

Transgender Persons (Protection of Rights) Act,2019

Author: Tejashree Dhasade

Introduction

Our constitution aims at equality before law but transgenders were not treated even near the statement. Every person deserves to be respected despite being of any religion, caste and gender. Abuse, assault, violence, sexual harassment are few of those crimes which have been committed and been left untreated. Extortion, criticism, mental dissatisfaction was few random effects which were in the life of the Transgender till the time Transgender Bill was passed in 2019. Gay, lesbians and other bisexual people were given place in the Indian society but Transgender were accepted last by the society. The present study deals with the challenges and hurdles faced by the transgender in country like India. Living in 21st century rights are ensured and preserved for every individual, considering transgender in the same.

Past of these people have been really struggling to survive and to make a place for them in society. As far as Indian society is concerned, they follow their culture and traditions with so ease that they did not consider transgender in any religion. Although, things have happened which says that transgender people did not get any allowance in the stake was because of the policies made and the loose stand taken by the government for them. With all the discrimination faced by the society and people transgender choose to be who they want to be and take all the struggles and hurdles given to them by the world. Being what you want to be without thinking about the history is no crime or damage to the country, people need to understand the difference.

Challenges faced by transgender:

Transgender community has been wronged in several countries for centuries. It is sad to see that this gender of society even today struggles for their rights. In this essay, I intend to critique the transgender (Protection of Rights Act), 2019 (The Act).

Activities like rejection in entering public and religious places by transgender was one activity which is supposed to be inhuman in nature and was actually performed by normal humans of

the society. Parents of transgender force them to leave the house at the earliest because of what society will say to them when they will keep a transgender boy or a girl with them. It was a complete myth and threat which they face by society.

In many cases it has been seen that these people are forced to go in profession of prostitution. This was insisted in their community by their own friends and own relatives. Few parents too were found indulging them in the profession of prostitution

Another major challenge faced by these people was poverty. This problem occurred because educationally these people were not trained as they were restricted from all main education institutions to enter and to enrol and even from the public sector before the reservation came in possession. Employment opportunities were nearest to zero for them as they were not included in any community by the people.

For Gender recognition of a person one must respect personal liberty and choice. Article 21 of the Indian Constitution states the same significance as every country is free to choose whatever gender they like and of their choice to live and none can violate it. Transgender have to fight for their recognition inspite of all these stated facts in the country.

Transgender persons (Protection of Rights) Act, 2019

This bill was passed in Parliament, the same day the abrogation of article 370 took place and was thus passed without any debate and its importance was also completely overshadowed.

Transgender have always overlooked and their rights were not and are still not considered important. They still are deemed inferior to the cis-gender population by public and the Indian legal system. It was as late as in 2011, when for the first-time census included transgender as the third sex and reported that there are around five lakh transgender people in the nation.

These people faced the harassment of society in such a way that they have to beg and serve the people in the wrong way to earn for their living. They were considered as Hijras in the society who were meant to entertain to the fullest and demand nothing.

This overruled the concept of the 2018 Bill and amended the new version of it in the 2019 Act which will diminish all the inequalities prevailing already. This act provides equality to all the transgender people in the places where they have been already harassed to the extreme. They are treated equally in the employment sector, education, housing, healthcare and other services etc. This Bill states that these people are treated as equal as 'Transgender' and accepted only after they have the proof of 'Gender change Certificate'.

How does the act come into being?

In the post-independence period, awareness regarding transgender rights has increased tremendously, especially with the wave of the LGBTQ+ movement. In 2014, the Supreme Court of India pronounced the landmark NALSA judgement. While recognizing the social exclusion faced by the transgender community, the apex Court upheld their right to self-identify their gender.

This Court directed the Central and State governments to frame welfare measures for the community, in keeping with articles 14, 15, 19 and 21 of the Constitution of India. Following this landmark judgement, the first Bill on transgender rights was introduced by the Dravida Munnetra Kazhagam's Tiruchi Siva in the Rajya Sabha in 2014. The Bill was drafted in conformity with NALSA but was never taken up for discussion. When the next transgender Bill was introduced by the government in The Lok Sabha, it was opposed on many counts, including the way it defined transgender persons as "neither wholly female nor wholly male". The Bill was sent to a parliamentary standing committee but the report it produced in July 2017 was rejected by the government.

