

DE JURE NEXUS LAW JOURNAL

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2nd Year.**AN ANALYSIS OF THE TRANSGENDER PERSON (PROTECTION OF RIGHTS) ACT, 2019****ABSTRACT:**

The Transgender Persons (Protection of Rights) Act was introduced in the Lok Sabha in 2019 and soon passed by the Rajya Sabha and implemented. The act had a few hits and considerable misses which sparked nationwide revolution in the trans community. The Act made it mandatory for a person to provide proper documentation to get a certificate as a transgender and provide proof of Sex Reassignment Surgery to be identified as a trans man or a trans woman. It had less severe punishment for trans individuals as against cisgender individuals and made it mandatory for a trans child to stay in their residence in spite of discrimination they might face. It also made an ambiguous claim to ensure that trans people had inclusion in the society but made no positive affirmations in terms of employment, education or civil rights. It did establish a National Council for Transgender People and provided for medical relief but overall, it was negatively received and rejected by the very community it sought to empower.

INTRODUCTION

India is a country deeply rooted in religious values. The century old nation has often not wanted to have difficult conversation regarding LGBTQ+ Rights. However, in the recent years the

scenario has changed and people have begun to acknowledge the LGBTQ+ communities prevalent in India. The Transgender Persons (protections of Rights) Act, 2019 is one such provision.

THE TRANSGENDER PERSON (PROTECTION OF RIGHTS) ACT, 2019

The Transgender Person (Protection of Rights) Act, was first introduced in the House of People or the Lok Sabha soon after the lapse of the Transgender Person (Protection of Rights) Bill, 2018 by the Minister of Social Justice and Empowerment, Thawar Chand Gehlot. It was the first legislative effort on the part of the Indian Government to give the means to the minority community of transgender people in India to have their own sexual identity and to empower them in terms of welfare related to education, housing, employment opportunities and government schemes.

The Act defines the term "transgender person" as “a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta.”¹

Although the Act intended to create a positive impact on the trans-community in India yet it was vehemently protested by the community, trans-activists, students and lawyers as well. The act had provisions which were not clearly defined and created ambiguity. It also had sections which instead of benefitting the community, infringed upon their privacy and bodily autonomy and was considered regressive in nature.

CRITICISMS OF THE ACT

Firstly, we shall go on to analyze the provisions of this Act which are problematic in nature. These provisions have also actively been criticized by the trans-community in India. They have been summarized below.

The Chapter 3 of the Act which is titled “ Recognition of Identity of Transgender Persons” has 4 clauses with subsections. The §5 of the Act states that a “transgender person may make an application to the District Magistrate for issuing a certificate of identity as a transgender person”

¹ §2(k), The Transgender Persons (Protection of Rights) Act, 2019, No.40, Acts of Parliament , 2019

². The contention however is that this issuance of a ‘Certificate’ requires the individual to submit a report of a psychologist of a hospital of appropriate government which is offensive since it implies that being transgender is a mental disorder and alienates the individual from society.

According to §7 of the Act “ if a transgender person undergoes surgery to change gender either as a male or female, such person may make an application, along with a certificate issued to that effect by the Medical Superintendent or Chief Medical Officer of the medical institution in which that person has undergone surgery, to the District Magistrate for revised certificate, in such form and manner as may be prescribed.”³ It further goes on to state that the discretion to judge the “correctness” of this certificate is entirely upon the district magistrate as well not taking into consideration his expertise in this field. Thus, through the inclusion of psychologist reports, medical proofs and the administration the Act heightens the stigma and humiliation around being transgender thereby drawing attention to the sexual identity of the person and in a way invading their privacy and infringing upon their bodily autonomy as well.

This has hence become the biggest drawback of the Act which made it significantly regressive as compared to the NALSA Judgement of 2014⁴ which guaranteed sexual identity based on self-declaration alone. The judgement had laid down that an individual’s gender status was to be defined by that person only, without being influenced by family or society. But the bill vests the power to certify an individual as transgender on the district administration which could be unqualified or even prejudiced. According to the Hindustan Times, even if this provision was included to ensure that imposters could not take advantage of the welfare schemes yet to do this at the cost of the right of transgender people to self-determination was not a suitable price to pay.⁵

The §18 of the act imposes a punishment of at least 6 months to 2 years with fine on anyone charged with abusing, harming or injuring a trans-gender person. However, the same offence in case of a cis-gender woman could result in life imprisonment or even the death penalty. The blatant discrimination seen through this is another reason for concern for the Indian trans-community.

