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LEGISLATIVE REVIEW OF THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

by Aastha Khanna and
Divesh Sawhney*

INTRODUCTION

Fifty Eight. Beyond the man-woman binary, there are as many as fifty-eight gender variants.¹ The

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¹ Aastha Khanna & Divesh Sawhney, *NALSA Judgment: Critique of the Indian Perspective Beyond the Adams-and-Eves Worldview*, GEO. U. UNDERGRADUATE L. R. (Aug. 25, 2020), <https://guulr.com/2020/08/25/nalsa-judgment-critique-of-the-indian-perspective-beyond-the-adams-and-eves-worldview/> (citing Arun Kumar and Anr v. Inspector General of Registration and Ors, (2019) SCC OnLine Mad 8779, ¶ 16 (India)). Following the policy of inclusivity, social media platforms like Facebook and Tinder now allow users to choose from 58 and 37 gender identities respectively while signing up.

expression "transgender" is an umbrella term for persons whose gender identity, expression, and orientation are incongruent with their biological sex. Although activists around the globe have put in tireless efforts, life for the transgender community continues to be odious when tested on the bedrock of human dignity. Arundhati Roy in her book, *The Ministry of Utmost Happiness*, highlighted the spells of insignificance and insecurity that a transgender person quietly endures:

In Urdu, the only language she knew, all things, not just living things but all things — carpets, clothes, books, pens, musical instruments — had a gender. Everything was either masculine or feminine, man or woman. Everything except her baby. Yes of course she knew there was a word for those like him — Hijra. Two words actually, Hijra and Kinnar. But two words do not make a language. Was it possible to live outside language??

The whole idea that individuals may amend their genders as per their whims and fancies is flawed as it fails to consider that it is the gender, as already tagged on us, which regulates our experiences, and not vice versa. It is the gender which chooses individuals and not the other way around.³ The insurmountable torment faced by transgender persons is not confined to state in the Global South such as India, rather it is something which is prevalent *in rem* including superpowers like the U.S.⁴ To the utter dismay of the transgender community,

² ARUNDHATI ROY, *THE MINISTRY OF UTMOST HAPPINESS* 12 (Penguin Books 2018).

³ Mari Mikkola, *Feminist Perspectives on Sex and Gender*, STAN. ENCYCLOPEDIA OF PHIL. ARCHIVE (May 12, 2008, revised Oct. 25, 2017), <https://plato.stanford.edu/archives/fall2019/entries/feminism-gender/>; Khanna & Sawhney, *supra* note 1.

⁴ Human Rights Campaign, *Understanding the Transgender Community*, <https://www.hrc.org/resources/understanding-the-transgender-community> (last visited Mar. 28, 2021); Rick Rojas & Vanessa Swales, *18 Transgender Killings This Year Raise Fears of an 'Epidemic'*, N.Y. TIMES (Sept. 27, 2019), <https://www.nytimes.com/2019/09/27/us/transgender-women-deaths.html>.

a matter captioned as *Ong Ming Johnson v. Attorney-General*⁵ from the High Court of Singapore recently dismissed a constitutional challenge to Section 377A of the Singapore Penal Code, which criminalizes homosexual acts between males. In doing so, the Singapore High Court rebuffed the Indian Supreme Court's monumental decision in *Navtej Singh Johar and Ors. v. Union of India*.⁶ In addition to the discriminatory decision in Singapore, Hungary has enacted policies that have been extremely harmful to the transgender community. Hungary's authoritarian government recently enacted legislation that ended all legal recognition of transgender people's existence. The pandemic has only exacerbated the struggles experienced by the transgender community in states where their rights have been curbed since legal status is vital to access aid.

In India specifically, there are two facets of recognition: one, constitutionality and another, reality. The Supreme Court of India earnestly refers to fundamental rights enshrined in Part III of the Constitution of India.⁷ The widely celebrated decision in *National Legal Services Authority v. Union of India (NALSA)*⁸ is an exemplary depiction: the Indian Supreme Court laid down the dogma

of gender autonomy and expression, noting the Yogyakarta Principles⁹ and Malta's law¹⁰ on the subject. The Indian Constitution rests on an anti-totalitarian principle, hence being a trans-person or a gender non-conforming (hereinafter GNC) adult is not an anomaly, but rather a reality that ought to be welcomed with an open psyche.

These principles of equality were impetus enough for theoretical constitutionality; however in reality, the transgender and gender non-conforming individuals face different facts of existence. Indian mythology has long exalted the transgender community as providential. But this ceremonially respected community has been abused, tormented, and ridiculed as comedy in Indian cinema.¹¹ Further, until December 5, 2019, India had no laws in place to combat the adversities faced by the transgender community, which has been languishing in the margins of society for decades.¹²

We must also consider the draconian Criminal Tribes Act, enacted by the British in India in 1871. This law deemed the transgender community as innately criminal. While the government repealed this Act in August 1949, seventy years later the Indian

⁵ *Ong Ming Johnson v. Attorney General*, (2020) SGHC 63 (Sing.).

⁶ *Navtej Singh v. Union of India*, (2018) 10 SCC 1 (India).

⁷ BHĀRATĪYASAMVIDHĀNA [CONSTITUTION] Nov. 26, 1949, (India).

⁸ *Nat'l Legal Serv. Auth. v. Union of India*, (2014) 5 SCC 438 (India).

