protection of Rights) Bill 2019<sup>8</sup>, in S.2(k) defines a transgender as follows: "transgender person means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta." The Bill further empowers a person to *self-perceive* their gender identity, based on which the District Magistrate will issue a certificate of identity indicating that the person is a transgender. Upon Sex Reassignment Surgery the person can again apply for changed gender certificate.

There is no clarity regarding the following aspects:

1. What are the checks to be made based on the self perceived identity both medical and psychological aspects?
2. Can there be a refusal to issuance of certificate, and in such cases where does appeal lie?

Furthermore, in case of a minor Proviso to S.5 of the Bill holds that a parent or guardian can make such an application. There is no clarity regarding

- The lowest age limit in case of a child i.e. can a 2 year old kid make such an application via their parent?
- What will happen in cases where parents disagree with one another?

These are certain issues being faced by the Western Society at present and it will be better if we determine these issues with the help of an expert panel composed of jurists doctors and psychologists.

The concept of self determination can introduce another layer of issues when it involves transgender sportsmen. The International Olympic Committee in 2003 had 3 major conditions for permitting transgender to compete in Olympics, namely,

1. SexReassignment Surgery with changes in external genitalia plus gonadectomy.
2. Legal recognition of their assigned gender by appropriate authority.
3. Hormone therapy for at least 2 years.

But this initial list of requirements were changed in 2015 as follows<sup>9</sup>

Those transitioning from male to female are eligible to compete in female category under following circumstances

1. Athlete has to declare that he gender is female and the declaration can't be changed for spring purposes, for a minimum of four years.
2. Athlete must demonstrate that her total testosterone level in serum is below 10nmol/L for at least 12 months prior to her first competition; it must remain below 10nmol/L throughout eligibility period.

This new position has ensured that there is no need for sex reassignment surgery. Now situation maybe such that even a certificate of being a transgender issued on self determination by our government will be enough to help them compete in Olympics, without any gender change operation. Though initially it seems as to be a welcome move, it has a high potential for being misused, as we can see from various cases across the world.

<sup>7</sup> National Legal Services Authority V Union of India, (2014) 5 SCC 43

<sup>8</sup> Bill No: 169 of 2019

<sup>9</sup>[https://stillmed.olympic.org/Documents/Commissions\\_PDFfiles/Medical\\_commission/2015-11\\_ioc\\_consensus\\_meeting\\_on\\_sex\\_reassignment\\_and\\_hyperandrogenism-en.pdf](https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf), last accessed on 19/11/2019.

Canadian Transgender athlete Rachel Mckinnon who was born male, but identifies herself as a woman, keeps dominating the women's cycling, creating controversy. In October 2019, this 37 year old Canadian set world record in 200 meter sprint in 35-39 age categories, for woman.<sup>10</sup> In an interview with SkyNews former champion Victoria Hood opined that science is pretty clear that the male body that has gone through puberty retains the advantage which doesn't go away. She observed that while transgender have rights to participate in sports they must not have rights to participate in any category they wish.<sup>11</sup> While Jennifer Wagner Assali, a bronze medallist in cycling said *"I do feel hard fought freedoms for women's sporting are being eroded. If we continue to let this happen, there will be men's sports and co-ed sports, but there won't be any women's sports."*<sup>12</sup>

Similar story can be found in USA where a transgender athlete Mary Gregory had made record breaking performance at local power-lifting competition. She broke 4 records during the competition in squat, bench press, dead-lift disciplines along with the total record in weight class. However the results were annulled when a doping test later revealed that the athlete was actually a male in the process of becoming a transgender female.<sup>13</sup>

The recent IOC guidelines have been shelved for now as there is huge controversy amongst the scientist as to the permissible testosterone levels. Present guideline calls for the athlete to prove that her total testosterone level in serum is below 10nmol/L for at least 12 months prior to her first competition. But the testosterone level for women in general is between 0.12 and 1.79 nmol/L and for men between 7.7 to 29.4 nmol/L. Also findings from Karolinska Institute of Sweden show that testosterone suppression for transgender women has little effect on reducing muscle strength even after a year of treatment. Those who have undergone male puberty still retain some physical advantages even after transitioning.<sup>14</sup> Thus there is no clarity regarding guidelines for transgender women until now for the 2020 Tokyo Olympics, which is a bit alarming.

### Age for Self Determination and Sex Reassignment Surgery

As pointed out earlier the Bill is silent regarding the lower age limit of the minor as regards making an application being named transgender and application for change in gender after sex reassignment surgery. This begs the question; at what age can a child be treated to be competent enough to decide that they can undergo sex reassignment surgery with the consent of their parents, and what if the two parents disagree? The State must obviously fix a lower age limit in case of sex reassignment surgery, as it is a major step in the life of a child.

There is a huge controversial case going on Texas USA, in this particular aspect which involves a mere 7 year old child. Anne and Jeffery a divorced couple share custody of their 7 year old child born as a male. Anne the mother, who is paediatrician by profession, holds that the child has gender dysphoria and that the child must be affirmed as transgender girl. While Jeffery, the father mathematician by profession holds that his ex-wife manipulated their child into false gender identity and that the child must not undergo gender reassignment surgery.<sup>15</sup> This controversial situation has grabbed eyeballs across the globe, with support pouring in for both parents. In this charged environment a State Lawmaker in Georgia, USA Ginny Ehrhart called for legislations that protect kids from irreversible procedures. Ginny Ehrhart observed<sup>16</sup> that she was calling for prohibition of removal of body parts that are otherwise healthy or non-diseased in case of minor kids.

