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## Transgender Persons (Protection of Rights) Act, 2019: An Analysis

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*With the increase in global awareness regarding social issues such as feminism, civil rights, overpopulation, etc. in the last half-century, countries all across the world are making efforts to emancipate the conditions of these groups which are socially backward or have been discriminated against and finding ways to incorporate these groups into their society. The fight for trans persons' equality, acknowledgement, and legal recognition has been lengthy and is currently ongoing. The Indian govt. has taken an inclusive approach in the recent year 2019 by enacting the much-needed Transgender Persons (Protection of Rights) Act for the betterment and acceptance of Transgender people in the Indian society. The Act was passed as a consequence of the landmark judgement in NALSA vs Union of India wherein the court recognized the rights of transgender persons. However, the act has become a controversial issue with trans activists claiming that the act does not grant true equality and defeats its own objectives. This article seeks to discuss the developments in the struggle to accept trans people in the society and the issues inherent in this stride.*

**Keywords:** *transgender, protection, equality, rights.*

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### INTRODUCTION

There has been a shift in the focus of communities around the globe, from politics, and land or water disputes to solving social dilemmas such as gender or racial inequality. Over the last few decades, the Indian government has been working towards the acceptance of marginalized

groups into society. Transgenders have faced a long history of discrimination throughout the world. Ever since the UK criminalized homosexuality via the Criminal Law Act, 1885 similar laws were established throughout Europe and other colonies of the British. Upon suspicion of being a homosexual or a transgender, people could face imprisonment along with hard labour. The Transgender Persons (Protection of Rights) Act, 2019 was enacted with the view to emancipate the transgender community and to ensure that they receive protection from the law in cases of infringement of their fundamental and legal rights. The social stigma surrounding gender-queer, homosexual and transgender people has led to severe deterioration of their life and liberty. Until recently, the law of the country had not recognized transgender people and had no provisions for their rights, due to which they faced severe problems such as lack of legal rights, harassment, discrimination, poverty, identity documents, and more. The Act, being the first of its kind, introduced provisions relating to the prohibition of discrimination against transgender persons, recognition of transgender as the third gender, the inclusion of transgenders in society, etc., and prescribes penalties for the breach of such provisions. However, the Act has garnered much attention in the global news, with Transgender activists claiming that the Act has failed to provide true equality and that it further restricts their gender self-expression. These contrasting viewpoints are the primary focus of this article.

## WHY THE ACT?

The Transgender Persons (Protection of Rights) Act, 2019 was introduced as a result of the landmark case of *NALSA vs Union of India*<sup>1</sup>. In this case, the Apex court was asked to decide whether the persons who do not fall under the binary classification of gender as male or female can be legally identified as 'third gender'. In this case, the Supreme Court recognized the right of transgender persons to identify as 'third gender' and also discussed gender identity at length. The court deliberated on the matter carefully and held that under Article 15<sup>2</sup> of the Constitution, in which discrimination on the basis of 'sex' is expressly prohibited and placed one's gender identity within the meaning of the fundamental right to 'dignity' under

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<sup>1</sup> *NALSA v Union of India* (2014) Writ Petition (Civil) No. 400/2012

<sup>2</sup> Constitution of India, 1950, art. 15

Article 21<sup>3</sup>. The court also noted that under Articles 14 and 19(1)(a)<sup>4</sup>, the right to equality and freedom of expression should be extended to “all persons” including transgenders, and held “self-expression through dressing, actions, and words” to be a part of freedom of expression and that the right to equality of transgender persons has been violated because they face “extreme discrimination in all spheres of society.” On the basis of the combination of these observations and decisions, the court found it necessary to enact legislation to remedy the wrongs that are inherent in the workings of the society and directed the Central and State governments to take proactive action in securing the rights of the transgender persons. However, the government had blundered by completely ignoring to rely on the requests and aspirations of the transgenders, and not relying on surveys and consultations while passing the 2018 Bill in Lok Sabha. Across the country, protests were breaking out over various instances of police brutality, unlawful detention, and public stripping and parading of transgender people. Finally, the government came up with the Transgender Persons (Protection of Rights) Act, 2019 with the purpose of the welfare of transgender persons and the protection of their rights.