In 2014, the court gave the landmark judgement in the case of National Legal Services Authority vs. Union of India and gave transgender their long due right to self-identify themselves. The government had to follow up on this judgement. Tirauchi Siva, a member of DMK, for the first time, put forth private members bill for transgender.

This bill was soon passed in Rajya Sabha and was moved to Lok Sabha. This bill, which actually had provisions that uplifted and protected the transgender community, was not taken up for discussion in Lok Sabha. Another bill in 2016 was introduced, which faced heavy criticism from the community members and activists.

It was taken under review and a report was prepared by the parliamentary committee and was sent to the government which was rejected. It led to the introduction of a new bill in 2018 with 27 amendments.

This bill even though had several changes, didn't uplift the transgender community and didn't even put them at par with the cis-gender men and women. It is evident on reading The Act that no assistance was taken from the people of transgender community as even the basic definition of transgender was erroneous.

Thus, Bill states that:

- They have right to Self Discern gender identity
- The Bill provides right to minor transgender till the age of 18 to reside with its original family by law.
- This Bill prohibits Begging and considers it as a criminal activity.
- Hijras and Trans Women have received the focus of the Bill to grant all necessary changes needed.
- The child who is born as a transgender can only be separated from his family by the order of the court and only family is strictly entitled to take care of the child.
- Indian Penal Code has decided punishment for begging which is given more than six months with fine because it is strictly prohibited as lot of reservations have been made for transgender people to work in the public sector.
- 2% reservation is provided for transgender in education system and 4% in public sector employment by government in 2014 Bill.
- 2017 Act also provides six months imprisonment which is extended to two years with fine if anyone is found committing crime against a transgender.

Why is the act not reformative?

This act's failure to define transgender is reflective on the Indian legal system. The act which is supposed to be for the welfare of the transgender community, fails to even describe them and mixes it with the definition of intersex person. It is a shocking misrepresentation as there is a lot of difference between a transgender and an inter sex person. Another term which the law makers failed to see from the point of view of transgender is the term 'family'. It is defined under section 2(c) of the act. It is, for the purposes of this act, said to "mean a group of people related by blood or marriage or by adoption made in accordance with law"

This definition of family is banal. It fails to include what truly is important to a transgender person. There is a need for an expansion of the term family mentioned in the act as most transgender people do not live with their blood family as more often than not, they face mental or physical abuse, lack of support, criticism and shame. They prefer living with people from their community, which they have themselves chosen and that family needs to be included in the realm of the term family.

Legitimizes Discrimination

The discrimination that started with Criminal Tribes Act, 1871 still persists. The previous bill (2016) had the provision which criminalized begging and sex work which was removed from the new act. However, a new clause was introduced, section 18 (a) of Chapter VIII makes “compelling or enticing a transgender person into bonded labour” an offence.

It should be noted already an act called Bonded Labour System Abolition Act is in force which criminalizes bonded labour for all genders without any discrimination. It is evident that addition of this provision is futile.

The words have been carefully mended and the sole reason for introduction of this provision in The Act could be to criminalize sex work and begging indirectly. The twisting might help the lawmakers in implementing what they wanted to implement earlier but failed to due to the criticism.

The discrimination extends to sexual offences as well. Section 18 (d) of The Act says “any abuse towards transgender would be punished by 2 years of imprisonment”.

This includes sexual abuse and violence against transgender person which would even endanger their life. The punishment of two years clearly implies that offences against transgender are considered “petty offences”. Over the year sexual abuse against transgender has been rampant but still is ignored and this is an example of it. Under IPC, offence of rape against cis-gender women are punished by 7 years and punishment for the same offence against transgender is very less. This clearly reflects the prejudice of the lawmakers in enacting the act against the transgender person.

Unnecessary Policing

Section 8 of the Act speaks about rescuing and rehabilitation of transgender people. This clause of the act mentions that transgender can take shelter in shelter homes but transgender more often than not face sexual abuse mental abuse in these places and are apprehensive about living in such places and find Solace in living with community. The transgender doesn't need policing

about where to live and where not to live but they need laws that protect them from mental and physical torture in which ever place they reside. There is restriction on the movement of transgender out of the family without a court order. It has been seen that transgender have often left their family and immediate family due to discrimination, mental and physical abuse. If they want to live life around people of their community, this provision mandates them to get a court order in order to leave the family. This has crippled the transgender who do not have access to courts of law. The freedom to move have been taken away from the transgender through this clause and the only alternative of a family is a rehabilitation centre where transgender people experience similar problems.

