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**Ethics and Jurisprudence With special reference to**  
**The Transgender Persons (Protection of Rights) Act,**  
**2019**

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## **Abstract**

*Ethics and jurisprudence have either always been linked to each other or have been totally devoid of each other, the years-old debate of whether ethics affect jurisprudence or should jurisprudence be affected by ethics has been tried to be discussed in this paper. Following this discussion, the highly controversial, The Transgender Persons Act 2019 has been referred to see if the ethics are linked to jurisprudence and if so, if the said act is ethical or not.*

*This paper is inclusive of all the terms used and holds the research to find the answers to whether the public resistance to the Act is justified or not. However, before reaching the conclusion a detailed study of ethics and jurisprudence has been done in order to clear out the terms used. A link between ethics and jurisprudence has also been made in this paper. Following the link, we have analysed the act and its background in order to find all the facts.*

*The key role of the 2014 judgement and its following steps have been discussed which provide a great deal of insight into this topic of ethics and law.*

**Keywords** – ethics, jurisprudence, Transgender, The Transgender Persons Act 2019.

## **What Are Ethics?**

When asked what is ethics many people comment ethics is related to their feeling of righteousness, the socially accepted norms or the following of the law. However, ethics are not these.

Ethics cannot be determined by the feeling of wrong or right as the wrong for one may be right for one, a robber robs for his own personal reasons while robbed is left feeling wronged.

Similarly, socially accepted norms or living ways can also not be labelled as ethics, and an example of this is during the Nazi period, when the whole society's thinking was corrupted or the discrimination against Black during the slavery period.

Lastly, ethics and law always do not go hand in hand. While all ethics can be asked to be turned into laws, all laws cannot be called ethical. An example is the Indian exploitative laws in colonial India, while these laws were deemed fit by the colonial rule at that time, they were against the ethics of equality.

So ethics are two things rather these definitions First, ethics refers to well-founded standards of right and wrong that prescribe what humans ought to do, usually in terms of rights, obligations, benefits to society, fairness, or specific virtues.<sup>1</sup> These are those reasonable obligations which refrain the individuals from those acts which shall harm the society at large and not just individuals' consciousness. Second, ethics is the study of these developing ethical standards. As I mentioned above, it is easy for ethics to be deviated by feelings, societal norms or law, however ethics men the study of how and why these deviations happened. It is the part of individuals' ethics to determine their inner ethical values and how they differ from the actual standard which is to be followed.

Now that we have talked about ethics, it is necessary to talk about morals and their difference. Ethics and morality are closely related, almost synonymous, what may have been referred to as moral code or moral principles earlier, may now be referred to using the terms 'ethical code' or 'ethical principles. Now, this replacement of words can be looked upon as the result of the extension of the meaning of the term ethics. Originally ethics was called to be the study of morals, it was in a sense the study of moral philosophy. With changing times we have seen that ethics are what people might call the "imposed morals." Morals are an individuals' sense of right or wrong. Over time, as people get grouped more and more, the ethical code of a certain group can be called the morality of every individual of that group.

Three parties are necessary to the existence of a legal right,-the state, the one in whom the right is conferred by the state inheres, and the one subject to the correlative obligation which the state imposes. But as regards a moral right, two parties alone are concerned; the third party, the state, is no longer present, and therefore the moral right cannot be enforced.<sup>2</sup>

Ethics is an applied science. Although ethics has continually been viewed as a branch of philosophy, its broad sensible nature links it with several alternative areas of study, together with social science, biology, law, economics, history, politics, sociology, and theology. Yet, ethics remains distinct from such disciplines as it's not a matter of factual data within the approach that the sciences and alternative branches of inquiry are all about. Rather, it has to do with determining the nature of normative theories and applying these sets of principles to

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<sup>1</sup> Manuel Velasquez, Claire Andre, Thomas Shanks, S.J., and Michael J. Meyer, *What is ethics? 1, ISSUES IN ETHICS, II E, 1987.*

<sup>2</sup> MERKEL, JURISTISCHE ENCYCLOPAEDIA 34.

practical moral problems.<sup>3</sup>

It is ethics which provide the rules of best human conduct and is divided into two branches the ideal moral code and the positive moral code. The ideal moral code conducted, is related to natural law, the law which is not been legislated or manmade but is enshrined in the hearts of people in society which is unchanged and remains true in the future. The positive moral code deals with the rule of actual conduct as displayed in any society at a certain time. Such rules of positive morality, being based on public opinion of a specific society, necessarily change with the men, places in the society<sup>4</sup>.

Now before applying this branch of philosophy to the study of law which is jurisprudence, we shall see delve into what jurisprudence in its essence is.

