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Inadequacies of the Transgender Persons’ (Protection of Rights) Act, 2019: A Juxtaposition with International Legal Frameworks & Conventions³

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Abstract

By way of safeguarding the rights of transgender individuals, the Indian government enacted the Transgender Persons’ (Protection of Rights) Act 2019. Studies show that the Act does not fully comply with many international treaties that aim to safeguard the rights of and provide safeguards for transgender individuals. To commence, to acquire a certificate of identity, transgender individuals are required to undergo a screening procedure administered by a medical officer and a District Magistrate to be certified. This requirement contradicts the idea of self-identification that is highlighted in international treaties such as the Yogyakarta Principles and the International Covenant on Civil and Political Rights (ICCPR). In this article, the author conducts a comparative study of the provisions that should be promptly added to the Act to give it the necessary prominence that has been overdue.

Keywords: transgender persons, international frameworks, human rights, gender equality.

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Niedoskonałości ustawy o ochronie praw osób transpłciowych z 2019 r.: zestawienie z międzynarodowymi ramami prawnymi i konwencjami⁴

Abstrakt

Aby zapewnić odpowiednią ochronę praw osób transpłciowych, rząd Indii uchwalił ustawę o osobach transpłciowych (o ochronie praw) w 2019 roku. Z analizy wynika, że ustawa ta nie jest w pełni zgodna z wieloma traktatami międzynarodowymi, których celem jest ochrona praw oraz zapewnienie niezbędnej ochrony osobom transpłciowym. Aby uzyskać certyfikat tożsamości płciowej, osoby transpłciowe muszą przejść złożoną procedurę weryfikacyjną przeprowadzaną przez lekarza i sędziego sądu okręgowego. Wymóg ten jest sprzeczny z ideą samoidentyfikacji, tak często podkreślaną w traktatach międzynarodowych – takich jak „Zasady Yogyakarty” oraz „Międzynarodowy Pakt Praw Obywatelskich i Politycznych (ICCPR)”. Autorzy dokonują analizy porównawczej przepisów, które powinny (już dawno) zostać włączone do wspomnianej ustawy, aby mogła skutecznie służyć oczekiwanemu celowi.

Słowa kluczowe: osoby transpłciowe, prawa międzynarodowe, prawa człowieka, równość płci.

⁴ Badania wykorzystane w artykule nie zostały sfinansowane przez żadną instytucję.

Introduction

The provision awarding equal treatment of all persons in this country is enshrined under Article 14 of the 'Indian Constitution,'⁵ which states, "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."⁶ This right of equality serves as a foundation for all persons to live an equal and dignified life. Although India has attained independence after many years of struggle, which was initially against the Varna system and – later – against the colonial system, the much-awaited independence was celebrated by the vast majority of the Indian society, with only few exceptions. "Those marginalized sects have been referred to by various terms like Hijras, Kinnas, Aravani, and Thangi and the most used in the recent debates is, Transgender".⁷

'Transgender' has been used as a term that acts as an umbrella for all those who do not resonate with the gender of their birth. The two generally used words, 'sex' and 'gender' call for better clarity under the concept with more precision. 'Sex' is a narrower term generally ascribed to the reproductive organs in a human being and 'gender,' on the other hand, refers to social attributes such as the choice of clothing, interests, and preferences. Those who don't find themselves matching this dichotomy and prefer to blend the two are the ones who desire to be called Transgender.

These marginalised people have a history to narrate, but hardly have found an audience to hear their plight over the years. Their existence dates back to the times of the Indian mythological epic, Mahabharata. The mention of '*Shikhandi*' finds a place in the epic when he was recognised on the battlefield for his warrior skills alongside Pandavas. He was born as a daughter of King Draupada and the elder sister of Draupadi, but was raised as a young male soldier. "Later, he was highlighted to have played an instrumental role in the killing of Bhishma, the most powerful. In other religious texts, the mention of Aravan, the son of Arjun also finds a prominent place."⁸

⁵ Art. 14, Equality before law, Constitution of India 1950.

⁶ Art. 14, Indian Constitution 1951.

⁷ D. Konduru, C. Hangsing, *Socio-Cultural Exclusion and Inclusion of Trans-genders in India*, "International Journal of Social Sciences and Management" 2018, 5(1), pp. 10–17.