Indian Cases

1. National Legal Service Authority vs. Union of India and Others 15th April 2014

This case was the legal light for all the transgender people of India. This case gave the judgment regarding the gender identity to transgender people that they will be treated as third gender party in the economy. They will legally have a right in all fundamental rights granted by the constitution of India. This case was a step towards gender equality in the areas of inequality. As a third gender party they were also granted reservation in the jobs and all educational institutions. After this case they were given equal importance in all medical health areas and hospitals where they were not treated properly earlier. Government also declared that these people will no longer be treated economically and socially backward and will be granted all rights. State government was asked to generate schemes regarding their importance in the society and so that people will not consider them as untouchables and backward class. All this was done in the guidance of the Ministry of Social justice and Empowerment expert Committee.

2. S Swapna vs. State of Tamil Nadu 20th August 2014

This case talks about the inequality they face after getting the gender change certificate also. In this case the petitioner was a transgender who was man earlier and have changed to woman. She applied for SSLC and HSC certificate which was denied by the director of the school examination with a new name and Gender enrolled in it. This case then went into Madras High Court for further judgment. The court said that this application would be considered again and the certificate would be provided to her within four weeks of the judgment. This case shows the significance of the Transgender person to register their identity in various institutions too.

Literature Review

The bill passed by the upper house of the parliament and signed by the president was stated unconstitutional by the transgender community. They say that the specific provisions that were passed by the law were unconstitutional for them including the provisions that were signed by the Supreme Court that provided gender identity to every individual. A literature review was passed by the practitioners to examine the experiences of the Gay, Lesbians and transgender in the places of work etc.

To seek the identity in the society few transgenders have to give up their feelings while other people struggle for their feelings and shame and confusion created by the society. Some transgenders are not even satisfied with the sex orientation then they seek for the sex affirming treatments. Hijras is the common name given to the transgender in the society.

On 15th April 2014 judgment regarding the NALSA (national legal service authority) vs. Union of India was given declaring Transgender as third gender community of India. The bill which was passed in 2019 was successful in eradicating few controversies and norms from the society but failed at identifying sex assignment surgery. To specify them as a man or woman they had to undergo such surgery otherwise they will be treated as a transgender.

Conclusion

India being a democratic country consists of a long road which combines a variety of people in it with various problems. Religion, caste is an ongoing matter in which India is already struggling and it cannot manage to afford Gender as another problem. Although this problem is already in motion and acquired a long way in the country. A gender transformation is not entitled to take away those rights as human. Our constitution also states that everyone is free to live in whatever manner they like so no law can take that right away. The evolution of transgender from exclusion to inclusion in the society is pretty commendable and challenging. These people have managed to establish their place in the society but this has always been questionable.

The government needs to realize the faults that they have made in the act and correct it because the Transgender (protection of rights) Act 2019 will take precedence over the judgement in the case of National Legal Services Authority vs. Union of India and will be effective law till the time it is struck down by the Supreme Court. This act basically has put transgender in a worse position than they already were. It has legitimized the stereotype that transgenders are different



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from other genders and has reinforced the already existing stereotype that they don't deserve equal treatment as cis-gender men and women.

The Act lacks an enforcing authority for discrimination and remedial measures for discrimination against the transgender. India, when compared to its south-Asian counterparts, has been the last to acknowledge that there is a need for welfare policies for the transgender. National Legal Services Authority vs. Union of India judgement was also the last one to come when compared to Pakistan's and Sri Lanka's courts. Bangladesh, even before the landmark case in India, had already passed an effective law giving transgender their rights. In India, despite the judgement being in the favour of transgender, their travesty of rights and struggle to self-identify still continues as the administration overlooks the actual needs of this marginalised community. The government needs to stop policing the transgender community and should aim at securing their rights not bending them.

End-Notes:

1. Lori b. Girshick, April 2009 Transgender beyond women and men
2. Transgender people face discrimination in health care services 13 March 2017. Retrieved 23 April 2017
3. Transgender voices beyond women and men April, 2009
4. Transgender people face discrimination in health care services on 13th March 2017
5. Transgender (protection of rights) Act, 2019, 18(a) (2019).
6. Bonded Labour System (Abolition) Act, 1977
7. Anti-Violence Project National coalition of anti-violence programs Retrieved 19th April 2015
8. Transgender (protection of rights) Act, 2019, 18(d) (2019).
9. Indian penal code, 1860 The Hindustan Times 201