

Transgender Law in India: A Legal Conundrum

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Abstract

The apathy of the transgender community in India is no exception to the general state of affairs across the world. Yet, the irony here is that India that has had a glorious history of the transgender community who commanded respect is now reduced to treatment worse than ?lower animals?. The colonial history has contributed significantly to this hatred and the historical injustices have not been done away with even today. The present day government has enacted a legislation that attempts to provide a sigh of relief. But, it has immense flaws underneath its glossy cover. The paper attempts to take a critical perspective of the law that points at missed opportunities that the law could have addressed and hence the ignorance of the government of the ground realities bothering the transgender community. It is unfortunate that the legislature failed to incorporate the demands of the community that it addresses. It also failed to acknowledge the sensitiveness of the issue and applied the same formulae that it adopts for all other laws without realizing that this will ultimately collapse the objectives of the law.

Index terms— transgender, reservations, criminal acts, law, bill, policy.

1 Introduction

he mini constitution within the Constitution of India-Art. 21 (Right to life and personal liberty) comes in rescue for recuperating almost all the evils the Indian society comes across in the process of evolution of the society. Such is the case with the subject-matter of the transgender persons. The human rights derogations have been and are obviously covered under Art. 21. The famous NALSA vs. Union of India 1 India has newly passed and brought into effect the 'only' sui generis law for the protection of the transgender community in India. This newly enacted legislation (Transgender Persons (Protection of Rights) Act 2019-hereinafter Act) and its Draft Rules 2020 (not yet in force) is in furtherance to the court decision and judgement (hereinafter NLSA judgement) of 2014 as pronounced taking into account the tenants as enshrined through expansive interpretation of the provision as interpreted by the Court. The guidelines pronounced by the Apex Court came handy and the recognition of the transgender was a milestone achieved by the diverse country.

the international obligations on the subject-matter and apparently in consideration of the abuses faced by the community. However, the Act suffers from major irregularities and the attempt in this paper aims is to bring to light two of the glaring inconsistencies in the Act that has the possibility of undermining the utility of the Act in its entirety.

2 II.

3 Achievements of the Law

The law while does little than expected or anticipated or is needed, the same cannot be casually let go off with criticisms because irrespective of the legal issues pertaining to the Act, there are a few interesting achievements that this law undertakes which to certain extent is trans-friendly and are quite progressive. Before delving into the missed chances of ensuring better lives to the transgender persons of the diverse nation-India, a short list is provided herewith.

5 RESERVATIONS POLICY

43 First, Recognition to all the different communities, especially socio-cultural communities within the transgen-
44 der communities in India like hijra, kothi, kinne, aranvani and jogta. This is very essential considering the fact
45 that there is a social stigma and that protection henceforth would be accorded to all these communities as well.

46 Secondly, Self-employment has been recognized in furtherance to the job opportunities that must be made
47 available to the community has been mandated under this Act. This is remarkable for the recognition of
48 selfemployment is empowering and gives an idea of capabilities of the transgender communities (similar to any
49 other human being in the society) much beyond the prevalent perception that they are useless and uncouth. This
50 is definite to bring in the adequate confidence and faith amongst the members of the community. At the same time,
51 emphasis on the vocational training within the provision asking for empowering of the transgender community
52 members is aimed at upliftment to the mainstream society. Section 14 in this regard is quite progressive, but,
53 usefulness is a difficult question as shall be explained below.

54 Thirdly, Sex Reassignment Surgery (SRS) has been finally legally recognized in India with this law under
55 section 15 2 2 asking to provide facilities and benefits for such treatments. Until this provision, the only legal
56 attestation was the famous NLSA judgement that sought to protect and ensure SRS be conducted with ease. So,
57 with this provision in place, the fear amongst the transgender community members of atrocities by officials or
58 citizens will hopefully be eased out. At the same time, another pathbreaking feature of Act with regard to SRS
59 is the Insurance scheme for SRS and hormonal therapy envisaged under section 16 3

60 4 III.

61 Unaddressed Issues in the Law . Until recently, the process of SRS was life threatening and difficult, so an
62 insurance coverage is very essential for the protection of the transgender persons. Furthermore, the insurance
63 coverage will ensure lessening of unnecessary financial burden on the transgender persons who are in dire need
64 for help.

