



## The Transgender Persons (Protection of Rights) Act, 2019: Beneficial or Detrimental to the LGBTQ Community

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**Abstract-** The year 2014 is memorable for the members of Lesbian, Gay, Bisexual, Transgender, Queer and Intersex community as the Apex Court delivered a landmark judgement in the case of National Legal Services Authority of India (NLSA) Vs Union of India (2014). By virtue of this judgement the Central Legislature was compelled to draft a comprehensive legislation namely The Transgender Persons (Protection of Rights) Act, 2019. Unfortunately, the abovementioned Act is not comprehensive in nature as it does not include other members of the community like the lesbians, gay and bisexuals. After its enactment, it led to serious dilemma and ambiguity in the minds of the activists of the field and others from legal profession as to the application of the Act. However, the author shall present facts, questions of law involved, and the decision of the Hon'ble Court in brief of the NALSA vs. Union of India judgement. This study specifically focuses on the definition of the term transgender with all its inclusions as defined under Section 2 (k) of the aforementioned Act and also analysis the Act and loopholes therein.

**IndexTerms:** LGBTQ, NLSA case, Transgender, The Transgender Persons (Protection of Rights) Act, 2019.

### I. Introduction

Despite the prevalence of Articles 14 and 15<sup>1</sup> of the Indian Constitution, there are numerous discriminations towards the individuals from the LGBTQ community. They even did not have the right to identity which is a basic human and fundamental right of any individual whatsoever, irrespective of social status, caste, creed, race, place of birth, gender and sexual orientation. The judgement of National Legal Services Authority (NLSA) vs Union of India was pronounced in the year 2014. Before that, no one ever thought on the rights of these persons from the LGBTQ community. Most of the times, they were not treated as fellow human being and thus denied of all basic and fundamental rights. A writ petition was filed in the Supreme Court of India under Article 32<sup>2</sup> seeking remedy for these persons from the aforementioned community. The Apex Court referred to Articles 14<sup>3</sup>, 15<sup>4</sup>, 16<sup>5</sup>, 19<sup>6</sup> and most importantly Article 21<sup>7</sup> which states right to life with proper

<sup>1</sup> Indian Constitution, Art 14 & Art 15.

<sup>2</sup> Indian Constitution, Art 32.

<sup>3</sup> Article 14 : The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India

<sup>4</sup> Article 15: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

<sup>5</sup> Article 16 : Equality of opportunity in matters of public employment.

<sup>6</sup> Article 19: Protection of certain rights regarding freedom of speech, etc.

<sup>7</sup> Article 21: Protection of life and personal liberty.

dignity and not a mere animal existence. The Court was astonished to note that there were no legislative measures to provide remedy to the members of the LGBTQ community. In the International context there is the Universal Declaration of Human Rights, 1948 (UDHR) Article 6<sup>8</sup> of the said Declaration talks about Right to life. International Covenant on Civil and Political Rights (ICCPR), 1966 also provides for provisions relating to Right to Life (Article 6)<sup>9</sup>, Right to recognition before Law, Prohibition against cruel, inhuman and degrading treatment. The petitioners argued that, there are no recognition as to the members of the LGBTQ community is given. Further, such individuals are not protected by the existing provisions of law, like, Articles 14, 15 and 21<sup>10</sup>. No schemes are there to protect their interest and for their welfare. On the contrary, the State contended that an expert committee has been setup to take up and solve matters and provide them the necessary welfare measures. The Apex Court opined that, there is a need for enactment of a central legislation which would endeavour to provide proper remedies as to the problems and difficulties of these people. Keeping in view, the rulings of the Supreme Court of India, the central legislature enacted a legislation namely, The Transgender Persons (Protection of Rights) Act, 2019<sup>11</sup>.

