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# CRITICAL ANALYSIS OF TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

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## ABSTRACT

Through this study the researcher aims to do the critical analysis on the laws presently available for the LGBT Community. Are they mitigating the need and requirements of the LGBT Community and the freedom that they shall get at home in their personal life? As according to the researcher it's the biggest question of morality at present times which has confronted the judges many times that whether the laws available in India yielding with the needs and requirements of LGBT community? Indian Constitution gives the freedom to every Indian Citizen under Article 14, 15, 19 and 21. Is it Bias to them? Do the Laws Presently available under IPC are implicated justifiably? Recently the Trans Persons (Protection of Rights) Act, 2019 has passed by Indian Government it's a big victory for the LGBT Community. After a long battle they got the recognition but is it the END of their battle or there is something missing yet? That's the main focus of researcher to look in to the circumstances & the reality of LGBT's situation in perspective of laws available. As recently the Navtej Singh Johar's Case given them the liberty to marry the same sex person while decriminalising Section 377 of IPC, but yet the war has just started and it's not the end of their battle. As the question how has overlooked the part of applicability has been not touched. Though the Act is useless it need many amendments as per the researcher's analysis.

**Keywords:** Trans Act, LGBT Community - Rights, Justice, Constitution, IPC, Gender Justice, Discrimination, Equality, Uniformity of Law, Societal Response

## **Introduction**

The Transgender people are overlooked in every field rather it's economic field or legal field. They are also human being and they also have their needs and desires to fulfil. They are not having any kind of law supporting till date with is fulfilling their basic needs or gives them freedom of life, or security.

## **Transgender Act**

The Transgender Persons (Protection of Rights) Act, 2019 is an act of the Parliament of India with the objective to provide for protection of rights to transgender persons, their welfare, and other related matters. The Act was introduced in the Lok Sabha on 19 July 2019 by the Minister of Social Justice and Empowerment, Thawar Chand Gehlot, in light of the lapse of the Transgender Persons (Protection of Rights) Act, 2018. On 5 December 2019 it was signed into law by the President of India<sup>1</sup>.

## **Is the Act Satisfactory?**

**Here's a comprehensive list of the problematic aspects of the Act:** The Act, which is supposed to protect the rights of transgender people, was drafted and passed without approaching anyone from the community. No one from the community was asked about their needs and requirements. As a result, assumptions were made based on stereotypes. It requires a transgender person to approach a District Magistrate to obtain a certificate stating that they are transgender. It's only after this that they will be able to change their gender to either Male or Female on government-issued identification cards.

The process to obtain this certificate is to show proof of sex reassignment surgery, which A) is not something all transgender people want B) is a very expensive procedure, which many aren't able to afford C) does not have a clear definition regarding how the District Magistrate will actually examine the person or their documents D) is a violation of privacy. It also does not specify the kind of surgery they are expecting, because there is more than one type. This contradicts the 2014 NALSA (National Legal Services Authority of India) judgement by the Supreme Court, which gave transgender people the right to self-identify, and did not mandate surgery. **“This Act is a total violation against human rights.** How can they force transgender to opt for surgery and then validate them as transgender? They should have the freedom to

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<sup>1</sup> Bill No. 169 of 2019

express themselves the way they want to. “The fact that we have to prove our identities with surgery make no sense to me,” says Megh, an HR Consultant from Bengaluru. “By checking our gender and giving us certificates, they are being inhuman. This is not a Act by us for us, it’s a Act by them against us,” adds a student from Bengaluru, who prefers to stay anonymous. The Act defines a transgender person as one whose gender does not match with the gender they were assigned at birth, including trans men and trans women, or one who is genderqueer, or belongs to communities like kinner, hijra, aravani, and jogta. It also says that a transgender person is someone with intersex variations. However, the fact that the Act conflates transgender people with intersex people proves that it was not thought through, and has been made with inadequate knowledge. Not every intersex person identifies as transgender, and not every transgender person is intersex. It also says that a person's identity as transgender is valid whether or not they have undergone sex reassignment surgery. However, this directly contradicts the point about having to receive a certificate from a District Magistrate, proving that they have undergone surgery. “The Rajya Sabha aims on erasing our identities and our rights as individuals by passing the Murder of Rights Act, that's what I call it. The only protection here is about them. Putting intersex and trans identities in one box is not only barbaric but also erases both identities synchronously. It allows for more abuse and imposition of what a cisgender person believes on intersex/trans bodies,” says Ali, a student from Bengaluru.

