AN ANALYSIS OF THE TRANSGENDER LAWS IN INDIA

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I. INTRODUCTION
The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity establishes that “All human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights”.¹ This principle underscores the obligation of States to protect human rights without discrimination. Nevertheless, the transgender community in India has been subjected to human rights violations from time immemorial. They are deprived of rights which other persons enjoy as citizens of the country.

Transgender is an umbrella term for whose gender identity or gender expression do not confirm to the binary standards of sex. The transgender community in India comprising of Hijras, Eunuchs, Kothis, Aravanis, Jogappa and Shiv-shaktis have strong historical presence in our country. They were highly regarded in the Hindu mythology texts. The hijras had good respect in the society and practised a custom of ‘badhai’ in which they sing, dance and confer blessings on auspicious occasions. The hijras of Tamil Nadu were called aravanis. The Jain religious texts also have reference to transgender and details the concept of ‘psychological sex’. They had a significant role in the royal courts during the Mughal rule in Medieval India. The situation changed drastically with the onset of colonial rule in the country when the very existence of eunuchs was criminalized. The lack of legal protection, social stigma and poverty led their lives into complete misery.

This article aims to analyse the relevant legal developments and court decisions in India regarding the transgender persons. It explores the scope of transgender rights in the light of international human rights principles. It discusses how the unequal treatment of law leaves them vulnerable to abuse, discrimination and sexual assault at home, public places and even prisons. The article concludes by stating recommendations to the present law.

II. HISTORY OF TRANSGENDER LAWS IN INDIA
The law in India had been an authoritative tool controlling the lives of transgender persons. Discriminatory legislations had always put their very existence in misery. The law did not provide adequate civil rights. Some criminal laws handed over extensive power to the police and other authorities making the transgender persons more vulnerable to abuse.

The Criminal Tribes Act,1871 was the legislation that rooted contemporary violence against the transgender community in the colonial period. Certain tribes and communities were considered to be criminals by birth by the British. The 1987 amendment was sub-titled ‘An act for the Registration of Criminal Tribes and Eunuchs’. A eunuch was ‘deemed to include all members of the male

sex who admit themselves, or on medical inspection clearly appear, to be impotent’. Being a eunuch itself brought them under criminal law and regular surveillance. The local government had to keep a register of them as they are ‘reasonably suspected of kidnapping or castrating children or of committing offences under Section 377 of the Indian Penal Code’. They could be arrested without a warrant and punished with imprisonment of two years or fine or both if they were found dressed like woman or taking part in any public exhibition. They were denied rights of acting as a guardian, making a gift or adopting a son. This colonial legislation stands repealed now but it clearly paved way for the perception of hijras as thieves and the further inhuman violence against them.

Section 377 of the Indian Penal Code, 1860 categorised all penile- non-vaginal sexual acts as unnatural offences, attracting punishment. Analysis of the judicial decisions discloses that penetration had broader meaning to include oral sex, anal sex and even thigh sex. Since what was criminalised were basically associated with the bodies of queer persons, authorities always presumed homosexuals or hijras to have engaged in unnatural intercourse. In the case *Queen Empress v. Khairati*4, the police arrested the victim who was seen singing and dancing with women and dressed in woman’s clothes, under Section 377 IPC. The medical reports showing distortion in his anal orifice and his feminine behaviour led the court to observe that he is a regular sodomite. Though Khairati was acquitted, the trials based on non-conformity to binary gender was not a single incident. Many arrests under Section 377 were not even officially recorded by the police. Thus, Section 377 continuously stigmatized the sexual nature of queer people. The law considering the intercourse between queer people as ‘unnatural’ legitimized the violence against this marginalized community. This discriminatory section was struck down in the landmark case *Naz Foundation v. Government of NCT of Delhi*5 in 2009.

Immoral Traffic Prevention Act of 1956 (amended in 1986) is another legislation widely misused to abuse transgender persons. The amendment shifted the criminal liability from commercial sex undertaken voluntarily to the sexual exploitation or abuse of persons. In reality, the sex workers were usually arrested instead of the powerful people behind these institutions since the former were the weakest of this chain. Sections VII and VIII criminalized prostitution in public places and soliciting respectively. Thus, the law in fact allowed prostitution to satisfy the ‘sexual need’ of males but its practice was constantly under legal complications and police harassment. The male, female and transgender sex workers became a targeted community to assault and humiliation.

