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Prasanna S,

Chairman of Institute of Legal Education (Established by I.L.E. Educational Trust)

No. 08, Arul Nagar, Seera Thoppu,

Maudhanda Kurichi, Srirangam,

Tiruchirappalli – 620102

Phone : +91 94896 71437 – info@iledu.in / Chairman@iledu.in



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CRITICAL ANALYSIS OF TRANSGENDER PROTECTION ACT, 2019

AUTHOR – AVANEE MISRA, STUDENT AT KIIT SCHOOL OF LAW, BHUBANESWAR

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ABSTRACT

India has been a land of diverse human race and have enormous society. In a diverse country like ours where the citizens are pleased by all the privilege by being a part of this pronounced society but we should never to remember that every coins have two sides, there are also people who are deprived of their basic privilege. Considering the Transgender community as they have been a part of this society for very long, the rights of this community have been triumph over antiquated and anachronistic British era laws in India. It wasn't simple to be transgender and to live in a cultural society like India. Each individual have fundamental entitlements to life, education, healthcare, and employment, but the people of transgender community have been fighting for these privileges prior to they were even born. Despite claiming to be evolved, our culture does not recognize the various gender identities and expressions. Such individuals have difficulty because they are not prepared to embrace change or anything that is distinct. The transgender community is harmed by societal norms. The greatest obstacle that transgender people face is Section 377 of the Indian Penal Code, 1860. Articles 14, 15, and 21 of the Indian Constitution are in conflict with this section. Additionally, the rights granted to transgender people are insufficient; they want the mankind's respect and acceptance. They continue to experience social discrimination and stigma.

In the case of **NALSA.v. Union of India**¹¹ the Supreme Court recognized the 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**¹². This led to the drafting of Transgender Act, 2019 which was eventually passed and received the assent of the President.

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



¹¹ Navtej Singh Johar. v. Union of India AIR 2014 SC 1863.

¹²National Legal Service Authority .v. Union of India AIR 2018 SC 4321.

I. INTRODUCTION

“Bhagvatgeeta teaches about the soul and every person has the right to live in their own way without any discrimination against him or her. The soul does not have any gender”.

Since ages, the community of transgender residing in India have not only been constantly discriminated in the society itself but also been deprived with certain rights which have been enjoyed by the others in the society. Transgender individual signifies "an individual whose sexual orientation is not consistent with the sexuality which was bestowed to them at their time of conception however they are people with intersex variation and genderqueer". These are the individuals who have male or female anatomy at the time of birth but who feel or act differently due to their gender expression, belonging, or conduct from their birth sex. The transgender community is a term used for people comprising of eunuchs, Aravanis, Jogappas, Shiv-Shakti, Hijras etc¹³. These groups had also found their source in the Hindu Mythology (specially mentioned in the Ramayana). Even during the period of Mughals in India the transgender community enjoyed many special prerogations and proximity as they were also contemplated to be faithful with powerful discernment and in addition to that they clasp major positions during the Mughal rule¹⁴. The social position and privileges of transgender community in India declined shortly after British colonization started taking place in the eighteenth century.

Nevertheless, in the year 2014 the landmark judgement was passed by the Supreme Court of India in the case of National Legal Services Authority vs. Union of India, regarding the acknowledgement of the community's rights and providing them the status of "3rd gender" in the country through the **NALSA JUDGEMENT**.

This judgement had a great impact in the society and acted as a "light in the darkness" for the whole community at large as the stigma started getting erased due to the raise in consciousness among the common masses. Apart from that numerous welfare programmes were established and framed for the transgender community by the government at both central and state level.

II. HISTORICAL EVOLUTION OF TRANSGENDER COMMUNITY IN INDIA

1. ACIENT PERIOD

Since ancient times, transgender people have been a part of Indian culture and are revered as divine beings. The sagas, Vedic literature, and Puranas provide historical backing for the acceptance of an additional gender. In the epic tale of the Ramayana, Valmiki made reference to transgender people and their unique position in society. the LORD RAMA gave the Hijras bestow blessings on the populace at blessed and inaugural events like marriage and childbirth. In addition, Lord Shiva can take another form in which he unites with Parvati, creating the half-Siva, half-Parvati creature known as Ardhanari.

2. MEDIVAL PERIOD

During the spell of Mughal control in India particularly during ottoman empire, Hijras represented very essential role as the community use to be considered as the "guardian of harems". They were also designated positions of power in the Islamic Organizations and apart from that they had also received a huge amount of money. We can also witness in movies like Jodha Akbar and Padmavat.

