

ISSN :2582-6433



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed 6th Edition

VOLUME 2 ISSUE 6

www.ijlra.com

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TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019 (INDIA)

Authored By-Jayant Poddar¹ & Mr. Manish Bhardwaj²

The Transgender Act, 2019 :- Impact and Evaluation on the Third Gender.

Society, as we know today is normally bifurcated into two groups: 'female' or 'male' and this is the general acceptance and consensus of the present day society. Transgender or 'third gender' is making it's way into the acceptance of the society and it somewhat causing a disruption in the day to day functioning. There are multitudes of groups of people that classify themselves as Transgender in India, they are :- "Hijras, Kinnars, Shaktis, Sakhi, Aradhis" any many more. These groups face extreme persecution and discrimination in all fields. They become a victim of many a crimes which range from physical abuse and violence to false imprisonment, denial of work or even acceptance in professional, medical or educational institutions. The aim of this paper is to draw the attention of the readers towards the discrimination faced by the Transgender community and ways and means to uplift their status and position in the society.

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Introduction

Transgender

Section 2(k) states :-

“transgender person”³ means 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*

Being transgender is not a disorder and it cannot be “cured” with any treatment. Transgender people may feel a relentless disconnect between their internal sense of themselves and their assigned sex. Gender dysphoria is the term used for this feel of disconnect, which can cause undue pain and distress in the normal day to day functioning of transgender people.

Parents should consult experts with experience who have a hunch that their children might be transgender. A professional with expertise should evaluate the child and determine whether or not he/she is a transgender.

Issues Faced by the Transgender Community

Being different comes with its own set of challenges and Transgender people are no exception to this. It not only deprives them of social and civil goods and rights such as education, health, housing but it also deprives them a place in society where they can be themselves without any judgement or interference, this often wheels them into being at risk of social isolation.

Social Exclusion and Impact of Marginalization

Marginalisation or Isolation rests in the heart of every society, a few target groups or a certain few people will always be amongst those who shall be isolated because of various factors. This act usually lead these people into having low self confidence and esteem and their primitive talent to contribute to the society fades away. They become the target of negative public attitudes and they are socially excluded.

³ https://www.indiacode.nic.in/show-data?actid=AC_CEN_25_35_00007_201940_1579157374013§ionId=49775§ionno=2&orderno=2

Transgender People are no different in this phenomena, they face racism, alienation, exclusion from public or private places, poverty, all of these factors deteriorate their physical and mental health. With Transgender People, its their sexual orientation that differs from the generally accepted form of non-transgender which places them at the edge of societal acceptance. This stigma attached with them leaves them with little to no resources at their disposal because their own families don't support them and this in turn amounts to negligence in medical or educational facilities. The oppression and negligence that the Transgender People face aggravates various health issues such as HIV infection and AIDS Because of them being treated as outcasts these people resort to becoming sex slaves or prostitutes for getting their daily bread. A biggest problem that these people face is the discrimination in almost all public and private places. They are even denied the access to use public washrooms as because there are no separate washrooms for TG people and as a result it increases the chances of becoming a victim of sexual harassment or assault. " A study done by the National Human Rights Commission (NHRC) shows that about 99% of the Transgender Community have experiences social rejection in some form or the other. 52% of the community has faced harassment by their school classmates and about 15% from their teachers which resulted in them dropping out of the school"⁴. The government had sought public feedback on the law but it couldn't have come at a worse time considering that on May 2020, the country was on lockdown due to the pandemic and it made it difficult to discuss the rules and offer any form of feedback.

Transgender Persons (Protection Of Rights) Act, 2019

The Transgender Persons (Protection of Rights) Act, 2019 seeks to realize the identification of transgender individuals and prohibit discrimination in various fields such as the fields of education, employment, healthcare, holding or doing away of property, accounting for public or private office and access to and use of public offerings and benefits. The act was introduced in the Lok Sabha on July 19th, 2019, passed in the Lok Sabha on August 5th, 2019 after which it was passed down to the Rajya Sabha and it received the upper house's assent on November 26th, 2019. It was introduced in the Lok Sabha by the Minister for Social Justice and Empowerment, Mr. Thaawarchand Gehlot.

⁴ <https://www.orfonline.org/expert-speak/pride-month-2020-68965/>

Background of the Act

In “[National Legal Services Authority v. Union of India](#)” the apex Court of India laid down the groundwork for transgender persons rights in India by recognizing ‘transgender’ as the ‘third gender’ and identifying various parameters to overcome discrimination against transgender individuals and protect their rights. The judgement was in favour for transgender people that they be given preference in occupations and educational institutions, as well as the noble right of such individuals to accept their very own gender identity without undertaking any sex reassignment surgery.

Key Features Of The Law

Definitions

Some basic definitions of transgender persons and people with intersex variation have been given in the act and it includes definitions of males and females, even if the individual has not undergone any procedure such as hormone therapy, sex reassignment procedure or any other such procedure

Non-discrimination

The law prohibits any form of discrimination against transgender individuals at any place of educational or professional institutions, any healthcare or public places and it also safeguards their right to unrestricted movement and right to hold property and offices.