There had been a few reforming legal developments and judgements in view of empowering the transgender persons. The

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2 Human Rights violations against the transgender community- A study of kothi and hijra sex workers in Bangalore, India, Peoples’ Union for Civil Liberties, Karnataka (PUCL-K) (Sep. 2003), http://pucl.org/sites/default/files/reports/Human_Rights_Violations_against_the_Transgender_Community.pdf
3 Ibid
4 *Queen Empress v. Khairati* (1884) ILR 6 All 204
5 WP(C) No.7455/2001, DELHI HIGH COURT; Decision on 2nd July, 2009.
Madhya Pradesh High Court once clearly acknowledged the existence of a distinct ‘eunuch’ class with its own rituals and customs that must be respected.6 This was declared in a case where the court allowed a hijra woman to receive property from her Guru because the court accepted that the community cannot transfer property to anyone outside their community.7 In 1994, the state of Tamil Nadu had granted them voting rights as a third sex.

The constitutionality of Section 377 of the Indian Penal Code was challenged by a Public Interest Litigation filed by Naz Foundation in Delhi High Court. It was dismissed in 2004 for lack of cause of action. The Supreme Court set aside the dismissal and directed Delhi High Court to hear the petition. Section 377 of the Indian Penal Code was then held unconstitutional in the remarkable case Naz Foundation v. Government of NCT of Delhi8 in 2009. The Court found that the said section infringes the right to privacy and dignity. Thus sexual relations of transgender and homosexual people were decriminalised serving as a source of protection from abuse and arrest from law enforcing authorities. The judgement also drew attention to the sexual health of these sexual minorities. The judgement clearly liberated the lives of sexual minorities from long-time oppression at certain levels.

III. National Legal Service Authority v. Union of India9

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7 Iliyas and Others v. Badshah, alias Kamla, AIR 1990 MP 334
8 supra note 5
9 National Legal Service Authority v. Union of India (2014) 5 SCC 438
10 Ibid at 81
restrictions under Article 19(2). Thus, the court emphasised legal recognition of self-identified gender to be an integral part of right to dignity and freedom. The apex court directed the State to ensure equal protection of law under Article 14 through necessary social and economic changes. It also declared that the transgender persons are legally entitled to the benefits of socially and educationally backward classes (SEBC) under the special provisions incorporated under Article 15(4). It was also noted that the prohibition of discrimination on ground of sex under Articles 15 and 16 are not based on the biological sex but the self-identified sex. The judgement defines discrimination on the basis of sexual orientation or gender identity to include any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transporting equality by the law or the equal protection of laws guaranteed under the Constitution.  

The court also broadly refers to international human rights principles and transgender laws of other nations in the judgement. This is a landmark case in the history of transgender rights in India. The court directed the State to formulate necessary laws for the protection of rights of transgender persons, relying upon Articles 14,15,16,19 and 21 of the Constitution, Directive principles of State Policy and various international instruments to which India is a party.

IV. THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

The Transgender Persons (Protection of Rights) Act, 2019 is an act to provide for protection of rights of transgender persons and their welfare and for matters connected therewith and incidental thereto. It is an enactment aimed at providing a statutory recognition for the constitutional rights of transgender persons and establishing procedures to enforce them. The legal framework of the country had been considerably binary in nature, recognising only male and female genders, which resulted in the denial of equal protection of law to the transgender community. Though the Supreme Court recognised equal constitutional status of the transgender persons in the landmark case National Legal Service Authority v. Union of India12, the judgement was not supplemented by any legal framework as such.

The Rights of Transgender Persons Bill, 2014 was the first effort by the legislature to this cause. This was after the long-time demand for a law ensuring the rights of the transgender community. It was introduced as a Private Member’s Bill in December 2014 in the Rajya Sabha. The lower house never debated the bill even though the upper house passed it unanimously. The 2016 and 2018 bills also lapsed in the parliament. The retrogressive and discriminatory provisions of the previous drafts such as the establishment of district screening committee for medical examination and criminalisation of beggary by transgender people were highly criticized. The 2019 Act that came into effect on 10th January, 2020 removed many widely opposed sections and included welfare provisions for the marginalized community. However, several petitions were filed challenging the constitutionality of the act as some provisions were inconsistent with the constitutional rights ensured through the NALSA judgement. The Union Ministry of Social Justice and Empowerment notified the Transgender Persons (Protection of Rights)

**Important Features**

1) **Prohibition Against Discrimination** (Chapter II - Section 3)
The Act prohibits discrimination on the grounds of the denial, discontinuation or unfair treatment in:

- Educational establishments and services
- Employment or occupation
- Healthcare services
- Any goods, accommodation, service or facility meant for public use
- Right of movement
- Right to reside, purchase, rent or otherwise occupy any property
- Opportunity to stand for or hold public or private office
- Government or private establishment in whose care or custody a transgender person may be.

