

HUMAN RIGHTS OF TRANSGENDER PERSONS: LAW AND REALITY

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ABSTRACT

Gender norms divide human society into men and women and can be considered the oldest form of normative system for the classification of people, which is not illegitimate, yet problematic owing to the violence and phobia that comes about as a result. The transgender community is thus the worst hit. They are made to see as “different” than the rest- the bi-gendered world. This instigates the phobia and the resultant violence shattering transgender lives and pushing them to the corners of society. Thus, the problem. Justification for such kind of hatred is provided by quoting examples of transgender persons like any other “human beings” committing crimes, something that was prevalent during the British rule in India. Allegations of kidnapping children and abduction, emasculation, extortion, and the like are slapped on them. Such offences are objectivized as special because it is committed by a transgender person and as a result the same is generalized for all. These have led to a situation of hatred, violence, and victimization from a nation that was known for its tolerance and resilience to this community and celebrated its existence. This historical injustice caused to the transgender community was a culmination of several factors in India which has been sought to be undone with a new law in India effective from 2019. This article attempts to take a look at the gaps this law attempts to bridge, if at all, and aims to provide insights into the realities of violence and victimization that need legal protection.

Keywords: Transgender, Human Rights, Violence, Protection, Gender Identity, Law

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I. Introduction

IT IS often said that laws either meet the realities or it is far from being accommodative of the realities. The case of transgender persons in India and across the world is an instance of the latter. India has recently witnessed what many people term as massive upheaval or overhaul of the democracy and of the few, the Transgender Persons (Protection of Rights) Act 2019 too became a victim that witnessed the abrupt and quickened process of passage of the Houses of Parliament. This kind of hurry has somehow become the norm in recent

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legislative history, in the opinion of the author. But, how far it has affected the present Act in discussion will be the subject matter of discussion. However, before delving into the Act, some analysis of the subject (the transgender persons) and the 'realities' that the author notes here is required to be investigated at length.

The paper has been distinctly classified as the historical basis for the trans community, the violence that they are meted with, the causes, and how much such violence exceeds the threshold limit for human rights derogation to construe a crime concluding finally with the evaluation of the Transgender Persons (Protection of Rights) Act 2019. This scheme of analysis, it is expected, will give a reflection of the societal realities and evaluate the sufficiency of the present legislation to combat the milieu.

II. Historical Basis for the Transgender Community

The presupposition of this work lies in an important and interesting understanding of the trans community- those who have been betrayed by the members of the majority community. This presupposition is that this community forms a coherent group in itself which is unique, distinct, identifiable, and permanent. Also, it is extremely crucial to realize and accept that they are a natural, rather biological creation just like the binary gender identities prevalent in society. It is rather unfortunate that we have seen their presence from the times of Mahabharata and Akbar in India to the present Indian society, but have never given them the recognition they deserved, whether legally or socially. However, many times societies have been compassionate towards them, but the ultimate result as we see today was not expected of a country like India that boasts of this diversity. A distance has always been maintained in society, almost like an 'untouchable'¹- the concept which was prevalent and is yet so in India and to some extent in South Africa. But, this hatred through irrational classification came as a colonial administration tactic in the form of the infamous Criminal Tribes Act, 1872.

In the opinion of the researcher, the binary identification of sexes is definitely legitimate and scientific; however binary gender identification is definitely not legitimate and undermines the right to be recognized as such which is a universal human right.² This has been laid down in scholarly works like Gender Trouble by Judith Butler. As a consequence of such ignorance what emerges is the denial of humane treatment towards them. It is in fact

¹ Jessica Hinchy, *Governing Gender And Sexuality In Colonial India The Hijra, c.1850 to 1900* 240 (2019).

² Universal Declaration of Human Rights, 1948, art. 6.

scientifically proven that such a condition is not unnatural to humankind, but is one of the exceptions that is surely natural.³

Ardhanariswara is a traditional concept prevalent in Indian mythology which, to the researcher's point, is quite amenable to the idea of transgender where the personal accounts of transgender persons portray their feeling of being trapped in the body of the opposite sex than the feeling of the gender s/he feels. The concept of *ardhanariswara* resembles the idea that in every man there are elements of a woman and the vice-versa, but the degree of the opposite sex is more in the trans-identified persons. In other words, the manliness in a woman becomes more than the usual threshold which makes the woman a trans-identified man and vice-versa.