⁹ The Yogyakarta Principles addresses a broad range of international human rights standards and their application to SOGI issues. On 10 Nov. 2017, a panel of experts published additional principles expanding on the original document reflecting developments in international human rights law and practice since the 2006 Principles, The Yogyakarta Principles plus 10. The new document also contains 111 'additional state obligations', related to areas such as torture, asylum, privacy, health, and the protection of human rights defenders. The full text of the Yogyakarta Principles and the Yogyakarta Principles plus 10 are available at: www.yogyakartaprinciples.org.

¹⁰ Gender Identity, Gender Expression and Sex Characteristics Act, CAP. 540, (2015) (Malta).

¹¹ Pushpinder Kaur, *Gender, Sexuality and (Be)longing: The Representation of Queer (LGBT) in Hindi Cinema*, 7 AMITY J. OF MEDIA & COMM. STUD. 22 (2017); see also Sanjeev Kumar Sabharwal & Reetika Sen, *Portrayal of Sexual Minorities in Hindi Films*, 3 GLOB. MEDIA J. 1 (Jun. 2012) (India).

¹² M. Michelraj, *Historical Evolution of Transgender Community in India*, 4 ASIAN REV. OF SOC. SCI. 17-19 (2015), <https://www.trp.org.in/wp-content/uploads/2015/10/ARSS-Vol.4-No.1-Jan-June-2015-pp.17-19.pdf>.

government declared another innately discriminative provision: section 377 of Indian Penal Code.¹³ This provision criminalised homosexual acts between two consenting adults and prescribed life imprisonment, thereby denying the right of self-expression and sense of individuality and identity to a community in society — dire violation of Articles 14, 19, and 21 of the Constitution of India.¹⁴

The transgender community's decades-long struggle and endurance of societal atrocities has impelled the Parliament to finally legislate on gender parity vis-à-vis the transgender community and the gender binary.¹⁵ The equality of treatment model has been somewhat achieved by the struggle and resultant legislation; however, in reality, this is nothing but a facial parity because there are miles to cover before the community achieves equality of impact.¹⁶ A cliché dichotomy and wide schism between different gender identities persist today. Transgender constitutional jurisprudence is moving towards its second phase wherein it is time to demand a scrutiny of the impacts of legislation, policies, and welfare schemes on transgender people as a class. Indubitably, transgender persons' experience, values, and needs, to the extent that they differ from cisgender men and women, must also be embodied into the ethos of all institutions and the legal system. Thus, it is prudent to articulate areas where a legislative act related to gender parity must abide by, lest it be considered a failure. Jillian Weiss outlines these areas of note in her article published in the *Journal of Race, Gender, and Ethnicity*:

- 1) Laws regarding sex designation on government-issued identification, such

as birth certificates and driver licenses;
 2) Name change laws that restrict a person's right to use a name stereotypically considered of the opposite sex;
 3) Laws requiring or permitting sex segregation in public facilities, such as bathrooms and dressing rooms, educational settings, youth facilities, homeless shelters, drug treatment centres, foster care group homes, domestic violence shelters, and prisons;
 4) Laws requiring or permitting sex discrimination in private settings, such as employment, sports, and assisted reproductive technologies;
 5) Policies imposing restrictions or negative consequences on the right to transition or cross-dress, such as those imposed on youth, on divorced transgender parents, on adoptive parents, in workplaces, educational institutions, and prisons;
 6) Exclusions for transgender persons in private and government health care;
 7) Laws that restrict marriage and/or civil unions based on gender, including rights contingent on the validity of marriage such as intestate inheritance; right to sue for torts to a domestic partner, alimony, child custody, visitation and support; and insurance coverage. . . .¹⁷

By reviewing the Transgender Persons (Protection of Rights) Act, 2019 and the Transgender Persons (Protection of Rights) Rules, 2020, we hope to find any voids, lacunae, or inconsistencies with the present-day statutes, and the high law of the Constitution of India. This paper weaves through the provisions of the Act seriatim under the headings: Title, Definitions, Operative Sections, Offenses & Penalties and Conclusion. References to the Rules

¹³ PEN. CODE § 377 (India).

¹⁴ BHĀRATĪYASAMVIDHĀNA [CONSTITUTION] Nov. 26, 1949, art. 14, 19, 21 (India).

¹⁵ The Transgender Persons (Protection of Rights) Act, 2019 (Act No. 40/2019) (India) [hereinafter *The Transgender Persons (Protection of Rights) Act*].

¹⁶ G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 1 (Dec. 10, 1948), [hereinafter UDHR] ("All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.").

¹⁷ Jillian T. Weiss, *Gender Autonomy, Transgender Identity and Substantive Due Process: Finding a Rational Basis for Lawrence v. Texas*, 5 J. OF RACE, GENDER, & ETHNICITY 2, 3-5 (2010).

have been made wherever relevant. In the main, the paper is punctuated with suggestions, some hackneyed, some pristine, that may help to better this progressive piece of legislation.