⁸ <https://www.iilsindia.com/blogs/2017/03/10/brief-history-transgenders-india/> (accessed: 19.01.2024).

“During the Mughal period, positions of high repute like that of political advisors, administrators as well as guardians of the harems were held by Transgender for their cleverness and trustworthiness.”⁹ In the Islamic states, they were entrusted with guarding of their religious institutions like Mecca and Medina and held a dignified position in the society. “With the coming of colonial rule in India, the sun of pride marked its dusk on their existence and the members of this community strive to establish their existence even today.”¹⁰ From the denial of basic civil rights to criminalising sex amongst people of the same gender, there was no sight of hope for a dignified and equal life for them.

The discrimination began with the enactment of the ‘Criminal Tribes Act, 1871’ under the British regime in India. The Act was not merely regulatory, as it also took away their primary source of income along with other human rights. It further led to their exclusion from society from every possible aspect – and ultimately led them to a state of acute poverty.

The Transgender Persons’ (Protection of Rights) Act, 2019 is a significant step toward recognising and protecting the rights of transgender individuals in India. This act was passed in 2019. Despite this, the efficiency of the legislation and its conformity to international standards needs to be reviewed critically, just like any other piece of legislation. Ensuring the safeguarding and advancement of human rights – including the rights of transgender persons – is a core value that is explicitly expressed in several international treaties and agreements. These treaties act as standards for assessing the sufficiency and efficiency of national laws in protecting the rights of disadvantaged people. To improve the rights and dignity of transgender people in India, it is crucial to examine how inadequate the Transgender Persons’ (Protection of Rights) Act, 2019 is in comparison to international agreements. By recognising and resolving these deficiencies, persons with a vested interest can play a role in creating laws that maintain the ideals of equitable treatment, absence of prejudice, and human rights for all individuals, irrespective of their gender identification.

⁹ P. Sharma, *Historical Background and Legal Status of Third Gender in Indian Society*, “IJRESS” 2015, 2(12). Available from: <http://oldisrj.lbp.world/Article.aspx?ArticleID=7068> (accessed: 15.01.2024).

¹⁰ M. Michelraj, M., *Historical Evolution of Transgender Community in India*, “International Streams Research Journal” 2015, 17–19.

Strive for Social and Legal Inclusion

Sociological impacts call for immediate redressal

With the emergence of a 'new India' in 1952, the Criminal Tribes Act, 1952 was repealed for being considered a blot on the newly adopted Constitution of India by the then-Prime Minister, Jawaharlal Nehru, empathising with the misery of the community who had silently suffered ever since the British regime qualified the entire community as criminals. However, while preserving most of the provisions, except classing the entire community as a criminal, a new legislation, The Habitual Offenders Act, 1952 which instead of criminalising an entire community focused on criminalising an individual was passed by the government of the time.

"Transgenders remain to be on the bottom line of the priority list, socially, economically, culturally, and politically."¹¹ The most viable document, which is the Census, discusses the country's demographic statistics, information about literacy, housing, and health care amongst other notable essentials. An entire community had never been mentioned there for almost 65 years and surprisingly, for the first time, it was identified in the statistics of the 2011 Census. "Based on this it was understood that Uttar Pradesh, Bihar, and Maharashtra were amongst the three most highly concentrated states with the Transgender populace."¹²

The literacy rate amongst the community was marked at a mere 46% in comparison to the literacy rate of 74% in the overall population of the country.¹³ Constant bullying, body shaming, and sexual abuse have been reported as a reason for major dropouts. Recently, there has been a glimmer of hope for the transgender community, not merely through efforts to improve literacy but through judicial decisions that hold the potential to transform the lives and futures of transgender individuals across the country. In 2014, a circular was issued by the University Grants Commission to include a column separately for all transgender communities in all application forms. Also, "instructions have been issued to ensure an adequate environment in the educational institutions to prevent any humiliation, stigma, fear, or fame for the Transgender."¹⁴

¹¹ J. Hunchy, *Obsceity, Moral Contagion and Masculinity: Hijras in Public Space in Colonial North India*, "Asian Studies Review" 2014, 38(2), pp. 274–294.

¹² http://censusindia.gov.in/2011-prov-results/prov_rep_tables.html (accessed: 12.01.2021).