2) **Recognition Of Identity** (Chapter III - Sections 4, 5, 6, 7)
A person recognised as transgender shall have a right to self-perceived gender identity. The right to obtain a certificate of identity from the relevant authorities is additionally recognised.

- A transgender person may make an application based on the affidavit submitted declaring the identity of any person, to the District Magistrate for the issuance of certificate of identity. Such an application shall be made by a parent or guardian in case of a minor child and by the competent authority under the Juvenile Justice (Care and Protection of Children) Act, 2015. The District magistrate shall issue a transgender identity card at the time of issuance of the certificate of identity. This identity card entitles the transgender persons to all the benefits issued by the state authority and be a proof of recognition of the identity as a transgender person.

- If a transgender person undergoes surgery to change gender as a male or female after the issuance of the above-mentioned certificate of identity, that person is required to submit an application, along with a certificate issued by the Medical Superintendent or Chief Medical Officer of the medical institution where the person underwent the surgery, to the District Magistrate. The change in gender or the subsequent issue of revised certificate shall not affect the rights and entitlements to the person under this Act.

3) **Welfare Measures by the Government** (Chapter IV - Section 8)
Welfare measures to secure full and effective participation and inclusion of transgender persons in the society, facilitate their access to welfare schemes, ensure their rescue, protection and rehabilitation, promote and protect participation in cultural and recreational activities, are to be formulated by the appropriate governments.

4) **Obligation of Establishments and Other Persons** (Chapter V - Sections 9, 10, 11, 12)

- Every establishment should follow the provisions of this Act and a complaint officer is to be appointed to look into the complaints of violations of these provisions. The Act
defines an establishment as any body or authority established by or under a Central Act or a State Act or an authority or a body owned or controlled or aided by the Government or a local authority, or a Government company defined in section 2 of the Companies Act, 2013, and includes a Department of the Government; or any company or body corporate or association or body of individuals, firm, cooperative or other society, association, trust, agency or institution.

- Right to reside in the household of parent or immediate family is ensured except when a competent court order otherwise. Right to rehabilitation is also recognised.

5) **Education, Social Security and Health of Transgender Persons** (Chapter VI – Sections 13,14,15)

- There should be provisions for inclusive education for transgender persons in every educational institution and welfare schemes to support their livelihood through vocational training and self-employment by the appropriate governments.
- Healthcare facility measures including separate HIV sero-surveillance centres, medical care facilities and medical expense coverage for sex reassignment surgery, hormonal therapy, laser therapy or any other health issues of transgender persons are to be taken by the appropriate Government.

6) **National Council for Transgender Persons** (Chapter VII – Sections 16,17)

The National Council for Transgender Persons is required to perform functions including advising the Central Government on formulating policies, programmes, legislation, projects for transgender persons, monitoring and evaluating their impact and ensuring redressal system for the grievances.

It shall also review and coordinate the Government departments and other Government and non-Government organizations that deal with activities with respect to the transgender persons.

7) **Offences and Penalties** (Chapter VIII – Section 18)

The following offences against transgender persons attracts punishment of not less than six months which may extend to two years with fine.

- Compels or entices a transgender person into forced or bonded labour other than any compulsory service imposed by the Government
- Denies a transgender person right to passage or access to a public place
- Forces or causes a transgender person to leave household or the place of residence
- Commits or tends to do acts that harm, injure or endanger mental or physical safety, health or well-being of a transgender person including physical, sexual, verbal, emotional and economic abuse.

**Criticism**

The transgender community criticises the Act aimed at providing protection against socio-economic discrimination to be unjust in nature. The procedures to obtain certificate of identity as a transgender, and the offences and penalties are the widely opposed provisions in the Act. Activists opine that the lawmakers failed to recognise their concerns and claims. They fear that the extraordinary procedures for gender recognition violates their fundamental rights and are impractical for individuals of the long-persecuted community.

1) **Ambiguous Definitions in The Act**
The Act defines “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), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta.14 “Person with intersex variations” is defined as a person who at birth shows variation in his or her primary sexual characteristics, external genitalia, chromosomes or hormones from normative standard of male or female body.15 The most important term in the Act i.e. ‘a transgender person’ is vaguely defined and includes persons with intersex variations. The transgender persons are those who identify a different gender than that assigned at the time of birth whereas the gender of persons with intersex variations is based on biological characteristics. The definition of transgender person in the Act is made too wide to include persons with intersex variations.

