

JOURNAL SECTION**TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019: ANALYSIS AND CRITICISM****By : Kartika Bakshi****INTRODUCTION**

Transgenders, often identified as Hijras, Aravanis, Kothis, Kinnars or Sakhis, have existed in the Indian historical records since the 9th century BCE. There was a time when the third gender was given a prominent place in the society as administrators and political advisors to the king. The Hindu mythology has also given due recognition to the transgender, be it in the form of worshipping of ardhnarishwar or the blessings bestowed upon them by Lord Rama when he came back from exile. However, over the course of time their status has degraded. This degradation and discrimination became institutionalized for the first time when the British rolled out the Criminal Tribes Act in 1871. This Act particularly targeted the transgender community. Even though the Act was repealed in 1951, the damage was already done and India was transformed into a transphobic society.

BACKGROUND

Until 2019, there were no social welfare legislations meant to uplift the transgender community. Most of them were abandoned in early childhood, denied formal education and employment opportunities. Due to the absence of any laws to protect them and facilitate their inclusion in the society, they spent decades being marginalized. It was only in 2011 Census, that the transgenders were recognized as the third sex for the first time. The year 2014 was a watershed year in the recognition of transgender rights. The NALSA judgement¹ recognized the rights of the transgender persons in India and laid down a series of measures for securing the rights of the transgender persons. The judgement prohibited discrimination, recommended the creation of welfare policies as well as reservations for transgender people in educational institutions and jobs. Most importantly, it upheld the right of transgender person to self-perceived gender identity, guaranteed by the Constitution of India, in the absence of sex reassignment surgery. This position of the Supreme Court was reiterated in subsequent judgements.²

1 National Legal Services Authority v. Union of India

2 Justice K.S. Puttaswamy (Retd.) and anr. V. Union of India and ors. (2017) and Navtej Singh Johar v. Union of India

Post the NALSA judgement, Tiruchi Siva of the Dravida Munnetra Kazhagam party, introduced the Rights of Transgenders Bill in 2014 which was passed by the Rajya Sabha in 2015 but has been pending in the Lok Sabha since then. This bill was welcomed by the queer community and contained progressive provisions. However, this bill underwent significant changes when the government drafted its own version, omitting the various progressive provisions in the 2014 bill. The bill was discussed in the Lok Sabha in 2016 and met with a lot of criticism from the transgender community. It was recommended to the Standing Committee a new bill with 27 amendments was passed by the Lok Sabha in 2018. However, this bill too was criticized on ground that it overlooked the recommendations of the standing committee and suggestions from the transgender community. This bill lapsed and finally in July 2019 a new bill was introduced and passed on 5th August, 2019 by a voice note, amidst the chaos following the abrogation of Article 370. However, this Act too was met with protests and criticism by the transgender community for many reasons which have been discussed subsequently.

CRITICISM

The Transgender Persons (Protection of Rights) Act, 2019 fails on many accounts, specifically:

- a) The Act includes the intersex community in the definition of transgenders, which is inappropriate and at variance with the internationally accepted definitions as not all intersex people identify themselves as trans-people.
- b) The definition of 'family' is too restrictive keeping in context the unique position of the transgender persons who find a home with their chosen 'family' rather than the biological one.
- c) While the bill does grant the right to self-perceived gender identity, it also states that an individual must apply to the district magistrate for an identity certificate that "confers rights" and acts as "proof of their identity as a transgender person". Thus, the 'self-perceived' identity needs to be confirmed both medically (in case of sex reassignment surgery) and legally. This is in contradiction with the 2014 NALSA judgement as well as the international standards of legal gender recognition. It places unilateral power of denial in the hands of the district magistrate and does not state any provision for appeal.
- d) There is no provision for reservation in educational institutes or jobs.

- e) The National Council for Transgender Persons which is composed of at least 30 persons has a mere representation of 5 persons from the transgender community. This is gross under representation of the community.
- f) The penalty for rape is just six months to two years while it a minimum of seven years for cis-gendered persons. Even endangering their life is punishable by a maximum of two years. This trivializes crimes against the transgender communities and reduces them to "lesser humans" than cis-gendered people. This also sends out the message that the dignity or life of transgender persons is not as important as that of cis-gendered people which is discriminatory and derogatory.
- g) The Act is silent on bullying and harassment of transgender persons in the public sphere.

CONCLUSION

The act removed certain discriminatory provisions of the previous bills such as criminalization of begging by the transgender persons and the provision for district screening committee after they were met with wide protests from the transgender community. However, the new Act leaves a lot to be desired and appears to be a half hearted attempt at improving the lives of this marginalized community. The Act is not only at variance with the NALSA judgement but also contradictory to the provisions laid down in the Indian Penal Code. It is violative of Article 14, 21 of the Indian Constitution and also opposed to the international standards of legal gender recognition. The legislation was passed on the same day as the J&K Reorganization Act, 2019 and drowned amidst the noise created by it. This shows that the law makers had no intention to have a real conversation on this issue or to address the grievances of this long suffering section of the society. There is a need to bring the Act in consonance with the International Human Rights framework and the Fundamental Rights guaranteed in the Constitution of India. In its present form, it fails to live up to both.

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