

TRANSGENDER ACT 2019- AN ANALYSIS

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ABSTRACT

The **Transgender Persons (Protection of Rights) Act, 2019** is an act of the parliament of India with the objective to provide for protection of rights of transgender persons, their welfare and development. The abovementioned act was presented in the Lok Sabha on 19th July 2019 by the Minister of Social Justice and Empowerment, in the light of the lapse of Transgender Persons (Protection of Rights) Bill, 2018. The 2018 bill was preceded by a 2016 version and both were met with protests and criticism by transgender groups, lawyers, and activists in India. The 2016 bill was sent to a Standing Committee which submitted its report in July 2017. Following which the Lok Sabha tabled and passed a newer version of the bill in December 2018. However, it did not incorporate many of the committee's recommendations. Members of the opposition in Rajya Sabha criticized the bill and assured transgender persons of not voting in favor of it, although it was passed by the Rajya Sabha on 25 November 2019. On 5 December 2019 it was signed into law by the President of India. This research paper will try to establish a link between the different versions of this bill over the years. It will also contain the definitions of the different misinterpreted terms in this domain. This research paper will discuss over the various important sections of this act and also will try to check over the constitutionality over some of its debatable and controversial sections. A person may be considered to be a transgender person if their transgender identity is inconsistent or not culturally associated with the sex they were assigned at birth and consequently also with the gender role and social status that is typically associated with that sex.¹ Transsexual is generally considered a subset of transgender, but some transsexual people reject being labeled transgender. Globally, most legal jurisdictions recognize the two traditional gender identities and social roles, man and woman, but tend to exclude any other gender identities and expressions. However, there are some countries which recognize, by law, a third gender. There is now a greater understanding of the breadth of variation outside the typical categories of "man" and "woman", and many self-descriptions are now entering the

¹ Wikipedia

literature, including pangender, genderqueer, polygender, and agender. Terms such as transgender people, Trans men, and Trans women are replacing the category of transsexual people. This raises many legal issues and aspects of being transgender. Most of these issues are generally considered a part of family law, especially the issues of marriage and the question of a transsexual person benefiting from a partner's insurance or social security.

KEYWORDS: Transgender, legal issues, rights, society, gender

INTRODUCTION

“Remember this, whoever you are, however you are, you are equally valid, equally justified, and equally beautiful.” – Juno Dawson

No one can deny the fact that transgender community has suffered a lot of discrimination. There always have been struggles and problems faced by the transgender persons in keeping their dignity alive. Even today people belonging to the third gender category are considered as a taboo at some places. There are many instances where discrimination against LGBTQ community can be observed. People belonging to this community have always suffered struggling against the society whether with any petty issue or something as big and as impactful as the **Transgender Persons (Protection of Rights) Act, 2019**. Considering the situations of the LGBTQ community, India was in a dire need to legislate some laws for the protection and development of people of the above mentioned community and for this there have been many attempts to legislate and implement such laws and finally on 10th January the Transgender Persons (Protection of Rights) Act, 2020 came into force after getting the assent of the President on 5th December, 2019. But this act has been referred by some transgender community as ‘Black Day’ and also ‘Gender Justice Murder Day’. The research paper will try to analyze the different contradictory sections and clauses of this act will also find out the reasons for such reaction by the transgender community.

The first and the foremost thing needed to understand is the difference between the words - Cis and Trans. These are two Latin terms meaning this side and that side respectively. So a Cisgender person is that person whose gender identity matches the sex that they were assigned at birth.

While on the other hand, a Transgender person is that person whose gender identity is different from the gender they were thought to be at birth.

HISTORICAL BACKGROUND

The first copy of this bill was first introduced in 2014 by the DMK leader Mr. Thiruchi Silva in the upper house of the Parliament i.e. Rajya Sabha as a private bill. This bill was passed unanimously by the Rajya Sabha on 24th April 2015. Siva said that this bill was made keeping in mind the development and welfare of the transgender community. Some of the important features of this bill were 2% reservation in educational institutions and jobs of the transgender community. Also formation of special Transgender Rights Court for dealing with such cases. Punishment of hate speech against them was 1 year with fine. This bill could have been a landmark bill not only because it would provide rights to the transgender people but also because it could have been the first private bill to be passed by the Parliament after 36 years but this bill was rejected in Lok Sabha. The 2016 bill underwent significant changes and had various provisions reported 'regressive'. This bill was met with various criticisms and protests and hence was referred to a standing committee which submitted its report in 2018 therefore the 2018 bill was introduced. The 2018 bill was a big step in this domain but this bill was also criticized a lot and also there were many protests against this bill. There were certain features which were considered as obligatory and inhuman to the transgender community for instance; according to that bill begging was criminalized for transgender community, also, transgender needed to go a screening process to prove their identity. The bill was once again met with severe criticism and protests pan-India, as it overlooked the recommendations made by the standing committee and suggestions offered by transgender persons. However, the 2018 bill stood lapsed.

