

Critical Analysis of Transgender Persons (Protection of Rights) Act, 2019

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Abstract: *Transgender people have been part of Indian society for centuries. The rights of transgender people have been suppressed by antiquated and antiquated British - era laws in India. Since the Indian Constitution came into force, a sexual minority has waited long enough for their identity and rights to be recognized. They were discriminated against and harassed and treated as second - class citizens. In the case of NALSA. v. Union of India (Navtej Singh Johar.v.Union of India AIR 2014 SC 1863) the Supreme Court recognized transgender people as "third gender". Further, part of Section 377 of the Indian Penal Code 1860 was decriminalized which prohibited consensual sex between homosexual couples in the case of Navtej Singh Johar. v. Union of India (National legal State Service Authority. v. Union of India AIR 2018 SC 4321). This led to the drafting of the Transgender Law of 2019, which was eventually passed and received Presidential approval. The article aims to critically analyze the law and shed light on the criticism for failing to identify and resolve the community's problems. The methodology used will be doctrinal, so the article will refer to various sources such as books and the Internet.*

Keywords: Transgender, Discrimination, Harassment, consensual, prohibited.

1. Introduction

The transgender community is an umbrella term that consists of eunuchs, Aravanis, Jogappas, Shiv - Shakti, Hijras etc¹. They have been part of Indian society for centuries. There is also historical evidence that the community was given the status of "third gender" at the near beginning of ancient writings in India. The community also finds its roots in Hindu mythology in the chronicle of Ramayana, it has been written that when Lord Rama was to leave for his 14 years of exile and was being followed by the residents of his kingdom. He turned around and told them to return. Among them, it was the hijras who decided to stay with him. Lord Rama on being impressed by their loyalty accredited them with the power to shower blessings on occasions like childbirth marriage and inaugural functions. Thus, from then it has been long - lasting that these occasions set the stage for hijras to sing and dance². During the Mughal Period also, transgenders enjoyed privilege and proximity. They were considered to be loyal with a strong acumen and also held very important positions during the Mughal rule³. After the advent of the British during the 18th century, there was a downfall in the status and rights of transgenders in India.

The Downfall of Transgender Rights during the colonial era

The Britishers perceived acts of transgenders as a supplication for sexual services. In the 19th century, they criminalized all penile - non - vaginal and sexual acts through Section 377 of the Indian Penal Code, 1860. The purpose of the Britishers was to remove the visibility of the transgender community from social categorization so they legislated the Criminal Tribes Act 1871 (hereinafter CTA) which led the community under surveillance and control of Britishers by referring to them as habitual offenders⁴. Despite the efforts of the Britishers to erase the community, the transgender community managed to survive and continue their public presence.

Condition of Transgender after Independence

After India attained independence, the first Prime Minister of Independent India - Jawaharlal Nehru repealed the Criminal Tribes Act 1871 as according to him the Act was a stain on the Constitution of India. The Government of India enacted new legislation namely, the Habitual Offenders Act which preserved most of the provisions of the Criminal Tribes Act 1871. The transgender community had been living a vulnerable life since Independence. The community had no legal recognition, because of which they could not avail of socio - economic benefits and participate in the political process which requires an official validate identity. Over the years the community has suffered harassment and violence from the community which has feared sexual and gender non - conformity⁵. In the year 2014, The Supreme Court of India gave a judgement in the case of *NALSA Vs UOI* and recognised the rights of transgender people in India

¹ Alina Bradford 'What does transgender mean' <<https://www.livescience.com/54949-transgender-definition.html>> accessed 25 June 2020.

² M.MichelRaj, 'Historical Evolution of Transgender Community in India' (2015) ARSS <<https://www.trp.org.in/wp-content/uploads/2015/10/ARSS-Vol.4-No.1-Jan-June-2015-pp.17-19.pdf>> accessed 17 July 2020.

³ FokusMenschrente, 'Living a life of Exclusion: Being a transgender in India'

<<https://fnst.org/sites/default/files/uploads/2017/11/20/focuahuman-rights-rightsoftransgenderinindia-donajohn.pdf>> accessed 17 July 2020.