Application for Certificate of Identity.

Section 5 states that :-

“A transgender person may make an application to the District Magistrate for issuing a certificate of identity as a transgender person, in such form and manner, and accompanied with such documents, as may be prescribed:

Provided that in the case of a minor child, such application shall be made by a parent or guardian of such child.”⁵

Equal Opportunities

It also enables equal opportunities in regards to policy matters for the transgender community. This law has had made it mandatory for the inclusion of various specific policy measures that would include the transgender community at large.

⁵ https://www.indiacode.nic.in/show-data?actid=AC_CEN_25_35_00007_201940_1579157374013§ionId=49778§ionno=5&orderno=5

Complaint Officer

The law requires every public or private establishment to create a designation of a complaint officer especially for the people of the transgender community.

Healthcare and Medical Facilities

The law also guarantees for installation of separate HIV surveillance centres for Transgender persons; the facilities are to be inclusive of healthcare technology relating to hormone therapies, sex reassignment procedures etc and also provides for covering the medical expenses by a specific insurance scheme designed for the transgender persons

Welfare Schemes.

The bill states that the transgender sensitive, non discriminatory and non stigmatising welfare schemes and policies are to be framed.

National Council for Transgender Persons (‘NCT’)

The law makes it necessary for the constitution of the National Council for Transgender persons for aiding and advising the appropriate government for checking on the existing policies and also for the formulation of new ones as well as for grievance redressal of the old ones.

Offences and Penalties

Section 18 states that :-

“Whoever,—

(a) compels or entices a transgender person to indulge in the act of forced or bonded labour other than any compulsory service for public purposes imposed by Government;

(b) denies a transgender person the right of passage to a public place or obstructs such person from using or having access to a public place to which other members have access to or a right to use;

(c) forces or causes a transgender person to leave household, village or other place of residence; and

(d) harms or injures or endangers the life, safety, health or well-being, whether mental or physical, of a transgender person or tends to do acts including causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years and with fine.”⁶

⁶ https://www.indiacode.nic.in/show-data?actid=AC_CEN_25_35_00007_201940_1579157374013§ionId=49791§ionno=18&orderno=18

Latest Compliances for Employers

The Act now provides for a refreshed set of compliances for all institutions to follow which now also includes private enterprises and private employers. Given these requirements, employers are now expected to update their HR policies as well as strive to create an environment within the premises for accommodating Transgender Persons and also:-

1. Prohibit discrimination in order to provide a harmonious environment which ensures safety and growth amongst all employers.
2. Create a policy for equal opportunities for transgender people.
3. Establishment of infrastructural amenities and facilities such as unisex toilets, hygiene facilities, transportation and much more.
4. Requirement of designating a complaint officer at every establishment specifically for Transgender Persons grievances.

Analysis of the Transgender Law

The Success

Until recently, there has been a paradigm shift in raising awareness for different communities and the Transgender Community is no exception, there are various institutions which are working on raising awareness for the rights of the transgender community and are also responsible for making sure that this community gets treated properly with basic human dignity and equality alongside other genders in any institution or place. A major step in India towards the protection this community is guaranteeing access to good medical care and use of all public welfare schemes and facilities. The passing of this act is proof that India is moving forward as a progressive and liberal country wherein opportunities won't be discriminated because of gender.

The passing of this law has also ensured that India is complying with international benchmarks for protecting the human rights.

The new Transgender Act had dropped the requirement of a medical screening and assessment which was required for getting a identification certificate previously. It is going to reduce the mental trauma and harassment which the Transgender people used to face.

The previous draft which also had a stipulation which criminalised begging from Transgender people has also been dropped amid large scale protests. Despite begging, which is an issue that needs to be resolved sooner or later, the government has minimized the need to resort to other measures for making a living.

A welfare board is now to be established under Rule 10 of the **Transgender Persons (Protection of Rights) Rules 2020** which shall provide for a mechanism for guaranteeing non discrimination in all public areas and Rule 11 states to establish a Transgender Protection Cell and under Rule 12 emphasis to draft an Equal Opportunity Policy which shall provide for equal opportunities and make adjustments in infrastructure and work on the recruitment and promotion of Transgender Persons.

The Beatings

The Transgender Act though being new has its own set of incomplete information and also misleading. The definition of “Transgender Person” which provides for gender identity is confusing because the gender identity of Transgender person is different from that which is provided at birth and “intersex variants” are based solely on biological characteristics.

The penalties also given under the Transgender Act is not stringent enough. It includes imprisonment of only 2 years along with a fine which is not sufficient for grievous crimes such as sexual abuse or violence or rape or any form of sexual harassment or criminal assault.

The act also fails to mention some basic requirements such as rights or marriage, adoption or pregnancy. It also fails to mention any form of reservation which the community can benefit from which is an argument that it can attract more Transgender People into employment and educational and medical institutions.