FEATURES OF THE CURRENT ACT

The main motive of this act is social, educational and economic empowerment of the Transgender community. The transgender community in India has been struggling for decades

and has been demanding a codified law where all their rights for protection and development are mentioned. Some highlights of the bill are mentioned below:

The bill defines a transgender person as whose gender does not match the gender assigned at birth. Section 2(k) gives the definition of transgender person as - "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 kinnar, hijra, aravani and jogta.²It includes trans-men and trans-woman, persons with intersex variations, genderqueers, and persons with socio-cultural identities, such as kinnar, hijra.

The *Chapter II* of this act prohibits discrimination against the transgender community including denial of service or unfair treatment in relation to education, employment, healthcare, access to, or enjoyment of goods, services, facilities, opportunities available to the public. This act also prohibits the denial of right to movement, right to reside, rent or otherwise occupy property. Opportunity to hold public and private office and access to public and private establishment also cannot be denied and transgender people cannot be discriminated on any of the abovementioned criteria.

Every transgender person shall have a right to reside and be included in his household. Section 3(g) gives every transgender person the right to reside. If the concerned person is less than 18 years of age and the immediate family is unable to care for the transgender person, the person may be placed in a rehabilitation centre, on the orders of a competent court. The government according to this act must take steps to provide health facilities to transgender persons including separate HIV surveillance centers and sex reassignment surgeries.

Chapter III of this act can be said as the most controversial chapter of the whole act which talks about the recognition of identity of a transgender person. According to this chapter, a transgender person needs to prove his identity by getting an identity certificate from the DM. to get such identity proof; a transgender person may make an application to the District Magistrate for a certificate of identity, indicating the gender as 'transgender' a revised certificate may also be

² Transgender Persons (Protection of Rights) Act, 2019

obtained only if the individual undergoes surgery to change their gender either as a male or female.

Chapter IV of this act gives different measures for the development of the transgender community. This act states that the relevant government will take measures to ensure the full inclusion and participation of transgender persons in society. This chapter also states that the government must also take steps for their rescue and rehabilitation, vocational training and self-employment, create schemes that are transgender sensitive, and promote their participation in cultural activities.

Chapter VII gives the provisions for constituting a National Council for Transgender Persons. The NCT will consist of: (a) Union Minister for Social Justice (Chairperson); (b) Minister of State for Social Justice (Vice-Chairperson); (c) Secretary of the Ministry of Social Justice; (d) One representative from ministries including Health, Home Affairs, and Human Resource Development; (e) Representative of the NITI Aayog, and the National Human Rights Commission; (f) Representatives of State Governments; (g) 5 members from the transgender community; (h) 5 experts from Non-Governmental Organizations. This council will advise the Central Government as well as monitor the impact of policies, legislation and projects with respect to transgender persons. It will also redress the grievances of transgender persons which would mean that if someone thinks that the provisions of this act are not being followed lawfully and there is any breach with respect to the act, complaints can be filed up to the level of NCT.

Chapter VIII is also a problematic chapter which gives punishments for different types of offences. The act recognizes the following offences against the transgender persons; (a) forced or bonded labor (excluding compulsory government service for public purposes), (b) denial of use of public places, (c) removal from household and village, (d) physical, sexual, verbal, economic and emotional abuse. Penalties for these offences vary between six months and two years, and a fine.

