

A CRITICAL ASSESSMENT ON THE RIGHTS OF TRANSGENDER PERSONS IN INDIA

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ABSTRACT

The recognition and protection of the preferences of Transgenders in India has been debateable throughout. The plight of the transgender persons has been analysed in this paper. The paper also highlights the constitutional safeguards guaranteed to the Transgender personas and its implementation. The enactment of the Transgender Persons (Protection of Rights) Act, 2019 has been discussed in this paper. The statutory provisions have been described and also been compared to provisions in the previous Bills that were issued but not passed. The Act was not accepted by many activists in the society; thus, a criticism has also been drawn upon in the paper. The paper portrays the ineffectiveness of the legislature in framing laws for the betterment of transgender in the society and the lack of implementation of the rights already provided for. The Act of 2019 seems to be a discrimination in itself.

Keywords: Transgender, rights, constitution, Transgender Persons (Protection of Rights) Act, 2019.

INTRODUCTION

The social acceptance of transgender people has always been a controversial aspect in the society. “Transgender means a person when identifies oneself as different from the sex in which he/she was born in. Transgender people generally feel they are born into the wrong body and

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thus perceive themselves in an identity of their choice.”² “Trans gender is generally a canopy term given too the people who identify differently from their already assigned gender, including intersex.”³

This term is also used for people who are different from the conventional gender. “Trans gender in India include Hijras, jogtas, intersex and kinnars.”⁴ Before 2014 transgender was not considered as a gender in the society and these people were considered mere shame in the society. The Supreme Court, finally, in the judgement of *National Legal Services Authority v. Union of India*⁵, declared transgender to be considered as third gender in the country. The SC further prohibited any discrimination against transgenders in matters of employment and education. Transgenders were not only given legal recognition but were also given social and economic rights for their welfare schemes. The fundamental rights were also be applied to the transgender. The health care rights are to be taken care by the governments for their change in gender identity if they require. But not providing personal laws or similar treatment in matters of criminal and civil laws are still prevalent.

After the judgement, the parliament and Ministry of Social Justice and Empowerment had initiated drafting Bills for the protection of rights of the Transgender persons. Three different Bills were issue in 2014, 2016 and 2018 but neither of them was passed. In 2019, the Act of Transgender Persons (protection of Rights), Act was passed which is similar to the Bill of 2018. The Act, however, doesn't include the guidelines stated by the SC judgement of 2014 and does not provide with all the essential rights.

RESEARCH OBJECTIVES

- To focus upon the problems faced by the Transgender person in India
- To highlight the constitutional safeguards for the Transgender.
- To describe the provisions of the *Transgender Persons (protection of Rights), Act, 2019*.

² What's the difference between being transgender or transsexual and having an intersex condition?, Intersex Society of North America, (last visited June 15, 2020, 4pm), <https://isna.org/faq/transgender/>

³ Manoj K. Jha, Transgender Rights in India, IAS SCORE, (last visited June 15, 2020, 4pm), <https://iascore.in/national-issues/transgender-rights-in-india>

⁴ Transgender Persons (Protection of Rights) Act, 2019, No. 40 of 2019, Acts of Parliament, 2019 (India).

⁵ *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.

- *To draw a comparison with the previously issued Bills.*
- *To analyse the criticisms given to the Transgender Persons (protection of Rights), Act, 2019.*

RESEARCH QUESTIONS

1. What are the problems faced by the Transgender persons in India?
2. Whether or not the constitutional provisions for the Transgenders being implemented?
3. Whether or not the *Transgender Persons (protection of Rights), Act, 2019* sufficient in its legislation and working?

RESEARCH METHODOLOGY

The research is a doctrinal research. The paper is theoretical and analyses the rights of transgender persons in India in-depth. The analytical research also focuses on the issues faced because of the society by the transgenders. This research contains data of secondary nature. The data is collected from journals, news sites, internet sources and Acts, etc.

PROBLEMS FACED BY TRANSGENDER PERSONS IN INDIA

In India, the main issues faced by the transgender persons is discrimination in employment, education, religious and public interests. They suffer hate crime and seen in disgust by the society. They face difficulties in availing medical facilities and are mostly poverty ridden. The lack of political rights to transgender have been seen in many cases. “In 1994, when finally, transgender persons were allowed to vote, many of them couldn’t due to the gender and sex issue of their choice on the voter cards.”⁶

The acceptance of transgender in society has been the main concern. The society does not approve of them and despise them. The families of transgender person, does not accept them and

⁶ Supra Note 3.

apart from threatening and beatings, they usually disown or remove the person as a member of the family. The families see this as a matter of shame.

