

TRANSGENDER RIGHTS

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ABSTRACT

Once again, the world's biggest democracy reverberated with rhetoric speeches and debates on the burning issues of transgender rights. The year 2016 broke the age-old notions of transgender discrimination and mandated equal rights for them, showcasing that unity remains a powerful element of the Indian culture. The 2016 NALSA judgment kick-started a fight for the Transgender Community that would not only decide the future course of their community but also a struggle towards dignity and equality for the LGBTQIA community. The Act was first introduced as a private member's bill in April, 2015 by Tiruchi Siva and after being put through a voice vote was unanimously passed in the Rajya Sabha. The 2019 Bill and the subsequent Act has proved to be a game-changer for transgenders in India. The transgender have been hit hard with the worsening economic inequality in the presence of rapidly changing demography and at such a crucial juncture the tension about the Act is justified. Yet the harder part seems to be done with and the near future will see the Transgender community on equal footing with all. In this paper, I will be dwelling on the rooted history of gender divides and discrimination against the transgender community. Further, the paper will elaborate on the role of the NALSA judgment in uplifting the TGC and the future effects of the Transgender Rights Act, 2019.

KEYWORDS- Transgender rights, NALSA judgment, LGBTQIA community, Transgender Rights Act 2019, private member bill.

TRANSGENDER EQUALITY- A

GAME OF SMOKES AND MIRRORS

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INTRODUCTION

India is known for accepting natives and foreigners alike but today it stands at crossroads on whether to accept transgender people as one of its own or treat them as outcasts. Historical evidence proves that the TGC was respected in ancient times. India has been home to the Koovagam festival (Tamil Nadu), one of the largest festivals for transgender individuals. The festival is of special significance for the transgender people as they consider Koothandavar, the principal deity of the temple as their husband. It is evident in the fact that a brave warrior like Arjuna disguised himself as a eunuch named Brihannala to stay in the Matsya kingdom.¹

If the above is true and our history is full of examples of tolerance and inclusivity of TGC, then how and when did we start viewing them with suspicion and stereotypes? This divide came with the rise of the East India Company. The TGCs were called with derogatory reference terms and suffered ostracization. In its roughshod handling of the transgender community, the British government introduced the Criminal Tribes Act 1871², paving the way for the notion that Transgenders are undeserving of human rights or they are below it.

Inclusion Matters

- ▶ 92% of India's trans people are unable to participate in any economic activity
- ▶ Less than half of them have access to education
- ▶ 62% of those that do, face abuse and discrimination
- ▶ \$32 b: India's loss in GDP due to homophobia and transphobia, says a 2016 World Bank report
- ▶ Less than 100 out and proud trans people employed by India Inc, claims a UNDP consultant

Godrej, IBM, Accenture, Tata Steel, Kochi Rail Metro have progressive policies in place for trans inclusion

Albeit belated, it was the National Legal Services Authority of India that brought the plight of transgender persons to limelight and sought legal and constitutional rights for them. It filed a writ petition stating that non-recognition of the transgender community as a third gender is violative of their fundamental rights guaranteed under Article 14 and Article 21. The National Legal Service Authority vs Union of India³ verdict (hereinafter NALSA Case) resulted in the

¹LGBT Representation in Hindu Mythology JUST CLING, <https://blog.justcling.com/2018/11/06/lgbt-representation-in-hindu-mythology/> (last visited Nov 10, 2020)

²Transgender Rights: Historical, Constitutional, Legal Perspective and Critique B&B Associates LLP, <https://bnblegal.com/article/transgender-rights-historical-constitutional-legal-perspective-and-critique/> (last visited Nov 10, 2020)

³National Legal Services Authority v. Union of India (2014) 5 SCC 438

postulation of the Transgender Persons (Protection of Rights) Bill in 2019. After innumerable deliberations and debates, the bill finally became an Act on 26th November 2019.⁴

This paper analyses the NALSA verdict and argues that the SC has cast a positive obligation on the States to prevent discrimination of transgender persons. To assess the impact of the NALSA judgement, the paper scrutinizes for its mandates in the subsequent Transgender Persons (Protection of Rights) Act, 2019. It concludes by finding that though the NALSA verdict and the 2019 Act have scant statutory support, yet these mandates provide provisions to guarantee the TGC basic human rights.

