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# **ANALYSIS OF TRANSGENDER PERSONS (PROTECTION OF RIGHTS) BILL, 2019**

AUTHORED BY - KM TABSSUM

## **ABSTRACT**

Gender identity is well within a person's rights. In National Legal Services Authority v. Union of India Supreme Court has affirmed the right of every Indian citizen to choose their gender identity regardless of gender affirmation surgery. Following this judgment, states across India have been constituting transgender welfare boards and the Indian government has come out with The Transgender Persons (Protection of Rights) Act, 2019 with aim to provide for protection of rights of transgender persons and their welfare and for matters connected therewith and incidental thereto. Transgender people in India face a variety of issues. This discrimination not only denies Transgender people equal access to key social goods, such as employment, health care, education and housing, but it also marginalizes them in society and makes them one of the weaker sections who are at risk of becoming socially excluded. Here the researcher is highlighting some major problems faced by Transgender people in India. This basic recognition of the very existence took long to realize. In this paper, the author aims at establishing the unequal identity status and its acceptance for the transgender, in the society. For this, existing laws and their social backgrounds are analysed. The author doctrinally evaluates the identity acceptance of the third gender by resorting to analytical, comparative and critical methods. Towards this several social practices, laws, judgments and related documents have been referred to.

Keywords: transgender, identity of the transgender, Gender discrimination, , legal position of transgender.

## **INTRODUCTION**

Transgender community comprises of Hijras, eunuchs, Kothis, Aravanis, Jogappas, Shiv-Shakthis etc. Eunuchs have existed since 9th century BC. The word has roots in Greek and means "Keeper of the bed" castrated men were in popular demand to guard women quarters of royal households. Hinduism, Jainism and Buddhism - and it can be inferred that Vedic culture recognized three genders. The Vedas (1500 BC - 500 BC) describe individuals as belonging to one of three separate categories, according to one's nature or prakrti. These are also spelled out

in the Kama Sutra (c. 4th century AD) and elsewhere as pumspraktistri-prakrti (female-nature), and tritiya-prakrti (thirdnature). Various texts suggest that third sex individuals were well known in pre-modern India, and included male bodied or female-bodied people as well as intersexuals, and that they can often be recognized from childhood. A third sex is also discussed in ancient Hindu law, medicine, linguistics and astrology.

The foundational work of Hindu law, the Manu Smriti (200 BC - 200 AD) explains the biological origins of the three sexes: "A male child is produced by a greater quantity of male seed, a female child by the prevalence of the female; if both are equal, a third-sex child or boy and girl twins are produced; if either are weak or deficient in quantity, a failure of conception results. Indian linguist Patanjali's work on Sanskrit grammar, the Mahabhaya (200 BC), states that Sanskrit's three grammatical genders are derived from three natural genders.

The earliest Tamil grammar, the Tolkappiyam (3rd century BC) also refers to hermaphrodites as a third "neuter" gender (in addition to a feminine category of unmasculine males). In Vedic astrology, the nine planets are each assigned to one of the three genders; the third gender, tritiya-prakrti, is associated with Mercury, Saturn and (in particular) Ketu. In the Puranas, there are also references to three kinds of devas of music and dance: apsaras (female), gandharvas (male) and kinnars (neuter).

While another idea suggests that homosexuality is really a "trade off trademark." For example, we can say that particular characteristics in women help in increment of their accessibility, yet if those comparing qualities are passed on in a male body, by then they will slant him clearly towards homosexuality.

#### SURVEY OF THE EXISTING LITERATURE

1. **Grossman, A. H., D'Augelli, A. R., & Salter, N. P. (2006). *Journal of GLBT Family Studies*, 2(1), 71-92.**

Male-to-female transgender youth: Gender expression milestones, gender atypicality, victimization, and parents' responses studied on 31% MTF transgender youth to explore their gender uniqueness, gender expressions, gender untypicality and reactions of their parents. Findings show that they experienced their peculiarity at the age of 8 to 9 years and majority of them stated about parental abuse during their early days.

2. **Bryant, Karl & Schilt, Kristen. (2008). *Transgender People in the U.S. Military: Summary and Analysis*,78-90.**

It administered an online survey of TG persons in Australia and New Zealand. The findings show that majority of TG participants had tried to amend their documents to show their gender identity. Some of them reported denial of bank labour and housing, physical abuse. Participants stated higher rates of depression than the general population of Australia.

3. **Khan, S.I.,(2009). *Living on the extreme margin: social exclusion of the transgender population (hijra) in Bangladesh. Journal of Health, Population and Nutrition. 27(4), 441-451.***

They found that Hijras of Bangladesh have no dignified life. They faced tremendous oppression and abuse (physically, verbally, and sexually) this causes low self-confidence and self worth in them. The study suggested that Hijras should be recognised as another gender along with two gender norm of society and their citizenship rights also guaranteed. investigated the beginning of transgender movement and different issues related that the it.

