



QUEER JUSTICE AND JUDICIAL ACTIVISM: A CRITICAL ANALYSIS OF THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

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Abstract : For decades, the Indian queer community has fought for legal and social justice, with the judiciary playing a central role in shaping this movement. Landmark rulings such as *NALSA v. Union of India* (2014), *Justice K.S. Puttaswamy v. Union of India* (2017) and *Navtej Singh Johar v. Union of India* (2018) paved the way for the enactment of the Transgender Persons (Protection of Rights) Act in 2019. This law sought to safeguard transgender individuals from discrimination in areas like education, employment, healthcare and access to public places. However, despite its progressive intentions, scholars and activists have criticised the Act for undermining gender self-identification, lacking effective welfare provisions and failing to address deep-rooted inequalities. Using a critical analytical framework, this paper evaluates the Act in light of constitutional principles and judicial precedents, ultimately arguing that genuine queer justice in India remains incomplete and can only be achieved through meaningful reforms that advance equality and social inclusion.

Index Terms - Transgender Persons (Protection of Rights) Act 2019, judicial activism, queer justice, self-identification, equality before law.

I. INTRODUCTION

The LGBTQ+ community in India and the fight for their justice has been long and complex. Historically, as a marginalised community, transgender persons have faced systemic discrimination and social exclusion. They never had any legal rights also. But in recent years, Indian courts have played an active role in recognising the rights of queer people by passing landmark judgements showing strong commitment to equality, human dignity and constitutional values.¹

Judicial Activism is judiciary playing a proactive role in safeguarding the rights of the citizens and filling gaps left by legislature or executive. This activism has helped in promoting queer justice in India. The Supreme Court's verdict in *National Legal Services Authority v. Union of India* was a major milestone, which asserted the right to gender self-identification and gave recognition to transgender persons as the "third gender". Another significant judgement followed with *Puttaswamy v. Union of India* and then *Navtej Singh Johar v. Union of India*. These judgements helped built a strong foundation for queer rights and finally the Transgender

¹ Arvind Narrain & Gautam Bhan, *Because I Have a Voice: Queer Politics in India* (Yoda Press 2005); Nivedita Menon, *Seeing Like a Feminist* (Zubaan 2012).

Persons (Protection of Rights) Act was passed in 2019. Before this, queer people faced deep legal marginalisation as there was no recognition of genders beyond male and female. Because of this absence of identification, they were devoid of even basic rights like education, employment, healthcare, etc.²

Research Objective

The aim of this paper is to critically evaluate the Transgender Persons (Protection of Rights) Act, 2019 through the lens of judicial activism by examining how much it aligns with the constitution and finding out what kind of reforms are necessary to secure equality and social justice for transgender persons in India.

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

This Act was enacted as India's first legislation specifically aiming at giving rights to transgender persons. It provided a framework for identity recognition, prohibition of discrimination and welfare measures.

2.1 Key Provisions of the Act

The definition of Transgender Person includes individuals whose gender does not match the gender assigned at birth, covering trans-women, trans-men, persons with intersex variations, gender-queer, persons having socio-cultural identities as kinner, hijra, aravani and jogta, whether or not such person has undergone sex reassignment surgery or hormone therapy or laser therapy or such other therapy.³

Transgender persons have the right to be recognised as such, with a certificate of identity issued by the District Magistrate. A person can apply for recognition of their self-perceived gender identity, subject to certification.⁴

Discrimination against transgender persons in education, employment, healthcare, access to public places, housing and government services is prohibited. Central and state governments are obliged to formulate welfare schemes to ensure social, economic and educational empowerment.⁵

Governments are directed to provide hormone therapy, sex reassignment surgery facilities, HIV surveillance and healthcare insurance. Transgender persons have the right to reside in the household of their family and not be excluded or separated. Offences like denial of access to public places, physical and sexual abuse, forced labour or emotional abuse against transgender persons are punishable with imprisonment (six months to two years) and a fine.⁶

A National Council for Transgender Persons is to be formed to advise the government, monitor policies and ensure effective implementation of the Act.⁷

² *National Legal Services Authority v. Union of India*, (2014) 5 S.C.C. 438 (India); *Justice K.S. Puttaswamy (Retd.) v. Union of India*, 2017 10 S.C.C. 1 (India); *Navtej Singh Johar v. Union of India*, (2018) 10 S.C.C. 1 (India); Alok Gupta, Section 377 and the Dignity of Indian Homosexuals, 41 *Economic & Political Weekly* 4815 (2006); The Transgender Persons (Protection of Rights) Act, No. 40 of 2019, INDIA CODE (Ministry of Law & Justice).

