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# EXAMINING THE CONSTITUTIONALITY VALIDITY OF THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

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## 1. Introduction

Article 15(1) of the Indian Constitution imposes a duty upon the state not to discriminate amongst its citizens on the basis of religion, race, cast, sex or place of birth. Out of all the above grounds for differentiation, today we have the word 'Sex' and the analysis upon, how effective the Transgender Persons (Protection of Rights) Act, 2019 will be. Supreme Court in *NALSA vs Union of India*<sup>1</sup> defined Transgender as a community which is associated with the third gender, that is, people who do not conform to the sex determined to them at the time of their birth or whose expressions or behaviour do not match with biological sex assigned to them. However, the plane definition does not exclude them from being citizens of our country and if observed Article 15 (1) applies to all citizens and not just to the first two genders. Where other citizens do have the liberty and freedom of rights such as that of education, Healthcare self-identification, employment etc., whereas these rights remain denied to the transgender community in India despite the passage of more than 70 years of independence. There has been a need of legislation for preventing atrocities on the people belonging to the third gender and it is now worthwhile to know if the recently introduced legislation meets the demand of this community of people or the expectations of the globe to make India a truly gender-neutral country.

## 2. Historical Evolution

Life is truly a race where people are running for success, wealth and increase in assets etc., however amidst all these people lives a community of people (roughly around 5 lacs in numbers according to the 2011 census) who are seen mostly dancing on roads or trains for alms, get along different auspicious festivities (like that of marriages aur of a birth of a new-born) and

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<sup>1</sup> National Legal Services Authority v. Union of India, (2014) 5 SCC 438

dance and sing and spread happiness in return and in expectations of some money. The point, however is the community from which the whole country fears for its power to bring misfortune in case of a spelt curse are themselves subjected to exploitation, discrimination and banishment. The Supreme Court of India in *NALSA vs Union of India*<sup>2</sup> held that the transgender community includes all people who strongly not conform to the gender assigned to them during birth (male or female) either through preoperative, post operative, non-operative or transsexual people. This was also the judgement in which the Supreme Court felt the need to have legislation in this regard. Also, this was the case, when the Supreme Court issued directions to the Central and State Governments for recognition of their rights and identity. Let us understand and dive deep down to understand what historical developments led to the passing of this act-

1. Under Colonial rule, the Criminal Tribes Act of 1871 punished Hijras (physical traits of more like a female but neither male nor female by bodily transitions) for dancing in public places or influencing young children to join the community. This act considered them as a separate gender and the punishment for such crime included imprisonment up to 2 years or fine or both.
2. The above act, however was repealed in 1952 but some of the states still has provisions similar to the above act, like Section 36 of Karnataka Police Act, 1964 contains provisions for the police to arrest and punish people from the transgender community guilty of kidnapping children and inducing them to commit offences on their behalf (like stealing or begging).
3. In 2014, the landmark case of *NALSA v. Union of India*<sup>3</sup> emerged where the Supreme Court held the following observations-
  - A. Recognition of fundamental rights of transgender people and confirmed equal rights and status under the Indian regime.
  - B. Right to self-identification upheld. Hijras and Eunuchs officially and judicially held to constitute the third gender. Court also held that right to self-identification derives itself from Article 14 (Right to Equality), Article 15 (1) (Right against

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<sup>2</sup> National Legal Services Authority v. Union of India, (2014) 5 SCC 438

<sup>3</sup> National Legal Services Authority v. Union of India, (2014) 5 SCC 438

Discrimination) Article 19 (A) (Freedom of Speech and Expression) and Article 21 (Right to Life and Personal Liberty.)

- C. Biological sex and gender identity held two complementary terms. Biological sex on the one hand, is determined through physical attributes of the individual, however gender identity is subjective with respect to innate personal perception of his or her gender.
- D. Under the said judgement, Supreme Court was firm in directing the Central and State Governments to grant recognition of their legal identity, consider this community as socially and educationally backward class of citizens- extending reservation to them in matters concerning admission to educational institutions and appointment to public offices, frame legislations and policies for their social betterment upliftment and empowerment and also to punish discrimination and atrocities against them.