Having these notions in mind while brushing aside the scientifically laid understandings of this condition, what the researcher aims to put forth is the proposition that certain characterizations of this community, like their dressing patterns and behaviour in contradistinction to society's gender stereotypes, make them determinable and also perceivably "deviant" yet susceptible to the scourge of the human race from that community who wish to dominate the former, but why is this mental construct as such is a question yet unclear to the researcher. However, answering this question is not the prerogative of this work, that is for those uncouth beings to figure out why such hatred towards them.

III. Analyzing the Trans Community

Taking inspiration from Giddens' work and analysis where he opines that "*there is nothing innate about ethnicity, it is a purely social phenomenon and reproduced over time*", the analysis of the community in terms of its features shall portray unique features that have been a result of socialization whereby young people assimilate the lifestyles, norms, and beliefs of their community- the trans community. Ethnicity being a fluid concept that is adaptable to changing circumstances fits well in the context of the transgender community.

Gender is the social expectations regarding behavior considered as appropriate for the members of each sex. It has no relation to the physical

³K. Long, *Intersex/Transgender in The Bloomsbury Handbook of 21st Century Feminist Theory* 125 (Bloomsbury, 2019).

*attributes in terms of which men and women differ, but to socially formed traits of masculinity and femininity.*⁴

The transgender community comprises members who are characterized by gender dysphoria, i.e. they are unable to relate themselves to the gender assigned at birth, or they anatomically lack the conditions which otherwise categorize us into the binary framework of gender. This condition has no semblance to their sexual orientation which might be a secondary phenomenon.

This is an umbrella term comprising of intersex, queer, agender, bigender, and eunuchs and also includes cross-dressed.⁵ They either undergo gender reassignment treatments or hormone therapies or none. It seems to define them, but in practicality, it is very difficult to accept them. This community has formed groups amongst themselves because of the belongingness they share. They significantly differ in their dressing style, and cultural homogeneity and have traditions to follow. The *hijra* community in India is a perfect example of this. The community is headed by a *guruma* (who maintains few disciples and is responsible for guiding, control and assist)⁶ have rituals (*hijragiri*) to undergo and specific livelihood to follow. Their linguistic and behavioral patterns also change (*tin tali*), especially with certain phrases and words that are distinct to them. They occupy some secluded ghettos or slums and are left to become beggars. They are exposed to harassment of various kinds, mainly sexual harassment which makes them prone to HIV. They are primarily jobless, but some of them undertake jobs as sex workers or journalists or teachers while others do the regular chores of the *hijra*. Many of them try to play double roles in their lives to the situation they are in.⁷ Time passes by with adversities and when age catches up that serves them poorly. Even death has no relief for them, as their bodies are often treated lower than that of animals and disrespected. The life-cycle of the transgender population is the same worldwide with ignorance and hatred.

It is interesting to note that contemporary researches in brain science, genetics, psychology and news of endocrinology have converged towards a specific conclusion that sexuality in human beings is considered not a matter of choice, but extreme biological and

⁴Anthony Giddens, *Introduction to Sociology* 689 (2002).

⁵GLAAD Media Reference Guide, *available at*: <https://www.glaad.org/reference/transgender> (last visited on April 19, 2022).

⁶Sharful Islam Khan, *et. al.*,"Living on the Extreme Margin: Social Exclusion of the Transgender Population (Hijra) in Bangladesh" 27 *Journal of Health, Population and Nutrition*(2009), *available at*:<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2928103/> (last visited on April 19, 2022).