³ *The Transgender Persons (Protection of Rights) Act*, No. 40 of 2019, INDIA CODE (2019).

⁴ *Id.*, Section 4-5.

⁵ *Id.*, Section 9-10.

⁶ *Id.*, Section 12-18.

⁷ *Id.*, Section 16.

III. JUDGEMENTS LEADING TO THE ACT

3.1 The National Legal Services Authority of India (NALSA) v. Union of India (2014) - the Supreme Court in an unanimous verdict, recognised transgender persons as a 'third gender'. This put them under the protection of Articles 14 (equality), 15 and 16 (non-discrimination), 19(1)(a) (freedom of expression), and 21 (right to dignity and life).⁸

- Transgender persons to be legally recognised as a third gender distinct from male and female.
- Individuals have the right to self-identify their gender as male, female, or third gender, without mandatory medical or surgical procedures. Extend full protection to transgender persons under Articles 14, 15, 16, 19(1)(a) and 21.
- Prohibition of discrimination against transgender persons in education, employment, healthcare and public spaces.
- Transgender persons to be treated as Socially and Educationally Backward Classes (SEBC) for reservations in public employment and education.
- Central and State governments directed to formulate social welfare schemes for transgender persons like separate public toilets, healthcare facilities and vocational training.⁹
- Public awareness campaigns to be organised to reduce stigma and sensitisation programmes for police, healthcare providers and other public officials.
- Government to amend existing laws and policies to incorporate the rights and recognition of transgender persons.

3.2 Justice K.S. Puttaswamy (Retd.) v. Union of India (2017) - a nine judge bench of the Supreme Court unanimously declared the Right to Privacy a fundamental right.

- Privacy is essential to the Right to Life and Personal Liberty under Article 21 and part of the freedoms guaranteed by Part III of the Constitution.
- Privacy is protected under Articles 14, 19 and 21 which makes it enforceable against both state and non-state actors.
- Earlier judgements (M.P. Sharma v. Satish Chandra (1954) and Kharak Singh v. State of UP (1962)) were overruled which had denied privacy as a fundamental right.
- The verdict recognised elements of privacy like personal autonomy, bodily integrity, informational privacy, decisional privacy and dignity (*Justice K.S. Puttaswamy (Retd.) v. Union of India*, 2017).
- Like any other fundamental right, privacy can be restricted if there is a legitimate state aim, the restriction is proportionate and it follows due process of law.
- Decisions related to individual autonomy fall under the right to privacy, like, sexual orientation, gender identity, food habits, marriage, procreation, and family life.¹⁰

3.3 Navtej Singh Johar v. Union of India (2018) - the judgement struck down Section 377 IPC and decriminalised consensual same-sex relations.

- Section 377 of the IPC (Indian Penal Code) was declared unconstitutional to the extent that it criminalised consensual sexual conduct between two adults in private.
- Section 377 was retained for non-consensual acts, sex with minors and bestiality.
- Section 377 was held to violate Articles 14, 15, 19(1)(a) and 21.
- The Court affirmed sexual orientation as an inherent identity protected by the Constitution (*Navtej Singh Johar v. Union of India*, 2018; Narrain, 2018).
- Societal prejudices cannot override the moral principles of the Constitution.
- Dignity, autonomy and the right to make intimate personal choices are an important part of the constitutional freedoms.
- The LGBTQ+ community has the right to equal citizenship and all the constitutional rights, free from stigma and criminalisation.
- The interpretation of the Constitution must be progressive and evolve with time to uphold justice and human dignity.

⁸ *National Legal Services Authority v. Union of India*, (2014) 5 S.C.C. 438.

⁹ Kaustav Chaudhuri, *Recognition of Transgender Rights in India: A Legal Analysis of NALSA v. Union of India*, 12 Indian J. Const. L 45 (2020).

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

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

The Act was enacted as India's first comprehensive legislation which aimed at safeguarding the rights of transgender persons. It came following the *NALSA v. Union of India* (2014) judgement, where the apex court recognised transgender persons as a "third gender" and declared their right to self-identification, dignity and equality. It also followed the *Navtej Singh Johar v. Union of India* (2018) judgement which decriminalised consensual same sex relations. Therefore, the Act should have ideally transformed the activism of the judiciary into a progressive legal framework. But in practice, it has been widely criticised for failing to represent inclusivity and liberty envisaged by the honourable courts.