The paper proceeds by tracing the fundamental right violations encountered by transgender persons in India, as enshrined in Part III of the Constitution. The ensuing segment places the right to self-declaration of one's gender as the sanctum sanctorum of one's identity as postulated in the NALSA verdict. It also traverses on how the Transgender Persons (Protection of Rights) Act, 2019 has nullified the main spirit of self-perceived gender identity. It further elucidates on how the 2019 Act has been in contradiction with the NALSA judgement on several fronts. Eventually, it presents an exposition of the Transgender Persons (Protection of Rights) Act, 2019; and how its contents have been both progressive and regressive at the same time.

NALSA V. UNION OF INDIA: HARBINGER OF A NEW ERA

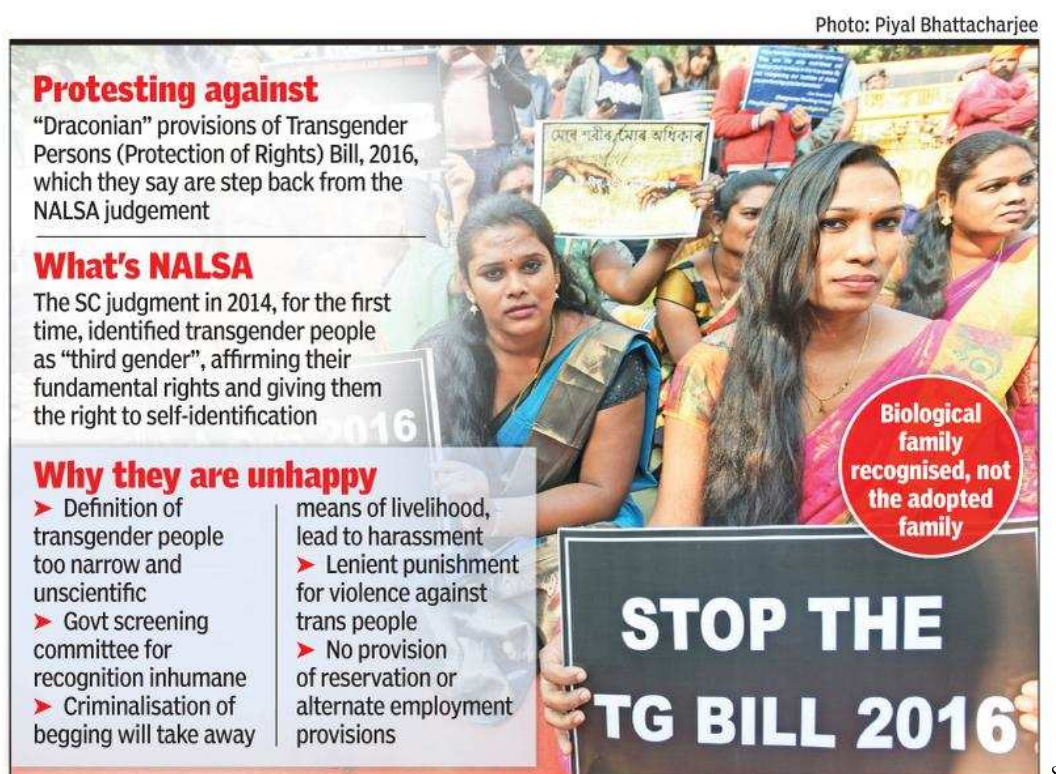
The NALSA judgment signified equality between those who are of binary gender, sex, and those who are outside these narrow boundaries. Before going into a judgement that is interwoven with “sex” and “gender”, let us first extrapolate these terms. Sex is the biologically determined characteristic of men and women whereas gender refers to those characteristics which are socially constructed. Gender, according to Judith Butler, is by no means tied to “material bodily facts, but is solely and completely a social construction, a fiction, one that, therefore, is open to change and contestation.” Butler regards sex as culturally constructed as gender. Moreover, Butler sees sex reassignment surgeries as an example of how people are trying to change their sex to fit the norm, which in her view makes sex socially constructed.”⁵

⁴The Transgender Persons (Protection of Rights) Bill, 2019 PRSIndia, <https://www.prsindia.org/billtrack/transgender-persons-protection-rights-bill-2019> (last visited Nov 13, 2020)

⁵ Felluga, Dino. "Modules on Butler: On Gender and Sex." Introductory Guide to Critical Theory, Routledge (2015), <http://www.purdue.edu/guidetotheory/genderandsex/modules/butlrgendersex.html>.