⁴ Shruti Iyer, 'The Third Gender and Indian Law- A Brief history' <<https://blog.ipleaders.in/the-third-gender-and-the-indian-law-a-brief-history/>> accessed 18 June 2020.

⁵ 'Third sex – Transgenders wants to be treated as a citizen in India Is this too much to ask for?' Economic and political weekly (India, 26 October 2013) 9.

and laid a series of measures against discrimination, recommended the creation of welfare policies, reservation in educational institutes and jobs etc. The justices upheld the rights of transgender persons to their self - perceived identity and held that these are guaranteed by the Constitution of India. The judgement also referred to hijra, kindness, and jogtas of the trans community. After the judgement, Tiruchi Siva, a member of the DMK party introduced a private member's Bill in the Rajya Sabha in this context. The bill was known as the Rights of Transgender Persons Bill, 2014. This bill was passed in Rajya Sabha. It was also welcomed by the queer rights activists in India.

In 2016, The 2014 Bill underwent some major changes when the government drafted its version of the Bill. It was strongly opposed by many activists and transgender as it violated the NALSA Judgement. It was then recommended to a standing committee in September 2016.

Further in the year 2018, The Bill was passed with 27 amendments in the Lok Sabha in December 2018. The bill was a controversial one and was heavily criticized. It criminalized begging and ignored the recommendations of the standing committee. However, it lapsed and could not be passed by the Rajya Sabha because of the 2019 general elections. The Bill was reintroduced in July 2019 and passed in August. It was moved in both Houses by the Minister of Social Justice, Thaavarchand Gehlot. The bill was passed by Rajya Sabha on November 25th despite heavy criticism by the Transgender community. The Transgender Person (Protection of Rules) 2020 was introduced to explain certain terms used in the 2019 Act. The draft Rules were released in April 2020 and in August 2020, and finally, on 25th September, the government notified the Rules.

2. Legislations for Transgender Rights in India

As per the 2011 census, 4, 87, 803 persons do not identify themselves as male or female⁶. The first move to recognize the rights of legislation was made by Tiruchi Siva, Member of Parliament from DravidaMunnetraKazaghnam party when she introduced a private member bill in the Lok Sabha⁷. The aforesaid bill was unanimously passed by the Council of States but was never debated in the Lok Sabha.

Key Highlights of the Transgender Persons Bill 2014

- Offered remedies against violence and harassment;
- Provided for rights such as equality, the right to live in society and freedom of speech;
- Provision for equipping transgender with skill development and providing them jobs for their rehabilitation and social security; and
- Establishments of transgender commissions at National and State levels and transgender rights courts.

⁶ Primary Census data for others (Indian& States UT's), Census 2011.

⁷ Rohan Abhram 'All you need to know about transgender Bill 2016' <<https://www.thehindu.com/news/national/all-you-need-to-know-about-the-transgender-persons-bill-2016/article21226710.ece>> accessed on 20 June 2020.

After the aforesaid NALSA judgement, where the Supreme Court of India recognized transgenders as *the third gender*, the Transgender Person Bill (Protection & Rights) was introduced by Thaavarchand Gehlot Minister of Social Justice and Empowerment. The bill was strongly opposed by the opposition and was referred to the Standing Committee and was passed on 17th December 2018 in the Lok Sabha. The salient features Transgender *Person Bill 2016* are enumerated below⁸ -

- The bill defined transgender as a person who is partly male or female, neither male nor female. Further, the person's gender should not match the gender assigned at birth including trans - women, trans - men, gender queer and person with intersex variations;
- The transgender will have to obtain a certificate of proof of identity as transgender to enjoy rights under this bill;
- The district magistrate will be conferred with the power to grant the certificate of proof of identity on the recommendation of the Screening Committee which consisted of a medical officer, and a psychologist. District welfare officer, and transgender person.
- The bill prohibited discrimination against transgenders in institutions such as healthcare, education, and employment. It further directed the state government to make welfare schemes for the community.
- It also provided for two years imprisonment and a fine for offences like compelling transgender to beg and denying them access to public places.