## **KEY FEATURES OF THE ACT**

### ***IDENTIFICATION***

It establishes a right to self-perceived gender identity and requires the district magistrate (or other authorized government authority) to issue a 'certificate of identification' to a transgender person without any medical or physical examination. It also states that a person undergoing surgery to alter their gender to either male or female may apply for a new certificate showing the gender change. Section 6 and 7 deal with the process of requesting a certificate indicating them as transgenders in pre-sex reaffirmation surgery and post-sex reaffirmation surgery situations, respectively. Section 7 has garnered much criticism from the transgender community because the government seeks to mandate a medical procedure to indicate a change in gender on the certificate.

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<sup>3</sup> Constitution of India, 1950, art. 21

<sup>4</sup> Constitution of India, 1950, art. 14 and art. 19(1) (a)

## **ESTABLISHMENT**

Chapter 5 of the Act is titled 'Obligations of Establishments and Other Persons.' This chapter provides that:

Establishments must not discriminate against transgenders in matters of recruitment, promotion, etc. (Section 9)<sup>5</sup>

All establishments must ensure compliance with the provisions of this Act. (Section 10)<sup>6</sup>

All establishments must form a grievance redressal system and appoint a complaint officer to take cognizance of violation of provisions mentioned in this Act. (Section 11)<sup>7</sup> Section 12<sup>8</sup> recognizes the right to residence and protects transgenders from being illegally displaced from their place of residence without an order of a competent court. It also protects any transgender child from being separated from his/her parents or guardians without the order of a competent court.

## **SOCIAL SECURITY AND HEALTH**

Chapter 6 of the Act deals with education, social security, and the health of transgender persons. It provides that the appropriate government shall provide inclusive education and equal opportunities to all transgender students without any bias. (Section 13)<sup>9</sup> For the facilitation of transgender persons, the government has to set up welfare schemes and programs including vocational training and self-employment. (Section 14)<sup>10</sup> Section 15 provides for the establishment of HIV Sero-surveillance Centers, providing medical facilities related to sex-reassignment surgeries and hormonal therapies, counselling, etc. for the purpose of creating a healthcare framework.

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<sup>5</sup> Transgender Persons (Protection of Rights) Act, 2019, s 9

<sup>6</sup> Transgender Persons (Protection of Rights) Act, 2019, s 10

<sup>7</sup> Transgender Persons (Protection of Rights) Act, 2019, s 11

<sup>8</sup> Transgender Persons (Protection of Rights) Act, 2019, s 12

<sup>9</sup> Transgender Persons (Protection of Rights) Act, 2019, s 13

<sup>10</sup> Transgender Persons (Protection of Rights) Act, 2019, s 14

## **NATIONAL COUNCIL FOR TRANSGENDER PERSONS**

Chapter 7 of the Act relates to the setting-up of the National Council for Transgender Persons (NCTP) and lays down its functions. Section 16<sup>11</sup> deals with constituting the council and provides for eligibility criteria and designations of its members.

Section 17<sup>12</sup> describes the functions of the council as:

- (a) to advise the Central Government on the formulation of transgender policies, programs, legislation, and projects;
- (b) to monitor and evaluate the impact of policies and programs aimed at achieving equality and full participation for transgender people, and
- (c) to review and coordinate the activities of all government departments and other governmental and non-governmental organizations dealing with transgender issues;
- (d) to address transgender people's concerns, and
- (e) to carry out any additional duties that the Central Government may impose.