When a person's genetically assigned sex does not line up with their gender identity then these people refer to themselves as transgender. Therefore, it is important to understand that a person's sex does not shape their gender.

The Apex Court in the NALSA judgment clarified this distinction by placing strong reliance on the "Yogyakarta Principles".⁶ These principles are related to international human rights law issues which pertains to understand violations suffered by people on grounds of gender orientation and sexual identity. These guidelines were broadened to YP plus 10 principles.⁷



The NALSA judgement was delivered by a two-judge bench comprising of Justice K.S. Radhakrishnan and Justice A.K. Sikri. The case accentuated that gender identity is what shapes a person and there can be genders beyond male or female. The bench asserted that any discrimination based on sexual orientation or gender identity of a transgender person, which does not provide them equality before the law and equal protection of the law is violative of Article 14 of the Constitution of India. The bench expressly pointed out that the application of the word "person" in Article 14 implies that it is not only restricted to males and females.

⁶Bharti Mukesh, Socio Legal Study of Sexual Minorities with Reference to Indian Criminal Justice System in Human Rights Perspective (Babasaheb Bhimrao Ambedkar University) (2017), https://sg.inflibnet.ac.in/bitstream/10603/246514/14/14_chapter5.pdf.

⁷ <https://yogyakartaprinciples.org/>

⁸ Picture available at: <https://timesofindia.indiatimes.com/city/delhi/we-are-being-made-criminals-transgenders-say-of-rights-bill/articleshow/62110602.cms>.

Moreover, the expression “person” encompasses TGC’s too and makes them entitled to all the rights that the Indian Constitution guarantees.

Article 19 further states that all citizens have the right to freedom of speech and expression, which also includes the right of transgender persons to self-identification of gender. The judges validated that a person’s gender shapes their identity and any restriction to this would be violative of Article 21 or their fundamental right to dignity. It is also to be noted that Article 15 and 16 include the term “sex (gender identity)” in the non-discrimination clauses. The NALSA judgement succeeded in incorporating the TGC community within the ambit of a third gender category. The court established that not granting the TGC expression of their gender would not only be violative of the aforesaid fundamental rights but explicitly a denial of social justice.



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IMPLICATIONS OF THE NALSA VERDICT: THE BALL STARTS ROLLING FOR THE TRANSGENDERS, WILL IT GATHER MOSS?

The NALSA judgement overturned the rulings in the “Suresh Kumar Koushal and others v. Naz Foundation and others case”¹⁰ by subverting its root argument. In this case, the SC held that criminalization of same-sex intercourse under Section 377 of IPC is not violative of Articles 14 and 15.¹¹ The NALSA judgement dismissed this by emphasizing the fact that

⁹Picture available at: <https://medium.com/@rinaschiller/sex-vs-gender-vs-sexuality-why-ash-needs-to-get-this-right-1e90838bc50c>.

¹⁰Suresh Kumar Koushal and others v. Naz Foundation and others (2013) Civil Appeal No.10972.

¹¹Divya Sharma, CASE COMMENT: SURESH KUMAR KOUSHAL & ANOTHER V. NAZ FOUNDATION & OTHERS (Manupatra) (2014).

Section 377 classified acts, and not persons as criminal wrongs, that are against the order of nature.

The most laudable aspect of the judgement was how the Supreme Court (SC) expanded the term transgender to include 'pre-operative, post-operative and non-operative'¹² transsexuals who strongly identify with persons of the opposite sex rather than confining its judgment to only post-operative transsexuals i.e., on biological identity.