The Act makes **sexual abuse** against a transgender person a punishable offence. However it fails to clearly define what constitutes sexual abuse. In the case of a cisgender woman, her rapist – once convicted – will be sentenced to a minimum of seven years of jail term, which can extend to a life sentence.

However, when it comes to a transgender person, the minimum sentence is **six months** and can extend to a maximum of just **two years**. This differentiation not only shows how the community is being treated unfairly but also indicates the government does not think the impact of sexual abuse on a Trans person is as impactful as on a cisgender woman.

The Act, while mentioning government aid in education and healthcare, does not specify the manner they will aid the transgender community. Will fees and medical Acts be subsidised? Will they be free? There is no clarity regarding this aspect. “This Act gives power to everyone but us, to determine our future and our lives- the District Magistrate, the Chief Medical Officer and the court. It essentially legalises humiliating us in the name of 'recognising us' and make

sure we trans people are not equal in the eyes of law,” says Ray R, a trans woman pursuing LLB at the University of Delhi.

The Act does not provide any reservations to transgender people, who often come from disadvantaged backgrounds and find it hard to get mainstream jobs or quality education. By giving them reservations, the government would only guarantee access to the bare minimum of survival, and not taking away existing rights of anybody else. If the family of a transgender person is unable to take care of them, the person may be placed in a rehabilitation centre, with orders from the court. This denies the right of a person to join other transgender communities, such as the hijra community.

The Act does not have any provisions to apprehend those who **discriminate** against, bully, or harass transgender people at educational institutes, workplaces or anywhere else. The Act also has no mention of things like **marriage rights, adoption rights, property rights, social security, or pension**. This deprives the transgender community of some of the most **fundamental rights**.<sup>2</sup>

Grace Banu, a Dalit transgender rights activist, said that the Act was a “murder of gender justice.” “As a community, we have opposed this Act from the beginning,” said Banu. “We do not want it. It does not uplift us. However, activists added that the passage of the Act would not stop the community from speaking against the legislation. “Our only hope is the constitution,” Banu said. “Our fight will not come to an end. I have to educate the community about what is in this Act.”<sup>3</sup>

**Problems Faced by LGBT Lesbian, Gay, Bisexual and Transgenders (LGBT):** LGBT faces major prejudices in growing up in a society where heterosexuality is frequently presented as the only suitable orientation and homosexuality is viewed as deviant. They endure harsh discrimination and elimination across the world in all domains of life. Homophobic aggressions and abuse of LGBT people arise on a regular basis. In most European Union member states, same-sex couples do not have the same rights and social security covers as opposite sex couples and subsequently suffer from discrimination and difficulty to access social protection organizations, such as pensions and health care. In the labour market, a mainstream of LGBT

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<sup>2</sup> Trans Act 2019: Why India's Tran's Community is opposing the Act which is supposed to protect their rights by Shasha R, 30/11/2019 at <https://yourstory.com/socialstory/2019/11/stoptransAct2019-india-transgender-community-rights>.

<sup>3</sup> What next for transgender people, as India clears a Act that activists call “murder of gender justice”? by Vijayta Lalwani, 27/11/2019 at QUARTS INDIA.

people hide their sexual orientation to avoid harassment and losing their work. Particularly susceptible are young LGBT people who experience separation from family and friendship networks, bullying in school and invisibility, which can result in some cases to underachievement at school, mental ill-health, school drop-out and homelessness. This discrimination not only denies LGBT people equal admission to key social goods, like employment, education, health care and housing, but it also disregards them in society and makes them one of the vulnerable groups at risk of becoming socially omitted. Some major problems encountered by LGBT people across the world are as follows, Impact of Exclusion and Discrimination: Exclusion and discrimination have major effects on the lives of gay, lesbian and transgender.