4. **Govier, E., Diamond, M., Wolowiec, T., & Slade, C. (2010). *Dichotic listening, handedness, brain organization, and transsexuality. International Journal of Transgenderism, 12(3), 144-154.***

It studied the working of brain of sixty-eight transwomen and twenty-six transmen by analyzing their performance with thirty-six male and twenty-eight female controls on two indicators of cerebral lateralization: dichotic listening and handedness. The findings show that the transwomen's dichotic pattern significantly similar to the control female pattern but the transmen's dichotic performance not significantly similar to the control male performance. There is significantly more inclusive right-handers in both transwomen and transmen groups. The neuroscience plays a significant function especially in the development of the MtF trans-condition.

5. **Sharma, P. (2012). *Historical Background and Legal Status of Third Gender in Indian Society. International Journal of Research in Economics & Social Sciences, 2(2), 65-71.***

It justified the demand of legal status of this powerless and abandoned community of

transgenders. Men and women of our country have benefitted by numerous welfare schemes of the Indian government but the third sex deprived of this because of their no legal status.

6. *Kisha, B. G. (2015). A Study of Attitude of Society towards Transgender in South India. International Journal of Science and Research, 6(8),1564-1569.*

It compared the correlation among attitude of youths and attitude of adults towards transgender to recognize the major dissimilarity in the research variables. Result of study shows positive attitude of the adults towards transgender than the youth.

### **STATEMENT OF PROBLEM**

*Even though laws have been passed in our country to help transgender but instead of serving the purpose of making their lives easier all they do is entangled them in a legal formalities. The act on the face of it looks like it aims to give equal treatment to transgender and treat them at par with every other member of the society, but it miserably fails to do so. This research aims to explore that aspect of the said law.*

At this time, it is estimated that 2-5% of the United States population is transgender; however, due to the relatively new exposure of this population, the exact number is difficult to determine. Often, this population remains hidden for many reasons that will be explored later in this study. Transgender people are best described as “denoting or relating to a person whose self-identity does not conform unambiguously to conventional notions of male or female gender” (Nuttbrock et al. 2014). Many times, transgender people express a desire to change their physical appearance to match the gender they feel is present within them. This can cause problems on many levels from psychological, where an individual becomes depressed or suicidal over their gender expression, to social, where they experience turmoil in personal relationships (friends and family) when they decide to transition to the opposite gender.

### **TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019**

The Transgender Persons (Protection of Rights) Bill 2019 has been passed by the Parliament. It was passed by the Rajya Sabha on 26th November, 2019 and already passed by the 17th Lok Sabha on 5th August, 2019.

The Transgender Persons (Protection of Rights) Act, 2019 (‘Transgender Persons Act’) seeks to recognise the identity of transgender persons and prohibit discrimination in, inter alia, the fields

of education, employment, healthcare, holding or disposing of property, holding public or private office and access to and use of public services and benefits.

## **Background**

In National Legal Services Authority v. Union of India<sup>1</sup>, the Supreme Court of India laid the foundation for transgender rights in India by identifying 'transgender' as the 'third gender' and establishing several measures to prohibit discrimination against transgender people and protect their rights. The judgement argued for transgender people to be given preference in occupations and educational institutions, as well as the right of transgender individuals to announce their self-perceived gender identity without undergoing sex reassignment surgery.

A private member's bill was introduced in the same year in the Indian Parliament which was passed by the upper house, a rare feat in itself, since, not a lot of private members' bills have moved this far. However, while the private member's bill was still pending, in 2016, the Indian government drafted and tabled its version of the bill in the Parliament which was referred to a Standing Committee of the Parliament for further suggestions.[4] In 2018, a new version of the bill was introduced based on the Committee's suggestions. At the suggestion of the committee, a new version of the bill was presented in 2018, but with the dissolution of parliament in 2018 and the formation of the new central government in 2019, the bill was reintroduced and finally entered into force.

With the Transgender Persons Act just coming into force, it is critical to grasp the key aspects of the law, the achievements and shortcomings, and the repercussions on employers, particularly in the private sector.

## **Key Features of the Law**

### **Definitions**

The definitions of transgender persons and people with intersex variation have been made inclusive of males and females, even if the person has not undergone any therapy such as hormone therapy, sex reassignment procedure or any other.

### **Non-discrimination**

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<sup>1</sup> Writ Petition (Civil) no. 604 of 2013

The law strictly prohibits discrimination against transgender persons at educational or professional institutions, healthcare and other public facilities as well as reinforces their right of movement, property and holding of offices.

