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Debarati Mukherjee

2nd year, BSc. LLB, School of Law

KIIT University

THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019¹: PROGRESSION OR SUPPRESSION? A CRITICAL REMARK

ABSTRACT

The transgender community is an integral of our society. Earlier they lacked recognition in the eyes of law but at present the situation has changed and they too have been recognised apart from binaries as a third gender. The article written is to analyse The Transgender Persons (Protection of Rights) Act, 2019, as to how far it has been successful and to discuss whether it will be of help to the community in enforcement of their rights and to provide them due justice, which has been deprived for many years. It is a critical appraisal of the act and suggests measures which if taken into consideration will help the community. The act provides protection of interests of transgender people. The bill, finally was passed in the Lok Sabha, on July 2019 by the Minister of Social Justice and Empowerment, Thawar Chand Gehlot. This act is passed with the objective to empower them and the article is an attempt to recognise the reasonableness of the act. The main focus of the article is to measure the implications of the provisions and how far they are at par with the needs of the transgender people. The act, though has not addressed few issues that are relevant to their interest and can cause future problems if not looked into properly, and hence this paper is written to figure out the possible loopholes in it along with suggestions.

Keywords-Transgender, Binaries, Lok Sabha

INTRODUCTION

The word “transgender” is an umbrella term for those people whose gender identity differ from the sex assigned to them at birth. The word “transgender” and its modern meaning came into existence only in the late 20th century, but people who come under the category of this definition already existed in every culture in the history.²The existence of the transgender community is from time immemorial. In ancient India in Ramayana and Mahabharata we find that the community played a very prominent role. During the British rule their existence was criminalised under a particular legislation. Section 377 of the IPC was mainly used to target the transgender community as it talks of carnal intercourse against the order of nature and consensual sexual intercourse was penalised if it was with the person of the same sex, this

¹ THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019, No. 40 of 2019, Acts of Parliament, 2019 (India)

² Understanding the Transgender Community, HUMAN RIGHTS CAMPAIGN, (Apr. 20, 2020, 3:31 PM), <https://www.hrc.org/resources/understanding-the-transgender-community>

was considered to be against the order of nature. Consequentially the LGBTQ community were given no legal recognition in the society and were considered to be criminals without committing any offence.

The landmark judgment of *National Legal Services Authority v Union of India*³ in 2014 declared the community to be treated as third gender. It declared to ameliorate their conditions and the right to decide their gender identity. In the year 2016, the government passed its own bill in the Lok Sabha for the protection of the rights of the transgender community, and it was criticised for several reasons and it was sent back for further scrutiny. Finally in 2018 the revised version of the bill from the government came up and was passed with 27 amendments. The Act is divided into 8 chapters that covers several aspects such as prohibition against discrimination, recognition of identity, welfare measures by the government, obligations of establishments and other persons, education, social security and health, introduction of national council for transgenders, offences and penalties etc. The article is to critically analyse the said Act as to how much it is beneficial for the transgender community and to what extent it will be able to give relief to the said community against the odds they face in the day to day basis.

NLSA judgment

The verdict given by the honourable apex court holds utmost importance and it was hailed by everyone because the rights of the transgender persons were legally recognised. The directions to the central and state governments from the judgment⁴ are-

- (1) To treat them as third gender apart from binaries and to safeguard their rights.
- (2) To give the right to self identity and to make provisions for them.
- (3) To treat them as Socially and educationally backward classes and to provide them reservations for education, employments etc.
- (4) To establish HIV Sero-surveillance Centres as the community faces several sexual health problems.
- (5) To address their problems such as fear, shame, gender dysphoria etc.
- (6) To give proper medical care to them and also provide separate washrooms for them along with various other facilities.
- (7) To start social and welfare schemes for them.
- (8) To spread public awareness so that the community can feel they are a part of the society and not treated unequally.
- (9) To take steps to regain their lost glory and place which they enjoyed earlier.

³ National Legal Services Authority v Union of India, AIR 2014 SC 1863 (India)

⁴ Id

It further explained the right to self identity by taking the reference of the principle 3 of Yogyakarta⁵ which states that- “Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination.”