This leads to the following outcomes such as dropping out of school, departure from Home and Family, inability to search regular jobs, less choices than others, being ignored by the society and unable to access social security. Unaware of their rights they move to other regions, (such as the city and urban areas), without social and family support and even move to other countries seeking safer livelihood and acceptance. After getting rejected from religion (Esp. Muslim and some Christian Fundamentalist sects), they decide to follow their parents to marry the opposite sex. Due to lack of interest they try to get divorced or even try to attempt suicide<sup>4</sup>.

**Impact of Family Reactions on LGBT Children:** Conflict and Rejection In the past, very few youths came out of their families or expressed their sexual orientation. Most Lesbians, Gay men and Bisexuals (LGB) postponed, until they were adults, to talk about their LGB personality with others. Fear of refusal and serious negative responses kept many LGB adults from sharing their lives. Till 1990s, there were inadequate resources for LGBT youth. Gay and transgender youth had few bases of information to study about their individuality or to discover support. More recently, school diversity clubs, the Internet and LGBT adolescence groups have assisted gay and transgender youth making available accurate information, direction and support. More LGBT youth are reaching out for greater contact to resources (sharing their gay or transgender identity with friends, family and other adults) through adolescence. Recently, little was known about how families respond when an LGBT youth comes out of adolescence and even less was known about how families disturb an LGBT adolescent's mental and

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<sup>4</sup> Reshma Elizabeth Thomas, Transgender Identity Issues and Public Policy– A Comparative Study Of Kerala and Tamilnadu, March 2017, unpublished P.h.d. thesis, the University of Madras, Chapter-1 Pg.no.7 &8.

physical health. Families and caregivers have a major effect on their LGBT children's risk and well-being.<sup>5</sup>

**Problems of Homelessness:** The innumerable problems faced by LGBT people who are homeless comprise a lack of housing and services that meet their specific needs. For example: A predictable 40-50 per cent of the homeless youth living in the New York City's street were identified as LGBT. They are living there because for being queer they were thrown out of their homes or ran away to escape from an abusive situation. Family housing in the shelter system across the country is not available for homeless same sex couples. Transgenders are not permitted to select which gender they feel happy to live in the shelter system. Abuse and discrimination of LGBT homeless people is extensive in the shelter system. Most native shelters do not accept transgender or gay men. There has been also a lack of any inclusive plan for long-term housing for people with AIDS.

**Problems of Homophobia:** Gay, bisexual, Lesbian and transgender are more likely to experience harassment, intolerance, discrimination and the threat of violence due to their orientation of sex, than those that themselves identify as heterosexual. This is due to homophobia. Certain factors that may reinforce homophobia on a larger scale are political, moral and religious beliefs of a dominant group. Many LGBT people living in a homophobic environment are forced to hide their sexuality for fear of the consequences and negative reactions. For the term homophobia, there is no single definition, as it covers a broad range of distinct view points and attitudes. Homophobia is normally termed as hostility towards or fear of gay people, but it can also be referred to stigma rising from homosexual social ideologies. Negative feelings or attitudes towards non-heterosexual behaviour, identity, relationships and community, can lead to homophobic behaviour and this is the root of the discrimination experienced by many Lesbian, Gay, Bisexual and Transgenders (LGBT) people.

**Harassment of LGBT Students in Schools:** LGBT students face harassment in schools, being a teenager is hard enough without fearing annoyance in a place where you are supposed to feel safe. All over the country Lesbian, Gay, Bisexual and Transgenders (LGBT) student get harassed every day in school. The Gay, Lesbian and Straight Education Network (GLSEN) reported that nearly nine out of ten LGBT students face discrimination. It could also be

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<sup>5</sup> Ryan, (2009), Supportive families, healthy children: Helping families with lesbian, gay, bisexual and transgenders children, San Francisco, CA: Family Acceptance Project.

observed that LGBT students were discriminated, 31.7 per cent of LGBT students missed a class and 32.7 per cent missed a day of school in the past month because of feeling unsafe.<sup>6</sup>

**Psychological Distress:** LGBT people face considerable levels of harassment, stigmatization and discrimination in their daily lives. Majority of LGBT people learn to manage with this, specifically when they have the support of friends, family and join with LGBT organizations and social networks. However, a major number of LGBT people, mainly youth had to cope with harassment, stigmatization and discrimination without support. Many also face additional stresses from experiences such as very high levels of homophobic bullying in schools, physical and verbal attacks. This had a negative effect on their mental health, leading to important levels of psychological self-harm, distress and suicides.