## **What Is Jurisprudence?**

There is no actual definition of the word Jurisprudence, if there is anything concrete about jurisprudence, it's the meaning of the word which comes from the roman word *jurisprudential* which means 'skill in law' or 'knowledge of the law'. Now if we look at this meaning the scope of jurisprudence is limited to a shameful extent. Jurisprudence in a broader sense everything about law, its history, its reasons, its formation, and its acceptability all in all we can say that jurisprudence is the study of the law of states descending from the natural law. Julius Stone describes jurisprudence as "the lawyers' extraversion. It is the lawyers' examination of the precepts, ideals and techniques of laws in the light derived from the present knowledge in disciplines other than the law."<sup>5</sup>

If we go by the different definitions by the eminent jurists we can see the variations in the meaning of the term jurisprudence are highly influenced by the era of the author and also the country of the authors. The Roman civilization, which is popularly known as the bedrock of all human civilizations in the world, started to question the meaning and nature of law. Ulpian defined law as the "knowledge of things divine and human". According to him, the law is the science of right and wrong. Several jurists in Europe began to deliberate upon the meaning of the law.

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<sup>3</sup> Singer, Peter. "Ethics". Encyclopedia Britannica, 2 Feb. 2022, <https://www.britannica.com/topic/ethics-philosophy>. Accessed March 28, 2022.

<sup>4</sup> STUDY LECTURE NOTES, <http://studylecturenates.com/what-is-ethics-relationship-between-jurisprudence-and-ethics>. Accessed March 26, 2022.

<sup>5</sup> JULIUS STONE, LEGAL SYSTEM AND LAWYERS' REASONING'S 16, (Stanford University Press, 1964).

If we look at Austin's approach to jurisprudence, we see a political invisible hand, according to Austin jurisprudence has nothing to do with the goodness or badness of law<sup>6</sup>. According to Austin, a law is positive law and should be followed by all irrespective of its moral or ethical background of it. This can be linked to the Queen's rule at that time, the word of the monarch shall be the word of law. Holland's definition of jurisprudence further strengthens this notion. Even though he criticised Austin's attempt at diving jurisprudence into general jurisprudence and particular jurisprudence, he did define jurisprudence as the 'formal science of positive law', wherein positive law has been defined by him as the general rule of eternal human action enforced by a sovereign political authority.<sup>7</sup>

What we consider good in any society at a certain time may be bad at another time in the same society or nation. In any society, not all people need to be ideal therefore some laws are required for the enforcement of certain rules of human conduct, and this is what ethics bring to jurisprudence.

## **Relation Between Ethics And Jurisprudence**

Now that we have a clear idea of jurisprudence and ethics we can delve into the relationship between the two.

One thing that should be kept in mind, ethics is not a branch of jurisprudence, nor is jurisprudence the branch of ethics. Both sciences are different and have their own dignities to maintain. And, therefore, ethics influences jurisprudence more by bringing to its life and light from without, than by holding an artificial and false position within the jural sphere.<sup>8</sup>

We have seen that ethics and morals are closely related, and the relation of law with morals is more evident than that of ethics and jurisprudence. The relationship between morality and law can be considered as a vein diagram. It might not have any point of contact, but they might overlap each other or may be completely dissolved in each other. We have instances where the law and morals go hand in hand, however, there are instances when an act can be legally right but has no moral significance. Harsh reality also shows that sometimes law and morals conflict with each other. A very common example of these instances can be the religious suppression of laws in various countries.

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<sup>6</sup> DR VD MAHAJAN, JURISPRUDENCE AND LEGAL THEORY 2, (Eastern Book Company, 1987).

<sup>7</sup> HOLLAND, JURISPRUDENCE 37.

<sup>8</sup> John Grier Hibben, *The Relation of Ethics to Jurisprudence*, Vol 4, INTERNATIONAL JOURNAL OF ETHICS, pp. 133, (1894)

However, we have also had instances when an act can be both legally and morally right. "Thou shalt do no murder" is the law of nature, and the law imposed by the individual conscience.

The way morals have shaped the laws cannot be overlooked. An act of law going against the morals of the group shall face rebellion. Only when an act is morally right it can be called ethics. As ethics are the enforced morals by the state, now as I read the journals I have come to the point where I can say that ethics have shaped the past and present of law thus Ethics are related to jurisprudence.

## **Indian Transgender Persons (Protection Of Rights) Act 2019**

In order to establish the relationship between the topics of ethics and jurisprudence and the said act, we shall first have a look at the said act.

Indian act, The Transgender Persons (Protection of Rights) 2019<sup>9</sup> which came to effect on 10 January 2020 for the welfare and protection of rights for transgender persons. The said act has a history worth knowing before moving ahead.

In the historic case of *National Legal Services Authority v. Union of India*<sup>10</sup>, the Supreme Court of India declared that the transgender was indeed the third gender and gave them room under the umbrella of fundamental rights which were earlier reserved for only two genders. The right of self-identification, even in absence of sex reassignment surgery, was also endowed to transgender persons. It was also during this judgement that the Supreme Court laid down a series of measures for securing transgender people's rights by mandating the prohibition of discrimination, recommending the creation of welfare policies, and reservations for transgender persons in educational establishments and jobs.

In the year 2014, a Private member's bill namely the Rights of Transgender Persons Bill, 2014<sup>11</sup> was introduced within the Indian Parliament that was afterwards passed by the Upper House of the Parliament, a rare accomplishment in itself, since historically, not several Private member's bills have progressed so far into the law enactment process. However, while the Private member's bill was still pending, in 2016, the Indian Government had written and tabled the version of the bill within the Parliament, which was assigned a committee of the Parliament for

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<sup>9</sup> The Transgender Persons (Protection of Rights), No 40, Acts of Parliament, 2019 (India).