The transgenders have no personal laws. The right to marry, adopt and inherit has not been provided to them. “In families once a person declares oneself to be transgender, they are not given property in form of inheritance.”⁷

There is no reservation for transgenders in employment and education facilities. Not even representatives in the parliament are elected for protection of the interests of the transgenders. In India, they are mostly observed begging due to no job opportunities. They are from the very beginning asked to live in this manner. “Many of them resort to prostitution as a result.”⁸

The discrimination against transgenders extends to the essential rights of usage of public utilities like toilets, wells, hospitals or schools. “In hospitals, there gender preference is not respected and are harassed by the officials by constantly subjecting to them as men while filling up forms or getting check-ups by a male doctor. They are treated as an outcaste in the society. With begging and dancing they are subjected to human trafficking.”⁹

Unlike other backward and socially disadvantaged groups, the transgenders in India including Kinnars, Hijras, don’t receive any welfare schemes or benefits by the government affairs. Instead, the transgenders face police brutalities without no justifiable reason.

The constitution of India provides for rights to choose and live with dignity and in a manner the individuals prefer without subject to interference by those of others in the society. But in matters of gender, only men and women are considered to be entitled to avail those rights. The fundamental rights, after 2014, are being implemented in favour of transgenders in India.

CONSTITUTIONAL PROVISIONS FOR TRANSGENDER

The constitution of India provides certain rights to the citizens inherent in nature. These basic rights also known as fundamental rights are essential for any citizen to live with peace and

⁷ Id.

⁸ Id.

⁹ Id.

dignity in a society. **Article 14**¹⁰ of the Constitution determines to treat every individual with equality. This right to equality entitles everyone for respect be it a man, women or Transgender (third gender). “As per **Article 15** of the Indian Constitution, the state prohibits any kind of discrimination among people in terms of race, sex, religion, caste or place of birth.”¹¹ This right in the constitution protects the right and interest of the trans genders from any discrimination on the basis of their gender. After the case of **NALSA v UOI**¹², third gender is considered a part of sex under Article 16 of the Constitution. **Article 16(2)**¹³, provides for prohibition of discrimination on basis of sex, race, religion or caste in matters of employment opportunities and further under **Art. 16(4)**¹⁴ gives the state to make special laws if the need arises. The right to equality is being provided by the law but its implementation is the question of doubt.

The constitution under **Article 21**¹⁵ provides every individual whether a citizen or not, the right to life and liberty. The right to life with dignity and respect to all people under no circumstance shall be aggrieved. Thus, trans genders have the right to live in peace with respect and dignity and free of hate crime. Also, through **Art. 19**¹⁶, all citizens have the freedom to choose and voice their interests and preference. Likewise, trans gender have the right to freely choose third gender and interest in the society without any conflict.

“**Article 23** of the constitution forbids any human trafficking in form of beggars or forced labour”¹⁷, which the third gender in India usually resort to due to the lack of job opportunities and distaste by the other genders towards the trans gender in the society.

The constitution has always propagated equality, justice and liberty by providing the rights to the people. The Preamble forming the basic structure of the constitution focuses on these pillar concepts. The rights given to trans gender by the constitution is same as any other gender, even though the treatment or implementation by the state and society may not be similar.

¹⁰ INDIAN CONST. art 14.

¹¹ INDIAN CONST. art 15.

¹² *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.

¹³ INDIAN CONST. art 16, cl. (2).

¹⁴ INDIAN CONST. art 16, cl. (4).

¹⁵ INDIAN CONST. art 21.

¹⁶ INDIAN CONST. art 19.

¹⁷ INDIAN CONST. art 23.

TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

The statute for the protection of the rights and interests of transgender was enacted in the year 2019 by the Legislature for the welfare of this community in the society. “The bills for protection of transgender persons was introduced in 2014, 2016 and 2018 but wasn’t passed as they received criticisms from wither the transgender activists or opposition for not providing sufficient or adequate rights to the third gender.”¹⁸ The bill was finally passed in 2019 after making several changes but still doesn’t incorporate many of the essential rights.

PROVISIONS UNDER THE STATUTE

The statute of 2019 for the protection of the rights of transgender prohibits discrimination against the community in matters of employment, promotion, education. “The act does not define but describes Transgenders under **section 2(k)** as a person who doesn’t match with the gender during the time of birth. The description of transgenders includes intersex persons, hijras, jogtas and kinnars under this provision. Under **section 7** of this act a transgender person can apply to the district magistrate to get an update on the birth certificate for the change of name but a transgender person can be either a male or female on the certificate after the sec reassignment surgery. The transgender child can upon a court order be parted from its family. The punishment for discrimination or crime against transgender person for imprisonment of six months to two years with fine. **Section 8** of this act authorises the Central Govt. to set up a National council for protection of the interests of Transgender persons.”¹⁹

¹⁸ Dhrubo Jyoti and Dhamini Ratnam, Transgender bill criminalises community, say activists; seek its overhaul, Hindustan Times, (last visited June 19,2020, 4pm), <https://www.hindustantimes.com/india-news/transgender-bill-criminalises-community-say-activists-seek-its-overhaul/story-U6hfkKpilq6bxsDAd2WvJI.html>

¹⁹ Transgender Persons (Protection of Rights) Act, 2019, No. 40 of 2019, Acts of Parliament, 2019 (India).