LGBT teenagers can be isolated, given that many will be exploring their gender identity or sexual orientation without any support. At this time of exchanging their journey to adulthood a critical period of social and emotional progress for which they can be particularly vulnerable. It is very often more problematic for LGBT people to be out in rural areas. Cities are more favourable for allowing LGBT people to select the areas of their life they wish to be out in and to whom they are out to, example work, to family, with friends, neighbours, with medical services and associative events. This is more tough in rural areas where 15 being out in one domain like at work means it is more likely that one's community, one's friends and one's family are aware that one is LGBT. Rural LGBT people may be more likely to leave the place of their birth or youth than the general population. Bisexual and Gay men and women are more likely to experience anxiety and depression than their heterosexual counterparts<sup>7</sup>.

**Poor economic condition and discrimination at workplace:** Addition to homophobia, lesbian, gay, bisexual and transgenders confront poverty and racism on a daily basis. Discrimination of LGBT persons in the workplace is an important factor in the variances in socioeconomic status for LGBT persons. Transgenders and Gay individuals suffer from socioeconomic dissimilarities in large part due to prevalent perception in the workplace. Discrimination directly causes high turnover and job instability, resulting in greater poverty

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<sup>6</sup> Reshma Elizabeth Thomas, Transgender Identity Issues and Public Policy– A Comparative Study Of Kerela and Tamilnadu, March 2017, unpublished P.h.d. thesis, the University of Madras, Chapter-1 Pg.no.11.

<sup>7</sup> Reshma Elizabeth Thomas, Transgender Identity Issues and Public Policy– A Comparative Study Of Kerela and Tamilnadu, March 2017, unpublished P.h.d. thesis, the University of Madras, Chapter-1 Pg.no.14 & 15.

rates and unemployment for transgenders and gay people, as well as the wage gap amongst gay.

**Drug Addiction:** of LGBT LGBT are more likely to use tobacco, alcohol and other drugs than the general population, are less likely to refrain, report higher rates of substance exploitation difficulties and are more likely to continue heavy drinking into later life. LGBT's use tobacco, alcohol and other drugs for the same reasons as others, but their likelihood for doing so is intensified by cultural and personal stresses resulting from anti-gay bias. Reliance on alcohol for stress caused by discrimination, socialization and targeted advertising by tobacco and alcohol businesses in gay and lesbian publications<sup>17</sup> are all believed to arise LGBT individuals to substance abuse. Internalized homophobia is a form of self-loathing, self-limiting a significant concept to understand in developing substance abuse services for this population.

**Barriers to Care:** People who are lesbian, gay, bisexual and transgender (LGBT) face particular barriers, obstacles and challenges that frequently make it hard for them to identify and receive competent as well as affirming healthcare. The quality of treatment is badly affected by heterosexist norms and fear of a negative experience keeps many LGBTs from seeking help. Organizations and individual therapists are not constantly LGBT friendly and few therapists may not even identify their own hetero-sexism. Staff can be judgmental towards LGBT sexuality or be uninformed or misinformed about LGBT resources.<sup>8</sup>

### **Conclusion/Suggestions**

After doing study about the condition/situation of the LGBT Community in perspective of the applicability of Family Laws to them the researcher feels that there is an urge of amendment in Family Laws as well as in The Special Marriage Act.