I. TITLE (LONG AND SHORT)

The name “The Transgender Persons (Protection of Rights) Act”¹⁸ as it currently stands hints towards the Act being solely for the protection of the rights of the transgender community, along with their welfare. However, the Act not only protects the rights of the transgender persons, but also gives legal backing to their right to self-perceived identity and expression.¹⁹ As observed by the Supreme Court in *NALSA*, gender autonomy is a value that falls within the realms of Article 19(1)(a)²⁰ and Article 21.²¹ Additionally, the aim of the legislation is to afford autonomy to people outside the gender binary so they can choose their gender on the basis of their own perception.²² The legislation not only protects constitutional and legal rights, such as the right to expression, dignity, and personal liberty, but it also attaches a deeper connotation to these rights. Hence, “Gender Autonomy (Protection and Recognition) Act” would be more appropriate given the provisions of the Act.

The objective²³ of the Act is not only to protect, but also to provide for the formulation, implementation, and recognition of the rights of transgender persons. The central or lynchpin goal is the recognition of other genders and the establishment of a space for the third gender, not merely accommodation within the binary framework.

¹⁸ The Transgender Persons (Protection of Rights) Act, *supra* note 15.

¹⁹ *Id.* at § 4.

²⁰ BHĀRATĪYASAMVIDHĀNA [CONSTITUTION] Nov. 26, 1949, art. 19(1)(a) (India).

²¹ *Id.* at art. 21.

²² Long title of the Act: An Act to provide for protection of rights of transgender persons and their welfare and for matters connected therewith and incidental thereto.

²³ *Id.*

II. DEFINITIONS (SECTION 2)

The definition of “appropriate government” under section 2(a) of the Act includes the Central Government, State Government, and local authority.²⁴ The Indian Constitution establishes a unique three tier quasi-federal system of governance which includes a Municipal Government²⁵ and Panchayat²⁶ (a local government of villages)²⁷ in addition to the Central and State Government. To achieve the objectives of the Act, the inclusion of Municipality and Panchayat was imperative, and this has been duly acknowledged by the legislature under section 2(f) defining local authority.²⁸

Under section 2(c) of the Act, family is defined as “a group of people related by blood or marriage or by adoption.”²⁹ This is a narrow interpretation of the term, which is of great import. Family should be inclusive of immediate family as well as self-created family to align with the Yogyakarta principle: “right to found a family.”³⁰ This liberal understanding of family allows transgender persons to choose or create families from within their community when they are abused at home.³¹

An important aspect of inclusive education is gender sensitization, but it is missing from the definition of *inclusive education* under Section 2(d). Classes

²⁴ The Transgender Persons (Protection of Rights) Act at § 2(a).

²⁵ BHĀRATĪYASAMVIDHĀNA [CONSTITUTION] Nov. 26, 1949, part IXA, *amended by* The Constitution (Seventy-Fourth Amendment) Act, 1992 (India).

²⁶ *Id.* at part IX, *amended by* The Constitution (Seventy-Third Amendment) Act, 1992 (India).

²⁷ *Id.*

²⁸ The Transgender Persons (Protection of Rights) Act § 2(f).

²⁹ *Id.* at § 2(c), (“Family” means a group of people related by blood or marriage or by adoption made in accordance with law.)

³⁰ International Commission of Jurists, *Yogyakarta Principles – Principles On the Application of International Human Rights Law In Relation to Sexual Orientation and Gender Identity* prin. 24 (Mar. 2007); *see supra* note 9 (background on Yogyakarta Principles).

³¹ Sixteenth Lok Sabha, Report on The Transgender Persons (Protection of Rights) Bill, 2016, 43 STANDING COMM. ON SOC. JUST. & EMPOWERMENT 1, 69 (July 2017).

concerning gender sensitization must be mandated for all students irrespective of their gender. The system of teaching and learning should be suitably adapted to meet the requirements of students having clarity about their gender identity and for those who are gender fluid.

Further, the definition of *persons with intersex variations* under Section 2(i) should replace cis-gender pronouns (his/her) with gender neutral pronouns, such as "their/zir," to reflect the objectivity of the legislation.

The definition of "*Transgender Person*" under section 2(k) should be inclusive of all gender identities and orientation except for lesbian, gay and bisexual individuals.³² There are different variations under the umbrella term "transgender"; however, the definition specifically includes only four other communities: *Kinner, Hijra, Aravani* and *Jogta*.³³ Non-inclusion of gender non-conforming ("GNC") persons is amiss. Also, various other gender identities such as *Iravanis, Khusras, Shiv Shakti, Eunuchs, Kothi, Nupa Maanba* and *Nupi Maanbi* from Manipur, and *Thirunangais* from Tamil Nadu (who may or may not identify themselves with the identities specified in the Act) should also be mentioned.³⁴ To ensure that the persons who fall outside the gender binary benefit from the Transgender Persons (Protection of Rights) Act, 2019, it is crucial to mention all transgender communities. Furthermore, the Act includes persons with intersex variation under the rubric of transgender persons.³⁵ This is a clear conflation of transgender persons with intersex individuals. It seems that the Act is conflating sex and gender, thus diminishing its capacity to understand the needs of transgender persons. Therefore, the definition should replace the word "means" with "includes."

The Supreme Court of India in *NALSA* clarified that lesbian-, gay-, and bisexual- identifying individuals

are, at present, beyond consideration to be covered under the ambit of Transgender Persons, in the following words:

[t]he grammatical meaning of transgender, therefore, is across or beyond gender. This has come to be known as umbrella term which includes Gay men, Lesbians, bisexuals, and cross dressers within its scope. However, while dealing with the present issue we are not concerned with this aforesaid wider meaning of the expression transgender. Therefore, we make it clear at the outset that when we discuss about the question of conferring distinct identity, we are restrictive in our meaning which has to be given to [transgender] community i.e. Hijra etc., as explained above.³⁶

By not defining terms like gender identity,³⁷ abuse, violence, and discrimination³⁸ the framers of the Act fail to bring out clarity to the contours of the Act. For instance, the terms like, "abuse" and "violence" are polysemic. By defining them in the Act, it would be easier for the enforcement agencies and courts to clamp down on the perpetrators.