3. COLONIAL PERIOD

Through the onslaught of colonialism in India during 18th century onwards, a drastic switch towards the position of the transgender community has been noticed. When the East India Company came to India, they were not able to comprehend the reason behind the importance and respect given to the transgender community here in India during the

¹³ Alina Bradford 'What does transgender mean' <<https://www.livescience.com/54949-transgender-definition.html>> accessed 25 June 2020.

¹⁴ Fokus Menschrente, 'Living a life of Exclusion: Being a transgender in India' <<https://fnst.org/sites/default/files/uploads/2017/11/20/focuahumanrights-rightsoftransgenderinindia-donajohn.pdf>> accessed 17 July 2020.

Mughal Era. During the amidst of 19th century the administration of East India Company criminalised the whole Hijra community and denied the basic civil rights to them and treated them separately from others. The Criminal tribe act was established in the year 1871, in which the hijra community people who were involved in kidnapping, castrating children and dressed like women who dance in public places. The punishment for such activities was up to two years imprisonment and a fine or both.

4. CONTEMPORARY PERIOD

After attaining independence, the first Prime Minister of Independent India, Shri Jawaharlal Nehru revoked the Criminal Tribes Act 1871 as according to him the Act was a stain on the Constitution of India. The Habitual Offenders Act, the latest legislation passed by the Indian government, kept the majority of the provisions of the Criminal Tribes Act of 1871. Since the American Revolution, the transgender community had been in a precarious position. Due to their lack of legal recognition, the community was unable to take part in the political process and receive socioeconomic advantages, both of that call for formal identification. Over the past decades the transgender community has faced humiliation, discrimination, violence from the community which has feared sexual and gender non-conformity¹⁵. In the year 2014, the Supreme Court of India in the case of **NALSA .v. Union of India** legally recognized transgender as “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** declared part of Section 377 of the Indian Penal Code 1860 as unconstitutional and decriminalized consensual sex between adults of the same gender.

¹⁵ 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.

III. LEGISLATIONS FOR TRANSGENDER RIGHTS IN INDIA

As per the 2011 census, 4,87,803 persons do not identify them as male or female¹⁶. In the year 2016, the Transgender persons bill was introduced by Mr. Triuchi Seva as a Private Members Bill in Rajya Sabha. This bill was passed in Rajya Sabha but was not given much importance in Lok Sabha as it was neither discussed or debated in the house. To ward off the sexual discrimination which the community was facing, various laws and regulations were made by the government in the form of Rights of Transgender Bill, 2015. After many negotiation with transgender activists and the legal experts the 2015 bill was eventually passed to the law ministry. The bill later on got revised and then introduced in Lok Sabha in the year 2016.

The Aim of the bill was to bestow the basic civil and fundamental rights to the transgender community in order to eradicate discrimination faced by them. Key features of the 2016 Transgender Bill are:-

- 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 includes trans-women, trans-men, genderqueer 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, psychologist, District welfare officer, and transgender person.
- The bill prohibited discrimination against transgender in institutions such as healthcare, education, and employment. It further directed the state government to make welfare schemes for the community.

¹⁶ Primary Census data for others (Indian & States UT's), Census 2011.

➤ It also provided for two years imprisonment and fine for offences like compelling transgender to beg and denying them access to public places.

Later on, this bill was set against by many specially the by the Transgender community as this bill was violating their fundamental right to self-identify which is one of the important right provided to the citizens of the nation by the constitution. Later to that the Navtej Singh Johar judgement in 2018, came into force who was the the Minister of Social Justice and welfare another **Transgender Persons Bill (Protection & Rights) Bill, 2019** which later became an Act as it received president assent on 5th December 2019. The key highlights of the Act are listed below¹⁷-

➤ The bill defined transgender individual as someone who does not resemble to the gender assigned to them at the time of their birth. This also includes individuals who are an intersex variation, genderqueers, trans-men, trans-women and persons with intersex variations

➤ According to this bill the district magistrate was allotted the power to distribute the certificate of identification which will be used to identify an individual as transgender.

➤ This also helps in interdicting discrimination against the transgender community and eradicate the unfair treatment which the community face in the public institutions like healthcare, education, employment etc.

➤ The bill provides the right to residence of a transgender person.

➤ The bill also formulates the scheme made by the government for the social welfare of the transgender community like self employment programme and also provide vocal training to them.

➤ Health care facilities were also being provided to the community which includes HIV surveillance centers and sex reassignment surgeries etc,

➤ 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 had led to a nationwide outcry by the transgender community criticizing the Act¹⁸.

