

## POSITION OF TRANSGENDERS AFTER THE ENACTMENT OF 'TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT,' 2019, AN ANALYSIS

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### **Abstract**

*Transgenders have been part of Indian society for centuries. The rights of transgender persons had been suppressed by the antiquated and anachronistic British-era laws in India. Since the enactment of the Constitution of India, the sexual minority has waited long enough for recognition of their identity and rights. They have been subjected to discrimination, and harassment and treated as second-class citizens.*

*In the case of **NALSA.v. Union of India**<sup>1</sup> the Supreme Court recognized transgender people as the "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**<sup>2</sup>. This led to the drafting of the Transgender Act, 2019 which was eventually passed and received the assent of the President.*

*The article aims to critically analyze the Act and shed light on the critics as it has failed to identify and solve the problems of the community. The methodology deployed will be doctrinal for which various sources such as books and the internet will be referred to for the article.*

### **Keywords**

*Transgender, Discrimination, Harassment, consensual, prohibited.*

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## **Introduction**

The transgender community is an umbrella term that consists of eunuchs, Aravanis, Jogappas, Shiv-Shakti, Hijras, etc<sup>1</sup>. 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 the 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 blessing 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 dance<sup>2</sup>. 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 rule<sup>3</sup>. After the advent of the British during the 18th century, there was a downfall in the status and rights of transgenders in India.

## **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 community had no legal recognition, because of which they could not avail socio-economic benefits and participate in the political process which requires official validate identity. Over the years the community has suffered harassment and violence from the community which has feared sexual and gender non-conformity<sup>4</sup>. In the year 2014, the Supreme Court of India in the case of NALSA .v. Union of India<sup>5</sup> legally recognized transgenders as the “third gender” and directed the government to formulate social welfare schemes for the community this decision was widely appreciated by the human rights activists across the globe.

Further, the Supreme Court of India in the case of Navtej Singh Johar .v. Union of India<sup>6</sup> declared part of Section 377 of the Indian Penal Code 1860 as unconstitutional and decriminalized consensual sex between adults of the same gender.

## **Legislations for Transgender Rights in India**

As per the 2011 census, 4,87,803 persons do not identify themselves as male or female<sup>7</sup>. The first move to recognize the rights of legislation was made by Tiruchi Siva, Member of Parliament from the Dravida Munnetra Kazhagam party when she

introduced a private member bill in the Lok Sabha<sup>8</sup>. 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<sup>9</sup>**

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 commission at National and State levels and transgender rights courts.

After the aforesaid NALSA judgment<sup>10</sup>, where the Supreme Court of India recognized transgenders as the third gender, the Transgender Person Bill (Protection & Rights) 2016 was introduced by Thaawarchand Gehlot Minister of Social Justice and empowerment. The bill was strongly opposed by the opposition was referred to the Standing Committee and was passed on 17th December 2018 in the Lok Sabha. The salient features of the transgender Person Bill (Protection & Rights) 2016 are enumerated below<sup>11</sup>-

According to the bill, transgender was defined as a person who was neither male nor female. Genderqueer people and transgender people, as well as people with intersex variants, should not have their gender assigned at birth.

As recommended by a medical officer and a psychologist, the District Magistrate shall have the authority to issue an identity proof certificate. A transgender person and district welfare officer.

Discrimination against transgender people has been outlawed by the bill. In addition, it instructed the state government to implement community welfare programs.

Transgender people were also given a two-year sentence and a fine if they were forced to beg or denied entry to public venues..

The Transgender person Bill Protection & Rights 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 judgment in 2018, the Minister of Social Justice and welfare another Transgender Persons Bill (Protection & Rights) 2019 which later became an Act as it received president assent on 5th December 2019. The key highlights of the Act are listed below<sup>12</sup>-

According to this, a transgender person is someone whose gender identity differs from the one he or she was assigned at birth. Genderqueers, trans-men, trans-women, and people with intersex variants are all included.<sup>13</sup>;

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<sup>14</sup>;

Recognizes the right to residence of a transgender person<sup>15</sup>;

It also recognizes offenses such as bonded labor, and physical and sexual abuse and provides for a minimum penalty of six months imprisonment and a maximum of two years with a fine<sup>16</sup>; and

The Act also provides for the establishment of the National Council for Transgender to monitor the impact of policies and legislation on transgender<sup>17</sup>.

#### **Drawbacks of 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 Sabha 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 judgment<sup>18</sup>. According to the ruling, a person has the freedom to self-identify as transgender despite the rule of law. 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.

#### **No Reservation for Transgender Persons**

All around the country, several High Courts received petitions requesting the implementation of the reservation plan. There is a 2% transgender reserve in government and government-aided schools for all levels of education, from basic to higher education. It also mandated a 2% transsexual reserve in the government workforce. Reservations should be granted to transgender people by NALSA's ruling that transgender people should be regarded as socially and economically disadvantaged. The High Court of Madras in the case of Swapna .v. Chief Secretary<sup>19</sup> directed the State government to form a scheme for reservation of transgender within 6 months, which is yet to be complied with.

#### **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. If same-sex marriages are legalized, advantages including maintenance, succession, and pension rights will be available only to married couples. Many same-sex couples desire acceptance and recognition of their relationship.<sup>20</sup>

### **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 an intimate relationship<sup>21</sup>. The Act provides punishment of 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 minimum for three years<sup>22</sup>. To maintain minimum security keeping into consideration the history of sexual abuse and suffering against transgenders. The punishment should be increased to a minimum of three years and 7 years of maximum imprisonment with a fine.

### **The Way Forward**

The various recommendation which is required to be kept in mind by the Indian government are listed below –

#### **Employment and Housing**

There are several companies like KPMG, Infosys and Accenture that 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 employment<sup>23</sup>. 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.

#### **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 planning<sup>24</sup>.

#### **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 persons<sup>25</sup>. 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.

#### **State Subsidies for Sex- Reassignment Surgeries**

The cost to get sex reassignment usually costs lakhs, especially in private hospitals<sup>26</sup>. Thus, most transgender lives 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.

### **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.

### **Conclusion**

After shedding light on the drawbacks of the Transgender Person Act, 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. As defined by the courts, the Indian judiciary must adopt a progressive stance toward transgenders and support their constitutional rights as such. People's needs are the main objective of the legislation.

### **Recommendation**

The court has suggested certain directions to the central and state government, which I consider to be the best policies that can be implemented to control the situation, which are:

Recognize the individual's need to express his or her own gender identity,

Reservations for citizens who are socially and educationally backward in public education and employment.

For transgender people, there should be special measures for HIV sero-surveillance and health services.

Face their fears, gender dysphoria, shame, despair, suicide thoughts, and other issues head on.”

In addition to creating separate wards and public restrooms for transgender patients in hospitals, more needs to be done to ensure their safety and well-being.

Design social welfare programs to promote their holistic growth.

According to Indian law, transgender individuals are separate from binary genders, and the Supreme Court of India, in its ruling in the National Legal Services Authority vs. Union of India (dated 15 April 2014, the Nalsa Judgment), designated them as the “Third Gender” under the Indian constitution and for the purposes of laws established by the parliament and state legislatures.

Third-gender non-recognition has resulted in a systematic denial of equal protection of the law and pervasive socioeconomic inequality in Indian culture and workplaces. Transgender Persons (Protection of Rights) Act, 2019 (the “Act”) was recently enacted by the Indian parliament in response to the Nalsa Judgment.

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