## **OFFENCES AND PENALTIES**

Under Section 18<sup>13</sup> of Chapter 8, the penalty imposed for offences against transgender persons has been succinctly described. The offences mentioned in the section are as follows:

- to compel or entice a transgender person to engage in forced or bonded labour,
- to deny a transgender person the right of passage to a public place or prevents such person from using or having access to a public place,
- to force or cause a transgender person to leave their household, village, or another place of residence, and
- to harm, injure, or endanger the life, safety, health, or well-being, whether mental or physical, of a transgender person

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<sup>11</sup> Transgender Persons (Protection of Rights) Act, 2019, s 16

<sup>12</sup> Transgender Persons (Protection of Rights) Act, 2019, s 17

<sup>13</sup> Transgender Persons (Protection of Rights) Act, 2019, s 18

The punishment for the breach of these provisions is imprisonment for a term which shall not be less than six months but which may extend to two years and a fine.

## MISCELLANEOUS

This chapter deals with miscellaneous sections such as grants by the Central government (Section 19)<sup>14</sup>, protection of action taken in good faith (Section 21)<sup>15</sup>, and power to remove difficulties (Section 23)<sup>16</sup> among others.

## OPEN TO AMENDMENT

On reading the Section 22<sup>17</sup> of the Transgender protection Act, we also observe that the Act itself is open to amendments and changes regarding-

- (a) the form and manner in which an application shall be made under section 5- This Section 5 provides for certification of identity as a transgender<sup>18</sup>;
- (b) the procedure, form, manner, and the period within which a certificate of identity is issued under sub-section (1) of section 6<sup>19</sup>;
- (c) the form and manner in which an application shall be made under sub-section (1) of section 7- this Section 7 provides for gender identification in case of sex-reaffirmation surgery<sup>20</sup>;
- (d) the form, period, and manner for issuing a revised certificate under sub-section (2) of section 7<sup>21</sup>;
- (e) welfare measures to be provided under sub-section (2) of section 8- to protect rights and to ensure access to welfare schemes<sup>22</sup>;
- (f) facilities to be provided under section 10- provides for establishment<sup>23</sup>;

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<sup>14</sup> Transgender Persons (Protection of Rights) Act, 2019, s 19

<sup>15</sup> Transgender Persons (Protection of Rights) Act, 2019, s 21

<sup>16</sup> Transgender Persons (Protection of Rights) Act, 2019, s 23

<sup>17</sup> Transgender Persons (Protection of Rights) Act, 2019, s 22

<sup>18</sup> Transgender Persons (Protection of Rights) Act, 2019, s 5

<sup>19</sup> Transgender Persons (Protection of Rights) Act, 2019, s 6(1)

<sup>20</sup> Transgender Persons (Protection of Rights) Act, 2019, s 7(1)

<sup>21</sup> Transgender Persons (Protection of Rights) Act, 2019, s 7(2)

<sup>22</sup> Transgender Persons (Protection of Rights) Act, 2019, s 8(2)

- (g) other functions of the National Council under clause (e) of section 17<sup>24</sup>; and
- (h) any other matter which is required to be or may be prescribed.

By the nature and provision of this section, the Act ensures that the applications, certifications, welfare scheme availability, and other essential aspects of the Act remain open for scrutiny and improvement along with the changing society and needs.

## CONTROVERSIES SURROUNDING THE ACT

Even after multiple attempts, the Government was unable to come up with a dedicated and effective solution to rectify the plight of transgender people. This Act is merely a formality and a very superficial approach to a much deeply engraved and serious problem. It can be observed that the Act attempts to approach the problems with a few positive outcomes and methodology, such as providing for identification of transgender, assigning establishments, coming up with a National Council for Transgender Persons and their problems, and sanctioning a few offences committed against them. But these are not enough to bring upon necessary changes and the Act is full of lacunae. The definition of Transgender has been laid down in Section 2(k)<sup>25</sup> and it has been pointed out that intersex persons have been put out of its premises. Intersex persons have been defined in clause (i)<sup>26</sup>, thus separating them from the transgender community and ignoring their problems. These people suffer, if not more, equally and they too need protection and steps to be taken to help them feel safe in society. Further, in Chapter II, the Transgender Act lays down the rights of transgender persons and enumerates the actions which will be deemed to be discriminatory. This step was essential to curb the gender distinction and to provide equal opportunity for them to grow and live life as an equal. But the same provision fails to provide for situations wherein these conditions have been breached. The Act is silent on the sanctions of infringement of this chapter. This shows the incomplete nature of this Act and how everything is not either thought through or provided