III. OPERATIVE SECTIONS (SECTIONS 3-17)

Section 3, which prohibits discrimination against a transgender person, sets out a statutory right without

³² *Id.* at 11.

³³ Nat'l Legal Serv. Auth. v. Union of India, (2014) 5 SCC 438 (India), ¶ 44.

³⁴ The Transgender Persons (Protection of Rights) Act § 2(k).

³⁵ *Id.*

³⁶ Nat'l Legal Serv. Auth. v. Union of India & Others, 5 SCC 1, 40-1 (2014) (India).

³⁷ Gender Identity, Gender Expression and Sex Characteristics Act, 2015 § 2 (Malta).

³⁸ The Rights of Transgender Person's Bill, 2014 (Bill No. XLIX of 2014) § 2(c) (India) ("Discrimination' means any distinction, exclusion or restriction on the basis of gender identity and expression which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field and includes all forms of discrimination, including denial of reasonable accommodation.").

a remedy, rendering that right impossible to exercise.³⁹ A duty has been cast upon individuals not to discriminate against transgender persons on the basis of their gender expression or identity. However, no enforcement mechanism or punishment has been prescribed for a breach or violation, which contravenes the deterrence theory of criminal jurisprudence.⁴⁰

Throughout history, transgender persons have asserted that “[they are] no ‘other’. [they are] not a tree, [they are] not a bus, [they are] not a train, a dog or a cat. [They are] pe[ople]. [They] want [their] identity. [They are] transgender, a Hijra.”⁴¹ In every form and document, there should be a choice to mention the specific gender that a person identifies with, instead of “Others.”

Section 4 is progressive because it recognizes the right to self-perceived identity of all transgender persons.⁴² However, the rights that this section confers upon individuals are diluted by succeeding sections. In *NALSA*, the Supreme Court held that the right to gender identity was protected under Article 19 and Article 21 of the Constitution.⁴³ *NALSA* conceptualized gender on a spectrum and interpreted sex to include one’s gender identity in its decision: “Articles 15 and 16 prohibit discrimination

against any citizen on certain enumerated grounds, including the ground of sex. In fact, both of the Articles prohibit all forms of gender bias and gender based discrimination.”⁴⁴

The Act rests on the assumption that the gender binary is a norm and it lays out the two-step process of certification in order to be legally recognised as transgender. In *Justice (Retd) K.S. Puttaswamy v. Union of India*,⁴⁵ it was further noted that the right to privacy protected the freedom to make intimate decisions regarding personhood and autonomy, decisions that brooked minimum interference from the state. Life and personal liberty are inalienable rights, inseparable from a dignified human existence. Personal dignity, equality between human beings, and the quest for liberty are the foundational principles of the Indian Constitution, which shall not be shaken by laying down a certification process for a specific section of the society alone, the transgender community.⁴⁶

Section 4(2) states clearly that only *after* recognition under the provisions of the Act shall a transgender person have the right to their self-perceived identity.⁴⁷ In other words, the Act makes identity conditional upon identification instead of the other way round (as held in *NALSA*).⁴⁸

Therefore, it is evident that the scheme of Sections 4 through 7 is constitutionally flawed. The issuance of a revised certificate of gender binary — male or female — is contingent upon completing Sex Reassignment Surgery (“SRS”). This system unequivocally forces a transgender person to

³⁹ The Transgender Persons (Protection of Rights) Act § 3 (The Transgender Persons [Protection of Rights] Rules, 2020, under Rule 11, provides that the appropriate government shall within two years from the date of coming into force of these rules shall formulate a comprehensive policy on the measures and procedures necessary to prohibit discrimination against transgender persons. Rules are available at <http://egazette.nic.in/WriteReadData/2020/222096.pdf>).

⁴⁰ The deterrence theory of punishment suggests that the punishment awarded to the offender should be such that it deters or discourages other people to commit such a crime. It aims to create a fear in the mind of the public. See also <https://marisluste.files.wordpress.com/2010/11/deterrence-theory.pdf> (last accessed on Mar. 26, 2021).

⁴¹ *We’re Not ‘Others’: Transgenders Demand EC Recognition as 3rd Gender*, FIRST POST (July 21, 2014), <https://www.firstpost.com/india/were-not-others-transgenders-demand-ec-recognition-as-3rd-gender-1627261.html>.

⁴² The Transgender Persons (Protection of Rights) Act § 4.

⁴³ BHĀRATĪYASAMVIDHĀNA [CONSTITUTION] Nov. 26, 1949, art. 19, 21 (India).

⁴⁴ Nat’l Legal Servs. Auth. v. Union of India, (2014) 5 SCC 438, ¶ 56 (India).

⁴⁵ Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1 (India).

⁴⁶ The Transgender Persons (Protection of Rights) Act § 6.

⁴⁷ *Id.* at § 4(2).