¹³ *Ibidem*.

¹⁴ A. Anusha, R. Hunnur, *A Review on Status of Transgenders from Social Exclusion to Social Inclusion in India*, *IOSR Journal of Business and Management*, "IOSR Journal of Business and Management" 2019, 21(2). Available from: <http://www.iosrjournals.org/iosr-jbm/papers/Vol21-issue2/Series-2/D2102022934.pdf> (accessed: 25.12.2020).

The vicious cycle of life of the members of this community remains one of the unpopular discussions in society and the minds of the policymakers of our country. The employment rate is low, and individuals are most often forced into begging, prostitution, or entertainment to earn a living. The Indian folklore considers their presence auspicious on the occasions of childbirth or marriages in the family and thereby rewards them on such occasions.¹⁵ At other times, they are the targets of disrespect and humiliation at large.

Considering the exclusion faced by them on every front like, social, economic, and political, it would be a travesty to even talk about their state of health owing to institutional/individual prejudice prevailing in the society. As per the statistics, globally, "transgenders are 49 times more affected by HIV than an ordinary adult."¹⁶ In India, "the prevalence of HIV-affected Transgenders is nearly 7.5% according to the estimates of the National Aids Control Organization (NACO)."¹⁷ "Suicides in this community grossly go unnoticed."¹⁸ This can also be proven by supporting evidence, where the "National Crime Records Bureau (NCRB) recorded the total number of suicides in this community as 15 in 2015, i.e. 0.005% of the 10.6% suicides recorded during that period in India."¹⁹

Social exclusion occurs in this community in many ways. The very fact that they were not considered as the 'normal' members of society coupled with the fact that could they find an identity for themselves until 2014's landmark decision by the Supreme Court, where a distinct self-identity was duly given to this group, sheds light on their individuality in the society. These exclusions have come from various dimensions and percepts. Not merely have these people been excluded by society, but also by their own families. *From being downtrodden to being devoid of equal rights as enshrined for the citizens of this country, the doubts about their citizenship also evoked questions about their basic rights under the Constitution.*

The social integration of the transgender population in India is a complex matter that necessitates collaborative endeavours from several stakeholders, including the government, civil society groups, and the general populace. Although the Transgender Persons (Protection of Rights) Act 2019, and important rulings by the Supreme

¹⁵ J. Dona, *Living a Life of Exclusion: Being a Transgender in India*, "Impressum" 2017, pp. 2–10. Available from: <https://fnst.org/sites/default/files/uploads/2017/11/20/focuahumanrights-rightsoftransgenderinindia-donajohn.pdf>.

¹⁶ S. Mishra, P. Singh, *Transgenders, a Marginalized Community and Their Exclusion: A Study*, "International Journal of Humanities and Social Science" 2018, 5(2), pp. 15–20.

¹⁷ <https://www.avert.org/professionals/hiv-social-issues/key-affected-populations/transgender> (accessed: 20.01.2020).

¹⁸ http://naco.gov.in/sites/default/files/TG-IBBS%20ReportPrint%20text_Edited.pdf (accessed: 21.01.2021).

¹⁹ Y. Conwell, K. Van Orden, E. D. Caine, *Suicide in older adults*, "The Psychiatric clinics of North America" 2011, 34(2), 451–ix.

Court acknowledging transgender rights have been made, there are still considerable obstacles impeding the social integration of transgender individuals in India.

Acknowledging the Psychological Problems Faced By Transgender

“Stigma directly affects health by encouraging ostracized individuals to avoid social encounters, shy away from healthcare professionals, reach for addictive substances to quell their anxiety and aloneness, or engage in risk-taking behavior like unsafe sex.”²⁰ An article in the American Journal of Psychiatry, titled ‘Understanding the Mental Health of the Hijra Women in India,’²¹ written by Dr. Vikas Jayadev, discussed “the mental health problems such as depression, anxiety, self-harm, suicidal tendencies, and substance abuse faced by the transgender community in India.”²²

There is a major lack of medical studies on the transgender community. “Considering that there is a high rate of prostitution in the community, the majority of medical studies have focused on HIV/AIDS.”²³ “Forty-eight percent of hijra participants suffered from psychiatric disorders, ranging from alcohol abuse and dependence to depression disorders.”²⁴ “Asking for aid is not a feasible choice for these individuals due to apparent and real stigma from health professionals.”²⁵