Though the Apex Court could not dictate the government, yet it used its authority to direct legislations for the betterment of the transgender persons. The court also asked for reservations in public offices for the TGC since they were economically and socially backward classes under Article 15(4).

The NALSA judgement also took the record of existing transgender laws prevalent in Pakistan and Nepal which had emerged in cases of Mohd. Aslam Khaki v. Supt. Of Police¹³ and Sunil Babu Pant. V. Nepal¹⁴ respectively.

Despite being a path-breaking endeavour to empower the TGC, the judgement had several shortcomings inter-woven. The court gave certain specific orders like provisions for separate toilets and medical facilities for the TGC, however, steps pertaining to generating public awareness, welfare schemes were quite vague. These broad and ambiguous orders do not leave space for accountability in case of failure.

Another question to which I would like to draw your attention is- was the Apex court is right to issue directions without having proper legislation and statutes in place? Though the court was within its power to issue directives it should have considered that these directions would remain confined to papers in the absence of adequate legislation. Further, the court did order for blanket reservation for the third gender by categorizing them as backward but failed to identify the parameters of backwardness. The SC granted transgender people the right to be identified as male, female, or third gender but there is no mention of the right to choose a sexual partner.

The Supreme Court has indeed set the ball rolling for the TGC and it remains to be seen whether in the absence of legal statutes these rights and provisions will materialize or not. Time will

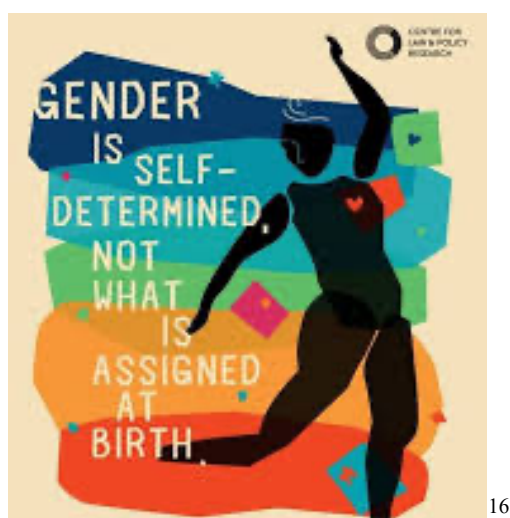
¹²A.K. Sikri, IN THE SUPREME COURT OF INDIA CIVIL ORIGINAL JURISDICTION WRIT PETITION (CIVIL) NO.400 OF 2012 (Supreme Court) (2014), <https://main.sci.gov.in/jonew/judis/41411.pdf> (last visited Nov 10, 2020).

¹³Mohd. Aslam Khaki v. Supt. Of Police citation, PLD 2013 SC 188.

¹⁴Sunil Babu Pant. V. Nepal (2007) WRIT NO. 914.

tell if these judgements were enough to bring trans persons into the mainstream and destroy the seed of mistrust, the social stigma that has long been sown in the society.

The 2014 verdict was succeeded by the case of *Navtej Singh Johar v. Union of India*.¹⁵ In this case, a five-judge bench of the SC partially struck down Section 377 of the IPC. Section 377 defined carnal intercourse contrary to the order of nature as a criminal offense. The bench, however, declared that what was unnatural was a product of majority views, and describing a thing unnatural doesn't pave the way for it to be criminal.



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TRANSGENDER PERSON (PROTECTION OF RIGHTS) ACT, 2019- TRANSPHOBIA OR USHERING IN POSITIVE CHANGES

The NALSA judgement was paralleled and succeeded by a series of bills going through the parliament. While the NALSA case was going on, an expert committee report on concerns associated with the TGC was published by the Ministry of Social Justice and Empowerment. Based on these reports, Tiruchi Siva of the DMK, introduced the Rights of Transgender Persons Bill in 2014. The bill advanced through the Rajya Sabha in 2015 but was left pending in the Lok Sabha and finally lapsed during the dissolution of the house, prior to the 2019 elections. Thereupon came the Transgender Bill of 2016, which was referred to the Standing Committee

¹⁵*Navtej Singh Johar v. Union of India*(2016) 7 SCC 485.

