



THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, : Right to protection or discrimination?

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Abstract: India was historically a Country with diverse cultural acceptance. Through generations of Regression rule and Colonisation, individual identity and rights were diminished enough to be non-existing. Some communities had to fight the freedom struggle even after being conferred with communal rights. Rather recently, judicial proclamations were made for reparations to the LGBTQA+ Community in India in an attempt to undo the centuries of communal hatred and oppression and subsequently, a legislative backing to ensure this protection against exploitation and to preach acceptance of the right to self-identification of gender as an integral virtue of dignified living. The guiding law that was brought into force suffered from lack of expertise and ambiguity of procedure. Some parts of the legislation directly refuted the object of the ratio stated in the NALSA judgement and even after expert reports and the response of the target community reflecting criticism of flawed approach and unconstitutional vice, the Legislation was made enforceable. This article is a humble attempt at framing a structured outline of discrepancies in the Law to play a marginal role in a long drawn struggle. As Justice Chandrachud said, “It is difficult to right a wrong by history. But we can set the course for the future”, deeming acceptance of identity to be protection against discrimination is only a half hearted attempt at inclusiveness.

I. INTRODUCTION

India, a welfare state except for the marginalized, was freed from the bondage of community hatred and gender-bias with the pathbreaking NALSA Judgement¹ which reflected social acceptance of gender identification across the scope of binary and showed a future with dignity of living, accessibility to justice and pride of self-identification. The Judgement showed recognized several International principles imbibed in the UDHR or even the ICCPR² and allowed the disadvantaged minorities to hope for social embrace but judicial activism can only go a certain distance without the backbone of a supporting legislation. The Transgender Community felt rather

¹ National Legal Services Authority V. Union of India (2014) 5 SCC 438 (India).

² UNDP Discussion Paper on Transgender Health and Human Rights, December 2013

attacked than protected when the Government brought in the Transgender Persons (Protection of Rights) Bill in 2019. The vehement objections of the community were paid no heed and reduced to being voiceless. The Bill has now received Presidential assent and become enforceable as Law as on January 10th, 2019³ without reassessment or amendment even after strong arguments in the Parliamentary debates. This article analyses the Act to ascertain the legal acumen behind the criticism and communal atrocity felt by the LGBTQA+ community in India.

II. EVOKING CONSTITUTIONAL PRINCIPLES

The Constitutional Assembly made the mother law to protect right and not ensure mere approval of their existence. The legislative intent of inclusiveness has always been reflected through our Preamble which clearly ensures justice with liberty. The freedom struggle for the identity activists has been much longer than ours. Through decades of liberative protests and claims for rights, there have been some judicial pronouncement that swayed the society to regain conscience of humane and dignified living. The case of Francis Coralie⁴ was amongst the early gems that roared acceptance of one's expression in diverse identity. Quite recently, activism reached the outcome of recognizing gender identity as an intrinsic part of dignity⁵ and personal anatomy was protected under the ambit of Article 21⁶. Diverse identity has been protected under the India Constitution long before its interpretation under Article 15 and 16 and the freedom to express it is an integral virtue of Article 19. It is unfortunate, that a virtue glaring at the face of the basic structure upon a literal reading, had to be fought for by an entire community only for the undemocratic vice of a biased bureaucracy.

The rights of the Transgender community falling under Part IV of the Constitution is thus also part of the Basic structure and any Law passed has to undergo the test of Constitutionality under Article 13. The novel legislation has been enacted with the object of protection of the rights of the people who identify as Transgenders as defined under Section 2(k) of the Act which is clearly independent of undergoing any Sex Reassignment surgery, or other therapy⁷. Upon understanding of the Act and the approach of implementation, the Authors find instances of differentiation without an intelligible differentia to create a reasonable nexus to the object thus violative of Article 14 and 15⁸. Moreover, being subject to evaluation for approval from the Government as a ground for protection hinders their freedom of expression as there is no protection from societal disgrace, it infringes their right to privacy and diminishes decisional autonomy⁹ while subjecting oneself through the approval procedure. The Act seeks to enforce manifest injustice under the color of protection and such a colorable legislation is liable to be severed to the extent of inconsistency.¹⁰

More recently, amidst the chaos of a pandemic and the vigorous restrictions needful during the Lockdown, the Transgender community has been hit much worse than others after being completely stripped off from their means of livelihood without the aid of emergency provisions for various intricate disparities and also subject to

³Ministry of Social Justice and Empowerment, F.NO.P. 13011/7(4)/2019-DP-III, Jan 10th, 2020.