Another provision being missed by the act is that the courts allow a trans person to put them in Rehabilitation Centres in case their families refuse to take care of them, but the bill fails to mention anything about rehabilitation homes and how sensitive the employees in these homes will be about the condition of Trans people, this again is in violation of Article 21 which states Right to life and to live with dignity.

Another shortcoming is that the bill only empowers for a National level Council for the community, there is no mention of any agency at the State or District level.

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.

NALSA Judgement, 2014 V/s The Transgender Persons (Protection of Rights) Bill, 2019

In light of the 2014 ruling, the parliament presented a series of bills that address the rights of transgender people. In the same year, a private member's bill was introduced in the Parliament which was passed by the Rajya Sabha, a rare phenomena in itself, since, for the last 45 years, not a single private members' bills has been passed. This bill was still pending though and in 2016 the government brought forward its own version of the bill and was awaiting suggestions by the Standing Committee. In 2018, after the suggestions from the committee, the government brought a new version of the bill but in the same year the parliament had dissolved and after reformation, the bill was put forth again by the parliament in 2019 when it finally became a law. The bill now known as 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 of 2014 recognized the principle of "Self-Declaration" without undergoing any medical proof and it is the only identification that is required. The ruling also held that any pressure to perform any reconstructive surgery shall be declared as unethical and illegal. The verdict is at par with international standards and practices.

The new Transgender Act requires a "transgender certificate" to legally recognize a transgender's identity. It requires to submit proof of a psychiatrist's report to get a "proof of identity". A revision certificate is also required in case the person changes his/her gender to either male or female which shall be issued by the District Judge. The inclusion of Judges, psychiatrists and physicians increases the chances of humiliation and decisive policy making, but this law also violates the NALSA's ruling of "Self Declaration"

The unequal status of punishment for crimes against Transgender Persons is a huge difference when compared with other gender, which is six months to two years against life imprisonment or even death sentences in certain cases, this gap shall pave the way for unequal treatment of Transgender Persons. The bill also fails to mention the civil rights and benefits of the Transgender People.

The whole act mentions only one section which is dedicated to welfare, but it fails to mention any specific ways in which the benefits shall be provided for and also fails to list anything about reservations amongst other benefits. The Trans activists say that the act has destroyed the essence of the apex court's judgement.

Clause 8 of the rules mentions that the District Magistrate shall inform the person if the application of the certificate has been rejected but it fails to mention any time limit on the same and also Clause 9 talks about the right to appeal but fails to mention anything about who the appellate authority shall be and what is the time limit before the appeal can be made.

The rules are incomplete, it fails to mention anything about the status and rights of TG persons who have undergone surgery in the past and may not have the documentation of the same.

The TG community is also objecting to the rules about the penal action that is to be taken against such individuals who make 'false claims' about any form of certificate or such, these provisions of IPC already deals with such a provision and so to why a specific provision of penal punishment is given under this act is unclear and also is in contradiction to the NALSA judgement.

The repeal of Section 377 by the apex court has granted some relief to the community that the state is now recognizing relationships of Transgender People. The law although has a lot of shortcomings but it is still a way forward, the law must ensure to guarantee equal rights whether they are social, economical or civil. The Transgender community should also have a say in the policies that can benefit them, their suggestions should be taken into consideration. Some time must be given to the public at large so that laws made for Transgender People can blend with the normal functioning of the society and also it reduces the stigma associated with them and it can uplift their socio-economic status.

The Way Forward And Conclusion

There is an unending stigma associated with the TG people and this is affecting them in terms of basic human and civil rights violation, discrimination in workplaces, educational institutions, healthcare facilities and the society as a whole. Positive and urgent action is needed to eliminate the discrimination and stigma which shadows this community. A few steps that can be taken towards helping the community are :-

- 1) The feeling of basic human conscience is necessary, making masses aware about their situation is the first step that can be done, it would bring out the humane in the masses and the plight of problems that the TG community faces can be dealt with a soft and affectionate heart. When the conventional group of people begin to see that they are not so different from us, their problems and situations will be considered in a more healthy manner.
- 2) Protecting Transgender children and adolescents from hostile residential and educational areas is necessary. The curriculum of school is one of the basic steps that can reduce the gap in this discrimination. Educational institutions can include certain policies that work in favour of TG people.
- 3) Laying down the feeling of harmony and affection in school going children towards the TG people, teaching them to respect each other and also include strict measures in case of any harassment or bullying
- 4) Free education should be given to TG children
- 5) Inclusion in pension programmes
- 6) Making their situation aware by the help of media and internet so that the information reaches the masses in an effective way. Stopping the spread of misinformation about TG people.
- 7) Healthcare institutions should be equipped with the needs of the TG people.
- 8) Positive and affirmative action by the police can go a long way in helping the TG community.
- 9) Anti-Discrimination policy should be adopted in workplaces. Strict action should be taken against individuals who violate the policies framed. Various benefits should be encouraged in workplaces.
- 10) Parents of TG children should be more supportive towards them and they must be aware of the possibility of their children being subject to violence or harassment and they must affectionately provide help.