¹⁶Picture available at: <https://www.ungender.in/wp-content/uploads/2020/06/A-Guide-to-the-Transgender-Persons-Protection-of-Rights-Act-2019-Preview.pdf>.

on Social Justice and Empowerment. The committee submitted its report within a year, however, the Bill lapsed due to the dissolution of the 16th Lok Sabha.¹⁷

The Transgender Persons (Protection of Rights) Act, 2019, which crystallized out of the Transgender Persons (Protection of Rights) Bill, 2019 (July) was introduced in the Lok Sabha by the Minister of Social Justice and Empowerment, Thawar Chand Gehlot.¹⁸ Despite severe criticism, the bill was passed with a voice vote in the Lok Sabha on 5th August, 2019 and was subsequently given majority clearance by the Rajya Sabha on 26th November, 2019. While progressing through the Rajya Sabha, a motion to refer the bill to a Select Committee was put forward but it defeated. The Bill later converted into an Act on 5th December, 2019 after receiving the Presidential assent.¹⁹

The Transgender Persons (Protection of Rights) Act, 2019 is another progressive step taken to bring the Transgender Community at equal footing in the society. It has been introduced with the objective to protect the rights of transgender people and to aid in their welfare. The Supreme Court also broadened the term “transgender” to include intersex people, trans men, and women.

AN INSIGHT INTO THE 2019 TRANSGENDER ACT: WAS THE WAIT WORTH IT?

The 2018 Bill had criminalized begging which was reinstated by the Transgender Persons (Protection of Rights) Act, 2019 through decriminalization of begging. The TGC relied on begging as a source of livelihood and also engaged in it as a ritual custom. Criminalizing begging was a grave wrong to trans persons and the 2019 Act decriminalized it. Similarly, the Act has dismantled the District Screening Committee, mandated in the 2018 Bill, stating it as violative of the right of self-determination, which was also highlighted in the NALSA verdict. However, it has mandated for certificates of identity to be issued by district magistrates after self-declaration.

¹⁷Rights of Transgender Persons Bill 2014 | orinam orinam, <http://orinam.net/resources-for/law-and-enforcement/nalsa-petition-tg-rights-india/rights-of-transgender-persons-bill-2014/>.

¹⁸The Transgender Persons (Protection of Rights Bill) and Act 2019 | orinam orinam, <http://orinam.net/resources-for/law-and-enforcement/the-transgender-persons-protection-of-rights-bill-2019/>.

¹⁹All about Transgender Persons (Protection of Rights) Act, 2019 Latest Laws, <https://www.latestlaws.com/articles/all-about-transgender-persons-protection-of-rights-act-2019/>.

Though the Transgender Persons (Protection of Rights) Bill, 2019 has been a significant move to uplift the TGC yet the Act has faced severe backlash from the opposition as well as the trans people. It has been stated as an attempt to curb and nullify the broad mindset of the NALSA verdict.

The NALSA verdict emphasized explicitly on self-declaration of gender identity, sans medical or psychological proofs. In contrast, the 2019 Act's statutory provisions mandate that a person will be recognized as a transgender based on a Certificate of Identity issued by a District Magistrate.²⁰ Further, Section 4 (2) of the 2019 Act grants trans persons autonomy to decide their own gender but in contrast Section 5 (1) mandates issuance of a certificate to confirm their identity. According to me, giving DM the power to judge 'correctness' of the application, after proof submission will make the process of gender identification and reassignment cumbersome and initiate a sense of invasive policing.²¹ The Act further issues no clarifications as to what documents would be needed for the procedure as well the process for review mechanism, if the certificate gets rejected. It also goes to the archaic method of Sex Reassignment Surgery for changing gender identity, subject to the discretion of the DM. Post switching gender identity, the trans person is allowed only to change his first name placing the last name at a sacrosanct position.