The Act came in the limelight after a long period of struggle of the transgender people as they were denied of human rights as well. Human rights refer to all rights inherent to all human being regardless of nationality, residence, sex, sexual orientation and gender identity, national or ethical origin, colour, religion, language or any other status. In other words, we are all equally entitled to some basic rights, i.e., the human rights without any discrimination. The basic principle underlying the human rights that everyone by virtue of humanity, is entitled to certain human rights and these rights are have evolved of the consideration of human dignity. The concept of human rights developed through ages, among which the most important are:

- 1215 The Magna Carta- which gave people new rights and made the King subject to the law.
- 1628 The Petition of Right- which set out the rights of the people.
- 1776 the United States Declaration of Independence- proclaimed the right to life, liberty and pursuit of happiness
- 1789 The Declaration of the Right of Man and of the Citizen- a document of France, stating that all citizens are equal under the law
- 1948 The Universal Declaration of Human Rights- the first document listing the thirty rights to which everyone is entitled.<sup>12</sup>

After the enactment of the Transgender Persons (Protection of Rights) Act, 2019, scenario has not changed to a large extent. Even the said Act, fails to provide complete protection to these people with respect to rights and freedoms. The Act fails to address many relevant issues. For example, it does not correctly describe the term “transgender” as it is in contravention of the Apex Court Judgement NALSA v. Union of India<sup>13</sup>. Also, no proper and effective method for the legal recognition of gender has been mentioned in the Act.

In India, it is difficult to categorise persons based on their sexual orientation. The society cannot recognise any third gender except male and female. This is not only because there was no legislative framework till 2019 but because of mindset of the people. There was prevailing discrimination with respect to the members of the LGBTQ community. They were treated in a degrading manner. Inequality, indignity are the terms, that are revolving around them. They had no rights, freedoms to protect themselves. There are many problems which has led to backwardness and made the group of people more vulnerable. Firstly, social exclusion is one of such problems. The members of LGBTQ community are often excluded from the society, which means, they are stigmatized and receive negative comments from the society. They develop low self-esteem and self-confidence, which leads to isolation. They get limited opportunities and resources for which they fail to achieve the goals in life. This marginalisation is not only caused by the relatives, friends and the peer but by their own family when they come to know about their sexual orientation. Secondly, in the education system they are highly vulnerable. They are often discriminated against.

<sup>8</sup>Universal Declaration of Human Rights, GA Res 217A (III), UN GA OR, 3rd Sess, Supp No 13, UN Doc A/810 (1948).

<sup>9</sup>International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force on 23 March 1976) [ICCPR].

<sup>10</sup> Indian Constitution, Arts 14, 15 & 21.

<sup>11</sup> The Transgender Persons (Protection of Rights) Act, 2019.

<sup>12</sup> What are human rights, Youth for Human Rights, available at: <https://www.youthforhumanrights.org/what-are-human-rights/background-of-human-rights.html>

<sup>13</sup>NALSA v. Union of India [2014] SCC 5 (SC), p.548.

## II. National Legal Services Authority (NLSA) Vs. Union of India: A Brief Analysis

### Facts:

The members of the lesbian, gay, bisexual and transgender community were the petitioners in the instant matter. There were however interveners, along the petitioners that is, the NLSA in the matter as well. The basic prayer of them before the Hon'ble Apex Court to seek the legal recognition of their gender. It is pertinent to mention here, that law only recognises binary gender and no other. As a consequence, the members of the above-mentioned community find themselves in a vulnerable state.

### II.A. Relevant Laws/ International Instruments on which Petitioners' Arguments were based:

The petitioners basically relied on Articles 14, 16, 21, and provisions under the Directive Principles of State Policy wherein a direction has been given to the State for enacting laws to uplift the weaker sections. The petitioners also pointed out that, the sexual offences in the Criminal Law of the land is gender specific which should be gender neutral. And the criminal law of the land should be drafted to such manner so that it can also protect the members of the LGBTQ community. The petitioners also relied on the provisions of the Universal Declaration of Human Rights, 1948 and the International Covenant on Civil & Political Rights, 1966 so as to highlight the blatant violation of human rights in India, where India is a nation-state which is a signatory to these above-mentioned international instruments.

### II.B Decision:

The Apex Court ruled in favour of the petitioners. In fact, the Hon'ble Court opined to give these members of the LGBTQ+ community their basic fundamental and human rights that is, the legal recognition of their gender. The Court therefore compelled the Central Legislature, that is, the Parliament to enact specific statute for protecting the rights of these people. Subsequently, the order of the Supreme Court was realised when The Transgender Persons (Protection of Rights) Act, 2019 was drafted and enacted. It will be pertinent to discuss the main aspects of the said statute.