DRAWBACKS OF ACT

In India there were many protests against the passing of this bill in Parliament. The protesters argued that many of provisions were changed with the postponement of passing this bill over the years; hence the act had lost its human spirit. Though it was argued by the government that the bill is 'progressive' in nature and would led to the development and welfare of the community but the Queer community on the other hand has always been against this bill and referred it to be 'regressive' in nature. It has also been alleged by some activists that the government did not take any recommendation from the transgender people. The LGBTQ community has pointed out many discriminatory and inhuman features which according to them are against Article 14 i.e. the Right to Equality and Article 21 i.e. the Right to Life. There were many appeals to the President for not signing the bill but on 5th December 2019 the bill was signed by the President of India and on 10th January 2020 it came into force. Since then, many petitions have been filed against the act in the Supreme Court of India. Here are some of the main reasons of the protests by Transgender Community:

The biggest opposition is the requisite for a screening committee to certify a person's gender status. According to this clause any transgender person will have to go the government or bureaucrats to prove his identity. If they want to get a transgender ID, they will have to approach a District Magistrate for their identification which is a matter of great concern as it can lead to humiliation and harassment of the person as well as the community and infringes the Right to Privacy of the concerned people. It is also against the landmark judgment of the NALSA case³ given by the Supreme Court in 2014 that recognized the transgender persons' right to self-determination among others.

The punishment clause of the act enforces a maximum of 2 years imprisonment in a case of assault or gender based violence. While in case of a *cisgender* woman the punishment for sexual assault is 7 years. Moreover, according to the Indian Penal Code⁴ any offence punishable with less than 3 years is a *bailable offence*. Hence, if any person commits any kind of assault on a transgender person that person would very easily get bail as in case of bailable offences, bail becomes a matter of fundamental right of the accused person. So there are no stringent laws to

³AIR 2014 SC 1863

⁴ The Indian Penal Code, 1860

curb the menace of assault against transgender community. Criminalization of begging is also a matter of great concern. The term 'Non Discriminatory' has been used very liberally in this act also the definition and nature of discrimination is not clearly defined. The Chapter VIII - Penalties and Offences deals with the different offences against the transgender community and punishments against them. Section 18(d) of the act gives punishment for sexual assault, harassment or abuse of just 2 years with fine.

The protesters also argued that the act does not give the transgender persons any opportunity or reservation in education, employment and healthcare. Also the enforcement minor's right of residence that compels any trans person below 18 to cohabit with their natal family, failing which the child will be moved to a rehabilitation home, a place to modify delinquent behavior. So there is no provision for any transgender person below 18 years of age to reside independently.

ROLE OF JUDICIARY

Judiciary has been regarded as the guardian of the Constitution of India. It's the duty of the courts to interpret different laws and see that whether they are against the constitution. Supreme Court at the apex of Indian Judiciary is the highest authority to uphold the constitution of India, to protect rights and liberties of citizens and to uphold the values of rule of law. Hence it is known as the guardian of our Constitution. The Apex Court over many years has safeguarded the constitution and has protected the fundamental rights of the citizens. The Apex of court of India has also given some landmark judgments regarding the rights of the transgender community. Some of the cases are mentioned herein:

NATIONAL LEGAL SERVICES AUTHORITY V UNION OF INDIA⁵

The NALSA judgment has cleared a lot of misconceptions regarding the transgender community and dwelled upon the status of identity of transgender community. In 2014, the Indian Supreme

⁵AIR 2014 SC 1863

Court in *NALSA v. India*⁶ ruled that transgender people should be recognized as a third gender and enjoy all fundamental rights, while also being entitled to specific benefits in education and employment. Justice K.S. Radhakrishnan, writing for the bench, ordered that “Transgender persons’ right to decide their self-identified gender” should be recognized by state and federal authorities. The court made clear that “any insistence for [sex reassignment surgery] for declaring one’s gender is immoral and illegal.”

The Court had to decide whether persons who fall outside the male/female gender binary can be legally recognized as “third gender” persons. It deliberated on whether disregarding non-binary gender identities is a breach of fundamental rights guaranteed by the Constitution of India. It referred to an “Expert Committee on Issues Relating to Transgender” constituted under the Ministry of Social Justice and Empowerment to develop its judgment. This was a landmark decision where the apex court legally recognized “third gender”/transgender persons for the first time and discussed “gender identity” at length. The Court recognized that third gender persons were entitled to fundamental rights under the Constitution and under International law. Further, it directed state governments to develop mechanisms to realize the rights of “third gender”/transgender persons. The court also directed the opening up the hitherto Social Welfare Schemes for needy Hijras/TG and to create specific welfare schemes to address the basic needs of Hijras/TG including housing and employment needs also ensuring greater involvement of vulnerable communities including Hijras/TG women in policy formulation and program development. The learned Judges in this case also observed that at times, genital anatomy problems may arise in certain persons in the sense that their innate perception of themselves is not in conformity with the sex assigned to them at birth and may include pre - and post - operative transsexual persons and also persons who do not choose to undergo or do not have access to operation and also include persons who cannot undergo successful operation.