4. Subsequent to the judgement in NALSA v. Union of India, the Parliament passed the private members bill with respect to incorporating all Supreme Court guidelines and welfare schemes in 2015. Consequently, Transgender Persons (Protection of Rights) Act, 2016 was introduced with multiple flaws and subject to widespread criticism. For examples, the establishment of a district screening committee, prohibition of begging and sex work and the flawed understanding of transgender identity are a few of the examples of the anomalies that the bill enlisted.

5. The bill was reintroduced in 2018 with 27 amendments to such anomalies but left before the Parliament with the dissolution of the house prior to General Elections, 2019. After the re-entry of the same government, the bill was reintroduced in 2019, in the lower house which was still found incongruent to some of the Supreme Court guidelines in the NALSA judgement such as a right to self- identity.

### **2.1- Position of Transgender People with Respect to Other Countries**

There are many countries in the world who have successfully acknowledged the third gender as a part of their intrinsic society and have made law stringent to buy letters and those who treat the third community in different and inhumanly. In one of the landmark cases of United

Kingdom, *Corbett v. Corbett*<sup>4</sup>, the Justice deciding the case held the factors of determination of individuals character and sex. The four factors of determination were Chromosomal, Gonadal and Genital tests alone. The fourth test, namely Psychological-Test, was held congruent to customary beliefs but violative of contemporary societal developments.

Other than this celebrated judgment, the other countries of the world punishing undifferentiated treatment towards transgender community are as follows-

1. The Gender Recognition Act, 2004 (Section 4) & Equality Act, 2010 of UK recognises equal treatment of People from the Transgender Community.
2. Civil Statutes Act (Section 33) of Germany punishes those who treat Transgender people differently.
3. Sex Determination Act, 2013 (Section 16) of Australia bans inequality towards the third gender.
4. Other than this, Article 1 of the Universal Declaration of Human Rights states that all human beings are born equal with respect to dignity and rights granted.
5. Even in India, right to privacy with respect to gender identification has been held to be a fundamental right in *Justice K.S Puttaswamy Judgment*<sup>5</sup>.
6. Based on the urgent need to uplift the principles of gender equality and for the application of international Human Rights laws, the expert panel met in 2006 in Yogyakarta, Indonesia to lay down certain principles/guidelines to be followed uniformly across the globe, for recognising enjoyment of rights such as human rights, equality and non-discrimination; right to life, privacy and sexual orientation.

### 3. Objectives of the Legislation

The Following are the Objectives of Transgender Persons Act, 2019-

1. The first and the foremost important objective of the said act is to define the term 'Transgender'. The definition is very similar to the one given by the Supreme Court in

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<sup>4</sup> *Corbett v. Corbett*, (1970) ALL ER 33

<sup>5</sup> *Justice K. S Puttaswamy v. Union of India*, (2017) 10 SCC 1

NALSA judgement. Having done this, the Parliament aims to differentiate the third gender community from others and this would help the government to ascertain as to whom the provisions of the act would apply upon.

2. The second primary objective of the act is to impose a ban on any kind of discrimination to the said community including denial of services and unfair treatment on the basis of gender in areas of education, employment, access to public places and facilities etc. This provision in the Act aims to promote equality of opportunity and resources devoid of gender-based discrimination.
3. The act also imposes a duty upon the state to ensure better Healthcare facilities to the people from this community and also issue insurance schemes to the said people at very nominal rates. The act also provides for application of Gender Identity Cards to the District Magistrate which will act as a valid source of Identity. This identification card will label the person as a 'Transgender' and this cannot be changed unless the concerned person undergoes a surgery to change the gender to either male / female. These provisions in the bill aims to induce mental prosperity and to incorporate welfare provisions for the people of the said community.
4. The act also lays down provisions for establishment of National Council of Transgender Persons (NCT) which will be headed by the Union Minister of Social justice and other 17 members, including 5 members from transgender community. This provision aims to establish speedy grievance redressal mechanism and monitoring key policy changes and uniformity in implementation across the country.
5. The act also deals with punishments and penalties with respect to people discriminating against people from the said community. Structural deformities at birth can also not lead to abandonment of the minor by family members post implementation of the said act.