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<sup>23</sup> Transgender Persons (Protection of Rights) Act, 2019, s 10

<sup>24</sup> Transgender Persons (Protection of Rights) Act, 2019, s 17(e)

<sup>25</sup> Transgender Persons (Protection of Rights) Act, 2019, s 2(k)

<sup>26</sup> Transgender Persons (Protection of Rights) Act, 2019, s 2(i)

for. Perhaps the most serious and pressing concern is the matter of Section 7<sup>27</sup>, with regard to gender identification. The Section states that if a person has been recognised under Section 6<sup>28</sup>, and the said person undergoes a sex - reaffirmation surgery, he/she will have to produce a certain document in a manner to get his/her gender changed. There being no other provision for gender change after registering under Section 6, the Act has rendered it quintessential to undergo sex-reaffirmation surgery to express the desired gender. Section 7 defeats the intention of the Act which is freedom of gender self-expression. That this freedom is tied with a person's right to life. It was laid down in the **National Legal Services Authority v Union of India and Ors**<sup>29</sup> that one's gender identity is a matter of fundamental right to dignity. The essence of gender self-expression was discussed and concluded to be the '*core of one's sense of being*' and an '*integral part of a person's identity*'. The Hon'ble Supreme Court also realised this under the purview of Article 21, stating it to be a part of the personal autonomy of the individual. The Court also relied on *Anuj Garg v Hotel Association of India*<sup>30</sup> to come to this conclusion. The same was also observed in *Navtej Singh Johar Case*<sup>31</sup>, where gender self-expression has been concluded to be an integral part of one's right to life, dignity, and autonomy, and this basic guarantee is violated in the 2019 Act. Section 7 of the Act has mandated sex-reaffirmation surgery to change a person's gender if it has been registered under Section 6 of the Act. This hampers the option of changing one's gender which is a constant struggle for the transgender community. Gender is a psychological and physiological state rather than being a physical matter. A person must not be mandated to undergo surgery in order to certify his gender expression. This provision was also criticized by the Human Rights Watch which called out the Act, challenging it to be against 'international standards of gender recognition. Various international standards and agencies call for the separation of legal and medical processes of gender recognition for the transgender community. It is also been stated by the Human Right Watch that this expression includes the removal of evaluations of applicants for legal gender recognition by panels of medical experts. Self-

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<sup>27</sup> Transgender Persons (Protection of Rights) Act, 2019, s 7

<sup>28</sup> Transgender Persons (Protection of Rights) Act, 2019, s 6

<sup>29</sup>NALSA (n 1)

<sup>30</sup> *Anuj Garg v Hotel Association of India* (2008) 3 SCC 1

<sup>31</sup> *Navtej Singh Johar v Union of India* AIR 2018, SC 4321



declared identity should be accessible to all social security measures, entitlements, and benefits thereof.

The other disputed aspects of this Act pertaining to Establishment provided and their quality. A series of incidents and examples laid down by the Transgender community from time to time has proved the degraded quality and working of establishment but the Act does not redress these issues. Violence, abuse, and other offences have been observed in the past in these institutions and no strict laws have been made for improving the life at establishment or rehabilitation. The Act made an important introduction of Complainant officer for the transgender but is silent on appointment and powers of the same. Grievance redressal is a very essential structure of any system and the same must be provided extensively and exhaustively. This proves the lack of seriousness on behalf of the legislators. It must also be noted herein that the participation of transgenders in the National Council for Transgender Persons is significantly small and it has been suggested to be increased in order to make better policies. The 2019 Act, among other things, also failed to lay down a structure for the health of a transgender person. Neither has this Act given any assurance of improving transgender-specific medical staff. The country lacks specialty doctors and attendants. No step is shown to be taken for the betterment of that. The Act also did not take mental health into consideration. No provision is laid to provide for mental assistance and care for transgenders who need these therapies to ease and help them accept their uniqueness, family separation trauma, societal unacceptance and boycott, and many more complications which come along.