⁴⁸ Nat’l Legal Servs. Auth. v. Union of India, (2014) 5 SCC 438, ¶ 76 (India) (The Supreme Court observed that gender identity is a person’s internal sense of being male, female or third gender. It is based on self-identification and not on medical or surgical procedure.)

undergo surgery if they hope to obtain certification of their self-perceived identity by the state. Transgender persons are, as per the combined reading of Section 6 and Section 7, required to undergo a surgery to be identified as per their lived gender, otherwise they would still be called transgender persons.⁴⁹

The Supreme Court of India in *NALSA* explicitly rejected an objective medical or pathological standard to determine an individual's gender, and recognised that "transgender" constituted its own, standalone gender for individuals who did not wish to associate themselves with either the male or female gender.⁵⁰ To summarise, under the current system in India, a transgender person can choose to be recognised as either male or female, or alternatively as transgender.

Sections 5 and 6 provide for recognition as "transgender" devoid of any medical procedure. But the process to receive a gender-binary certificate, which holds the legal significance that transgender individuals currently lack, is outlined under Section 7 and necessitates a medical procedure. While *NALSA*, on the one hand, recognizes a right to be recognized as "M," "F," or "TG" unaccompanied by any medical procedure, Section 7 provides for a "M" or "F" certificate only after medical procedure. And only by dint of this certificate can a transgender person avail themselves of state welfare schemes or reservation benefits, which they are entitled to.⁵¹

The current legislation reiterates that being cis-gender is the norm and being transgender is an exception. A conjoint reading of the Act and the rules suggests that a medical-intervention certificate from an institution — say, counselling, hormonal therapy, surgery — issued by a Medical Superintendent or Chief Medical officer of the institution is required to be annexed to the Application for change of gender

under Section 7. In contrast to this certificate-procuring requirement under the Act, Malta's law⁵² requires merely the signing of a declaratory public deed by a Notary, a public official. While Malta's provision sets a low bar for obtaining a correct gender certificate it is one of the most progressive systems in the world regarding freedom of expression. The right to gender identity under the Malta's law states that a transgender person is not required to provide proof of a surgical procedure for total or partial genital reassignment, hormonal therapies, or any other psychiatric, psychological or medical treatment.⁵³

Beyond the above discussion regarding the application procedure, the government has committed a folly in Form 3 of the Rules. Form 3 is the form of certificate of identity to be issued by the District Magistrate under rule 5 read with section 6 of the Act. This certificate uses titles like Shri (Mr.), Smt. (Mrs.), Ms. while certifying an individual as transgender person. This, yet again, evinces the society's parochial outlook toward gender-binary hegemony.

The Indian constitutional notion entails historical prejudices to level up chasms between communities today. Providing quotas or reservation for the historically-discriminated communities, in the Constitution itself, was one avenue to paper over the cracks. To this end, the founding members enshrined reservation for marginalised groups of women, Scheduled Castes/Scheduled Tribes⁵⁴ and other socially and economically backward classes. Reservation, with time, became a facet of equality and not an exception to it; therefore, in *NALSA*, the Supreme Court recognized the transgender community as a socially and educationally backward

⁴⁹ The Transgender Persons (Protection of Rights) Act §§ 6-7.

⁵⁰ Nat'l Legal Servs. Auth. v. Union of India, (2014) 5 SCC 438, ¶ 76 (India).

⁵¹ Transgender Persons (Protection of Rights) Rules, 2020 (India), <http://egazette.nic.in/WriteReadData/2020/222096.pdf>

⁵² Gender Identity, Gender Expression and Sex Characteristics Act, 2015 § 4 (Malta).

⁵³ *Id.*

⁵⁴ Vishnu Gopinath, *Who Are the Scheduled Castes, Scheduled Tribes, OBCs ad EBCs?*, THE QUINT (Jun. 12, 2018), <https://www.thequint.com/explainers/scheduled-caste-scheduled-tribe-obc-ebc-sc-st-prevention-of-atrocities-act-explainer>.

class under Article 15(4) and 16(4) of the Constitution.⁵⁵ The ‘The Right of Transgender Persons Bill, 2014’ also stipulated a two percent reservation for transgender persons in education and employment. But, alas, the Act or the Rules make no mention of reservation for the transgender persons community. Drawing from the constitutional provisions, reservation is not simply something the government may do, but indeed, is obligated to do after identifying relevant sections of society that stand in need for them.

The right to an adequate standard of living⁵⁶ and the right to protection from poverty⁵⁷ recognized under Yogyakarta principles include access to the welfare regime. The doctrine of “Living Tree,” a Canadian law doctrine, describes the Constitution as a living document that continuously evolves over time.⁵⁸ The meaning of the Canadian Constitution may not be limited to the perspective of when it was adopted.⁵⁹ The change in social fabric of the state has given rise to the concerns which were not present seven decades ago. Absence of facilities such as transgender cells in police stations, separate frisking zones, special third gender or transgender ration cards, adoption of inclusive language and certain other fundamentals is appalling. All these basic facilities are necessary for a dignified life and absence of these violates Article 21 of the Indian Constitution, which subsumes the golden principle: “To Live is to Live with Dignity.”⁶⁰

Section 11 mentions the appointment of a complaint officer in every establishment.⁶¹ However, no

⁵⁵ BHĀRATĪYASAMVIDHĀNA [CONSTITUTION] Nov. 26, 1949, art. 15, 16 (India).

