#### Critical Analysis of Transgender Persons (Protection of Rights) Act, 2019

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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. After the enactment of the Constitution of India, sexual minority has waited long enough for recognition of their identity and rights. They have been subjected to discrimination, harassment and treated as second class citizens.

In the case of ***NALSA.v. Union of India[[1]](#footnote-2)*** 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[[2]](#footnote-3)***. This led to the drafting of 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 internet will be referred for the article.

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

**I INTRODUCTION**

The transgender community is an umbrella term that consists of eunuchs, Aravanis, Jogappas, Shiv-Shakti, Hijras etc[[3]](#footnote-4). They have been part of Indian society for centuries. There is also historical evidence that the community was given the status of “third gender" in the near beginning of ancient writings in India. The community also finds its roots in the Hindu mythology as 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[[4]](#footnote-5). During the Mughal Period also, the transgenders enjoyed privilege and proximity. They were considered to be loyal with a strong acumen also held very important positions during the Mughal rule[[5]](#footnote-6) . After the advent of the British during the 18th century, there was a downfall in the status and rights of transgenders in India.

**Downfall transgender rights during the Colonial era**

The Britishers perceived acts of transgenders as a supplication for sexual services. In the 19th century, they criminalized all penile-non-vaginal and sexual acts through Section 377 of the Indian Penal Code, 1860. The purpose of the Britishers was to remove the visibility of the transgender community from social categorization so they legislated the Criminal tribes Act 1871 (hereinafter CTA) which led the community under surveillance and control of Britishers by referring to them as habitual offenders[[6]](#footnote-7). Despite the efforts of the Britishers to erase the community,the transgender community managed to survive and continue their public presence.

**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 provision of the Criminal Tribes Act 1871. The transgender community had been living a vulnerable life since Independence. 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, violence from the community which has feared sexual and gender non- conformity[[7]](#footnote-8). In the year 2014, the Supreme Court of India in the case of ***NALSA .v. Union of India*** legally recognized transgenders 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.

**II. LEGISLATIONS FOR TRANSGENDERS RIGHTS IN INDIA**

As per the 2011 census, 4,87,803 persons do not identify them as male or female[[8]](#footnote-9). The first move to recognize the rights of legislation was made by Tiruchi Siva, Member of Parliament from Dravida Munnetra Kazagham party when she introduced a private member bill in the Lok Sabha[[9]](#footnote-10). 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***

* Offered remedies against violence and harassment;
* Provided for right 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's commission at National and State levels and transgender right courts.

After the aforesaid NALSA judgement, where the Supreme Court of India recognized the transgenders as *the third gender, t*he Transgender Person Bill (Protection & Rights) 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***Transgender Person Bill 2016***are enumerated below[[10]](#footnote-11) -

* 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 transgenders in institutions such as healthcare, education, and employment. It further directed the state government to make welfare schemes for the community.
* It also provided for two years imprisonment and fine for offences like compelling transgender to beg and denying them access to public places.

The Transgender person Bill 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 judgement in 2018, 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 below[[11]](#footnote-12)-

* It defines transgenders as one who does not match the gender assigned to him at birth. It includes persons with an intersex variation, genderqueers, trans-men, trans-women and persons with intersex variations;
* The district magistrate is empowered to give a certificate of identification to identify the person as transgender;
* Prohibits discrimination against transgender and unfair treatment is an institution like healthcare, employment, education and access to public facilities;
* Recognizes the right to residence of a transgender person;
* Provides for the formulation of schemes by the government like vocational training programs and self-employment for their social welfare;
* It states that the government must take steps to provide health care facilities to transgenders which includes HIV surveillance centers and sex reassignment surgeries;
* It also recognizes offenses such as bonded labour, physical and sexual abuse and provides for a minimum penalty as six months imprisonment and maximum for two years with a fine; and
* 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 Act[[12]](#footnote-13).

**III 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 only just after three days of debate and discussion without any amendment and additions to the Act. It ignores the **Right of self-determination of identity** as stated in the NALSA judgement[[13]](#footnote-14). 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 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.

**Recognition of transgender under existing laws**

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 transgenders under the same category[[14]](#footnote-15).’

**No Reservation for transgender persons**

The Act does not provide for reservation for transgender persons. The Transgender Persons Bill, 2014 provided for 2% reservation for transgender in government and government-aided schools for primary, secondary, and higher education. It further provided for 2% reservation for transgender in government establishment. After the pronouncement of NALSA judgement which stated that the transgender community should be treated as socially and economically backward and reservations should be provided to them under the category.Various petitions were filed across different High Courts in the country to implement the reservation scheme. The High Court of Madras in the case of *Swapna .v. Chief Secretary[[15]](#footnote-16)*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. 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.[[16]](#footnote-17)

**Punishment for sexual abuse against transgender not adequate.**

A report by National Coalition of Violence Group in 2012 stated that transgender people are two times more likely to get harassed and abused in intimate relationship[[17]](#footnote-18). 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 years[[18]](#footnote-19). To maintain minimum security keeping in consideration the history of sexual abuse and suffering against the transgenders. The punishment should be increased to a minimum of three years and 7 years of maximum imprisonment with fine.