#### **4. Summary of the Legislation**

Transgender Persons Act, 2019 has 23 Section in total, to give better recognition to the people of the transgender community and the people therein. The important sections of the act with respect to the contemporary needs are as follows-

- **Section 3- Prohibition Against Discrimination-** The Section talks about prohibiting discrimination against transgender people by any person or any establishment in matters relating to nine grounds that are contained therein the Act. The move can be celebrated since it is the society and the people inside this society that generally, discriminates against the transgender people but the question is what if The State itself begins to discriminate on Grounds of appointment to public offices or for admission to educational institutions, on the basis of their Gender and give preferences to people from the other two genders? This would violate the entire idea of having such a law in the first place.

Also the said section does not talk about giving any such remedy to the accused either under criminal or civil laws; this can lead to absolute punishment of the accused.

- **Section 4- Recognition of Identity of Transgender Persons-** The two parts to the section talks about granting rights to be recognised as a transgender and the right to self-perceived gender identity.

This provision goes against Article 21 of the Indian Constitution as it violates the Right to Dignity and Autonomy through granting gender self-determination. The repercussions of this act is that the right to gender self-determination also includes the autonomy to recognise yourself as either male or female or a transgender. This again goes against the basic idea of having a legislation for transgender people when they are explicitly, granting the autonomy to pre-determine their own gender.

- **Section 5- Application for Certificate of Identity-** The first part of this section says that a transgender person has the right to approach the District Magistrate Office and file applications for the issuance of a Certificate of Identity as a transgender person, based on the pre- requisite of furnishing sufficient documents. The second part however, grants the right of approaching the office and filing application, in the hands of a parent, in case of a minor.

Firstly, this goes against Article 21 of Indian constitution as it violates Right to Gender Identity and Autonomy. The issuance of a certificate is based upon the prerequisite of production of some special documents. This also goes against Article 18 of The Yogyakarta Principles which ensures protection from medical abuses. The flaw in the

second part of the section is that the state is granting the rights of gender determination in the hands of the parents, in case the person is a minor. The state also needs to consider the archaic mentality of the parents, especially in terms when they would not wish to bring disrepute to the family in the eyes of the society.

- **Section 6- Issue of Certificate of Identity-** There are three parts to the section. Section 6(1) talks about the rights vested with the District Magistrate to issue identity certificate under Section 5 and to give an identity to that person as a Transgender. Section 6(2) talks that the gender of the person should be recorded along with an official document with the Government. Section 6(3) says that issued certificates shall be conferring rights to the person as under this act and be a valid proof of his or her identity.

Here again, Article 21 of the Indian Constitution is violated (Right to Gender Identity and Autonomy) since, identity certificates should be made independent of any procedures and that self-declaration of gender should be sufficient. Also, the provision nowhere says that there would be an absolute ban on screening requirements, medical check-ups or even psychological examinations. This violates the principles laid down in the famous United Kingdom judgement of *Corbett vs Corbett*<sup>6</sup> and also the Indian landmark judgement of *NALSA vs Union of India*<sup>7</sup>.

- **Section 7- Change in Gender-** There are two parts to this section. In the first part, Section 7(1) talks about revision of gender applications made to the District Magistrate after ratification of a successful surgery undergone by the person from the Chief Medical Officer. Section 7(2) vests the duty upon the District Magistrate to induce a change to the certificate, once satisfied with the data so provided.

This again violates Article 21 of the Indian Constitution (Right to Gender Identity and Autonomy) since it allows the person to have issued an amended certificate only when medical reassignment surgery has been undergone into. This section also does not look into the fact that Gender Determination is an aspect of personal autonomy and liberty which further violates the *NALSA* judgement of 2014.