DIFFERENCE IN PROVISIONS UNDER BILLS OF 2014, 2016 AND 2018 FOR RIGHTS OF TRANSGENDER

The Act of 2019 similar to the Bill of 2018 but certain changes were made in the 2019 Act. The act was criticised on the grounds of criminalising begging by transgender persons and also for formation of a district screening committee to issue certificate to transgender persons. This was not included in 2019 Act. Further, the Bill of 2018 provided lower sentence of punishment in comparison to crimes against cisgender under the IPC. The Bill of 2018 and the Act of 2019 were drawn upon mainly from the Bill of 2016.

The bill of 2018 and the act of 2019 unlike the bill of 2014 does not provide for reservations of transgender in educational or employment matters. The bill set up for 2% reservation for this community.

The Bill of 2014 was much more progressive than the Bill of 2016 and 2018 as it provided with self-perceived identity without sex assignment surgery along with reservation.

CRITICISM FOR THE ACT

The Act of 2019 has been criticised by many activists on the ground of differential and inadequate rights provided by the Act.

“The meaning of transgender provided in the Act promotes the stereotypical notion of gender and further differentiates them from the society by attaching a stigma for being different from the normal gender.”²⁰

“No suggestions or wishes of the transgender persons was taken into consideration before drafting of this Bill and subsequently passing the Act. The Act is based upon the notions of the society without taking into account the needs of these persons.”²¹

²⁰ The Current status of Transgender rights in India, Global Human Rights Defense, (last visited June 19,2020, 4pm), <https://ghrdorg.wordpress.com/transgender-rights-in-india/>

For a person to be considered a third gender needs to obtain certificate from the magistrate but the assumption that all transgenders want to get a sex assignment surgery is discriminatory in itself.

There are no provisions for transgender personal laws like inheritance, marriage, adoptions, succession, etc. “No provision is made to join any transgender community but only go to rehabilitation centre to separate from the family.”²²

The transgender persons face constant police brutalities and hate crime due to the disgrace attached of being a transgender person. The act does not deal with any of these problems that have been persistent in our society. Also, observing the hardships being faced by the transgender persons, no facility of reservation has been given by the government in educational or employment offers.

Further, the 2014 judgement principles are not applied to the present enactment for the transgenders. The Act is contradictory to the NALSA judgement and mandates surgery instead of self-identity.

“The Human Rights Watch and International Commission of Jurists have criticised the legislations on many of these grounds.”²³

“In 2020, The Supreme Court through advocate and transgender rights activist Swati Baruah, gave a notice to the Central govt. upon the petition filed regarding the constitutionality of the 2019 Act.”²⁴

²¹ Sasha R, Trans Bill 2019: Why India’s transgender community is opposing a Bill which is supposed to protect their rights, SocialStory,(last visited June 19,2020, 4pm), <https://yourstory.com/socialstory/2019/11/stoptransbill2019-india-transgender-community-rights>

²² Id.

²³ India: Transgender Bill Raises Rights Concerns, Human Rights Watch, (last visited June 19,2020, 4pm), <https://www.hrw.org/news/2019/07/23/india-transgender-bill-raises-rights-concerns>

²⁴ Supreme Court notice to Centre on plea against transgender act, Hindustan Times, (last visited June 19,2020, 4pm), <https://www.hindustantimes.com/india-news/supreme-court-notice-to-centre-on-plea-against-transgender-act/story-HfBrPZBTFmusm9theecWoL.html>

CONCLUSION

Transgender persons also known as third genders in India have experienced controversial issues from a long period of time. The people having a separate identity in terms of gender from the biological one is all included under the ambit of transgender community. The problems faced by these transgender people comes from the deeply rooted disgust in the society towards them. Since India has conservation and conventional notions about gender any difference from the stereotype becomes a topic of debate and spectacle. The hate crime and discrimination towards them have called for the legislation for a special enactment to protect and preserve the rights and interest of the transgender persons.

The special enactment of Transgender Persons (Protection of Rights) Act, 2019 provides for provisions against discrimination but fails to meet the needs of the Transgender persons and has been criticised severally. The 2014 Bill for transgender rights seemed much progressive than the present act.

The presence of the Constitutional rights governs the transgenders against basic discrimination but non-implementation of the laws called for strict punishment in form of this Act. The constitution of India guarantees essential fundamental rights provided to all citizens equally. But for transgender people the meaning of these laws never was inclusive of them as gender. Only after 2014 were transgender people applicable for these laws.

To conclude it can be said that people have to become open minded. The acceptance of the choice of gender of some individuals is no sin. Many countries have recognised the true concept of gender and without discrimination provide the transgender persons with all rights of any other individual. However, many countries are yet to accept the community. But sooner or later they have to accept the transgender community and the choice of gender is a fact and no amount of hatred or discrimination will stop individuals from living the life they want. In many countries, people are becoming progressive and understand the plight of the community throughout the world. No right of the individual should be compromised depending upon the views of a segment of people in the society. The people objecting must come up with a way to adjust. No Third gender should live without dignity, respect and freedom of expression.