The Transgender Person Bill 2016 was vehemently opposed by the transgender community as it violated their right to self - identity which is a fundamental right under the Constitution of India. After the Navtej Singh Johar judgement in 2018, the Minister of Social Justice and Welfare another *Transgender Persons Bill (Protection & Rights) Bill, 2019* which later became an Act as it received the president's assent on 5th December 2019. The key highlights of the Act are listed below⁹ -

- It defines transgenders as one who does not match the gender assigned to them at birth. It includes persons with an intersex variation, gender queers, trans - men, trans - women and persons with intersex variations;
- The district magistrate is empowered to give a certificate of identification to identify the person as transgender;
- Prohibits discrimination against transgender and unfair treatment in institutions like healthcare, employment, education and access to public facilities;
- Recognizes the right to residence of a transgender person;
- Provides for the formulation of schemes by the government like vocational training programs and self - employment for their social welfare;
- It states that the government must take steps to provide healthcare facilities to transgenders which includes HIV surveillance centres and sex reassignment surgeries;
- It also recognizes offences such as bonded labour, physical and sexual abuse and provides for a minimum penalty of six months imprisonment and a maximum of two years with a fine; and

⁸ The Transgender Person (Protection& Rights) Bill, 2016

⁹ The Transgender Act (Protection &Rights) 2019.

- The Act also provides for the establishment of the National Council for Transgender to monitor the impact of policies and legislation for transgender.

The Act which was passed to address the needs of the community has left many problems unanswered. It led to a nationwide outcry by the transgender community criticizing Act¹⁰.

3. Drawbacks of the Transgender Person Act, 2019.

There are several problems in the legislation which are needed to address by the government. The Act is problematic from the fact that it was passed in the Rajya only just after three days of debate and discussion without any amendments and additions to the Act. It ignores the **Right of self - determination of identity** as stated in the NALSA judgement¹¹. It stated that a person has a right to self - identify himself as transgender contrary to the rule of law laid down in the judgement. The Act confers the power on the district magistrate to issue the Certificate of identification to claim benefits under this Act. If the District magistrate denies the certificate, it does not provide for a redressal mechanism. The Transgender Bill, 2016 provided for a screening committee to make recommendations to the District Magistrate to prevent any misuse. However, the provision was removed in Transgender Bill, 2019.

Recognition of transgender under existing laws

The civil and criminal laws in India identify only two types of genders man and woman. The Act does not specify whether they would also be recognized as transgenders under the same category¹².

No Reservations for transgender persons

The Act does not provide for reservations for transgender persons. The Transgender Persons Bill, of 2014 provided for 2% reservation for transgender in government and government - aided schools for primary, secondary, and higher education. It further provided for 2% reservation for transgender in government establishments. After the pronouncement of the NALSA judgement which stated that the transgender community should be treated as socially and economically backward and reservations should be provided to them under the category. Various petitions were filed across different High Courts in the country to implement the reservation scheme. The High Court of Madras in the case of *Swapna. v. Chief Secretary*¹⁵ directed the State government to form a scheme for the reservation of transgender within 6 months, which is yet to be complied with.

¹⁰ 'Why India's Transgender people are protesting against a bill that claims to protect their rights' <<https://scroll.in/article/944882/why-indias-transgender-people-are-protesting-against-a-bill-that-claims-to-protect-their-rights>> accessed 21 June 2020.

¹¹ 'Critical Analysis of transgender Bill 2019' <<https://www.jatinverma.org/a-critical-analysis-of-the-transgender-persons-bill>> accessed 22 June 2020.

¹² 'Issues for consideration' <<https://www.prsindia.org/node/842865/chapters-at-a-glance>> accessed 22 June 2020.