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<sup>6</sup> *Corbett v. Corbett*, (1970) ALL ER 33

<sup>7</sup> *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438

- **Section 12- Right of Residence-** There are three parts to the section. Section 12(1) talks about the rights of a transgender child to live with his immediate family member and should not be separated from his family except on orders of a competent court for the betterment of the child. Section 12(2) confers these rights upon the transgender minor and section 12(3) talks about the minor child to be put under the custody of a Rehabilitation Centre, if his immediate family members are unable to take care of the transgender child.

This section firstly, fails to differentiate between a transgender minor and an adult. Secondly, it violates Article 19 of the Indian Constitution and the Supreme Court judgement in Ahmedabad Municipal Corporation vs Nawab Khan Gulab Khan (1997)<sup>8</sup> which confers rights upon the individual to stay anywhere inside the whole vast territory of this country.

- **Section 16- National Council of Transgender Persons-** Talks about the establishment of NCT for quick grievance redressal and ensuring adequate policy implementation. Also talks about qualifications to be the Board members of NCT.
- **Section 18- Offences and Penalties-** This section has four parts. Section 18(A) prohibits forced / bonded labour. Section 18(D) prohibits endangering the person's life or causing physical or sexual abuse or causing economic loss to the person will be punished with six months of imprisonment (extendable up to two years) and with fine or both.

The said section violates Article 14 and 20 (Principles of Natural Justice) of the Indian Constitution as it fails to define the ingredients of the offence which may make the higher courts to independently interpret the provision on its own and lower courts may even go against the Principles of Reasoned Justice. This section also goes against Article 15 of the Indian Constitution as it discriminates against sexual abuse of a female and a transgender person and also, the sexual abuse of a transgender person is not guided by IPC provisions. This goes against the very purpose for which the Act was enacted which was to ensure gender equality between all three genders.

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<sup>8</sup> Ahmedabad Municipal Corporation vs Nawab Khan Gulab Khan, (1997) 11 SCC 123



## 5. Critical Appraisal

1. The primary purpose to bring the legislation into effect was to maintain and preserve the rights of a transgender person. Section 3 of the Act prohibits discrimination against people from the transgender community but the same discrimination is also prohibited by Article 15 of Indian constitution. Also, more than the imprisonment of the accused, the transgender people would want a compensation out of that discrimination owing to the vulnerability of the people of this particular community.

Future Scope- Incorporate discrimination by state under Section 3 of the said act to make it different from Article 15 of Indian constitution. Also, Section 18 of the said act, which talks about penalties should be discretionary in nature to help the transgender people decide if they want the accused to be imprisoned or instead, demand compensation.

2. Section 6 of this Act talks about Issuance of Identity Certificates but remains silent on various other questions which are of paramount importance. The section and the whole act in particular, is silent upon medical check-ups before issuance of certificates, reasons of refusal of granting certificate and how can these transgender people appeal in case of a refusal, how certificates can have changes made in case of an error etc. The section also talks about transferring a child to a rehabilitation centre in case his or her parents are unable to take care of him. This, as aforementioned, violates Article 19 of the Indian Constitution (Right to reside anywhere throughout the territory of India) and the Government also needs to look down upon the fact the transgender minors made to stay in rehabilitation centres is not the solution of the problem anyhow.

Future Scope- The government can make amends and ensure implementation of Article 21 of the Indian Constitution (Right to Gender Self-Determination) where the certificate would be issued without any prerequisite of providing sufficient documents. In cases of a minor, the child can be asked to be maintained by his immediate next family member(s) in order of hierarchy, and this would do away with the minors being transferred to a rehabilitation centre in most of the cases.

3. Other issues on which the bill is silent upon are Rights of Marriage (in cases of change in gender), Rights of Inheritance, Parenthood and Adoption. The bill should enlist

provisions for these issues as well, given the fact that these provisions are inherently the realistic picture of our developing society and these things can pose a major dilemma upon Courts unnecessarily if not addressed well within the time.