### **Sanction is Missing-**

As we know that the sanction is required for implementation of any law. Though they received the right to marry the same sex person under Section 377 of IPC in the case of **Navtej Singh Johar V. Union of India**<sup>9</sup> although the right they received lacks of the implementation part i.e. why the right they received under Section 377 becomes invaluable for them. The question how is overlooked i.e. what will be the rights available to them if something goes wrong, where

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<sup>8</sup> Reshma Elizabeth Thomas, Transgender Identity Issues and Public Policy– A Comparative Study Of Kerala and Tamilnadu, March 2017, unpublished P.h.d. thesis, the University of Madras, Chapter-1 Pg.no.17 & 18.

<sup>9</sup> MANU/SC/0947/2018



they can claim the remedy and what will be the remedy? Are they justified? Are they given equal priority like any other Indian Citizen? These questions remain unanswered.

The struggle against social and legal discrimination of lesbian, gay, bisexual and transgendered Community (LGBT) has been long. The researcher feels that it is not the end of their struggle, the judgement in *Navtej Singh Johar V. Union of India*<sup>10</sup> is not satisfactory or it is not giving them liberty or do not protect their rights which are available to any Indian citizen i.e. man/woman after a lawful wedding. The most practical way of attaining legislative recognition of same – sex marriages will be an amendment of Special Marriage act, 1954.

Recently The Transgender Persons (Protection of Rights) Act, 2019<sup>11</sup> passed under which a person recognized as transgender person shall have a right to self- Perceived gender identity. It's good that the government is tries to give justice and equality to them but yet here to it can be observed that the question how is overlooked. What the Act emphasis more is as we can see below:-

The Act prohibits discrimination against a transgender person, including unfair treatment or denial of service in relation to (i) education; (ii) employment; (iii) healthcare; (iv) access to public goods and facilities; (v) right to movement; (vi) right to rent or own property; (vii) opportunity to hold public or private office; and (viii) access to a government or private establishment which has custody of a transgender person.

### **The Act is Bias -**

The Act specifies these offences as crime against transgender i.e. (i) compelling transgender persons to do forced or bonded labour (excluding compulsory government service for public purposes); (ii) denial of use of a public place; (iii) removal from house hold ,village or other place of residence; and (iv) physical, sexual, verbal, emotional or economic abuse. These offences will be punished with imprisonment which is not less than 6 months and which may extend to 2 years or a fine.

**The Sanction is weak** - The Transgender Act, 2019 specifies these offences as crime against transgender i.e. (i) compelling transgender persons to do forced or bonded labour (excluding compulsory government service for public purposes); (ii) denial of use of a public place; (iii) removal from house hold, village or other place of residence; and (iv) physical, sexual, verbal,

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<sup>10</sup> MANU/SC/0947/2018

<sup>11</sup> Bill No.169 of 2019

emotional or economic abuse. These offences will be punished with imprisonment which is not less than 6 months and which may extend to 2 years or a fine rather in case of rape on woman the punishment is Death Penalty.

**Gender Identification is focused more than the Recognition and Implementation** - according to analyses of the researcher the whole judgment speaks more about the identification and their dignity and their protection but what about their Rights after Marriage? The question is as it is. Rather to strengthen them the judgment is demoralizing them. What if they get marry to same – sex person will they get the recognition under any Family Laws? Will they get Property Rights? Will they get succession? What if they want to have a child and wish to go for Adoption? What if they want to get separated? Will they get Maintenance? If yes who will give to whom?

#### **Priority & Status–**

The Rights of LGBT Community after marriage are untouched. The Indian Laws are silent. They should be prioritized as an Indian Citizen and being a human they also have their basic needs and requirements, which are needed to be fulfilled to live a happy life. They should be given their social status to live a respectful life without it they may feel discriminated.

#### **Parenting Rights –**

They must be given right to adopt a child and to enjoy the parenthood and they should be allowed for surrogacy if they can surrogate the child, they may get the child of their own.

The researcher tried drew attention to transgender identity issues and public policy identified the relevance to get a better understanding of the variables included in the study. It highlights the discrimination in the socio economic, harassments, physical and mental health of the transgender community. Gender variant people often experience barriers in securing stable housing, education, employment and legal protection. Transgender face challenges in public places and also in places accessing social services. These barriers and challenges stem from the stigma and discrimination directed towards transgender from society in which these people are socially penalised for misbehaving normative gender expectations founded on allotted sex.