“The worldwide fraternity no longer refers to transperson individuals as having an illness, but rather that they have a choice and right to decide their way of living.”²⁶ As per the study from DSM-IV-TR, “gender identity disorder was identified in 84% of the hijras who volunteered for the study.”²⁷ “The majority of these individuals in this study asked for sex change operations due to suffering from identity conflicts.”²⁸ Social taboos and absence of family support contribute to delayed medical

²⁰ S. Mishra, P. Singh, *op. cit.*

²¹ <https://www.psychologytoday.com/us/blog/the-truth-about-exercise-addiction/201612/why-transgender-people-experience-more-mental-health> (accessed: 18.01.2021).

²² V. Jayadeva, *Understanding the Mental health of the Hijra Women of India*, “Psychiatry Online”, 12(5).

²³ <https://www.youthkiwaaz.com/2019/11/mental-health-and-transpersons-in-india/> (accessed: 19.01.2020).

²⁴ S. Shivakumar, M. Manjula, *Markers of well-being among Hijras, the male to female transsexuals*, “International Journal of Psychology” 47. Available from: <https://insights.ovid.com/international-psychology/ijpsy/2012/01/001/markers-among-hijras-male-female-transsexuals/4043/00011205>.

²⁵ G. Kalra, N. Shah, *The Cultural, Psychiatric, and Sexuality Aspects of Hijras in India*, “International Journal of Transgenderism” 2014, pp. 171–181.

²⁶ Goyal S., Deb K. S., Elawadhi D., *Substance abuse as a way of life in marginalized gender identity disorder: A case report with review of Indian literature*, “Asian Journal of Psychiatry” 2014, 12, pp. 160–162.

²⁷ <https://www.youthkiwaaz.com/2019/11/mental-health-and-transpersons-in-india/> (accessed: 19.01.2020).

²⁸ G. Kalra, N. Shah, *op. cit.*

consultation, resulting in complicated presentations. "This highlights the necessity for awareness programs in our nation".²⁹

A Legal Invasion to Break the Stereotypes

Over time, the community's situation worsened and, sadly, it did not receive the necessary care that was urgently required. The desires for a stable income, respect, and security in their nation, which had been there for seventy years, had not yet been fulfilled. In 2009, the High Court of Delhi decriminalised homosexuality in India in the Naz Foundation Vs Government of Delhi case, marking a significant landmark in the history of transgender rights. "The justices emphasized that criminal law should not be influenced by common misunderstandings about the identities of individuals who are homosexual, gay, bisexual, or transgender (LGBT)."³⁰

In 2013, an appeal was filed with the Supreme Court in case Suresh Kaushal Vs Naz Foundation. The Court overturned the 2009 decision by the Delhi High Court, stating that section 377 is not unconstitutional. "The community suffered a major blow following the 2009 judgment, which had first given them optimism to strengthen their self-identities".³¹

The Supreme Court in its 2014's seminal judgment³², 'NALSA Vs Union of India,' stated that "transgender persons have the right to decide their self-identified gender and the State/Central Government need to legally recognize the gender of their choice as male, female or a third gender." The judgment also deals with the directive that all kinds of reservations should be provided to the transgender in educational institutions and public appointments.

A divisional bench consisting of 'K.S Radhakrishnan J' and 'Dr. A.K. Sikri J' handed a historic judgment after NALSA presented its core case on heteronormativity to the Supreme Court and argued that recognition of only two binary genders, male and female, is mandated by Indian law and enforced by the State.³³ "The petitioners requested legal actions to address the requirements of transgender individuals under constitutional rights."³⁴

²⁹ S. T. Shivakumar, M. M. Yadiyurshetty, *Markers of well-being among the hijras: the male to female transsexuals*, International Congress of Psychology, 2014, pp. 218–232.

³⁰ Naz Foundation v. Government of NCT of Delhi (2009), WP(C) No.7455/2001,

³¹ J. Dona, *op. cit.*

³² National Legal Ser. Auth v. Union of India & Ors (2014), Writ Petition (Civil) No.400 of 2012

³³ <https://www.encyclopedia.com/social-sciences/applied-and-social-sciences-magazines/heteronormativity> (accessed: 20.01.2020).