## 6. Judicial Response

- **Swati Vidhan Baruah v. Union of India (2020)**<sup>9</sup>- It is no doubt that the act has been truly very controversial with respect to the challenges it poses not just for the courts but also against the fundamental rights under Part 3 of the Constitution. These challenges also put the transgender people rights at stake which should instead have aimed to preserve their rights. The following case law was filed before the Supreme Court through a writ petition, to check the constitutionality of the act with respect to Section 4, 5, 6, 7, 12(3), 18(A) and 18(D) which goes on to violate Article 14, 15, 19 and 21 of the Indian constitution and multiple Yogyakarta Principles. The case is still pending before the apex court.
- **Naz Foundation v. Govt. Of NCT of Delhi (2009)**<sup>10</sup>- This case brought with itself the first High Court ruling, to declare Section 377 of the Indian Penal Code, 1860 (Homosexuality and Same-Sex Marriages) unconstitutional and had allowed the same. However Supreme Court did not pay much heed to this judgement and in 2013, Re-criminalized Homosexuality in Suresh Kumar Koushal v. Union of India<sup>11</sup>.
- **Justice K. S Puttaswamy v. Union of India (2017)**<sup>12</sup>- The judgement in which the Supreme Court observed that Right to Privacy is a Fundamental Right under Article 21 of the Indian Constitution. Also held that Right to Privacy extends to all individuals irrespective of the gender / sex. This paved the way for Right to Privacy in favour of the Transgender People as well and also helped them to be given the Right of Gender Self-Determination.
- **Navtej Singh Johar & Ors. V. Union of India (2018)**<sup>13</sup>- Five Years after the Suresh Kumar Koushal case, The Supreme Court felt the need to decriminalize Section 377 of

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<sup>9</sup> Swati Vidhan Baruah v. Union of India (2020), WP 531 OF 2020

<sup>10</sup> Naz Foundation v. Govt. Of NCT of Delhi (2009), 160 Delhi Law Times 277

<sup>11</sup> Suresh Kumar Koushal v. Union of India, (2013) Civil Appeal No. 10972 OF 2013

<sup>12</sup> Justice K. S Puttaswamy v. Union of India, (2017) 10 SCC 1

<sup>13</sup> Navtej Singh Johar & Ors. V. Union of India, (2018) 10 SCC 1

Indian Penal Code, 1860 since it violated Article 14, 15, 16 and 19 (1) (A) of the Indian Constitution.

- **Arun Kumar v. Inspector General of Registrations of Tamil Nadu (2019)**<sup>14</sup>- The Landmark case which included Transgender women to be included in the category of women. Under Section 5 of Hindu Marriage Act, 1955 marriage was deemed valid and legal between a man and a woman. With respect to this judgement, even transgender women came under the Ambit of a woman under the said section and under the said act. Therefore, marriages pertaining to the Transgender Women will be held valid and legal as well.

## 7. Conclusion

The time has now come to get done away with the archaic mentality of the gender discrimination. With equal opportunities and rights to both men and women, we now need to consider the rights of Transgender people as well and grant them the life they deserve. The Preamble to the constitution guarantees equality to all and it is now imperative to put down efforts to actually acquire an equal and a bias free nation with respect to the rights of the third gender as well.

In 2018, WHO (World Health Organisation) has reiterated that transgender is not a mental disorder and the term to call in rights for Transgender People is 'Transcism'. It is indubitably the reality that times are now changing. Transgender people have now begun to get rights and been given the freedom that they truly deserve. For example, Raigarh appointed its first-ever transgender mayor, Madhu Bai Kinnar. In 2017, Odisha became the first state to provide social welfare benefits to people from the said community. The transition is low but visible; the rights granted are less but not exhaustive; and the people from the said community are also humans and not aliens. With few important changes to the mentality of the people in the society and some more amendments to this act, would make this world a happy place for these transgender people and that is what we all wish to achieve (and not just the government).

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<sup>14</sup> Arun Kumar v. Inspector General of Registrations of Tamil Nadu (2019), WP(MD)No.4125 of 2019

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