The rule of law prescribes that law should not place undue cognitive or behavioral command on people. It should be stable and according to the demands of society. The law should be consistent and solve the contradiction legally which may arise[[19]](#footnote-20). The law proposed for the rights of transgender ignores their needs and places undue command as it is not according to the needs and demands of the community.

**IV GLOBAL POSITION OF TRANSGENDER RIGHTS**

In the year 1980 American Psychiatric Association had removed the word “*homosexuality*” from the Diagnostic and Statistical Manual for Psychological disorder bypassing and resolution. The Association opined that attraction towards the same – sex is a natural condition[[20]](#footnote-21). There are many countries that have also adopted a progressive approach towards gender recognition as reform such as Denmark, Argentina and the United States. The position of transgender rights in these countries allude below –

**United States of America**

The U.S Supreme Court in Lawrence[[21]](#footnote-22) had relied on the statement of the amicus curiae which stated that homosexuality and heterosexuality both form a normal part of sexual identity. Transgenders in the United States of America enjoy civil and basic constitutional rights. The employer who has more than 15 employees is prohibited to discriminate against people based on sex and gender identity or gender orientation[[22]](#footnote-23). 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 identity[[23]](#footnote-24). There is also a Federal Fair Housing Act which prohibits discrimination on the basisof sex by the landlords. The courts have also interpreted this law in such a manner to protect the LGBTQ community[[24]](#footnote-25). The United States is far ahead in terms of providing safety and protecting the rights of transgenders from India.

**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 steps[[25]](#footnote-26). 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.

**Argentina**

Argentina is one of the most progressive when it comes to LGBTQ rights. The people of the country have always advocated for minorities’ rights. In the year 2010,Argentina became the first country in Latin America to legalize same sex-marriage[[26]](#footnote-27). As a result, more than 15,000 couples had been married in Argentina in the year 2010. The Gender identity law was passed in Argentina which made sex-change surgery a legal right[[27]](#footnote-28). Transgender persons can opt forsex transition surgery without the fear of being diagnosed with psychological abnormality[[28]](#footnote-29). Even before the law was passed recognizing same-sex marriage, there were many judgments passed by the provincial courts in Argentina[[29]](#footnote-30). One of the famous cases in Argentina ***Freyre and Di Bello*** the decision, in this case, was approved and it was overturned. The couple finally managed to get married at the discretion of the governor in Tierra del Fuego where same-sex marriage was allowed at that time[[30]](#footnote-31).

The transgender persons are increasingly gaining legislative protection around the globe. These laws are still not successful when it comes to protecting them from the social stigma which exists in society. The supporter of Human rights Transgender had reported 2,264 killings of transgender persons worldwide between January 1, 2008, to September 30, 2016[[31]](#footnote-32). There is still a lot that needs to be done to protect the freedom and rights of the transgender community around the globe.

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**V. THE WAY FORWARD**

A comparative analysis of Indian Transgender Person Act .2019 with Argentina, USA and Denmark legislation for transgender indicates that there are various shortcomings in the Act and the government needs to rework the entire legal framework for transgender rights. Various provisions need to be added following the footsteps of the countries that have already adopted a progressive approach towards transgenders. The various recommendation which isrequired to be kept in mind by the Indian government are listed below –

1. **Employment and Housing**

There are several companies like KPMG, Infosys and Accenture who 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[[32]](#footnote-33). The appropriate solution is to provide a reservation for transgender in both government and private corporations. 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 out[[33]](#footnote-34). If this problem continues the majority of them will be forced to stay on the streets.Aseparate provision prohibiting the landlords to discriminate against transgenders is therefore, required.

1. **Change in Educational Curriculum**

As suggested by the Expert Committee to the Ministry of Social Justice and Empowerment that, there should be a compulsory education about gender identity and sexuality at schools[[34]](#footnote-35). There is a need for sensitization of the students and also make them aware of the problems faced by the transgender.This will remove 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.

1. **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 planning[[35]](#footnote-36). Thus, there is discrimination between heterosexual and homosexual couples with respect to rights available to them.

1. **Simple Administrative steps to change gender in official documents**

To change the gender in official documents transgenders have to deal with a lot of harassment[[36]](#footnote-37) . The transgenders have to give a proof of sex reassignment surgery which also violates their right of self-identification. A step by step procedure should be declared by the government which is simple and free of red-tapism.

1. **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[[37]](#footnote-38). 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.

1. **State subsidies for Sex- Reassignment surgeries.**

The cost to get sex reassignment usually costs in lakhs especially in private hospitals[[38]](#footnote-39). Thus, most of the transgender live 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.

1. **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.

Apart from these recommendations, there are a lot of steps that are required to be taken by the government like ***differential treatment of transgenders in prisons*** and sensitization of police personnel to deal with transgenders. The state’s responsibility is much higher to recognize the rights and identity of transgenders. These recommendations may not lead to an absolute recognition of rights and freedom, but these recommendations are necessarily the first step to remove the social stigma against trans - 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 anurgent need to reframe the entire legislation. The Constitution of India guarantees each individual equal rights regardless of their sex and identity. The only people who are not happy with the Constitution are people who believe in outdated ideologies which leads to levelling down of entire nation[[39]](#footnote-40). India needs to adopt a progressive nature toward transgenders and uphold the constitutional rights of transgender as interpreted by the judiciary. The primary motive of legislation is to recognize and fulfill the needs of the people.

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[[40]](#footnote-41)*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.

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