The other important facet missing is focusing on awareness. The position of transgender in a society is not related to transgenders themselves but arises out of the degraded and backward mentality of the society itself. It is a society that needs to be taught and made aware of the human nature of transgender and to normalise indifference. The psychological and physiological barriers need to have vanished and for that, awareness programmes and making additions to the education system need to be taken care of. This is lacking in the 2019 Act.

## CONSTITUTIONALITY OF CERTAIN PROVISIONS

Section 4, 5, 6, 7, 12(3), 18(a), and 18(d)<sup>32</sup> have been challenged before the Supreme Court and are claimed to be violative of Articles 14, 15, 19(1), and 21. In *Kesavananda Bharti Case*, the doctrine of basic structure has been discussed and Fundamental Rights have been concluded to be one of them. Fundamental Rights have been guaranteed to all and the right to life is of the essence<sup>33</sup> and must be protected. It is also to be noted that as per Article 13(2)<sup>34</sup> of the Constitution, State is prohibited to legislate any provision in breach of Fundamental Rights. The state cannot make any law that abridged the Fundamental Rights of a person conferred by the Constitution. Article 13(2) of the Constitution provides for situations wherein any law made in contravention of Article 13(2) shall be void to the extent of the contravention. The requirements in Sections 5 and 6 that identity cards be provided based on documentation as may be necessary are illegal since transgender people cannot be subjected to any additional documentary requirements, including records pertaining to medical or psychological examinations or reports. The provisions of Section 7 of the 2019 Act, which require transgender people to undergo medical surgery in order to identify with a gender of their choice, violate transgender people's right to bodily integrity, privacy, and personal autonomy, as guaranteed by previous decisions of this Hon'ble Court, as mentioned above. Section 12(3), which requires a transgender person to continue living with their biological family even if they endure abuse in the home, or to be placed in a rehabilitation centre on the instructions of a competent court, violates transgender people's right to life. It also makes no distinction in treatment between juveniles and adult transgender people, and it is an invasive way of controlling where individuals who may be adults can reside. Similarly, it does not provide the option of living in a third alternative arrangement. And Section 18 (a) does not define bonded labour and leaves it open to be used against transgenders and violates Article 14. Lastly, Section 18(d) lists the term for punishment for offences against transgenders. This is significantly lower for offences against transgender in comparison to the same assault against another gender. The Act prohibits and restricts gender self-expression, thus violating Article

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<sup>32</sup> Transgender Persons (Protection of Rights) Act, 2019, ss 4, 5, 6, 7, 12(3), 18(a) and 18(d)

<sup>33</sup> *Kesavananda Bharati v State of Kerala and Anr* (1963), AIR 1295

<sup>34</sup> Constitution of India, 1950, art. 13(2)

19(1)(a) along with hampering the right to life with dignity and autonomy, which comes under the purview of Article 21 of the Indian Constitution. The Sections of the said Act, are also violative of Article 14 which ensures the right to equality and equal opportunity to all aligned with Article 15, which prohibits discrimination based upon gender. And by the nature of Article 13, these need to be either amended or held *ultra vires* and be struck off.

## CONCLUSION

The Act comes with its own benefits and lacks. It was a necessary step to introduce this Act to protect Transgenders and to initiate a new perspective of their life. The same has been attempted to be done in the simplest way possible. The Act understands the urgent need and basic facilities but still needs to integrate many other possibilities. Topics, such as gender self-expression, mental health facilities, refinement of establishments, appropriate health and sanitary measures (separate washrooms, etc.), and appropriate representation in the advisory council have not been provided for. Certain provisions of the Act have been challenged and the judgement of such cases has to be waited for, to clearly understand the whole Act.