Does not recognize same - sex marriages

The decriminalizing of Section 377 of the Indian Penal Code 1860 itself has not been able to end the discrimination against homosexual couples. The need of the hour is to legally recognize the same sex as heterosexual marriages for which the Act is silent. The compelling and pragmatic reason to legalize same - sex marriages is that benefits such as maintenance, succession, and pension rights that are only available to married couples. Many same - sex couples desire acceptance and recognition of their relationship.¹³

Punishment for sexual abuse against transgender not adequate

A report by the National Coalition of Violence Group in 2012 stated that transgender people are two times more likely to get harassed and abused in intimate relationships¹⁴. The Act provides only 6 months minimum and a maximum of 2 years with a fine. In the Indian Penal Code 1860, the minimum punishment for assault or criminal force used against women with an intent to disrobe a woman is a minimum of three years¹⁵. To maintain minimum security keeping in consideration the history of sexual abuse and suffering against the transgenders. The punishment should be increased to a minimum of three years and 7 years of maximum imprisonment with a fine.

The rule of law prescribes that the law should not place undue cognitive or behavioural commands on people. It should be stable and according to the demands of society. The law should be consistent and solve the contradiction legally which may arise¹⁶. The law proposed for the rights of transgender ignores their needs and places undue command as it is not according to the needs and demands of the community.

4. Global Position of Transgender Rights

In the year 1980 American Psychiatric Association removed the word "homosexuality" from the Diagnostic and Statistical Manual for Psychological disorder bypassing and Resolution. The Association opined that attraction towards the same - sex is a natural condition¹⁷. Many countries have also adopted a progressive approach towards gender recognition as reform such as Denmark, Argentina and the United States. The position of transgender rights in these countries alludes below -

¹³ Mary L. Bonaut 'Goodridge in Context' (2005) 40 Harv. C.R.-C.L. L. Rev. 1.

¹⁴ Darrick Ing & Tiffany Woods 'Why Talking About Domestic Violence in the Transgender Community Matters', Transgender Law Center' <<https://transgenderlawcenter.org/archives/9392>> accessed 23 June 2020.

¹⁵ Indian Penal Code, 1860, s 354 B.

¹⁶ Naomi Choi 'Rule of law' <<https://www.britannica.com/topic/rule-of-law>> accessed 23 June 2020.

¹⁷ Elliot Kozuch 'Today in 1973, the APA removed homosexuality from list of Mental Illnesses' <<https://www.hrc.org/blog/flashbackfriday-today-in-1973-the-apa-removed-homosexuality-from-list-of-me>> accessed on 24 June 2020.

United States of America

The U. S. Supreme Court in *Lawrence*¹⁸ relied on the statement of the amicus curiae which stated that homosexuality and heterosexuality both form a normal part of sexual identity. Transgenders in the United States of America enjoy civil and basic constitutional rights. An employer who has more than 15 employees is prohibited to discriminate against people based on sex and gender identity or gender orientation¹⁹. There is also a ban on discrimination by schools based on gender identity and also recognizes rights to access separate sex programs and facilities which align with their gender identity²⁰. There is also a Federal Fair Housing Act which prohibits discrimination based on sex by landlords. The courts have also interpreted this law in such a manner to protect the LGBTQ community²¹. The United States is far ahead in terms of providing safety and protecting the rights of transgenders from India.

Denmark

In Denmark, an amendment was passed in 2014 regulating the Danish Population Register which allowed people to obtain new official documents changing their gender identity by a few simple administrative steps²². Many countries require people to go through a procedure conducted by medical experts and psychologists for obtaining a change in their gender status which is an outdated concept of gender identity. Denmark is the first country that has come up with the right approach to enforce the right of self - identity.

Argentina

Argentina is one of the most progressive when it comes to LGBTQ rights. The people of the country have always advocated for minorities' rights. In the year 2010, Argentina became the first country in Latin America to legalize same - sex marriage²³. As a result, more than 15, 000 couples had been married in Argentina in the year 2010. The Gender identity law was passed in Argentina which made sex - change surgery a legal right²⁴. Transgender persons can opt for sex transition surgery without the fear of being diagnosed with psychological abnormality²⁵. Even before the law was passed recognizing same - sex marriage, there were many judgments passed by the provincial courts in Argentina²⁶. In one of the famous cases in Argentina *Freyre and Di Bello* the decision, in this case, was approved and it

was overturned. The couple finally managed to get married at the discretion of the governor in Tierra del Fuego where same - sex marriage was allowed at that time²⁷.