### **Identity Certificate**

It administers the right to a gender identity that is self-perceived and further casts a responsibility on the district magistrate for the issuance of a 'certificate of identity as a TG person, without undergoing a medical assessment. It also provides for a further change of gender to female or male for any person claiming a change in gender.

### **Equal Opportunities**

It further administers equal opportunities with regard to policy matters for the transgender community. The law has mandated the formulation of certain specific policy measures that would be inclusive of transgender persons.

### **Complaint Officer**

The law requires every establishment to create a specific designation of a complaint officer.

### **Healthcare and Medical Facilities**

The law also provides for the establishment of separate HIV surveillance centres for TG persons; the facilities need to be inclusive of healthcare relating to hormone therapies, sex reassignment procedures etc., as well as cover medical expenses by an insurance scheme that is specific to the medical needs of transgender persons.

### **National Council for Transgender Persons ('NCT')**

The law also mandates the constitution of the NCT in order to guide and advise government officials for the auditing of existing policies and the formulation of new ones as well as redressal of grievances.

### **Offences and Penalties**

Offences such as forcing transgender persons into labour; or refusing accessibility to public facilities; mental, emotional, physical and sexual abuse or violence; and other related offences have now been covered under the act and are punishable by law.

### **Latest Compliances for Employers**

The Act also provides for a completely new bundle of compliances for all professional institutions to follow which also includes all private employers. Given these requirements, employers will be expected to update their HR policies as well as strive towards sensitising and training employees to accommodate transgender persons.

1. Prohibition discrimination in order to provide a working environment which ensures safety and growth.
2. Publish a policy for equal opportunities for transgender people.
3. Establishment of infrastructural amenities and facilities such unisex toilets, hygiene facilities, confidentiality, transportation and much more.
4. Requirement of designating a complaint officer at every establishment.

### **Analysis of the New Law**

Over the years, there is an urgent need to raise the awareness of different communities and institutions so that they are actively responsible for recognizing the rights of transgender people and treating them with basic human dignity and equality with other genders, whether in educational institutions or guaranteeing employment. Equal opportunities or guaranteed access to medical care and use of public welfare and facilities. This is a step forward for India towards the protection of the rights and identity of transgender people. The Transgender Act shows that India is moving towards a more inclusive and progressive society where people's opportunities will not be restricted by gender. It is hoped that this will ensure that labour standards comply with international standards.

Amid large-scale criticism and pan-Indian protests, a more prominent and controversial issue related to the criminal conviction for begging from transgender people, which was part of the previous draft bill, has been dropped. Although begging will continue to be a major problem that must be addressed, by not criminalizing this behaviour under the Transgender Law, the government has at least tried to minimize the need to earn a living without any other means of earning a living. Sexual harassment.

The need in the previous law with a requirement of a medical screening and assessment to get an identification certificate has been abandoned from the new Trans Act. This would assist in reducing trauma as well as harassment that transgender persons have to experience.

### **And the Misses**

The definition of “transgender person” in the Transgender People Act is vague and misleading. The gender identity of transgender people is different from the gender identity provided at birth, while “intersex variants” are based on biological characteristics. Although two subtly separate definitions create differences, the definition of “transgender” is too broad to include “people with intersex variation.”

The penalty for offences under the Trans Act include imprisonment of only up to two years with a fine, which appears to be insufficient for heinous crimes like rape, sexual abuse or violence, sexual harassment or criminal assault.

The Transgender Persons Act is likely to remain unsatisfactory because it fails to provide a skeleton on a variety of other associated rights, such as marriage rights, adoption rights, pregnancy rights, and so forth – a missed opportunity to be even more comprehensive.

The Transgender Persons Act imposes far too many requirements on the “appropriate government.” It remains to be seen how much emphasis the government will pay to ensuring that all of those duties are met on schedule – leaving transgender people at the mercy of the system for successful implementation of the benefits offered to them under the Transgender Persons Act. Some people may argue that if the Transgender People Act provides reservations (affirmative action) for transgender people in educational institutions and employment, it may better attract transgender people, and it will be more comprehensive and effective.

### **Transgender Persons Act, 2019 V/s NALSA Judgement, 2014**

According to NALSA’s ruling on the Federation of India, transgender people will be regarded as a “third gender” and their rights are protected by the Constitution. It recognizes that gender self-identification is sufficient to empower people. The Supreme Court also held that discrimination based on “gender” is not limited to physical gender, but also includes “innate knowledge of one’s own gender”, that is, the gender identified by transgender people. The court discussed gender identity, acknowledging its indispensable role in shaping an individual’s personality, and as a basic principle of living a dignified life. While this is a historic trial and an important milestone for the transgender community to fight for equal rights, it does not necessarily guarantee their equal treatment, nor does it necessarily guarantee them to live a dignified life.