Pros and cons

SALIENT FEATURES	COMMUNITY'S RESPONSE
<ul style="list-style-type: none"> • Definitions do not differentiate between transgenders, transsexuals, intersex persons and genderqueer 	<ul style="list-style-type: none"> • Community differentiates between transgender, transsexual and intersex persons and dismisses the 'one-solution fits all' idea
<ul style="list-style-type: none"> • Prohibition against discrimination in education, employment, healthcare, public facilities etc. Also prevents forced labour 	<ul style="list-style-type: none"> • Lack of enforceability dilutes provision. Lived experiences riddled with discrimination
<ul style="list-style-type: none"> • Certificate of identity can be obtained at the DM's office and a revised certificate is to be obtained if sex is changed 	<ul style="list-style-type: none"> • Shuns provision as impinging on their right to self-determination. Fear it'll lead to bureaucratic discrimination
<ul style="list-style-type: none"> • Government welfare measures and provisions of healthcare, including HIV surveillance centres, and sex reassignment surgeries 	<ul style="list-style-type: none"> • Step forward but medical community lacks knowledge of transgender bodies
<ul style="list-style-type: none"> • Transgender persons may only change their first name 	<ul style="list-style-type: none"> • Prefer to take Guru's name since many have severed ties with their birth family
<ul style="list-style-type: none"> • Setting up of a National Council for Transgender persons (NCT), including various Ministers and five transgender persons 	<ul style="list-style-type: none"> • Desire greater representation in decision making that affects them directly

SOURCE: PRS INDIA

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²⁰Pride Month 2020: Evaluating the Transgender Persons Act, 2019 | ORF ORF, <https://www.orfonline.org/expert-speak/pride-month-2020-68965/>.

²¹ The Transgender Persons (Protection of Rights) Act, 2019 Livelaw.in, <https://www.livelaw.in/columns/the-transgender-persons-protection-of-rights-act-2019-161739>.

²² Picture available at: <https://diligentias.com/the-transgender-persons-protection-of-rights-bill-2019-pib/>.

Further, the Act obligated that sexually and mentally abusing transgender persons is a punishable offense with a jail term from six months to two years. The provision is not what is contested upon, it is a matter of fact that the same crime when performed against a cisgender woman can draw a penalty of life sentence or death penalty. Discrimination while providing the same statutes to binary Indian citizens and Transgenders would be reinforcing the unequal status of the trans community in society.

Despite the NALSA verdict and the trans community's call for reservations, the 2019 Act has failed to address the issue. The Act has outlawed discrimination against trans person but has failed to provide penalties through legal recourse against such acts. By not providing affirmative actions in fields of education, health care, and employment, the Act is seen as regressive if we consider the judicial mandate in NALSA verdict.

CONCLUSION

The legislative process that churned the Transgender Rights Act, 2019 was entirely based on majority stereotypical notions. Transgender activists and legal scholars had drafted detailed responses to the successive versions of the bill. Yet these efforts were ignored and Act was devoid of any amendments. The community for whose welfare the Act was constituted wasn't even approached and asked about its demands. The Act is a culmination of tokenistic rights with the majority of the real demands being ignored. The LGBTQIA community also had a problem with the nomenclature of the bill as the name itself was not fair play to the diversities of non-binaries it encompassed.

The Act has postulated on the formation of a National Council for Transgender Persons (NCT) composed of a minimum of 30 people.²³ However, the trans community has a mere representation of 5 people in the body. The autonomy of the council too has been questioned as the board members will be nominated by the Central Government thereby decreasing the ability of the board to question the government on various issues.

²³Transgender Persons (Protection of Rights) Bill, 2019, No. 169, Acts of Parliament, 2019.

While the Transgender Rights Act, 2019 has been in scrutiny it is indeed the beginning of a 100-mile journey to ensure equal treatment of transgenders in Indian society. The upliftment of trans persons in lieu of the Act is an ongoing dialogue between the Apex Court and the state governments to implement the verdict. The onslaught of violations of TGC rights has been met with a tough stance of the law enforcement agencies as well as the drafters. The discrimination faced by Transgenders must be ended by formulation and implementation of strict laws against the same. Further, they must be provided reservation in educational and employment institutions. However, what has been achieved till now is woefully inadequate to include trans persons in the mainstream, however, proper institutional and legal framework will open up more latitude for incorporating genuine demands.