⁴Francis Coralie V. Union Territory of Delhi, 1981 AIR 746.

⁵Navtej Singh Johar V. Union of India (2018) 10 SCC 1.

⁶INDIA CONST. art 21,15,16,19.

⁷The Transgender Persons(Protection of Rights) Act,2019, No.40, Acts of the Parliament, 2020 (India).

⁸INDIA CONST. art.14,15

⁹Dhruva Gandhi and Unnati Gandhi, A Constitutional Challenge to the Transgender Persons Act, International Journal of Constitutional law, Dec.27,2019.

¹⁰R.M.D.C V. Union of India, AIR 1962.

strengthened class segregation. Under such circumstances, the Government had asked for replies against the newly framed rules for enforcement of the Act which give arbitrary powers to the District Magistrate to judge inherent identity which is fundamental in preserving dignity. The inconsiderate nature of this decision is discriminatory and reflects malice.

Through further discussions, the Article seeks to highlight the unconstitutional vice and reflect the manifest arbitrariness and discriminative nature of the Act.

III. SHUN ON SELF-IDENTIFICATION

Section 4(2) of the Act recognizes the right to self-perceived identity but it is subject to acceptance under the Act which under the subsequent Section 5 that mandates submission of documented proof of transgender identity contradictory to the ratio of the guiding judgement that expanded the scope of 'sex', beyond the physical characteristics congruent to the person at birth and developed inclusiveness towards gender identity and choice. The Yogyakarta Principles in support of the same denote that a person's identity is dependent on individual experience and the resulting choice of expression.¹¹

The term Transgender is not restricted to the physically trans-sexual but is an inclusive umbrella which applies to varied cultures and expression of personality like the Hijras, Kothis, Jogappas, Aravanis, Shiv-Shaktis and even the emasculated male member of the community.¹² The authentication of identity under Chapter III of the Act read with Subsequent Rules transgresses the entire motive of dignifies virtue and right to self-determination without mandatory medical transition. Thus, this chapter is nothing short of laying an unambiguous procedure which is manifestly unjust.

IV. AN ATTACK ON PRIVACY

After year of discourse and several deliberations, the 158-yr old colonial law which hampered the rights of the LGBTQ community had been abolished in September 2018. The questionable section of the IPC not only criminalized a consenting action between two adults, but also pried into their private lives. After the abolishment of section 377 from the Penal Code, there was some positivity on the end that there will barely be any more discrimination towards a section of people who were being left out and denied of their human rights due to their chosen orientation and what they felt like being in general.

However, on November 2019, a bill had been produced in the Parliament which indicated towards upholding and protecting the rights of the transgender community in India. The bill ideally sought to protect the transgender community from sexual abuse or harassment of any form, but there has been a massive outrage against the bill before and after enforcement as an Act. The activists' who have found a flaw within the Act and its rules against discrimination, have charged the law to be completely inadequate when it comes to protecting an entire community from decades of harassment. The discrimination clause has been referred to as 'ambiguous' by the activists' who claim that there is no solid ground laid on the kinds of discrimination that are faced by the transgender community

¹¹ Yogyakarta Principles (2007), Vol. A-1: P-1

¹² *Breaking the Binary: Understanding concerns and realities of queer persons assigned gender female at birth across a spectrum of lived gender identities – A Study by LABIA* Vol A-1: pp. 248 – 299 Apr 2016

in the first place. That activists' have demanded for a proper and comprehensive guide that state the anti-atrocities and anti-discriminatory regulations.