<sup>10</sup> National Legal Services Authority v. Union of India A.I.R. 2014 S.C. 1863.

<sup>11</sup> The Rights of Transgender Persons Bill 2014, (Rajya Sabha), XLIXC-C (2014).

any suggestions, the committee was assigned when the transgender community had felt left out and with this committee's suggestions in 2018, a brand new version of the bill was introduced with 27 amendments. However with the dissolution of the Parliament in 2018 and formation of recent central government in 2019, the bill was reintroduced within the Parliament in 2019 and eventually enacted into law. This 2019 was enacted into act<sup>12</sup> without going through a committee before as the vote was against of this criticism by the committee.

The issue arises where the judgement passed by the SC in 2014<sup>13</sup> is not reflected in the act passed in 2019. This has raised an issue of concern. Several points in act of 2019 are questioned.

Firstmost is the inclusion of the term 'intersex variation'<sup>14</sup> in the definition of the term 'transgender persons'<sup>15</sup> in the 2019 act. The 2014 judgement was given for transgender people and not intersex people who are actually not exactly transgender persons. While a transgender person is one who has a different gender identity than that provided at the time of birth, a 'person with intersex variations' is one whose gender is based on biological characteristics. Though the difference is subtly brought through the two separate definitions, the definition of 'transgender persons' has been made too broad to include a 'person with intersex variations'.

Secondly, The Transgender Persons Act probably remains inadequate as it fails to provide for a skeleton on various other related rights, like marriage rights, adoption rights, maternity rights etc. – which were actually introduced in the 2014 bill.

Thirdly, the 2014 judgement<sup>16</sup> had recommended the reserved quota for transgender persons in fields of education and jobs, however, the 2019 Act, had no such provisions.

The most important discrepancy is the right to self-identification, while the 2014 judgement gave the right for self-identification without sex reassignment surgery, the 2019 Act makes it compulsory to get the certificate for District Magistrate in order to claim their gender.<sup>17</sup>

Apart from these differences the penalties for offences under the Transgender Persons Act extend only up to two years of imprisonment with fine<sup>18</sup>, which may seem inadequate for more heinous violations like sexual abuse, rape, criminal assault or sexual harassment.

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<sup>12</sup> The Transgender Persons (Protection of Rights) 2019, *Supra note* at 9.

<sup>13</sup> National Legal Services Authority v. Union of India, *Supra note* at 10.

<sup>14</sup> The Transgender Persons (Protection of Rights) 2019, §2(i), No. 40, Acts Of Parliament, 2019 (India).

<sup>15</sup> *Id.* at §2(k).

<sup>16</sup> National Legal Services Authority v. Union of India, *Supra note* at 10.

<sup>17</sup> §5, *Supra note* at 12.

<sup>18</sup> *Id.* at §18.

## Is The Act Ethical?

Now that we have seen the detailed account of these two rights, the question is if its ethical for the government to form the Act so different from the supreme court's judgement or the Bill, both of which were made after in-depth recommendations from the committee which is more informed about the persons in question i.e. transgender.

The judgements of the Supreme Court of India are to be followed through as they are prescribed codes of conduct a citizen should follow. While these judgements are not strictly followed like fundamental duties, the judiciary of India has been given enough power to treat its judgements as the ideal advice for the citizens. Now, this code of conduct since imposed by an external force rather than the internal consciousness of the citizen therefore can be rightly called ethics. This code of conduct which should have ensured the right and equal representation of the third gender in the country forms the part of ethics.

From the above analysis of the 2019 Act, it can be said that the act is in violation of the judgement given by the Supreme Court. Hence this law is in violation of ethics deemed fit for the country.

It has been from time to time in history, that a law formed against ethics has always faced criticism, the same happened with this particular Act. Had the law been indifferent to ethics, it won't have faced rebellion but here the law goes against ethics. The nationwide protests against the act by the activists are nothing but the affirmation that such an unethical law can bring none of the achievements it promises.

## **Conclusion And Suggestions**

After intensive research on the said act and the relation between ethics and jurisprudence, the conclusion, I have reached is, that The Transgender Persons Act 2019 is indeed unethical.

This study was done by seeing various definitions of the terms involved in this question. The meaning of ethics was traced, the study of jurisprudence was traced and a connection between these two was established. A detailed analysis of the Act and its background laid down the facts of the discrepancy. After these facts, only the conclusion has been reached which shows that the Act is against ethics and the resistance faced by this act is rightly placed. The only possible suggestion for this act would be for the Supreme Court to assign a committee composed of activists and representatives of the community of transgender to review the Act and suggest possible amendments. Some of the possible amendments can be to comply properly with the 2014 judgement, along with this, provisions to make the Act transgender-inclusive should be made too. The Act should be passed through the hands of the community in question which is transgender people, only then it can claim its proclamation of it being for the welfare of the transgender people, can be accepted.

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