The Act provides for protection against discrimination in several realms of life of a transgender person. However, the Act or the rules of procedure do not provide a definition for ‘discrimination’. The second draft rules notified on 13th July, 2020 defined discrimination as 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.16 This definition was highly praised by the activists but was not included in the final rules.

2) Fundamental Rights Violation in Gender Recognition Procedure
The Supreme Court in the NALSA judgement recognised the right of every person to self-identify their gender. The court declared, “Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India”.17 The court also observed, “Article 19(1) of the Constitution states that all citizens shall have the right to freedom of speech and expression, which includes one’s right to expression of his self-identified gender”.18 It was also held that no person shall be forced to undergo any medical procedures as a requirement for legal recognition of their gender identity.

The 2019 Act also states, “A person recognised as transgender shall have a right to self-perceived gender identity.”19 It however mandates a person to submit an application, based on his affidavit of self-declaration of identity, to the District Magistrate for the issuance of certificate of identity. If a person later undergoes some

14 The Transgender Persons (Protection of Rights) Act,2019 § 2(k)
15 The Transgender Persons (Protection of Rights) Act,2019 § 2(i)
16 Draft Transgender Persons (Protection of Rights) Rules, 2020, §2(f) (July 13,2020)
17 supra note 10
18 supra note 9 at 76
19 The Transgender Persons (Protection of Rights) Act,2019 § 4
medical intervention to change gender to a male or a female, one must apply along with a certificate issued by the Medical Superintendent or Chief Medical Officer of the medical institution where he underwent the medical intervention, to the District Magistrate for a revised certificate of identity. The District Magistrate after checking the correctness of application, may issue or reject the certificate of identity. The person shall have a right to appeal to the appellate authority decided by the appropriate government.

The NALSA judgement had upheld the right to self-determination and prohibited any medical procedure for legal identification of gender. The prescribed format of application in the Act may not be feasible for the transgender persons in the remote and marginalized areas. The procedures clearly hand over extraordinary power to the authorities for the recognition of gender which violates the right to self-perceived identity. It even demands certificate from the medical institution for legal recognition of identity. Here the authorities hold the final decision to determine the gender identity of an individual. The Act states the change of name, gender and photograph in all the official documents shall be based on the issuance of the certificate of identity and should be completed within 15 days of the issuance. The Act or the rules do not clearly detail the procedure for this change as to whether the person must approach the authorities or it will be done by the State itself. These provisions are inconsistent with the fundamental rights ensured under Article 21 and Article 19.

The Yogyakarta Principles on the application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (2006) also addresses this issue. Principle 3 recognises ‘The Right to Recognition before the Law’. It states that the self-defined gender identity and sexual orientation is one of the basic aspects of self-determination, dignity and freedom. It prohibits forced medical procedures for the legal recognition of gender identity and upholds the right to recognition as a person before the law. Principle 18 – ‘Protection from medical abuses’ also states no person shall be forced to any form of medical or psychological procedures based on gender identity or sexual orientation.

3) Differing Criteria in The Act and The Rules
Section 7 of the Act deals with the application for a revised certificate of identity in case a transgender person changes the gender to male or female through a ‘surgery’. However, Rule 6 uses the term ‘medical intervention’ to mention the gender affirming procedure. Rule 2(i) defines ‘medical intervention as “any gender affirming medical intervention undertaken by an individual to facilitate the transition to their self-identified gender, including but not limited to counselling, hormonal therapy, and surgical intervention, if any”’. The rules have widened the scope of gender affirming procedures. It is significant to note the usage of different terms ‘surgery’ and ‘medical

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22 Transgender Persons (Protection of Rights) Rules, 2020 §2(i)
intervention’ as their co-existence would create many confusions at the time of application.