Since, a direction is always legally binding and to give effect to it the act has come into existence but it lacked basic knowledge of gender and failed to consider few essential points which are also in contrary to the above directions, are discussed below.

CHALLENGES

▪ Definition of a “transgender”

To give effect to the NLSA judgment, the government passed the bill for the community where it defined transgender in such a manner which went against the spirit of the verdict and also it included intersex variations. The problem is that not all transgender persons are intersex and vice versa and in doing so, the intersex persons are deprived of their right to declare themselves as cis genders or whatever they wish to. They are included in the category of a transgender.

▪ Definition of “family”

The word family is restricted to only people who are related by birth, marriage or adoption. But it nowhere mentions the transgender community. The topic is physical as well as an emotional issue. It does not give recognition to the traditions of the community as a family system.

▪ Certification

The verdict is in question where it clearly declared that the transgender community has the rights to self-identity and privacy respectively but the act mentions certification procedure by the District Screening Committee which is definitely a breach of privacy and dignity. The act states that the District Magistrate will issue identification certificate upon application which a transgender may make and it will identify the person as a transgender, depriving them of the right to self-identity and dignity, this leads to segregation from the society. But what if a transgender person or any other person suffering from gender dysphoria want them to be certified as a male or female and the further process in case the person is not given the certificate?

⁵ RAMYA JAWAHAR KUDEKALLU, Why transgender community is struggling inspite of the nalsa judgment, DailyO, (Apr. 27, 2020, 3:35 PM), <https://www.dailyo.in/politics/transgender-nalsa-judgment-aadhar-card-gender-rights-self-identification/story/1/15462.html>

It is a complete failure, that in the two tier process, first, without surgery one is identified as transgender and the gender can be changed from transgender to male or female only after medical treatment. Surgery is something that all transperson will not wish to adopt for many reasons. Essentially, self identification should be upon someone's own self declaration rather than upon a third persons discretion.

▪ **Prohibition against discrimination**

It is a positive side of the act that it talks of non discrimination but it doesn't mention penalties if there is ill treatment, bullying of the people of the community rather it also does not define discrimination in a clear sense. So due to this lacuna certain category of acts will be considered as discrimination while others will not. They are vulnerable and have lesser employment options unlike most of us and a large number of them are found begging on the streets to earn their livelihood.

▪ **Rehabilitation centres**

Sending a transgender person to a rehabilitation centre is yet again taking away his rights to move freely or to join the transgender community. On one hand, the law gives them the right to movement and on the other it is taking away the same. The act does not mention specifically as to what kind of rehabilitation centres they are talking about. It is discriminating that a transgender person cannot decide with whom and where he or she will live, goes in contrary to the fundamental rights in our constitution to move freely.

▪ **Offences and penalties**

A list of offences are mentioned and the common punishment for all of them though having diverse gravities including sexual abuse, is a maximum of 2 years while there are severe punishments if the same offence is committed against a woman. That is a transwoman is not equal in status of a woman. Everyone in India is governed by the Penal Code, where definition of man and woman is expressly given but what are the remedies to a transgender? as the term is not covered under the Penal statute and they are not governed by the Act. Sexual violence against a transperson attracts meagre punishment giving them lesser importance. Putting it in simple words, providing separate provision for offences against them is again a discrimination in the name of protecting their rights.

▪ **Reservation policies and others**

The Supreme Court directed to treat the community as Socially and Educationally Backward Classes but its mention is nowhere in the Act. The Bill do not mention rights of marriage, adoption, property, social security, or pension, depriving the transgender community of some of the most fundamental rights.⁶ The community is vulnerable and has been ignored since years and so many rights they are deprived of which are already there in article 14. So how can they make their place in the society? Comprehensive reservation is the key where there

⁶ Sasha R, Trans Bill 2019: Why India's transgender community is opposing a Bill which is supposed to protect their rights, SocialStory, (Apr. 20, 2020, 3:51 PM), <https://yourstory.com/socialstory/2019/11/stoptransbill2019-india-transgender-community-rights>

should be separate categories for their recruitment at workplaces. Otherwise based on pre conceived notions, stereotypes there can be chances that they might not get employments.