⁵⁶ International Commission of Jurists, *supra* note 30.

⁵⁷ *Id.* at prin. 34.

⁵⁸ The doctrine of ‘Living Tree’ is a Canadian law doctrine describing their Constitution as a living document, which keeps evolving with the changing times. The meaning of the Constitution may not be frozen to the perspective when it was adopted.

⁵⁹ Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1, 324 (India).

⁶⁰ BHĀRATĪYASAMVIDHĀNA [CONSTITUTION] Nov. 26, 1949, art. 21 (India).

⁶¹ The Transgender Persons (Protection of Rights) Act § 11.

eligibility or qualification for such a position has been provided. Moreover, no duty of the complaint officer has been stipulated, hence the penalty for breach in duty has also not been provided. Along with duty, the legislation must also state the remedy in case the person appointed as complaint officer does not comply with the provisions of the Act. Although the appointment of a complaint officer is a welcoming step, the section fails to mention necessary structural changes for creating better, inclusive spaces and addressing problems of “otherization” of transgender persons.

We recommend that a complaint made to the complaint officer should be forwarded to the state or District commission, which also needs to be formulated, as explained later, for transgender persons within three working days (or any other suitable time frame) from the date of receipt of the complaint. There should also be provisions in place for the assignment of an officer or a reputed person or both from an NGO working for transgender rights to deal with the complaint and supervise any following proceedings.

Section 12 of the Act provides for the right to residence. Under Section 12(1), a transgender child can be separated from the parents or the immediate family only after an order of a competent Court.⁶² Notwithstanding, Section 317 of the Indian Penal Code concerns the exposure or abandonment of a child under twelve by a parent or guardian.⁶³ It stipulates imprisonment which may extend up to seven years.⁶⁴ The Transgender Persons (Protection of Rights) Act contains a substantive clause disallowing transgender children below the age of eighteen to be separated from their families, but lacks an enforcement mechanism because there is no associated penal provision if such law is violated.

⁶² *Id.* at § 12.

⁶³ PEN. CODE § 317 (India).

⁶⁴ *Id.*

The word “rehabilitation centre” in Section 12(3) of the Act should be replaced by “reasonable accommodation” or “self-created/self-chosen/self-founded family.” Requiring a transgender person to live in a rehabilitation centre would be an involuntary detention and non-intentional infringement of their fundamental right to personal liberty provided for under Article 21 of the Indian Constitution⁶⁵ and also the Yogyakarta Principles.⁶⁶ There is a complex web of relationships in the life of a transgender person; therefore, it is crucial to understand the connectedness and legislate accordingly.

The Parliamentary Standing Committee⁶⁷ raised concerns that the two options provided by the Bill would not guarantee protection in practice. Several transgender persons face significant abuse at the hands of their own families, who deny them the right to self-identify with a gender of their choosing, and restrict their gender expression.⁶⁸ The nature of the rehabilitation centres is also unknown. The Committee noted that several transgender persons choose not to live at home, but rather within transgender communities where they form an alternative network of friends and family.⁶⁹ By compelling transgender persons to either live at home or in a state-run rehabilitation centre, Section 13 of the Act seems to deny them the right to choose the community they wish to live in.⁷⁰ Deciding whether to live at home would be considered an essential choice relating to family, and by denying transgender persons the third alternative of living within a transgender community, the state is

indubitably interfering with their “autonomy” as noted in the *Puttaswamy* case.⁷¹

We suggest that the Act should design provisions similar to Section 125 of the 1973 Criminal Procedure Code⁷² where minor transgender persons should have a right to maintenance from immediate family. In the case of transgender persons above the age of majority, the government should provide unemployment or a living allowance.

Although Section 13 in Chapter VI of the Act provides for inclusive education and non-discrimination policies at academic institutions, the provision has been rendered otiose since there is no penalty established for the perpetration of bullying or discrimination against transgender people in an academic space. The duty without a penalty in case of breach is like a toothless tiger. The Act should provide for specific remedies against bullying or singling out of transgender students. Educational institutions must formulate an anti-discrimination committee to monitor any form of discrimination against the transgender community such as the Expert Committee referred to in the Standing Committee report.⁷³ There must also be a provision for mandatory transgender/gender-neutral toilets in all public places.⁷⁴

Section 15 lists the healthcare facilities which the appropriate government shall provide in relation to transgender persons. However, under clause (a), separate centres for the transgender community will further stigmatize and isolate the community.⁷⁵ Ironically, the Act does not prevent but encodes discrimination. Apart from this, the Act should also provide for crisis counselling for transgender victims on the model of Rape and Crisis Intervention

⁶⁵ BHĀRATĪYASAMVIDHĀNA [CONSTITUTION] Nov. 26, 1949 (India).

⁶⁶ International Commission of Jurists, *supra* note 30.

⁶⁷ Sixteenth Lok Sabha, *supra* note 31, at 11.

⁶⁸ *Many Transgender Community Members Battling Mental, Physical Abuse During Pandemic*, THE TRIBUNE INDIA (Aug. 30, 2020), <https://www.tribuneindia.com/news/nation/man-y-transgender-community-members-battling-mental-physical-abuse-during-pandemic-133734>.

⁶⁹ Sixteenth Lok Sabha, *supra* note 31, at 69.

⁷⁰ The Transgender Persons (Protection of Rights) Act § 13.

⁷¹ Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1 (India).

