I. INTRODUCTION

The Transgender Persons (Protection of Rights) Act, 2019, was aimed at ending the age-old discrimination meted out to transgender community, with separate provisions for addressing each of the following forms of inequality.

They face discrimination when it comes to various aspects, one of them being education, as schools are usually reluctant to admit them. As a snowball effect, neither are they able to pursue a career of their choice, nor do they have the means to sustain themselves. Even if they go to school, they are subjected to harassment by their peers and teachers.

Even when it comes to the health sector, there is a deficiency of trained medical practitioners who are sensitive towards this community and trained on health issues concerning sexual minorities. Moreover, the transgender community is often denied medical treatment and verbally abused.\(^1\) They face barriers in accessing HIV testing, antiretroviral treatment and sexual health services. They are deliberately registered as males, referred to by male pronouns and admitted into male wards. Denial of medical services altogether is also well documented.

The unfortunate reality is that most transgender persons do not have access to any life or health insurance schemes, on account of lack of knowledge, or inability to get themselves enrolled or pay premiums. Thus, they have no option but to rely on government hospitals where there is pervasive bigotry.\(^2\)

It is not uncommon to see families scolding, assaulting or ostracizing their effeminate sons; who are unable to acquire a share in the familial property. Usually devoid of police protection, they are easy targets for money extortion and violence. Barring the Department of Social

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\(^1\) Sribas Goswami et al., *Transgender in India: Identified by law, discriminated by society*, Research Gate (2018), [https://www.researchgate.net/publication/325742658_Transgender_in_India_Identified_by_Law_Discriminated_by_the_Society](https://www.researchgate.net/publication/325742658_Transgender_in_India_Identified_by_Law_Discriminated_by_the_Society)

Welfare in the state of Tamil Nadu has recently established ‘Transgender Women Welfare Board’ which addresses the social welfare issues of Aravanis/Hijras, no other state has replicated this initiative yet.\(^3\)

However, the 2019 Act only showcases to address these issues. It has been met with suspicion, apprehension, and distaste from the Transgender community across the country. It has attracted heavy criticism for leaving out important welfare provisions provided in the 2014 Transgender Bill and the NALSA judgement. This Act falls short of treating transgender persons with basic human dignity and fulfilling its goal of inclusion.

II. ANALYSIS OF THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

Before the “Transgender Persons (Protection of Rights) Bill, 2019” was crystallised into an Act, different legislations were proposed to fill the lacunae regarding Transgender rights. The “Rights of Transgender Persons Bill, 2014” which was passed in the Rajya Sabha in 2015, and the “Transgender Persons (Protection of Rights) Bill, 2016” which was passed in the Lok Sabha in 2018. The conversation about Transgender rights began concretely for the first time in the Parliament with the introduction of the 2014 Bill. This Bill was more comprehensive and catered to almost all the needs of the Transgender community. However, the Ministry of Social Justice and Empowerment uploaded a Bill on Protection of Transgender Rights in 2015 with extremely diluted provisions which continue to reflect in the Transgender Persons (Protection of Rights) Act, 2019.

A. RESERVATIONS

The 2014 Bill provided for reservation for the Transgender community in education as well as employment- “All Government institutions of primary, secondary and higher education and all primary, secondary and higher education institutions receiving aid from the Government shall reserve 2% of the total seats in each class or course for transgender persons. Every appropriate Government shall reserve, in every establishment under them, not less than two per cent of the vacancies meant to be filled by direct recruitment, for transgender persons.”\(^4\) Further, in the NALSA\(^5\) judgement, the Supreme Court directed the Centre to treat the transgender community as socially and educationally backward classes and provide them with benefits that they are

\(^3\) Id.
\(^5\) (2014) 5 SCC 438.
eligible to receive. It was held that they are also entitled to reservation in matters of appointment as was intended by Article 16(4) of the Constitution. Additionally, the National Commission of Backward classes has also recommended the State to include the transgender community within the purview of OBCs. The 2019 Act, however, merely mentions inclusive education without any provision for reservation. Reservation for the transgender community as directed in the NALSA judgement was supposed to be perceived as a progressive step towards emancipation of the systemically oppressed community. Instead, it sparked controversy regarding the legal viability and constitutional validity of inclusion of the transgender community under the OBC category. A simple argument against this notion would be that the Court in the NALSA judgement held that discrimination on the grounds of sex includes discrimination on the grounds of gender identity. Thus, sex-based protections under Article 15 and 16 of the Constitution should be extended to transgender and intersex persons as special reservations and horizontal reservations. It is important to note that transgender persons should be given horizontal reservation and not vertical reservation, in order to address the enhanced discrimination faced by Dalit transgender persons.