The penalty which has been mentioned for the violators has also been understood as lower than that which is provided for harassment or violations of other sort against women, and does not have physical classifications like the one mentioned for in the bill that protects the rights of the transgender community.

An extreme attack on the transgender community arises, wherein, the right of 'self-determination' is being hampered and goes in contradiction to what the court itself said in 2014 about the transgender community to have their own identification, under clause 6(3) of the Bill. There is no appropriate number or census on the entire transgender population, even though an approximate of half a billion has been said to exist.¹³

This bill has explicitly provided that a 'sex-assignment' or surgery has be shown as proof, otherwise, the identification certificate will not be provided to the person. And this same proof of gender shall be mandated by the court or a district magistrate with the issuance of a certificate, without which there can be no identity that will be given to the person. This is an extreme abuse of power, and a complete infringement of privacy and the person will not be given any right to identify themselves as a gender they want to associate themselves without surgery, which ultimately leads to coercion and does not allow the person to be what they are trying to be, leading to defeating the entire purpose of the bill which aims to protect the trans community.

The purpose wherein a person must strive to prove their identity by manual procedures of a court, defeats the entire purpose of creating a law which strives to uplift and protect the identity of individuals who have been trying to place their identity as normal in this society.

V. UNREASONABLE CLASSIFICATION

In *Afzal v. State of Haryana*¹⁴, the Court had held that '*A responsible advocate, if he speaks with the same voice two diametrically opposite statements, and is accepted to be correct, the conduct not only is unbecoming of responsible advocate but also needs deprecation in stronger terms*'. When this entire statement is reflected on, the whole ambiguity and contradictory statements of the bill comes into light. A Act provides that the people who receive their identification certificate, must move back into their original families, or they must go to a rehabilitation center. In this manner, a distinction is being made wherein people who are either born transgender or become the same, as being given an unreasonable classification of having a mental disbalance due to which they must be under the protection of supervisory places.

Most transgender people have had a history of running away from home due to extreme torture and harassment, and the others are often simply kicked out of their houses due to the sexual orientation that they decide to related themselves with. A coercion to move back into the same place without any stable reason also leads to a classification that the people of the trans community are or have suffered from any situation that they need supervision, as well as the duress to move into a rehabilitation center does. The Bill itself contradicts its own

¹³ NALSA written Submissions, available
<https://docs.google.com/file/0B0FtTnxqjV47Mk9jeFhMS2VTaXQ2MEhLeTU0aXZabkIwbENJ/edit>

¹⁴ (1995) Supp. 2 SCC 388, para 8.

statement here again wherein in clause 12 ‘abusive environments’ are being condemned, yet, ‘homes’ have been provided as ‘establishments’ under clause 2(b), which leaves unaddressed, the atrocities that the community can also face inside their homes.¹⁵

The brutality and vehemence that the community has gone through, is only rising with the presence of the law, which classifies physical distinctions which show whether or not a member of the trans community has been harassed. On January 20th, 2015, police had detained an young transgender person who identified herself as a woman, for questioning surrounding the murder of another transwoman named Pravallika. However, the part of extreme abuse arose in the case of this detained transwoman, when the police refused to identify and note her identity down as a woman, and she was forced to strip naked among all the police officers, without the presence of a female officer at all.¹⁶

Unreasonable classification comes in wherein the Transgender (Protection of Rights) Act, 2019, goes in contrary to what is laid down within Article 14, 15 and 16 of the Constitution of India. A notice had been issued on 20th January, 2020 to a triple-judge bench with the Hon’ble CJI and others. A petition had also been submitted by Ms.S. Baruah, a transwoman herself, which states that the method of self-identification provided in the bill goes against the dignified right of privacy with cover medical records.¹⁷ A classification is also being noticed wherein an imprisonment of as less as six months is being provided to the persons who will be liable to ‘endanger the life’ of any trans-person. This is where the classification comes in, wherein imprisonments and fines surrounding crimes against women, or murder or even theft or abduction has been revised repeatedly and stringent rules have been provided to for the violation of rules against the same.¹⁸ The measures that will be taken against perpetrators according to this bill, only to a maximum period of 2 years, which is in stark contrast to that of anything mentioned under the Indian Penal Code, 1860.