65 Fourthly, Protection and participation in the cultural activities is yet another element looped into the Act
66 under section 8 that legitimizes the involvement of the communities with the several rituals and ceremonies of
67 the Indian diaspora. This will ensure lessening of the harassment they face whilst pursuing these activities which
68 are the only sources of income and livelihood for them. Thus, atrocities by police and civilians will to a great
69 extent be curbed through this who would not be manhandled or driven out by committing atrocities. Such acts
70 would henceforth be liable to be penalized. But, there are nuances to this criminalizing aspect of such atrocities
71 and it is not that encouraging as shall be detailed out later.

72 Finally, HIV camps have been conceptualized under section 15 to be set up by the government that will surely
73 enable in curbing the major setback to their lives endangering them to a life of danger by restricting openly
74 discussing about it. Thus, such a move will definitely come in aid of their life situations. At the same time will
75 there be any mitigation of the stigma arising out of being first a transgender person and then HIV positive and
76 will there be any effective remedy in dealing with this irrational stigma?

77 This draws light to the plethora of issues underlying this Act that gives an idea of the ignorance by the
78 government of the transgender community and the unfamiliarity with the realities and grass-root issues faced by
79 the community.

80 The transgender community's movement dates back to the 1970s and 1980s in the world and almost the same
81 time in India. Of the issues flagged during the movement, the same took decades after the independence and the
82 beginning of the movement to confer any kind of right or even legal recognition of and for the community. While
83 some of the major concerns have been attempted to be addressed as elaborated, two major and substantive issues
84 have remained unaddressed and as a result the completeness is compromised with. Without redress of these two
85 aspects, in the opinion of the author, the entire Act will not be fully effective allowing for the best results in
86 protection of the rights and preservation of their existence of the transgender community persons in India.

87 IV.

88 5 Reservations Policy

89 The Bill introduced by Tiruchi Siva in 2014 and passed in Lok Sabha in 2015 provided under clause 22, 2%
90 reservation for posts for the Transgender persons in every sector under the appropriate government 4

91 Taking a holistic view of the reservation policies or determinants legitimizing reservation policies from the
92 catena of judgements of the Supreme Court of India from M.R. Balaji vs. State of Mysore . The NLSA judgement
93 also declared the community as a Socially and Educationally Backward Class and was of the view that reservation
94 is quintessential for their protection and to finally give them the most desired equality of opportunity. ?? to K.C
95 Vasanth Kumar vs. State of Karnataka 6 to finally the Indra Swahney vs. Union of India 7 a. Social and not
96 necessarily educational backwardness of the community concerned; judgements, then the following determinants
97 could be identified all of which are applicable to the transgender community.

98 The criteria laid down is the abovementioned groundbreaking judgements of the apex court of the country are
99 as follows: b. Poverty; c. Comparable backwardness; d. Economic backwardness identified through occupation
100 or income; e. Occupation related backwardness and f. Habitation All these determinants undoubtedly cast
101 grave responsibility on the legislature for recognizing the transgender community as a socially and educationally
102 backward community liable for reservations and the benefits therefrom.

103 Moreover, taking inspiration from the Indra Swahney judgement referred above-reservation should not be
104 reservation 'simpliciter' but other forms of special provisions like concessions, exemptions and preferences. These
105 are considered the lower forms of reservation as per the judgement and the policies usually followed. However,
106 sections 8 to 10 of the Act providing for opportunities to be conferred upon the community does not explicitly
107 detail out the lower forms of reservations. Thus, the concern here is whether such parameters or determinants
108 are not really met while analyzing the transgender community that the legislatures did not find it prudent to
109 have some minimum reservation for them.

110 Lastly, an important consideration here is with regard to the vertical or horizontal reservation as per the
111 Indra Swahney judgement. Though, initially analysis suggests adopting horizontal reservation in-depth research
112 portrays that it is the vertical reservation that will do more justice for the community and the historical injustices
113 that they have been victims of will only then be slowly faded.