Transgender persons are increasingly gaining legislative protection around the globe. These laws are still not successful when it comes to protecting them from the social stigma which exists in society. The supporter of Human Rights Transgender had reported 2, 264 killings of transgender persons worldwide between January 1, 2008, to September 30, 2016,²⁸. There is still a lot that needs to be done to protect the freedom and rights of the transgender community around the globe.

5. The Way Forward

A comparative analysis of the Indian Transgender Person Act.2019 with Argentina, USA and Denmark's legislation for transgender indicates that there are various shortcomings in the Act and the government needs to rework the entire legal framework for transgender rights. Various provisions need to be added following the footsteps of the countries that have already adopted a progressive approach towards transgenders. The various recommendation which is required to be kept in mind by the Indian government are listed below –

1) Employment and Housing

Several companies like KPMG, Infosys and Accenture introduced new policies to help the community to move into a formal workplace. The new startup likes Perriferry and is also helping to set up employment for the community. The Chief Operating Officer of Perriferry had estimated that in India only 5% of the transgenders can get employment²⁹. The appropriate solution is to provide a reservation for transgender in both government and private corporations. If transgender persons secure financial stability, it will be the first step to their welfare. Another problem faced by transgender is that they are discriminated against by landlords and singled out³⁰. If this problem continues the majority of them will be forced to stay on the streets. A separate provision prohibiting landlords to discriminate against transgenders is, therefore, required.

2) Change in Educational Curriculum

As suggested by the Expert Committee to the Ministry of Social Justice and Empowerment, there should be compulsory education about gender identity and sexuality at

¹⁸ 2003 SCC online US SC.

¹⁹ Civil Rights Act 1964, Title VII.

²⁰ Education Amendments 1972, Title IX.

²¹ 'Know Your Rights <<https://www.aclu.org/know-your-rights/lgbtq-rights/>> accessed 24 June 2020

²² 'Landmark Transgender Law enforced in Denmark' <<https://www.equalrightstrust.org/news/landmark-transgender-law-enforced-denmark>> accessed 24 June 2020.

²³ 'Argentina approves Gay marriage, in a first for Region' <<https://www.nytimes.com/2010/07/16/world/americas/16a-argentina.html>> accessed 24 July 2020.

²⁴ Gender Identity Law, 2018 <<https://tgeu.org/argentina-gender-identity-law/>> accessed 25 June 2020.

²⁵ 'A look at Progressive LGTBQ rights in Argentina' <<https://theculturetrip.com/south-america/argentina/articles/an-lgbtq-guide-to-living-in-argentina/>> accessed 25 June 2020.

²⁶ Argentina LGBT resources <<http://www.refugelegalaidinformation.org/argentina-lgbti-resources>> accessed 25 June 2020.

²⁷ Marcela Vainte, 'Latin America: First same-sex marriage in Latin America' <<https://www.globalissues.org/news/2009/12/29/4060>> accessed 25 June 2020, > accessed 25 June 2020.

²⁸ 'Transgender 2016 Press Release' <<https://tgeu.org/tdor-2016-press-release/>> accessed 25 June 2020.

²⁹ 'India Inc opens door to transgender employees' <<https://economictimes.indiatimes.com/news/company/corporate-trends/india-inc-opens-doors-to-transgender-employees/articleshow/73237262.cms>> accessed 25 June 2020.

³⁰ 'Hunting for a home is not easy for transgender' <<https://www.hindustantimes.com/real-estate/hunting-for-a-home-not-easy-for-transgenders/story-eKnNUU4ZYdlbCkPt0ZCtRM.html>> accessed 25 June 2020.

schools³¹. There is a need for sensitization of the students and also making them aware of the problems faced by the transgender. This will remove transphobia from the root levels of the country. Thus, the government should recommend the inclusion of gender identity education in both government and private schools.

3) Recognizing same - sex marriage

Consensual intercourse between the same gender was decriminalized in 2018. There is no legal recognition of same - sex marriage which leads to the discrimination of transgender couples on various fronts such as inheritance of property, adoption and tax planning³². Thus, there is discrimination between heterosexual and homosexual couples concerning the rights available to them.