B. DETERMINATION OF IDENTITY OF TRANSGENDER PERSONS

Chapter III of the 2019 Act is self-contradictory, as clause 4 states that all transgender persons shall have a right to “self-perceived gender identity”, whereas the immediate next clause appears to mandate a two-step process for legal gender recognition. This is in violation of Article 21 of the Constitution which guarantees Right to Life and Personal Liberty and Right to Privacy. The Supreme Court, in the NALSA judgement held that “self-determination of gender is an integral part of personal autonomy and falls within the realm of personal liberty guaranteed under Article 21”. The Act requires a transgender person to apply for a transgender certificate, after which a certificate holder can apply for a “change in gender certificate” which signals the authorities to change their gender to either male or female. The second step seems to require a medical procedure in order to make an application to change a transgender person’s gender to either male or female. Through this provision, the State is making medical

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6 Id., para 60.
7 National Commission for Backward Classes, NCBC Advice No.1/AllIndia/2014 dated May 15, 2014.
9 The Transgender Persons (Protection Of Rights) Act, 2019; No. 40 Of 2019, Gazette Of India (5th December, 2019).
procedures a prerequisite which further negates the positive steps sought to be taken, as a result of the NALSA judgement. The Court, cited the Yogyakarta principles, which state that, “A person’s self-defined sexual orientation and gender identity is integral to their personality and no one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity. Compelling a person to submit proof of medical procedures violates ones right to dignity and right to be free from unwanted medical procedures”.11

By extending its reach to a decision that is inherently personal and intrinsic, the State is infringing their Right to Privacy as well as right to decisional autonomy. It has been established by Courts that this right does not just imply freedom from State intervention, but it also protects the “autonomy of private will and a person’s freedom of choice and action”.12 The Act also falls short of clearly stating what the procedure of issuance of the certificate would be. Such ambiguity will only expose transgender persons to exploitation and arbitrary decisions of the authorities. The Act does not mention if the authorities need to provide reasons in case an application is rejected. Moreover, it does not even provide remedies that transgender persons can resort to, in such a scenario. This process of gender recognition not only violates Court rulings and provisions of the Indian Constitution, but also international standards for legal gender recognition. In 2015, the office of the UN High Commissioner of Human Rights recommended that States should begin issuing legal identity documents, upon request, that reflect preferred gender, eliminating abusive preconditions, such as sterilization, forced treatment and divorce.13

Thus, having transgender persons petition the State for recognition of gender creates an environment of suspicion around them and in turn strengthens the very prejudice this Act was supposed to eliminate.

C. LAWS RELATING TO RAPE

Next, clause 18 of the Transgender Act states that, “whoever, 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 sexual and emotional abuse shall be punishable.” It provides for a

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12 Naz Foundation v Govt. of NCT of Delhi (2009) SCC Online Del 1762.
punishment with imprisonment for a term which shall not be less than six months but which may extend to two years with fine.\textsuperscript{14} According to Section 376 of the Indian Penal Code, whoever commits rape against a cisgender woman shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years.\textsuperscript{15} This violates the Right to Equality guaranteed by Article 14 of the Constitution because rape of a cisgender woman is recognized and punished with a term longer than the one provided for ‘sexual abuse’ under the Transgender Act. ‘Reasonable classification’ cannot be used as a justification, as this provision \textit{prima facie} discriminates amongst citizens based on their gender.\textsuperscript{16}

Article 15 prohibits discrimination on grounds of sex, among other grounds\textsuperscript{17}. The expression ‘sex’ used in Articles 15 is not merely restricted to the biological sex of an individual, but is intended to include people who do not conform to stereotypical generalizations of binary genders.\textsuperscript{18} In \textit{Naz Foundation v Govt. of NCT of Delhi},\textsuperscript{19} the Delhi High Court recommended an expansive interpretation of the term ‘sex’ so as to include prohibition of discrimination on the basis of ‘sexual orientation’. The same was observed in Justice J.S. Verma Committee on Amendments to Criminal Law.