114 V.

115 6 Criminal Acts -Section 18

116 The greatest disadvantage of the Transgender Persons (Protection of Rights) Act 2019 8 amongst others fails
117 to identify, recognize, criminalize and prosecute for varied kinds of acts committed against the community and
118 restricts itself to four kinds. As a result of this, there is blatant disregard of human rights violations that underlie
119 their existence. Chapter V (Sections 9 and 10) definitely casts obligations on establishments and persons to act
120 in adherence to Arts. 14 to 16 of the Constitution 9

121 Furthermore, there has been utter dilution of the reality whereby offences and penalties, with varying
122 degrees of severity grouped together for all the acts of derogations under one category (section 18). The
123 dilution makes all such awful actions, seem mere injuries endangering the life, safety, health or well-being of
124 transgender persons and accordingly suggest meagre penalties. So, whether rape of transgender persons or
125 denial of basic amenities to them, the penalty envisaged is same-maximum being 2 years! Also, the verbal
126 abuse is peculiar and of a much higher threshold for the transgender community as compared to verbal abuse a
127 woman faces. In this context, the 2014 Bill and administrative law principles of internal complaint officers.
128 But, the Act fails to protect the Right to life and liberty of the members of the transgender community
129 despite its apparent outlook on extending protection to them because it is disproportionate to the harm
130 that is caused. 10 gave recognition to the sensitive age-old issue of verbal abuse against the community
131 and accordingly provided for punishment in the form of imprisonment (clause 50). But, the same goes
132 unpunished in the present <http://socialjustice.nic.in/writereaddata/UploadFile/TG%20bill%20 gazette.pdf>. 9
133 https://www.india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf.

134 7 legislation.

135 Another glaring issue in this section is the fact that the maximum punishment available being 2 years of
136 imprisonment makes the offence a non-cognizable offence as a result of which a warrant from the Magistrate
137 is needed. In other words, police is not mandated to take a First Information Report (FIR). So, no matter how
138 gruesome the atrocities be there can be no FIR! Thus, instead of making the law a 'special law' which in every
139 sense of the term it should have been and was thought and expected to be the intention of the legislature, all
140 such expectations have failed and what we now see is an ineffective law giving no scope for welfare or benefit of
141 the transgender community.

142 With this kind of a straight-jacket formula 11

143 Additionally, the law grossly ignores incorporation of other criminal special statutes that have relevance to
144 every stage of lives of the transgender persons like the Domestic Violence Act 2005 , the special character of
145 the law is lost and the law even though is not in derogation with any other laws (section 20), the same will
146 prevail in the normal course of interpretation owing to the principle of generalia specialibus non derogant with
147 an implied repeal effect which then undermines the utility and efficacy of the Act. Similarly, unlike the effect of a
148 non-abstante clause that would have asserted Since, it does not have such a clause, there is doubt as to whether
149 the interpretation with the greater or lesser punishment prevail like Section 42 of another special law-Protection
150 Of Children against Sexual Offences 2012 specifically lays down that the greater punishments out of all the similar
151 legislations providing for such offences (mainly Indian Penal Code) will prevail, but such is missing in the present
152 legislation. when they manage to find a job. Even though sections 5 and 12 make reference to the atrocities of
153 transgender children, strict punishments are not prescribed. So, a robust comprehensive mechanism sensitive to
154 the causes of the transgender community is missing.

155 Thus, unless, safety is assured to the transgender community in India primarily from protection against criminal
156 acts like sexual assault, outraging modesty, rape and others the realization of civil rights granted in furtherance
157 to human rights obligations, from international agreements as well cannot be realized and effectuated adequately!

158 1 2 3

¹AIR 2014 SC 1863.

²<http://socialjustice.nic.in/writereaddata/UploadFile/TG%20bill%20 gazette.pdf>.

³http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/210_2016_LS_Eng.pdf.

159 .1 Year 2020

160 Transgender Law in India: A Legal Conundrum Unless, safety is assured which primarily comes down from the
161 protection against acts criminal in nature, the realization of the civil rights being granted in furtherance to human
162 rights obligations (from international agreements) as envisaged in the law cannot be realized and effectuated
163 adequately. The Act has failed to take note of the moral failure of the society in respecting these fellow human
164 beings that the earlier Bill could have attempted to dissuade. This has been an exercise in futility that has done
165 very little to redress the grievances of the most vulnerable and mostly forgotten community existing amongst the
166 civil society. While certain provisions can be considered as wonderful achievements-the same is overshadowed by
167 the vagaries inherent in them. Thus, the only law of the land, as it stands now has in totality demeaned the cries
168 of the community as well as the Supreme Court and the same is required to be rethought of a better future for
169 the community and humanity at large.