<sup>10</sup> <https://www.foxnews.com/sports/transgender-cyclist-rachel-mckinnon>, last accessed on 1/12/2019.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> <https://www.rt.com/sport/459588-transgender-powerlifter-mary-gregory>, last accessed on 1/12/2019.

<sup>14</sup> <https://www.theguardian.com/2019/sep/24/ioc-delays-new-transgender-guidelines-2020-olympics>, last accessed on 1/12/2019.

<sup>15</sup> <https://www.buzzfeednews.com/article/tasneemnashrulla/texas-transgender-child-custody-dispute>, last accessed on 25/11/2019

<sup>16</sup> [https://www.theepochtimes.com/georgia-legislator-seeks-to-prohibit-performing-sex-reassignment-surgery-on-minors\\_3136168.html/amp](https://www.theepochtimes.com/georgia-legislator-seeks-to-prohibit-performing-sex-reassignment-surgery-on-minors_3136168.html/amp), last accessed on 25/11/2019.

## Refusal of Services

Chapter II of the Bill calls for prohibition against discrimination in form of the denial or discontinuation of, or unfair treatment with regard to, access to, or provision or enjoyment or use of any goods, accommodation, service, facility, benefit, privilege or opportunity dedicated to the use of the general public or customarily available to the public.<sup>17</sup>

At a normal glance of above provision we might form a casual opinion that it is fair and valid. But there are certain issues that crop up from such a vague provision without any checks and balances, which enable mischief to be created. This can be well illustrated by the Jessica Yaniv case<sup>18</sup> in Canada, wherein a Canadian Transgender caused selective economic havoc amongst the immigrant community. Jessica Yaniv is a Canadian who identifies herself as a woman but has male genitalia. Jessica brought complaint against 13 different beauty salons claiming discrimination in services. All of these salons offer Brazilian Waxing Services for women. In each case Jessica approached for Brazilian waxing services via social media. This particular waxing service involves removal of pubic hair around female genitalia. Following the appointment obtained via social media Yaniv used to call up and explain to the Salon that she was a woman with male parts and the Salon would promptly refuse services saying they don't handle male body parts waxing. Yaniv, as next step used to get another appointment using a fake profile and again approach salon for appointment. On getting the same, she used to question if she can bring along with her a lady friend who has male body parts, only to be refused again. This again prompted Yaniv to argue with the Salons that they were discriminating against transgender. She approached British Columbian Human Rights Tribunal citing discrimination against her. Yaniv had requested the Tribunal to ensure that all the salons apologised and that 10 amongst those saloons pay \$3,000/- as damages. She also requested a verdict from the tribunal prohibiting refusal of waxing services based on discrimination<sup>19</sup> The Tribunal observed that there was difference between waxing male and female genitalia. The Tribunal also found that Yaniv had used the law to punish minorities and immigrants she perceived to be anti-LGBT. Tribunal also observed that two of the saloons had to close shutters due to her bullying and extortionist behaviour. Tribunal dismissed all charges and also ordered Yaniv to pay \$2,000 to 3 of such salons including one run by an Indian Sikh Immigrant.

## Conclusion

A simple study of the prevailing scenario amongst the Western countries will go to show that there is a deep need for course correction and balance. India has just now taken its first step to erase centuries of injustice to transgender, the Bill is yet to be enacted, so India must ensure that balance is maintained.

There is no second thought to the fact that transgender must be recognised uplifted and given equal rights as every Indian citizen. There is no question regarding grant of positive discrimination for transgender as it is absolutely required for them to thrive after centuries of oppression. At the same time it is the duty of our parliament to ensure that grant of privileges do not adversely affect the future of children, transgender as well as the rest of the population.

There are many instances across the globe where people who underwent gender reassignment surgeries wish for a reversal back to their original gender. A specialist in the field Prof.Djordjevic, with 20 plus years of experience, has performed just 14 'Retransition Surgeries' using new innovative techniques, observes that the transitioning procedure is extremely complex and can cost upto 15,965 Pounds.<sup>20</sup>

It is clearly better to make kids wait with their life altering decisions at least until they attain majority. Similarly it is necessary to ensure that there is no negative impact on the rest of the population by misuse of the rights guaranteed under transgender protection legislations. It is important that the Legislature makes a thorough study of all these aspects, instead of putting out a haphazard legislation to merely fill in a legislative need rather than looking at the needs of the society as a whole.

<sup>17</sup> S.3(e) of Bill No.169 of 2019

<sup>18</sup> Yaniv V Various Waxing Salons No.2 2019 BCHRT 222

<sup>19</sup> <https://www.telegraph.co.uk/news/2019/10/23/canadian-transgender-woman-loses-case-against-beauticians-refused>, last accessed on 29/11/2019.

<sup>20</sup> <https://www.independent.co.uk/life-style/gender-reversal-surgery-demand-rise-assignment-men-women-trans-a7980416.html>, last accessed on 30/11/2019.

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