³⁴ S. Parashar, *Inclusion of Transgender Community Within Socially and Educationally Backward Classes: Examining The Deeper Concerns*, "ILI Law Review" 2017, pp. 105–123. Available from: <http://ili.ac.in/pdf/sakshi.pdf>.

The bench, before moving into the intricacies of the case, began by defining the term 'transgender'. The bench defined the term 'transgender' as:

"An umbrella term that refers to all identities or practices that cross over, cut across, move between, or otherwise queer socially constructed sex/gender binaries. The term includes but is not limited to, transsexuality, heterosexual transvestite, gay drag, butch lesbianism, and such non-European identities as the Native American Berdache or the Indian Hijra."³⁵

"NACO Report considers the term 'Transgender' as the symbolic representation of crossing boundaries, and it has been derived from two different languages; the Latin word 'trans' and the English word 'gender'."³⁶

"Section 2((k) of the Act, 2019 defines a "transgender person" as a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), a person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta."³⁷

While the entire concept of being a transgender person revolves around the basic premise that the sex assigned at birth for a transgender person doesn't align with the gender of the person, the legislature by using the terms gender and sex as synonymous defeats the very purpose *ab initio*. An amendment in the definition of the fundamental subject of this Act needs to be brought in conformity with the analysis of the NALSA judgment and other international organisations like the United Nations.

The Supreme Court dismantled the binary gender system defining 'man' and 'woman,' granting a marginalised population equal rights and protection under Articles 14, 15, and 16 of the Indian Constitution.

The judgment gave wings to those who didn't even get a chance to walk. Discrimination based on their gender choices, in employment and education, and sexual

³⁵ G. Kalra, N. Shah, *op. cit.*

³⁶ T. Laxmi *et al.*, *Transgender – A Hijra strategy*, 2011. Available from: http://naco.gov.in/sites/default/files/4.%20TG_paper_NACO%20shortversion.pdf (accessed: 9.01.2021).

³⁷ Sec 2(k), Transgender Persons' (Protection of Right) Act, 2019.

and physical assault had been quite common among them. "The first ray of hope to identify themselves publicly came after the NALSA judgment."³⁸

Another crucial aspect that was focused on by the Supreme Court was Article 21 – highlighting the Right to Dignity that must be recognised with an individual's self-identity.

For the first time, global principles of dignity, freedom, and autonomy outlined in the 'Universal Declaration of Human Rights 1948', the 'International Covenant on Economic, Social and Cultural Rights 1966', the 'International Covenant on Civil and Political Rights 1966', and the 'Yogyakarta Principles' were combined to eliminate discrimination against the transgender community. The ruling raised expectations for the transgender community to have a decent life and placed a significant obligation on the government to pass a law to enhance their position in society.

With the 'Navtej Singh Johar Vs Union of India, 2018,'³⁹ case, the transgender community celebrated a significant moment of pride and excitement as they finally gained their long-awaited rights, symbolizing progress for individual freedoms. They are optimistic about the future. The court acknowledged their human essence, distinctiveness, and freedom. The court praised the petitioners for being the initial individuals to advocate for their complete and equal rights, labeling it a 'transformative constitution'.

Before this judgment, a colonial-era law had wronged these people for a very long time. "With a wave of 'love is love' throughout the nation, the Supreme Court through its 5-judge jury, decriminalised Section 377⁴⁰ in a unanimous judgment." This judgment laid a great foundation by ensuring the entire gamut of rights and liberties to them. This brought a new dawn amongst all the transgender community and beyond. After a year of the passing of this judgment, the spirit of constitutionalism and its *victories* stand high, but the country is still waiting for legislation that strongly puts forward their rights and liberties and ensures a much-needed protection and promotion to move ahead.

The Need for Alignment with International Conventions & Frameworks

The transgender community in the country has long endured a myriad of hardships and challenges, yet their calls for legislative action to address these longstanding

³⁸ <https://www.thehindu.com/opinion/op-ed/a-promise-falls-short/article23505892.ece>.

³⁹ WP(Crl.)No.76/2016.