⁷² CODE CRIM. PROC., 1973 § 125 (Act No. 2 of 1974) (India).

⁷³ Sixteenth Lok Sabha, *supra* note 31, at 7.

⁷⁴ Nina C. George, *Toilets: He, She, and Them?*, DECCAN HERALD (Nov. 26, 2019), <https://www.deccanherald.com/metrolife/metrolife-your-bond-with-bengaluru/toilets-he-she-and-them-780085.html>.

⁷⁵ The Transgender Persons (Protection of Rights) Act § 15(a).

Centres, counselling for mental health issues other therapies.⁷⁶ Adequate insurance covers for SRS will benefit immensely, too. Since harassment and gazing may also lead to mental health issues,⁷⁷ the government should ensure the setup of separate gender neutral washrooms and unisex dress codes. These facilities should follow Principle 13 (The Right to Social Security and other Protection Measures) and Principle 17 (The Right to a highest attainable Standard of Health) of the Yogyakarta Principles.⁷⁸

Section 16 and Section 17 under Chapter VII of the Act establish a National Council for Transgender Persons. The Council, a statutory body, will assess the impact of various policies and they are free to decide on the modalities.⁷⁹ However, the National Council is just a symbolic setup with no real power or capabilities. Being a high profile body, it would be rendered non-functional for the want of quorum. The Council is only afforded five representatives from the transgender community, posing a serious threat to the legitimacy of this body due to inadequate representation. Therefore, we suggest that a National Commission be set up with adequate representation from the transgender community, and preferably with the chairperson also from the transgender community. Powers of the Civil Court may be vested in this Commission for any issues in connection with the transgender community. A State or District Commission may be established as well, keeping in mind the population of transgender persons in each State or District.

⁷⁶ See Delhi Commission for Women, *Crisis Intervention Centres*, http://dcw.delhigovt.nic.in/wps/wcm/connect/lib_dcw/DCW/Home/Projects/CICs/; see also Sixteenth Lok Sabha, *supra* note 31, at 81.

⁷⁷ H. G. Virupaksha, Daliboyina Muralidhar, & Jayashree Ramakrishna, *Suicide and Suicidal Behavior Among Transgender Persons*, 38(6) INDIAN J. PSYCHOL. MED. 505-09 (2016).

⁷⁸ International Commission of Jurists, *supra* note 30.

⁷⁹ Press Release, Ministry of Social Justice & Empowerment, National Council for Transgender Persons Will Assess Impact of Various Policies With Respect To Transgenders (Sep. 16, 2020) (India).

Such a commission may also provide free legal aid to transgender persons and help with mediation and conciliation. The Commission should also monitor and ensure robust police investigations in case of criminal offences committed against transgender persons and a report prepared by the Commission may be sent to special courts, which should exclusively be set up for offences committed against transgender persons and the judges would be trained in dealing with the issues.

IV. OFFENSES & PENALTIES (SECTION 18)

Section 18 under Chapter VIII of the Act provides the offenses and penalties which require our most sincere attention. If this section is not delineated appropriately at the time of its inception, the legislation would become an ill-conceived vision.⁸⁰ The legislature has failed to define the terms used in the section, making the list of offenses ambiguous and arbitrary. Also, the quantum of imprisonment and penalty are disproportionate to the gravity of offences.

Separate sentencing guidelines should be established for each type of abuse in accordance with the severity of the crime. Physical abuse harms the body of the victim, but sexual abuse tears the very soul of a person.⁸¹ Thus, they cannot be grouped together when it comes to sentencing recommendations.

The section should also include penalties for discrimination outlawed under Section 3 of the Act and for breach of duty committed by any public servant, such as the refusal to register a First Information Report⁸² or the refusal to provide medical help to the transgender person by a doctor.

⁸⁰ The Transgender Persons (Protection of Rights) Act § 18.

⁸¹ State of Punjab v. Gurmit Singh, 1996 SCC (2) 384 ¶ 21 (India).

⁸² First Information Report (FIR) is the earliest form and first information of a cognizable offence given to the police/officer-in-charge of the police station by the victim or witness or any other person having knowledge about the commission of the offence. See also, https://www.humanrightsinitiative.org/download/1456214633FIR_14-1-16.pdf (last accessed on Mar. 26, 2021)

Statistically, “52% of [transgender people] are facing harassment from the police. 70.3% are not confident to face the police, and . . . 96% do not raise complaints against violence because of their gender identity.”⁸³ According to a Right To Information application,⁸⁴ there is not even a single case of sexual crime, registered in thirteen of sixteen districts in Delhi over the past two years. These two pieces of information conspicuously reason out the hardship faced by the visibly invisible transgender community in seeking help from public authorities

The sentencing guidelines in offences against Scheduled Castes or Tribes⁸⁵ may be mirrored with regard to transgender persons. The Scheduled Caste and the Scheduled Tribes (Prevention of Atrocities) Act, 1989⁸⁶ (“SC/ST Act”) may prove to be helpful in this regard. The SC/ST Act provides for an aggravated measure of punishment when an offense is committed against a member of the community for the sole reason of the victim belonging to the community. Such a provision of meting out aggravated punishments to perpetrators who commit crimes against transgender persons only because of their gender identity and expression will go a long way in solidifying the object of the Act.