## III. The Transgender Persons (Protection of Rights) Act, 2019: An Analysis

Like every other legislation, The Transgender Persons (Protection of Rights) Act, 2019 also starts with the object which clearly states that the said Act is enacted to protect the rights of "transgender" persons only. In this connection it is pertinent to mention that, the rights of the other members of the community like, the Lesbians, Gays, Bisexuals are not protected by the Act of 2019 as transgender persons only form one segment of this community. Also, if their rights are curtailed and violated then also the Act of 2019 would not be of much help. Further, if one notes the definition part of the Act, many aspects or segments are not defined under the Act of 2019. Only the term "transgender" has been defined and that too contains certain ambiguity. The Act of 2019 includes the terms "intersex" and "genderqueer" into the ambit of the term "transgender" person which is not accepted by the members of the lesbians, gays, bisexuals, intersex, transgender and queer community. Furthermore, whether sex reassignment surgery is undergone or not, has nothing to do with the definition of the term "transgender". It should be noted that *Hijras*, *kinnars* are separate concepts and does not come within the ambit of the term "transgender" persons as defined by the Act of 2019. Rather these terms (*Hijras*, *Kinnars*) forms part of intersex persons and not all members of the LGBTQ + community.

The Transgender Persons (Protection of Rights) Act, 2019 has failed to guarantee majority of rights to the other members of the community apart from transgender. For instance, if a grave sexual offence is committed against a lesbian person, then the Act of 2019 fails to give protection to that person and no remedy in specific is available to the aggrieved person. Section 3 of the Act of 2019 provides for "Prohibition against Discrimination". The Section specifically protects the trans men and trans women from being exploited and does not consider the rights associated with other persons of the community.

Further, Section 4 of the Act of 2019 provides for right to legal recognition to the "transgender" persons solely. The said section does not talk about the others from the community and hence fails to protect their rights. This Legislative comment seeks to provide some suggestions to the existing statute or Act of 2019 so that it becomes a welfare legislation for the vulnerable sections in the proper essence of the term.

#### IV. Suggestions and Conclusion

The laws relating to sexual offences and punishment thereof should be made stringent so as to ensure minimum sexual offence against these people from Lesbian, Gay, Bisexual, Transgender community. In this regard, the Author contends that, the Criminal Law of the Land that is the Indian Penal Code (IPC), 1860 should be amended so far as the laws relating to “Rape” under Section 375 (Rape) should be made gender neutral. In a nutshell, the Author intends to submit that, the current Section 375 of the Code of 1860 starts with “A Man is said to commit Rape...sexual intercourse with a woman...”, this should not be the starting. Alternatively, the section 375 should start with the following words “A Man is said to have committed Sexual offence/ Rape to any person...”. This is to emphasise upon the fact that a sexual offence can be committed to any member of the LGBT community as they are vulnerable and their rights are not protected and their gender is not legally protected as well.

Secondly, the author would like to suggest that although in the Act of 2019 there is a mention of a council for the welfare of the Transgender Persons, but again, the community does not comprise solely of the transgender persons, all the interests of every such member of the community including the intersex persons should be kept into consideration by the Government. Intersex persons are vulnerable with no welfare schemes for them. It is the high time that the State should act as per directives under Part IV that is, the Directive Principles of State Policy (DPSP).

Finally, the Author would like to advocate for a tribunal which shall be constituted solely for hearing petitions, applications and complaints regarding violation of rights of this vulnerable class of people, that is, the LGBTQ + Community. The Tribunal should be constituted for delivering speedy justice to the members of the said community as it is well known to all that “Justice delayed is Justice denied”.

Every mature Legal system focuses upon the welfare of the people through codifying and implementing laws that are beneficial in nature. India is a welfare state that endeavours to protect each and every right of the citizens irrespective of caste, creed, gender, place of birth and sexual orientation under Part III (Fundamental Rights) of the Constitution of India, 1950. Despite the prevalence of Article 14 of the Constitution of India, 1950 no right to equality was guaranteed to the members of this community. The concept of Right to Equality was only in black and white for these people. However, we look forward for a society, for a democracy that will endeavour to protect all our Rights irrespective of any discrimination whatsoever.

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