⁴⁰ Indian Penal Code 1860 s. 377 (Ind).

issues have often been met with indifference or resistance. While the rest of the country celebrated the repeal of Article 370 and the perceived unification of India, the transgender community found themselves once again facing an erosion of their identity and rights. The lack of meaningful apology and legislation that matches the intensity of their struggles has left an indelible mark on this marginalized group, with 5 August 2019 being marked as a “Gender Justice Murder Day” for them.⁴¹

The issue of transgender rights in India has long been a complex and contentious one, with the government’s attempts to address the challenges faced by the transgender community often being criticised as inadequate and ineffective. The enactment of the Transgender Persons (Protection of Rights) Act in 2019 was heralded as a landmark achievement, but for many within the community, it has done little to alleviate their struggles.

There is no debate on the legal empowerment laws needed to create a framework that would elevate transgender individuals to an equal position in Indian society and culture. Gender identity is often narrowly conceived. The author will outline several areas where legislative measures are needed, comparing them with laws adopted by nations that have taken action to improve the rights of the transgender population.

The Transgender Act grants the right to a new gender identity.⁴² Chapter III of the Act, sections 5 to 7, provides a procedure for gender reassignment that involves a series of steps aimed at recognising the identity of transgender individuals legally. First and foremost, Section 5 requires that a transgender individual submit an application for a certificate of identity to a district magistrate, which will confirm their gender as transgender. Upon receiving this certificate, Section 6 grants persons the opportunity to pursue medical procedures for gender reassignment at their discretion. After undergoing surgery, Section 7 states that the person must apply to the district magistrate and give a certificate from the medical institution that confirms the operation. Section 6 establishes the foundation for Section 7. The procedure starts with the medical validation of gender reassignment surgery (Section 6), which is a mandatory requirement for initiating the application for the modified certificate of identity (Section 7).

This is necessary to obtain an updated certificate that reflects the individual’s new gender. This procedure guarantees the legal acknowledgment of transgender individuals’ identities, granting them the essential paperwork to accurately represent their gender identity.

⁴¹ <https://www.downtoearth.org.in/governance/why-is-transgender-community-unhappy-with-trans-persons-bill--67158> (accessed: 9.12. 2024).

⁴² Transgender Persons (Protection of Rights) Act 2019, c III.

However, it needs to broaden its reach to include gender identification on passports and birth certificates. "Australia issues new birth certificates to transgender individuals after gender reassignment surgery (GRS)."⁴³ This might be viewed as a proactive step to recognise the presence of transgender individuals in a culture. The Transgender Act, specifically under Section 6, refers to the certificate issued as an "identity" certificate. The transgender community has been upset because a district magistrate or any individual does not have the authority to determine someone's identity. This requirement contradicts the idea of self-identification that underlies international treaties such as the Yogyakarta Principles and the International Covenant on Civil and Political Rights (ICCPR). Conversely, a birth certificate serves as a recognition of one's existence, which is considered more suitable from a moral standpoint. After issuing a new birth certificate, "New Zealand essentially invalidates the old birth certificate."⁴⁴ "The alterations to the gender and name of the transgender individual are presented as if they were their original attributes."⁴⁵ On the contrary, the Transgender Persons' (Protection of Rights) Act of 2019 does not include provisions for the automatic modification of the birth certificate to accurately represent the changed gender of an individual. The procedure entails many stages and necessitates proactive measures on the individual's side to achieve the formal recognition of their new gender identification in their birth certificate and other legal documents.

Although the Transgender Act is stringent, transgender persons in India now possess the legal entitlement to have gender reassignment surgery. However, our lawmakers must ascertain if simply providing gender reassignment surgery as a legal right is enough. A straightforward gender reassignment surgery (GRS) in India generally involves an average minimum cost of INR 6,00,000. In light of the widespread destitution within the transgender community, the government must provide a financial resource to subsidise costly medical interventions. These laws bear resemblance to all other welfare statutes. While the concept appears favourable in principle, its feasibility is slightly hindered. "In New Zealand, this funding is allocated by the Ministry of Health specifically for singular medical treatments."⁴⁶ The legislators overlooked the fact that government representatives think that transgender individuals' income earned via begging and sex business puts them

⁴³ Births, Deaths and Marriages Registration Act 1997 s 24 (Ind.)

⁴⁴ *Ibidem*, p. 77 (Ind.)