RECOMMENDATIONS & CONCLUSION

No doubt that this act is the first step in the history of India to make our country more inclusive and to end varieties of discrimination, restoring dignity of the transgender community and also to empower them. But the act took a different approach than what actually is needed. It failed to address the ground realities and ignored few technical grounds. Instead of the certification process, like Argentina, new birth certificates can be issued with changed gender as the person who applies for it wishes to be and the old birth certificate should be cancelled and minors also should be allowed to modify their documents, but that has to be done following a proper method. This makes it more convenient. A time limit should be framed for the certification process. More clarity should be given upon the surgery process and the liabilities on the medical authorities if it goes wrong. Article 14 mandates equality for everyone. So in regard to many things the community should be treated equal. The transgender community can be empowered by various other legislations such as the Pocso Act, Sexual Harassment of Women at Workplace Act etc. It is necessary to amend Indian Penal Code and other laws, so as to include sexual assault and other offences against a transperson a crime. Special courts or fast track courts for transgender rights protection can be established and the reporting of crimes against them should be made mandatory along with penal provisions for the person who fails to do so like the Pocso Act. The victim compensation scheme shall also be made applicable for them. Non discrimination is a positive aspect but not many transgender people have employment options unlike us. In fact, state level and district level council for them can also be established not only national level council. According to Stonewall Scotland⁷, transgender issues at present also create "a lot of anxiety" amongst the stereotyped minds of employers.⁸ It's also possible that they have been turned away so many number of times by people at workplaces possibly because of discrimination that they feel "discouraged," and report that they are "unable to (find) work."⁹ Sending them to rehabilitation centres should not be mandated but setting up of rehabilitation centres in every state should be. Separate public toilets should be created for the transgender community because very often they face violence with respect to this issue. The act should be looked into again for the tiny points which are not addressed, in a sensitive way. The act has failed to distinguish gender and sex. To bridge the gap first, the members of the transgender community should be consulted and also be included in drafting of transgender laws, screening committee, councils, ministry because only they know what they deal with rather than us. Previously there was nothing with which the community could go forward, but at

⁷ See, <https://www.stonewallscotland.org.uk/power-inclusive-workplaces>

⁸ Mathew Jenkin, Transgender issues in the workplace, The Guardian, (Apr. 20, 2020, 4:30 PM), <https://www.theguardian.com/careers/transgender-issues-in-the-workplace>

⁹ Christopher Carpenter & Gilbert Gonzales, Transgender Americans are more likely to be unemployed and poor, (Apr. 27, 2020, 7:15 PM), <https://theconversation.com/transgender-americans-are-more-likely-to-be-unemployed-and-poor-127585>

present they have a particular legislation and changes can definitely be made. It has brought new hope to them. This will definitely be of some help and suffice the needs of the community.

India's transgender community has a long history as long as that of Indian civilisation. Indian law now recognises transpeoples as third gender but till date they are in a constant struggle for their identity, they are not getting their due acceptance by the society members. The objectives of the study is to investigate the problems faced by the community in this globalised century on the grounds of education, employment, social acceptance, and various other issues. The study is a mere attempt to discuss the act and how far it will give relief to the emotions and feelings of transgender by studying our case subject Kamla Bua who is struggling for past so many years for the rights of transgender and representing this community in Madhya Pradesh as well as other states of India. The proposed study has used as an inventory and experimental tool for collecting facts and views from Kamla Bua and other transgender people of this community. A number of series of personal interview sessions have been organised in between 25 July to 25 Sept 2017 for collection of facts, and during these sessions the case subject has discussed her life experiences and various events of their life which reflects the problems faced by them in their day to day life. The major observations of this study are focused on attempts made by the community in the state of Madhya Pradesh for improving their image so that they get equal respect and acceptance in the society. The study is an effort to highlight the issues related to transgender who are struggling for their identity in this global-techno world.