CONCLUSION

Apart from the provisions laid down in the Act, there is a pivotal need to confer other civil rights on the transgender community like the right to marriage,⁸⁷

⁸³ DEPT. OF SOCIAL JUSTICE, GOVERNMENT OF KERALA, State Policy for Transgenders in Kerala (2015) (India).

⁸⁴ Right To Information Application, Registration No. DE-POL/R/E/20/01726/5, applicant: Aastha Khanna (Mar. 14, 2020) (India).

⁸⁵ Vishnu Gopinath, *Who Are the Scheduled Castes, Scheduled Tribes, OBCs ad EBCs?*, THE QUINT (Jun. 12, 2018), <https://www.thequint.com/explainers/scheduled-caste-scheduled-tribe-obc-ebc-sc-st-prevention-of-atrocities-act-explainer>.

⁸⁶ The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (Act No. 33 of 1989) (India).

⁸⁷ Aastha Khanna, *From Gender Binary to Gender Spectrum: Recognition to Cis-Trans Marriage in India*, SCC ONLINE (Feb. 6, 2021), <https://www.sconline.com/blog/post/2021/02/06/from-gender-binary-to-gender-spectrum-recognition-to-cis-trans-marriage-in-india/>.

adoption, and succession as the Parliament of Pakistan has granted to the transgender community.⁸⁸

Transgender lives are no longer footnotes in law books; their identities are no longer uniformly bound to surgical requirements in India.⁸⁹ As principles of equality and dignity move in the forefront of legal thinking, transgender people are not an afterthought anymore.⁹⁰ The fate of the transgender community has undoubtedly been ameliorated by legislative intervention.

Article 19 read with Article 21 the Constitution of India confers an infrangible right to freedom of expression, which conspicuously encompasses gender orientation and preference.⁹¹ Paradoxical as it may seem, the law is only a spurious claim if not accepted by the public at large. Through looking back at how norms have evolved from the past when being transgender was an ostensible anomaly, it is clear that people’s perspective of gender autonomy and recognition is key. Even today, if we are unable to alter this perspective, the empowering rationale behind the legislation will not only be torn, but left in tatters.

Transgender people should be able to live with dignity without discrimination and have equal access to education, employment, health care facilities. According to the 2011 national census, there were 480,000 transgender people in India and the gendered law failed to recognize and protect them from living a life of misery and disgrace.⁹²

⁸⁸ The Pakistan Transgender (Protection of Rights) Act, 2018 (Pak.).

⁸⁹ Khanna & Sawhney, *supra* note 1.

⁹⁰ Cole Thaler, *What Does It Mean to Be Real? Transgender Identity and the Law*, 27 GPSOLO MAG. 26, 29 (2010).

⁹¹ BHĀRATĪYASAMVIDHĀNA [CONSTITUTION] Nov. 26, 1949 art. 19, 21 (India).

⁹² NATIONAL CENSUS REPORT (2011) (India), <https://censusindia.gov.in/2011Census/pes/Pesreport.pdf>.

Though legislative intervention, keeping in mind the doctrine of non-retrogression,⁹³ affirmative steps are taken toward ensuring the recognition and welfare of transgender persons. However, there are many snags, as highlighted by critics, which need government's consideration; otherwise such legislation may well be a glove that ill fits the hand it was tailored for.

The rather contemporary Transgender Persons (Protection Of Rights) Act, 2019 is yet to pass the constitutional muster on the touchstone of Articles 14, 15, 16, 19 and 21 of the Indian Constitution⁹⁴ since a matter captioned *Swati Bidhan Baruah v Union Of India*⁹⁵ is currently pending before the Supreme Court. The final judgment in the matter will serve a great deal in addressing the loopholes discerned in detail throughout this analysis of the Act. It would be prompt, for all it's worth, to quote the Supreme Court itself — “[l]egislation should not be only assessed on its proposed aims but rather on the implications and the effects.”⁹⁶ This legislation is a

beginning to the end of the dilemma of a transgender person's life, beautifully expressed by Arundhati Roy:

*She, who never knew which box to tick, which queue to stand in, which public toilet to enter (Kings or Queens? Lords or Ladies? Sirs or Hers?) She, who knew she was all wrong, always wrong. She, augmented by her ambiguity.*⁹⁷

⁹³ The doctrine of non-retrogression sets forth that the State should not take measures or steps that deliberately lead to retrogression on the enjoyment of rights either under the Constitution or otherwise. *See also, supra* note 7 at ¶¶ 188-89.

⁹⁴ BHĀRATĪYASAMVIDHĀNA [CONSTITUTION] Nov. 26, 1949 (India).

⁹⁵ Writ Petition(s) (CIVIL) No(s). 51/2020 (India) (*Swati Bidhan Baruah*, Assam's first transgender judge, has challenged the constitutional validity of the Transgender Persons (Protection of Rights) Act, 2019. The Petitioner seeks for the Court to strike down Sections 4, 5, 6, 7, 12(3), 18(a) and 18(d) of the Act as unconstitutional. In addition, they pray for the Court to issue a Writ of Mandamus that directs Centre and State Governments to provide reservations for transgender persons in public employment and education, as directed by the Court in *NALSA*); *see also Swati Bidhan Baruah v. Union of India* (2020) WP(C) 51.

⁹⁶ *Anuj Garg v. Hotel Assoc. of India* (2008) 3 SCC 1, ¶ 44 (India).

⁹⁷ Roy, *supra* note 2..