⁴⁵ *Ibidem*.

⁴⁶ www.health.govt.nz/our-work/hospitals-and-specialist-care/high-cost-treatment-pool (accessed: 20.01.2020).

beyond the poverty threshold. Therefore, “they do not allow transgender individuals to receive any below-poverty-line programs.”⁴⁷

Especially when the fundamental rights enumerated in Article 21 are not acknowledged, the government’s endeavour to achieve equality for transgender individuals appears to be more rhetoric than tangible action. It is crucial to understand that the Transgender Persons (Protection of Rights) Act of 2019 primarily focuses on safeguarding the rights of transgender individuals. The law lacks sufficient evidence to serve its purpose hinted at in its name. The discussion does not include the right to marriage and its related effects, such as tax benefits and inheritance. “In New Zealand, same-sex marriage became legal once the Civil Union Act of 2004 was passed.”⁴⁸ Some may contend that India, as a developing nation, would experience similar advancements. Our failure to recognise global progress is inexcusable. The Civil Union Act was enacted in New Zealand in 2004, and there has been no legislative action on it for sixteen years. No concrete conversations or real talks have taken place. Gay couples in Spain are granted equal rights to straight couples under the Code Civil through several regulations.

The Rajya Sabha discussion on the Transgender Law is condensed into a 33-page booklet, with around 30 members of parliament expressing their opinions and thoughts on different sections of the law. Husain Dalwai from the Indian National Congress, Tiruchi Siva from DMK, and V. Vijay Sai Reddy from YSRCP, among others, have acknowledged discriminatory practices and social taboos related to transgender individuals. However, no provisions addressing these issues have been included. This community urgently requires effective and explicit regulations that completely ban all types of discrimination. It is difficult to comprehend why the measure addressing the ‘rights of transgender’ individuals does not encompass anti-discriminatory legislation. “New Zealand’s Human Rights Act of 1993 and the New Zealand Bill of Rights Act of 1990 prohibit discrimination based on gender, marital status, or sexuality.”⁴⁹ Furthermore, the human rights bill in New Zealand has taken due care and noted that transgender people in New Zealand face discrimination that undermines the ability to have a secure family life, find a place to live, work, pursue a career, and participate in the community. Had our lawmakers taken the initiative to observe their surroundings, they would have gained a better understanding of the necessary provisions for the Transgender Act. For instance, akin to New Zealand, the United States enacted the Affordable Care Act of 2010,

⁴⁷ N. Goel, *Uptake of Social Protection Schemes By Transgender Population in India*, National Aids Control Organization <https://www.undp.org/content/dam/india/docs/pubpovertyreduction/Uptake%20of%20Social%20Protection.pdf>

⁴⁸ Civil Union Act 2004 (Ind.)

⁴⁹ Equal Opportunity Act 1984 Part IIAA. (WA.)

which explicitly prohibits sex discrimination in federally funded healthcare facilities. This prohibition has been clarified to encompass discrimination based on transgender status. Furthermore, the Affordable Care Act also prohibits healthcare providers from denying coverage to individuals based on pre-existing conditions, including transgender status.

Furthermore, there is a pressing need to address the persecution faced by transgender individuals. The Citizenship Amendment Act of 2019, enacted on 11 December 2019, was intended to provide refuge to religious minorities facing persecution. Considering that several prominent countries neighbouring India criminalise same-sex relations as being against the natural order or categorise them as grossly indecent, India should introduce legislation that offers asylum to individuals persecuted on the grounds of being transgender.

Laws against same-sex relationships are often expressed vaguely or indirectly and may be implemented inconsistently. The term 'buggery' is limited to anal sex, although 'sodomy' can encompass both anal and oral sex. "Both terms are not exclusive to same-sex relationships, although the arrest of heterosexual couples under these statutes is extremely uncommon."⁵⁰ Let's look in more detail at a few countries. Bangladesh does not recognise same-sex relations and categorises them as unnatural or indecent acts, offenders of the same will be sentenced to 10 years imprisonment, which may extend up to life as provided under Section 377 of the Indian Penal Code of 1860.⁵¹ Chapter 14 of the Penal Code of Bhutan addresses sexual offenses. Section 213 of this Act deems same-sex interactions as contrary to the natural order and carries a penalty of imprisonment ranging from one month to one year. In Myanmar, those who engage in carnal intercourse outside the order of nature face a 10-year jail sentence, similar to the law in Bangladesh. Myanmar's law has a clause that sentences criminals to transportation for life, resulting in their banishment and exile for life. Pakistan criminalises same-sex intercourse and imposes imprisonment ranging from 2 to 10 years under Section 377 of the Pakistan Penal Code (XLV of 1860).