Article 21 aims to protect one’s life, personal liberty and dignity.\textsuperscript{20} It protects one’s sexual orientation. The vulnerability of transgender persons to sexual assaults was acknowledged in the \textit{NALSA} case. The Court held that a transgender must not be denied their basic human rights. Yet, to continue to exclude them from the definition of rape under the IPC would constitute an unfathomable abdication of the State’s constitutional duty to ensure observance of human rights.\textsuperscript{21}

Section 375(1) of the IPC states that, “A man is said to be guilty of rape if he commits sexual intercourse with a woman either against her will or without her consent.”\textsuperscript{22}

\begin{itemize}
\item\textsuperscript{14} The Transgender Persons (Protection of Rights) Act, 2019; No. 40 of 2019, Gazette Of India (5th December, 2019).
\item\textsuperscript{16} DD Basu, \textit{Introduction to the Constitution of India} (22nd Edition).
\item\textsuperscript{17} \textit{Id}.
\item\textsuperscript{18} \textit{NALSA v UOI} (2014) 5 SCC 438.
\item\textsuperscript{19} 2009 SCC Online Del 1762: (2009) 111 DRJ 1.
\item\textsuperscript{20} \textit{Maneka Gandhi v Union of India} (1978) 1 SCC 248.
\item\textsuperscript{21} (2014) 5 SCC 438.
\end{itemize}
The said definition does not extend the purview of rape beyond the male-on-female paradigm. Although this may stem from the law’s refusal to disbelieve a female victim, it is under-inclusive. It would be more appropriate to adopt a human-rights-based approach while defining the offence. In the Jhaku case, Singh J. opined that ‘rape’ should be redefined in gender-neutral language. He acknowledged the fact Section 375 is the sole recourse under Indian criminal law for filing a complaint for the heinous act of sexual assault.

Further, the 172nd Report of the Law Commission of India suggested that the offence of rape be replaced by a completely gender-neutral offence of “sexual assault”. An adamant fixation to binary genders coerces members of the transgender community to suppress their true identities, and identify themselves as either male or female. Consequently, numerous victims and perpetrators are absent from theories of rape. This presents a class of victims who have to choose between gender identity and the pursuit of justice.

Gender neutral rape laws are not meant to desexualize rape or abolish the construct of gender from rape law jurisprudence, but only restrict its influence in recognizing the victims and perpetrators of rape.

If a law discriminates against a group of citizens by not granting them full and equal participation as citizens; rights and liberties guaranteed by the Constitution, it would be subject to challenge. The Court would ultimately adjudicate upon the validity of such a law.

III. CONCLUSION

Although India is known to be a melting pot of cultures and customs, the overall populace appears to have restricted knowledge regarding the third gender, leading to an attitude of intolerance towards them. For centuries, they have been ridiculed and tormented without any

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28 Id.
recourse which pushed them to the fringes of the society and they are often left with no livelihood options other than begging and sex work.\textsuperscript{30} It is high time that affirmative action be taken to safeguard their interests. In the words of Justice Chandrachud, “In a democratic Constitution, the rights of discrete and insular minorities are as sacred as those conferred on other citizens to protect their freedoms and liberties”.\textsuperscript{31}

Sexual rights are entitlements related to sexuality and ensue from the rights to equality, privacy, autonomy and dignity of all people. As per the World Health Organisation, for people to attain the highest standard of health, they must also have the right to exercise choice in their sexual lives. However, for the transgender community, discrimination, stigma, and violence prevent them from attaining basic sexual health.\textsuperscript{32} It is important that the State embody principles of equality and non-discrimination while passing a legislation for the welfare of an ostracized community without which such a legislation will only reinforce the discrimination it aims to eradicate.

The NALSA judgement and Transgender Persons (Protection of Rights) Act, 2019 are starkly juxtaposed. The latter was passed under the pretext of protecting the community’s rights, but the ground reality is proof that the objective is far from being achieved. The last thing transgender persons need is a legislation which curtails their already restricted rights.

It is suggested that the Act be amended and interpreted in a manner that terminates any form of discrimination against the Transgender community and enforces the fundamental rights available to every individual regardless of their gender identity or sexual orientation.


\textsuperscript{31} (2017) 10 SCC 1

\textsuperscript{32} Dr. Carmel Shalev, \textit{Rights to Sexual and Reproductive Health}, The ICPD and the Convention on the Elimination of All Forms of Discrimination Against Women (March 18, 1998), \url{https://www.un.org/womenwatch/daw/csw/shalev.htm}