² §5, The Transgender Persons (Protection of Rights) Act, 2019, No.40, Acts of Parliament , 2019

³ §7, The Transgender Persons (Protection of Rights) Act, 2019, No.40, Acts of Parliament , 2019

⁴ National Legal Services Authority (NALSA) Vs. Union of India AIR 2014 SC 1863

⁵ Available at: <https://www.hindustantimes.com/editorials/transgender-rights-should-not-depend-on-a-screening/story-c1oqqLOTEzSAfyBoV0fWWN.html>, (Accessed at: 11-10-2021)

The Act is also quite ambiguous on the trans-individuals' access to welfare benefits and civil rights. Chapter IV of the Act focuses “Welfare Measures by Government”, Chapter V on “Obligations of Establishments and Other Persons” and Chapter VI on “Education, Social Security and Health of Transgender Persons”. Although they state that no discrimination should be faced by the trans-community yet these new rules do not clearly provide any concrete provisions for affirmative action in education, healthcare and employment or civil rights related to marriage, adoption or property. The Act also does not provide quotas for transgender people in public education and jobs — something that the Supreme Court's 2014 ruling had directed the government to do. The NALSA judgement directed the government to establish affirmative action measures in order to “increase the presence of transgender in educational institutions and public appointments”.

Lastly, the §12(2)(a) provides trans individuals a “right to reside in the household where parent or immediate family members reside”. However, it also states that “where any parent or a member of his immediate family is unable to take care of a transgender, the competent court shall by an order direct such person to be placed in rehabilitation center”.⁶ Transgender individual often face discrimination from their family and want to move out to live among their own communities. This Act mandates a court order to ensure that these individuals are allowed to leave home making the process more cumbersome.

APPRECIATION FOR THE ACT

There are however also notable provisions which have the aim to benefit the Transgender community. The efforts of the government in terms of uplifting the Trans community have also been acknowledged and summarized below.

§11 of the Act ensures that every establishment has a complaint officer who shall register the complaints against the violation of the act.

§15 of the act states the medical provisions that shall be taken by the government in terms of upliftment of the trans community. It states that the government must take steps to provide health facilities to transgender persons including separate HIV surveillance centers, and sex reassignment

⁶ §12, The Transgender Persons (Protection of Rights) Act, 2019, No.40, Acts of Parliament , 2019

surgeries. The government shall review medical curriculum to address health issues of transgender persons, and provide comprehensive medical insurance schemes for them.

§17 states that the government must establish a National Council for Transgender Person to perform the duties assigned to it

The National Council shall perform the following functions:⁷

- (a) To advise the Central Government on the formulation of policies, programmes, legislation and projects with respect to transgender persons
- (b) To monitor and evaluate the impact of policies and Programme designed for achieving equality and full participation of transgender persons
- (c) To review and coordinate the activities of all the departments of Government and other Governmental and non-Governmental Organizations which are dealing with matters relating to transgender persons
- (d) To redress the grievances of transgender persons
- (e) To perform such other functions as may be prescribed by the Central Government.

EFFECT OF THE ACT

The Act sparked a nationwide controversy among the trans-community. The shortcomings of the act were considered to be violative of the basic principles of Art 21 and Art 14 of the Indian Constitution and they considered the Act to be regressive and urged lawmakers to revisit the Bill. Transgender community in India is disparaged and they face exclusion and as a result have to consider sex-work or begging as an alternative. In 2014, the trans-community celebrated the passing of the NALSA Judgement which recognized transgender as a third gender and allowed them the right to self-declaration but the bill set the whole movement back and, in a sense, reversed the judgement by introducing bureaucratic difficulty and red-tapism around declaring one's gender identity.

The Standing Committee, which examined the 2016 Bill, noted that the role of Screening Committee is critical in declaring a person as transgender. It further emphasized on the importance of the role of the Chief Medical Officer to check any potential misuse of the certificate, and

⁷ §17, The Transgender Persons (Protection of Rights) Act, 2019, No.40, Acts of Parliament , 2019

recommended that the role of the Chief Medical Officer should be clearly defined in the Bill. However, the 2019 Bill removes the provisions for a District Screening Committee and leaves the power to issue the Certificate with the District Magistrate, based on procedure notified through rules.⁸

A notice was issued by the Supreme Court of India to the Government on the basis of a petition filed by trans activist Swati Bidhan Baruah who claimed that the Act was violative of the fundamental right to privacy and life and equality of Trans Individuals.

CONCLUSION:

There is no doubt a number of noteworthy and noble provisions in the Act which ultimately aimed to uplift and empower the trans community in India but the Act could not understand the basic stigma and hardships faced by trans-people in the country. Gender dysphoria is an uneasy sensation that one faces when the sex assigned to them at birth does not match with their gender identity and it can be quite intense for an individual so much so that it leads to depression and anxiety. They might not want to reside at their home where they face discrimination and they might not want to draw much attention to their gender identity or even be comfortable to share what gender identity they conform with all of these struggles have been invalidated by the Act. While the Act provides much emphasis on transwomen and the hijra community there is however little focus on intersex, genderqueer or even transmen. The right to have one's gender identity not be revealed is a basic right and should not be violated in the way that it has been in the Act. In order to safeguard the interests of the community, the Act must guarantee equal social, economic and civil rights as well as protection against abuse and discrimination. It is also essential to consult the transgender community before formalizing the rules. The public consultation process must become more inclusive and provide sufficient time to discuss the rules as well to ensure that it truly benefits the stigmatized Trans community it seeks to uplift.

⁸ Accessible at: <https://prsindia.org/billtrack/prs-products/issues-for-consideration-3283>, (Accessed at : 11-10-2021)



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