In light of the 2014 ruling, the parliament presented a series of bills that address the rights of transgender people. The most recent was launched in July 2019 and was later called the

Transgender (Protection of Rights) Act 2019. The act has received a lot of negative responses from the TG community because it invalidates and is in contradiction of the NALSA judgment. They claim that the new law is not only inadequate but will also reverse the progress made in guaranteeing the rights of transgender people.

The NALSA ruling recognizes the principle of “self-declaration” without any medical or psychological proof, and is the only legal gender identification required. The verdict also held that any insistence on performing reconstructive surgery is unethical and illegal. The ruling complies with international standards and best practices. For example, the United Nations requires that medical and legal procedures for gender reassignment of transgender people be separated, including the elimination of evaluations by psychologists, doctors or other experts.

According to the Transgender Act of 2019, in order to legally recognize a person’s transgender identity, the bill requires the person to apply for a “transgender certificate”, which will mark their gender as transgender. However, the new rules require the person to submit a psychiatrist’s report in order to obtain a “proof of identity.” In addition, if the person changes their gender to male or female through surgery, they need a “revision certificate” issued by the district judge. The district justice of the peace has the right to judge the “correctness” of the application, although he can show evidence of gender confirmation surgery. The draft rules make the process of gender identification and redistribution cumbersome and intrusive. The rules on how to judge accuracy are unclear. In addition, it does not require administrators to receive training on the subject. By including psychologists, certified physicians, and district administrators, these rules not only exacerbate humiliation and intrusive policing, but also violate the right to “self-declaration” recognized in the NALSA ruling.

Furthermore, the bill stipulates that the abuse of transgender people is a punishable offense, punishable by six months to two years in prison. A similar crime against a cisgender may be punished with life imprisonment or even the death penalty in some instances. Providing milder punishments strengthens the unequal status of the transgender community. The bill is also unclear about opportunities for transgender people to gain civil rights and benefits. The NALSA decision ordered the government to formulate affirmative action measures to “increase the presence of transgender people in educational institutions and public appointments.” However, the new rules do not clearly stipulate those affirmative actions should be taken in the areas of education, health and employment, or civil rights related to marriage, adoption, and property.

## Conclusion

It can be deduced that though the colonial heritage acknowledges gender diversity in temple sculptures, myths and religious treatises, transgender people in India today still face intolerance, stigma, discrimination and violence. Human rights violations against transgender people violate families, educational institutions, workplaces, law enforcement agencies, healthcare institutions, the media, and society as a whole. Affirmative action is needed to eliminate stigma and discrimination associated with the community. The following actions can help improve access:

1. Awareness of gender variety, as well as the need to protect transgender adolescents from hostile educational situations, is critical. Schools and teacher education programmes are critical places for addressing TG issues and concerns. Schools can employ the following policies and procedures to help enhance health and safety among TG students.
2. A special school for transgender students should be developed, as well as free education from kindergarten to grade twelve.
3. Encourage students to respect each other as well as Initiate strict measures against bullying, harassment and violence.
4. Determine “safe areas,” such as counsellors’ offices, dedicated classrooms, or student groups, where TG youth can obtain support from administrators, instructors, or other school personnel.
5. Encourage student-led and student-organized school organisations that promote a safe, inviting, and accepting environment in the classroom.
6. The community has a culture of folk songs, art and dance that is unique to them. It provides a strong sense of strength and identity to the community. These cultural and artistic expressions are an integral part of the community and must be combined with people’s livelihood activities to ensure more community participation. Efforts should be made to provide sufficient financial support as a link to employment opportunities.
7. The community needs to be included in pension programmes in order to enjoy their benefits.
8. Inform the police about the issues facing the transgender community. In the event of dishonourable comments and harassment, the law will be followed.
9. Make the masses aware of their problems. The impulse of conscience is essential. Local authorities, policy-makers, schools and families need to be further educated on how to

accept children with gender differences, treat people of different genders and gender identities equally, and implement policies and plans in a way. “friendly” rather than hostile.

10. Transgender human rights issues should be highlighted in the media and other public forums to raise public awareness and improve the ability of transgender people to realize these rights. The stigmatization of media reports must stop.
11. Doctors and healthcare providers must meet the specific needs of all transgender people. Advocacy activities should be carried out for counsellors, psychiatrists and other mental health professionals to prevent psychosocial harassment and discrimination.
12. Parents must be aware and informed in order to support their gender nonconforming or transgender children, despite their discomfort and deeply held normative ideas. Parents must pay attention to the possibility of their child being subjected to violence outside home– at school, in the extended family, on the playground etc. – and provide appropriate help. They must also be aware of the increased stress experienced by a gender hetero normative or transgender youngster when he or she enters puberty and experiences dysphoria when sexual organs traits conflict with his or her sense of gendered identity.

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