IV. DRAWBACKS OF TRANSGENDER PERSON ACT, 2019

There exists a number of issues with the law that need to be fixed by the state. Because the Act was passed in the Rajya only after three days of discussion and deliberation with not having any changes or additions, it is challenging.

➤ It ignores the **Right of self-determination of identity** as stated in the NALSA judgement¹⁹. 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 bestow the powers to the District Magistrate to issue the certificate of identification showing which the people belonging to the community can avail the benefits which are brought down in the Act, and in case if the District Magistrate denies to issue the certificate to an individual the it does not provide for a redressal mechanism.

➤ The civil and criminal laws India identifies only two types of genders man and woman. The Act does not specify whether they would also be recognized as transgender under the same category²⁰. Apart from this the Act also not provide recognition in the existing laws as current civil and criminal laws

¹⁸ '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.

¹⁹ 'Critical Analysis of transgender Bill 2019' <<https://www.jatinverma.org/a-critical-analysis-of-the-transgender-persons-bill>> accessed 22 June 2020.

²⁰ 'Issues for consideration' <<https://www.prsindia.org/node/842865/chapters-at-a-glance>> accessed 22 June 2020.

¹⁷ The Transgender Act (Protection & Rights) 2019.

only mentions about two gender that is MALE and FEMALE. The act does not describes whether the transgender community falls under these two categories or they are considered as a separate entity.

- The act also does not provide reservations to the transgender community. A 2% reservation for transgender students in government and government-aided schools for primary, secondary, and higher education was made possible by the Transgender Persons Bill of 2014. Additionally, it stipulated a 2% reservation for transgender people in positions of authority. following the NALSA ruling, which ruled that the transgender community ought to be addressed as being economically and politically backward and that they should be given reservations under the category. The High Court of Madras in the case of *Swapna .v. Chief Secretary*²¹ directed the State government to form a scheme for reservation of transgender within 6 months, which is yet to be complied with.
- The decriminalization of sec 377 of IPC,1860 is still not successful in removing the discrimination faced by the homosexual couples. 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 of the same-sex couples desire acceptance and recognition of their relationship.²²
- No adequate punishment have been made for the sexual offenses done against the transgender community people. The Act provides only 6 months minimum and maximum for 2 years with 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 years²³.

V. CONDITION OF TRANSGENDER IN DIFFERENT PARTS OF THE WORLD

The term "homosexuality" was eliminated from the Diagnostic and Statistical Manual for Psychological Disorder Bypassing and Resolution by the American Psychiatry Association in the year 1980. According to the Association, attraction to people of the same sex is an inherent trait. Many nations, including Denmark, Argentina, and the United States, have also adopted a progressive strategy towards recognizing gender as reform. The position of transgender rights in these countries allude below –

1. ARGENTINA

Anybody over the age of 18 can choose their gender identity, undergo a gender change, and update official paperwork without beforehand judicial or medical authorization. Children can do so with the permission of their legal guardians or through a brief hearing before a judge. Argentina pioneered this concept in 2012 with a law that is regarded as the gold standard for legal acceptance of gender.

2. IRELAND

The outcome of Lydia Foy's 22-year legal battle, a retired dentist, was Ireland's 2015 Gender Recognition Bill. Her requests for gender recognition prior to Ireland's High Court in 1997 and 2007 were supported by both national and international human rights organizations that urged Ireland to implement a procedure based on identity and human rights, not surgeries and professional opinions. Regardless of constant pressure, it was not until 2015, after a crushing win on a same-sex marriage election, that the government established transsexual-based legal gender recognition.

3. UNITED STATES OF AMERICA

The U.S Supreme Court in *Lawrence*²⁴ had relied on the statement of the amicus curiae which

²¹ Writ Petition No. 31091/2013 5th July 2016.

²² Mary L. Bonaut 'Goodridge in Context'(2005) 40 Harv. C.R.-C.L. L. Rev. 1.

²³ Indian Penal Code, 1860, s 354 B.

²⁴ 2003 SCC online US SC.

stated that homosexuality and heterosexuality both form a normal part of sexual identity. In the USA the basic civil and constitutional rights are being enjoyed by the people belonging to transgender community. The employer who has more than 15 employees is prohibited to discriminate against people based on sex and gender identity or gender orientation²⁵. There is also a ban on discrimination by schools based on gender identity and also recognizes rights to access to separate sex programs and facilities which are consonance with their gender identity²⁶. There is also a Federal Fair Housing Act which prohibits discrimination on the basis of sex by the landlords. The courts have also interpreted this law in such a manner to protect the LGBTQ community²⁷.