With the presence of little to absolutely inadequate provisions against any heinous crimes that are or will be committed against a community that has only been belittled since time unknown, proves that this community is being classified as a less important community as a whole and their rights are not equally significant to that of the two “primary genders” which have been recognized as ‘normal’ in the community so far.

Under clause 2(i) of the Act, has defined who can refer to themselves as ‘persons with intersex variations’, and then included transgender people under the same definition under clause (k). This, yet again defeats the purpose of the whole Act, as it confuses people who wish to associate themselves with a separate sexual orientation and people who wish to associate themselves with a whole different identity or gender in general.

¹⁵ THE LEAFLET; <https://theleaflet.in/reclaiming-rights-transgender-persons-bill-and-beyond/>

¹⁶ THE HUMAN RIGHTS WATCH; <https://www.hrw.org/news/2015/02/05/india-enforce-ruling-protecting-transgender-people>.

¹⁷ Debraj Deb, Supreme Courts Notice to centre, Newsletter Jan,27,2020 available at <http://indiaexpress.com>.

¹⁸Tripti Tandon, *Reclaiming Transgender Bills and Beyond*, (jun. 12,2020, 12.02 p.m) THE LEAFLET; <https://theleaflet.in/sc-issues-notice-to-centre-on-a-plea-against-transgender-protection-of-rights-act-2019/>

VI. A STRUGGLE IN VAIN

The transgender community has been struggling since time immemorial, and the only fault of theirs being that they are not normal like that of the other genders. The attempt to protect the identity of belonging to the transgender community is not just confusing but completely ambiguous with its provisions which keep going against each other. The given Bill is completely silent on every issue such as marriage, civil partnership, or even rights to succession, which defeats the purpose of an act which is supposed to provide the things to a whole community which they have been deprived of for their entire lifespan.

Every other community which has been considered as a minority and has been seen to struggle since centuries, have been given a special reservation spot which provides them a seat in employment or educational institution. However, no such mentions have been made in the Bill which seeks to protect the rights of individuals who have been mistreated by society constantly and denied any opportunity to work in decent environments or even gain education which they are perfectly suitable for.

The struggle for years, and currently on behalf and for the community goes completely in vain as the Parliament's response towards scrutinizing the Bill, which became an Act in January of 2020 remains positive, however no comments or apology surrounding the complete ignorance towards the most important issues have also given the constant protests an inefficacious light, completely dimming down the efforts of the community as a whole.

In a particular case, the Chhattisgarh High Court had granted bail to the perpetrator on various grounds including the medical report which stated that the complainant was transgender and did not have a 'completely developed' vagina after SRS.¹⁹ This just happens to be one of the instances wherein the transgender community is constantly denied of their basic human rights, and furthermore an Act meant to protect them, goes ahead to establish rules which do not help in forming any rights which will shield the community from unending ferocity towards them.

VII. CONCLUSION

In the case of *Prohibitions del Roy*, in 1608, it was asserted in England that '*the king cannot adjudge any case, either criminal, or treason, felony, and so on, or betwixt party and party... but these matters ought to be determined and adjudged in some court of justice according to the law and custom of England*'.²⁰

This completely points towards the fact that the court should be the ultimate determining authority when it comes to the credibility of the law. When the legislature takes the role of law making authority, a lot of damages that have been done towards a whole community get ignored, hence the law made itself becomes questionable. The authority to decide anything for the transgender community should be the judicial system, that must ensure that the rights which have been curbed in the name of protection, must be provided, at least as an apology for all the ferocity that has been unleashed upon the LGBTQ+ community for a prolonged period of time.

¹⁹ Tripti Tandon, *Reclaiming Transgender Bills and Beyond*, (jun. 12,2020, 03.40 p.m) The Leaflet; <https://theleaflet.in/reclaiming-rights-transgender-persons-bill-and-beyond/>

²⁰John Hostettler, *Sir Edward Coke*, First Indian Reprint (Delhi: Universal Law Publishing Co. Pvt. Ltd), 2006; P.69