"In the UK, Germany, and the Netherlands, there are support groups for children and teenagers who have questions regarding gender identity, and their parents".⁵² "Sexual orientation has been recognized as a ground for persecution."⁵³

⁵⁰ https://features.hrw.org/features/features/lgbt_laws (accessed: 12.12. 2024).

⁵¹ The Penal Code 1860 s 377 (Ind.).

⁵² T. Hammarberg, *Human Rights and Gender Identity*, Council from European Commission of Human Rights, 2019. Available from: <https://rm.coe.int/16806da753> (accessed: 23.12.2020).

⁵³ *Discrimination on grounds of sexual orientation*, Council of Europe Publishing Strasbourg Cedex, 2011, p. 65. Available from: https://www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011_en.pdf (accessed: 25.12.2020).

In case 'Hernandez v Canada',⁵⁴ the court of law recalled that the appellant was hesitant to admit her gender identity for fear of persecution by immigration officials. The federal court held that *"the IRB has erred in failing to consider that the claimant was trans, or that she may face discrimination based on her gender identity if forced to return to her country of origin."*⁵⁵

Legislators, an essential component of India's democracy, should put religious debates and bias into the background. Indian citizens must recognise that there are public issues that go beyond secularism and religion. The rights of transgender individuals are as significant as the rights of those identifying with binary genders. Individuals are facing persecution due to their sexual orientation and preferences and should be granted asylum in nations such as India to live a decent life with freedom of choice. As a nation, our duty extends beyond safeguarding the human rights of our citizens. India's intrinsic worth should serve as a model for nations worldwide.

Conclusion

The entire nation that applauded the Apex Court's decision in 2014, further strengthened in 2018, took to the streets to show their disappointment with the recently passed Transgender Persons (Protection of Rights) Act on 5 December 2019. The sound of drumbeats has muffled and the joy on their faces has faded. The Act that brought such high hopes came out as a disappointment for the very people it was supposed to protect and empower. The Act looks like an empty box wrapped in a sheet of huge promises to fulfil, but does nothing to promote the members of the community in question. For the least, the policymakers have considered the massive crimes like sexual harassment against them to the levels of minor crimes in the Indian Penal Code and accordingly have imposed an imprisonment of a mere 2 years. They have not even equated Transgender to the existing marginalized community of women in the country.

However, the Transgender Persons' (Protection of Rights) Act, 2019 has brought in a wave of blessings in disguise as well for the community in India by providing legal recognition, protecting against discrimination, ensuring access to healthcare and education, and promoting social welfare. From providing them legal recognition for the first time in all these years to granting them rights and offering educational

⁵⁴ [2007] FCJ No 1665.

⁵⁵ *Ibidem.*

and employment opportunities as a legal right like other individuals in the country along with social security and rehabilitation.

The National Portal for Transgender Persons, launched by the Ministry of Social Justice and Empowerment in India, serves as a vital online resource aimed at enhancing the accessibility and efficiency of services provided to transgender individuals. This portal has simplified the application process for the community. Transgender individuals can easily apply for a certificate of identity from the comfort of their homes, reducing the need for physical visits to government offices and ensuring quicker processing and issuance. The portal provides a wealth of information on various schemes and programs available to transgender persons, including educational, healthcare, and employment opportunities. The National Portal for Transgender Persons is a significant step towards ensuring the inclusion, empowerment, and protection of transgender individuals in India.

Moreover, the Act demands amendments to be made at the earliest to provide the members of this community with some benefits that they deserve. Despite being considered as a third gender; the question remains the same. When will they be allowed to live a fundamental and dignified life, like the rest of society? Despite their widespread protests, their voices may not have been adequately heard by legislators, yet their struggle persists. We owe them an apology for this oversight. Their journey remains a long and arduous one. There is much work to be done.

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