4) Unfair Penalties for The Offences
The NALSA judgement defines discrimination on the basis of sexual orientation or gender identity to include any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transporting equality by the law or the equal protection of laws guaranteed under the Constitution. Section 3 of the Act lays down provisions for the protection of the transgender persons against discrimination in different areas of life. Rule 11 holds the appropriate governments responsible for formulating a comprehensive policy for protection against discrimination. The Act or the rules of procedure however do not define ‘discrimination’ or mention any civil or criminal remedy at instances of discrimination. Section 18 of the Act deals with the offences and penalties. ‘Sexual abuses’ against transgender persons are punishable only for less than six months which may extend up to two years with fine. This is unacceptable when the sexual offences against the transgender persons are in an alarming rate. The Supreme Court in the NALSA judgement noted, “Non-recognition of the identity of Hijras/transgender persons denies them equal protection of law, thereby leaving them extremely vulnerable to harassment, violence and sexual assault in public spaces, at home and in jail, also by the police. Sexual assault, including molestation, rape, forced anal and oral sex, gang rape and stripping is being committed with impunity and there are reliable statistics and materials to support such activities”. The Act does not even mention the actions that constitute the offence of sexual abuse making it difficult for the transgender people to even file a complaint. It is significant to note that sexual assaults to cis-women have more rigorous punishments that can extend to life imprisonment or even death penalty. The law prescribing a lesser punishment for the same offence puts the transgender persons in an unequal status. This is a clear violation of the right to equality guaranteed under the Constitution. Article 14 does not restrict the ‘person’ to only male and female. The court had also guided in the NALSA judgement that necessary social and economic changes must be brought to ensure equal protection of law to the transgender persons. The different punishments for the same offence depending upon the gender identity do not satisfy the ‘reasonable classification test’ and ‘standard of arbitrariness’ incorporated under Article 14.

5) Unclear Purpose of Requisites in the Application Form
The applicant is required to provide information about their educational qualification, annual income, name of the parent/guardian/husband etc. It was observed by the Expert Committee on Issues Related to Transgender Persons (2014) that the transgender community faces ostracisation from family, unemployment and homelessness. Considering the social status

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23 supra note 9 at 86
24 Transgender Persons (Protection of Rights) Rules,2020 §11
25 supra note 9 at 71
of most persons in the community, these questions are hard to answer and the purpose of collecting these details is unclear.

6) **Non-Specification of Welfare Measures**
Section 8 of the Act discusses the welfare measures by the Government. The Act and the rules of procedure hold all obligation to review existing policies, form schemes and programmes, create institutional and infrastructural facilities for the social inclusion of transgender persons and educate the transgender persons about the benefits available to them, upon the appropriate governments. The Act does not provide any uniform standard or guideline for the enforcing welfare measures or mention any remedy to the transgender persons in case of non-compliance of these regulations.

7) **Absence of Provisions for Reservation**
The Supreme Court had identified transgender as the ‘third gender’, and directed states to consider them as ‘socially and educationally backward classes’ to provide them reservation in the areas of education and employment. The court held, “TGs have been systematically denied the rights under Article 15(2) that is not to be subjected to any disability, liability, restriction or condition in regard to access to access to public places. TGs have also not been afforded special provisions envisaged under Article 15(4) for the advancement of the socially and educationally backward classes (SEBC) of citizens, which they are, and hence legally entitled and eligible to get the benefits of SEBC. TGs are also entitled to reservation in the matter of appointment, as envisaged under Article 16(4) of the Constitution. State is bound to take affirmative action to give them due representation in public services”\(^\text{27}\).

The Act does not even mention the reservation of the transgender persons. It has also failed to recognise the right to enjoy social, economic, political and cultural rights without discrimination under Article 15(2), 15(4) and 16(4) through its provisions.

8) **Non-Recognition of Civil Rights**
It was observed in the NALSA judgement that the legal recognition of ‘third gender’ would subsequently avail many other rights attached to the sexual recognition such as the right to vote, right to own property, right to marry, right to claim a formal identity through a passport or a ration card, a driver’s license, the right to education, employment, health and so on.\(^\text{28}\) The Act does not have any mention about many civil rights of the transgender persons that are essential to live with dignity. It does not provide a guideline for the related rights like marriage, adoption, civil partnership, maternity, property, succession, social security and so on. The Act could have been more inclusive by providing all the necessary civil rights to the transgender persons.

**V. CONCLUSION**
The recent legal developments recognising a third gender is undoubtedly progressive. But these progressive measures which is considered necessary for the social survival of the transgender community is kept at bay due to the lack of necessary statutory provisions. Certain provisions of the 2019 Act are criticised to be retrogressive. The Act has not properly addressed the civil rights of transgender people including the rights to marriage, succession and adoption, and the provisions for reservations. The offence of

\(^{27}\) *supra* note 9 at 74

\(^{28}\) *supra* note 9 at 116
sexual assaults must be separately categorised with stringent punishments. There is a need for an amendment to the Immoral Traffic Prevention Act, 1956 to protect the sex workers from further abuses. Transgender people are harassed even in prisons and thus separate cells for people of each gender identity are required. Appropriate Governments should provide for sex reassignment surgery as specified in the Act, ensuring non-exploitation of transgender persons by private hospitals. Active efforts are to be taken to change the social stigmas and prejudices that discriminate third gender. The State legislations must be in conformity with the constitutional values and the international principles to ensure them equal protection of law.

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