A major point of conflict is the requirement of certification of identity which must be obtained from the District Magistrate with further medical proof for recognition as male or female. First, this is in direct contrast to the principle of self-identification given by *NALSA* (2014)¹¹ and second, transgender persons are put not only at the mercy of bureaucrats, but also humiliation and gatekeeping. What should have been a matter of simple gender self-identification has been made an unnecessary administrative task.

Absence of reservations is another critical shortcoming of this Act. In the *NALSA* judgement, the Supreme Court directed that transgender persons be treated as Socially and Economically Backward Classes (SEBC) and should be given reservations in employment and education. But the 2019 Act does not include any provisions for such.¹² The promise of equality cannot be fulfilled without proper affirmative actions.

The provisions of this Act on healthcare are vague and not so promising. There is no mention of any mechanisms, funds or accountability to establish proper medical care, especially gender reaffirming procedures.¹³ Trans people (who can afford it) have to seek such medical care outside India because of lack of accessibility, facilities and large-scale discrimination.

What's more, the penal provisions in the Act show an unequal treatment of the transgender persons. It directs a punishment of six months to two years for offences like sexual or physical abuse against transgender persons which is seriously lower than the penalties for the same crimes against cisgender women.¹⁴ This disproportion of punishment not only diminishes deterrence strongly but also reinforces the fact that this community is legally inferior in this country still and that their lives do not matter like the others.

The Act also envisions a National Council for Transgender Persons whose task would be to advise on policies but in its composition, government officials weigh more than the community itself (International Commission of Jurists, 2019). This is a big risk to their representation and genuine participation.

V. FUTURE DIRECTIONS

The Transgender Persons (Protection of Rights) Act, 2019 is an important milestone in the acknowledgment of transgender rights in India but its flaws demand an urgent need for reforms and motivated measures to make true inclusion a reality. Legal amendments, innovative policies and societal transformation have to work side by side.

The principle of self-identification must be achieved to its fullest sense. The requirement of certification by a District Magistrate should be replaced with something that doesn't undermine the dignity and autonomy of the trans people. The amendment should give the freedom to declare one's gender without bureaucratic intervention.

¹¹ *National Legal Services Authority v. Union of India*, (2014) 5 S.C.C. 438; V. Ramasubramanian, *Understanding Transgender Rights in India* (2021).

¹² D. Bhattacharya, "Transgender Rights and the Question of Reservations in India", *Economic and Political Weekly* (2020).

¹³ UNDP India, *Hijras/Transgender Women in India: HIV, Human Rights and Social Exclusion* (2018); A. Misra, "Decriminalising Homosexuality in India", *Indian Journal of Gender Studies* (2009).

¹⁴ A. Gupta, *Law, Gender and Sexuality in India* (2023).

Reservations recommended by the Supreme Court should be formally incorporated in education and employment to remove structural hinderances and socio-economic barring faced by trans persons. Without these actions, legal recognition will remain only in papers.

Healthcare reforms must take place without wasting more time. Required healthcare protocols should be established for which medical professionals should be trained in sensitivity.¹⁵ Hormone therapy and surgery should be subsidised so that they can be easily accessed. Creating mental health support is equally important to tackle years of trauma and stigma.

The laws should be made more stringent because this community deserves equal protection from crimes committed against them. Strict laws have the power to send a strong message of equality before the law, a principle which is the backbone of the Constitution.

Finally, social sensitisation and awareness are crucial. It's vital to change the mindset of the society and break prejudices. Public campaigns, inclusive educational curriculum and active participation of all communities is the way forward.

VI. CONCLUSION

The path of queer rights in India reflects an exceptional progress. From being invisible and criminalised to getting constitutional recognition and judicial protection, transgender persons have finally got their fair share in the society which was long overdue. Landmark judgements including *NALSA v. Union of India* (2014), *Justice K.S. Puttaswamy (Retd.) v. Union of India* (2017) and *Navtej Singh Johar v. Union of India* (2018) have thoroughly established that equality, privacy, dignity and non-discrimination are not privileges that only a few deserve, but are fundamental rights that every individual of this country is guaranteed irrespective of gender or sexuality. The Transgender Persons (Protection of Rights) Act, 2019 was enacted as a legislative response to these judgments and years of demand for queer justice. But the Act has its flaws which weakens the spirit of judicial rulings. That is where Judicial Activism can act as a saviour by safeguarding the Constitution's core values and principles. Queer justice is way beyond just decriminalisation. True justice will be obtained only when each and every queer person can live freely in this country with dignity, and full acceptance by the society.

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