⁶https://en.wikipedia.org/wiki/National_Legal_Services_Authority_v._Union_of_India

NAVTEJ SINGH JOHAT V UOI⁷

In this landmark judgment also the Supreme Court recognized the rights and status of the Transgender Community. The court held that there is no valid or fair reason to deny the community of their basic human rights which includes right to life and liberty with dignity, right to privacy and freedom of expression, right to education and empowerment, right against violence, right against exploitation and right against discrimination. Moreover the court said that the constitution has fulfilled its duty to provide the transgenders with their fundamental rights and now it was the duty of the courts to recognise this and to extend and interpret the Constitution in such a manner as to ensure a dignified life for transgender people and all of this was possible only after the recognition of the Transgender as the third gender. The judgment also laid focus on the inalienable gender identity and correctly connects with human rights and the constitutionally guaranteed right to life and liberty with dignity.

The petitioners in this case referred to the decision of Supreme Court in NALSA case wherein the transgenders were recognized as the third gender and were given certain rights. Yet, in view of the existence of Section 377 in the IPC, consensual activities amongst transgenders would continue to constitute an offence. Drawing inspiration from the NALSA case, the petitioners submitted that the rights of the LGBT group are not fully realized and they remain incomplete citizens because their expression as regards sexuality is not allowed to be pronounced owing to the criminality attached to the sexual acts between these persons which deserves to be given a burial and, therefore, the rights of the LGBT community also need equal, if not more, constitutional protection.

FUNDAMENTAL RIGHTS

The Court interpreted 'dignity' under Article 21 of the Constitution to include diversity in self-expression, which allowed a person to lead a dignified life as in the landmark case of *Kharak Singh V State of Uttar Pradesh*⁸- the court held that under Article 21, the word 'life' meant a lot

⁷AIR 2018 SC 4321

⁸1963 AIR 1295, 1964 SCR (1) 332

more than mere animal existence. The Court has placed one's gender identity within the framework of the fundamental right to dignity under Article 21.

Further, it noted that the right to equality (Article 14 of the Constitution) and freedom of expression [Article 19(1) (a)]⁹ was framed in gender-neutral terms ("all persons"). Consequently, the right to equality and freedom of expression would extend to transgender persons.

It drew attention to the fact that transgender persons were subject to "extreme discrimination in all spheres of society" which was a violation of their right to equality. Further, it included the right to express one's gender "through dress, words, action, or behavior" under the ambit of freedom of expression. Under Articles 15 and 16, discrimination on the ground of "sex" is explicitly prohibited. The Court held that "sex" here does not only refer to biological attributes (such as chromosomes, genitalia and secondary sexual characteristics) but also includes "gender" (based on one's self-perception). Thus, the Court held that discrimination on the ground of "sex"¹⁰ included discrimination on the basis of gender identity. Thus, the Court held that transgender persons were entitled to fundamental rights under Articles 14, 15, 16, 19(1)(a) and 21 of the Constitution. Further, the Court also referred to core international human rights treaties and the Yogyakarta Principles to recognize transgender persons' human rights.

The Court held that public awareness programs were required to tackle stigma against the transgender community. It also directed the Central and State Governments to take several steps for the advancement of the transgender community, including: (a) Making provisions for legal recognition of "third gender" in all documents; (b) Recognizing third gender persons as a "socially and educationally backward class of citizens", entitled to reservations in educational institutions and public employment; (c) Taking steps to frame social welfare schemes for the community.

CONCLUSION

So after critically examining the Transgender Persons (Protection of Rights) Act 2019, it can be said that though being a very bold but necessary step, there are some loop holes in some sections of the act which could be declared as unconstitutional by the honorable Supreme Court of India

⁹<https://www.toppr.com/guides/civics/the-indian-constitution/rights-and-fundamental-rights/>

¹⁰<https://www.norton.com/books/Sex-and-the-Constitution/>

as there are certain sections in this act which are against the Article 14 and Article 21 of the transgender community. What is really needed is that to include the opinions of the concerned people as well in the legislation of any act. Also there is a dire need for some stringent laws for assault or discrimination against the transgender. We have been living in a society where a lot of prejudices still exist. The transgender community faces tremendous bias, despite all efforts by its advocates. What more is needed is a change in the thinking of the people and the society. The transgender should not be treated as unequal or taboo or who cannot be accepted. They are just humans. As it is rightly quoted, “Include everyone, no matter their gender, sexual orientation, race, or religion. We are all human beings and we are part of society.”



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