4) Simple Administrative Steps to change gender in official documents

To change the gender in official documents transgenders, have to deal with a lot of harassment³³. The transgenders have to give proof of sex reassignment surgery which also violates their right to self - identification. A step - by - step procedure should be declared by the government which is simple and free of red - tapism.

5) Enabling ways for transgender to live according to their genders

Studies show that social stigma regarding gender nonconformity affects the health and well - being of transgender persons³⁴. Social support and affirmation area constant support to the person. The choice of wearing clothes, or playing a certain type of game must be left to a transgender person.

6) State subsidies for Sex - Reassignment surgeries.

The cost to get sex reassignment usually costs lakhs, especially in private hospitals³⁵. Thus, most transgender live claustrophobic life and desire to convert themselves to the gender they feel that they conform to. The state should provide subsidies for sex reassignment surgeries which will also become a path for transgenders to achieve self - actualization.

³¹<<https://www.hindustantimes.com/cities/govt-to-frame-norms-to-make-schools-inclusive-for-transgender-students/story-sbbqdvwnBDMJ2ps7aEV58H.html>> accessed 25 June 2020.

³²ShamyitaChakarboty, 'Despite social marriage, gay couples still yearn for legal rights'<<https://timesofindia.indiatimes.com/life-style/spotlight/is-gay-marriage-a-reality-in-india/articleshow/69928813.cms>> accessed 25 June 25, 2020.

³³Nikhila Henry, 'Gender change on paper turns nightmare for Transgender'<<https://www.thehindu.com/news/cities/Hyderabad/Gender-change-on-paper-turns-nightmare-for-transgenders/article13981945.ece>> accessed 25 June 2020.

³⁴ 'Adult development and Quality of life of Transgender and Gender Nonconformity People'<<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4809047/>> accessed 25 June 2020.

³⁵Somrita Ghosh 'Battle for the right body: The realities of sex re-assignment in India'<<https://www.newindianexpress.com/cities/delhi/2020/feb/24/battle-for-right-body-the-reality-of-sex-reassignment-surgeries-in-india-2107686.html>> accessed 25 June 2020.

7) Increase in Punishment for Discrimination against transgenders.

There is a need for a law that imposes strict punishment for discrimination against transgenders. The punishment should set an example for others. The transgender community in India has suffered more than 100 years of discrimination thus, this is a crucial step for the welfare of the community.

Apart from these recommendations, there are a lot of steps that are required to be taken by the government like *differential treatment of transgenders in prisons* and sensitization of police personnel to deal with transgenders. The state's responsibility is much higher to recognize the rights and identity of transgenders. These recommendations may not lead to an absolute recognition of rights and freedom, but these recommendations are necessarily the first step to removing the social stigma against the trans - community.

6. Conclusion

After shedding light on the drawbacks of the Transgender Person Act, of 2019 and analyzing the global position of transgender rights, it can be concluded that Transgender Act suffers from a lot of infirmities and there is an urgent need to reframe the entire legislation. The Constitution of India guarantees each equal rights regardless of their sex and identity. The only people who are not happy with the Constitution are people who believe in outdated ideologies which leads to levelling down of the entire nation³⁶. India needs to adopt a progressive nature toward transgenders and uphold the constitutional rights of transgender as interpreted by the judiciary. The primary motive of legislation is to recognize and fulfil the needs of the people.

As propounded by Kelson in his pure theory of law every norm derives its validity from a larger norm. The judiciary referred to this theory of law in the case of *Indra Nehru Gandhi. Raj Naryan*³⁷ and stated that every law in India derives its validity from the Constitution. Thus, it is very important to uphold the values of the higher norm, the Constitution. The Transgender Person Act, 2019 fails to uphold the values. The community had struggled for their freedom for centuries. If the State does not fulfil its responsibility towards the community, it will continue to struggle for years to come. It will be one of the biggest stains on the Right to freedom and life, which is guaranteed by the Constitution.

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³⁶<<https://www.thebetterindia.com/170598/republic-day-constitution-fundamental-rights-nani-palkhivala/>> accessed 25 June 2020

³⁷1975 SCC (2) 159 .

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