4. 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 steps²⁸. Many countries require the 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 with the right approach to enforce the right of self-identity.

Around the world, transgender people are receiving more and more legal safeguards. When it comes to shielding them from the societal judgment that prevails in the community, these laws are still ineffective. The supporter of Human rights Transgender had reported 2,264 killings of transgender persons worldwide between January 1, 2008, to September 30, 2016²⁹. There is still a lot that needs to be done to protect the freedom and

rights of the transgender community around the globe.

VI. THE WAY FORWARD

Comparing the Indian Transgender Person Act, 2019 to the transgender laws in Argentina, the United States, Ireland and Denmark reveals that the Act has a number of flaws and that the federal government should overhaul the entire transgender rights legal system. In order to follow the example of the nations that have already taken a progressive stance regarding transgender people, many regulations must be added. The various recommendations which are required to be kept in mind by the Indian government are listed below –

- **RECOGNIZING SAME SEX MARRIAGE**

The 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 at various fronts such as inheritance of property, adoption and tax planning³⁰. Thus, there is discrimination between heterosexual and homosexual couples with respect to rights available to them.

- **CHANGES IN EDUCATION CURRICULUM**

The experts committee of Ministry of Social Justice and Empowerment suggest that students must be taught about the gender identity and sexuality at schools³¹ and should also be given proper guidance to each student regarding the same which will help in eradicating 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.

- **EMPLOYMENT AND HOUSING**

Many businesses, including KPMG, Infosys, and Accenture, have implemented new policies to assist the community in transitioning to an

²⁵ Civil Rights Act 1964, Title VII.

²⁶ Education Amendments 1972, Title IX.

²⁷ 'Know Your Rights' <<https://www.aclu.org/know-your-rights/lgbtq-rights/>> accessed 24 June 2020

²⁸ 'Landmark Transgender Law enforced in Denmark' <<https://www.equalrightstrust.org/news/landmark-transgender-law-enforced-denmark>> accessed 24 June 2020.

²⁹ 'Transgender 2016 Press Release' <<https://tgeu.org/tdor-2016-press-release/>> accessed 25 June 2020.

³⁰ Shamyita Chakarboty, '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 2020.

³¹ <<https://www.hindustantimes.com/cities/govt-to-frame-norms-to-make-schools-inclusive-for-transgender-students/story-sbbqdwbnBDMj2ps7aEV58H1.html>> accessed 25 June 2020.

official the place of work. The new business supports Periphery and aids in creating jobs for the locals. The Chief Operating Officer of Periphery had estimated that in India only 5% of the transgender can get employment³². If the transgender persons secure financial stability, it will be the first step to their welfare.

Another problem faced by the transgender is that they are discriminated by the landlords and singled out³³. If this problem continues the majority of them will be forced to stay on the streets. A separate provision prohibiting the landlords to discriminate against transgender is therefore, required.

- **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, playing a certain type of game must be left to a transgender person.

Apart from these recommendations, there are a lot of steps that are required to be taken by the government like ***differential treatment of transgender in prisons*** and sensitization of police personnel to deal with transgender. The state's responsibility is much higher to recognize the rights and identity of transgender.

VII. CONCLUSION

In addition to these suggestions, the government must take a number of other actions, such as providing transgender inmates with distinct treatment in prisons and training police officers on how to deal with transgender people. To acknowledge the rights and identity of transgender people, the state has a much greater duty. In addition to these

recommendations, the government must take a number of other actions, such as providing transgender inmates with distinct treatment in inmates and training police officers on how to deal with transgender people. To recognize the rights and identity of transgender people, the state has a much greater obligation. In Article 14, the laws of India guarantees the right to equality. In Article 15, it forbids bias based on caste, sex, religion, race, or place of birth. In Article 21, it guarantees the right to life and the right to privacy. Furthermore, they are residents of the state.

As propounded by Kelson in his pure theory of law that every norm derives its validity from a larger norm. The judiciary referred to this theory of law in the case of *Indra Nehru Gandhiv. Raj Naryan*³⁵ 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 which is the Constitution. The Transgender person Act, 2019 fails to uphold the values. The community had struggled for their freedom from centuries. If the State does not fulfil its responsibility towards the community, they 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.

³² '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.

³³ 'Hunting for a home is not easy for transgender' <<https://www.hindustantimes.com/real-estate/hunting-for-a-home-not-easy-for-transgenders/story-eKnNNU4ZYdlbCkPr0ZCtRM.html>> 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.

³⁵1975 SCC (2) 159.