⁷*Ibid.*

natural. It appears to be neurobiologically determined prenatally, without parent or offspring having anything to contribute to it consciously.⁸ However, if argued scientifically, then it cannot totally be considered to be prenatally determined because the environment around the person as a child might have some impact as well. But, it has been established that genes and hormones play a major role in determining sexual orientation and gender identity.⁹ While genes and hormones regulate the human structure, the assumption that there is only one single gene (or set of genes) is wrong and thus gender identity and sexual orientation is a purely polygenic phenomenon which has no particular “cause” for it similar to no one particular “cause” for heterosexuality.¹⁰ This is the pivotal reason why sexual orientation and gender identity are not a “lifestyle” or individual choice for the tiny population it consists of. Some researches elaborate the population of such community to be around 3% to 4%¹¹ and some others state it to be around 10%¹² or as 20 million. Even though this might be a minority population, it is not insignificant, both biologically and statistically for it concludes that this is not an error in nature which could have been such if the population would have been non-recurrent and 1% or less¹³, but a natural phenomenon just like left-handedness which is surely “normal”.¹⁴ This reinstates that nature is what it is and we humans tend to segregate it as per societal requirements. This is why there are restrictions to one’s expression of the “feeling” which is heavily ignored and violations ensue as a result.

The study of sexual minorities has been a long drawn one, so much so that it traversed the journey from being considered a mental health problem to a disease that required some “cure” and finally crossed the approaches of criminalization of such non-procreative sex to contemporarily be accepted as normal and an innate pre-disposition that could be interpreted as a kind of third sex.¹⁵ This thought backed by adequate research helped to inaugurate a medical dimension to this that could take away the criminalization or being considered as evil or even as a disease or disorder.¹⁶ India followed the classification of mental disorders made by the American Psychiatric Association who removed such homosexuality from being a

⁸Michael D Kirby, *Sexual Orientation And Gender Identity – A New Province of Law For India* 62 (2015).

⁹Jacques Balthazart, *Minireview: Hormones and Human Sexual Orientation*, NCBI, (Jul. 21, 2011), available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3138231/> (last visited on April 19, 2022).

¹⁰Supra note 10 at 62.

¹¹S. Michaels, “The prevalence of Homosexuality in the United States”, in *Textbook of Homosexuality and Mental Health* 43-63 (Cabaj& Stein ed., 1996).

¹²J.S. Spong, *Living in Sin?: A Bishop Rethinks Human Sexuality* 198 (1990).

¹³B. Bagemihl, *Biological Exuberance: Animal Homosexuality and Natural Diversity* 244-255 (1999).

¹⁴Supra note 10 at 67

¹⁵R.C. Friedman & J.I. Downey, *Sexual Orientation and Psychoanalysis* 173 (2002).

¹⁶*Id.* at 174.

mental disorder in 1973. Similarly, in 1990, the World Health Organization followed the similar pattern of development by removing homosexuality from its International Classification of Diseases. Thus, there was a paradigm shift which gave emphasis on the scientific underpinnings and not some irrational mental disorder or crime. But, probably it is not time yet for this change to seep in for people suffering from gender dysphoria, yet the biological reasoning discussed above is of much assurance that such a day is not far away, after all, few research studies conclusively show that gender nonconformity is also a heritable trait,¹⁷ not a mental disorder.

Transgender Persons

The proportion of the human populace that identify themselves as trapped between differing biological and psychological sexes who are often heard complaining that they feel they are women “trapped in a man’s body” or vice-versa. As a result of this, they adopt a lifestyle significantly different from that of what the society thinks oneself to be of. They can be called as the ‘missing link’ between man and woman and hence are in a transitory position. It is undoubtedly a painful experience which leads many of them to decide for surgical intervention. This is the sex or gender reassignment treatment- an expensive one and until lately was life threatening. This involves several stages like hormone therapy, surgery and artificially constructing female or male genitals and other organs. This transition is termed as M2F or F2M i.e. Male to Female or Female to Male transition respectively. This leads them to a better life than what they face otherwise, however, there is no guarantee that societal acceptance would come about by adopting this method. In fact, situations can become complicated with this as well. But, most of the trans identified persons are unable to afford such expensive treatments and remain as transgender persons.

Eunuchs in the South Asian perspective

This is probably the most ill-treated community in the human society who are considered lesser than humans. Even though the term transgender is colloquially used for them alike, they are significantly different from the transgender persons. These people are termed as *hijra* in the Indian society. They are, however, legitimately termed as the “third sex”. It is pertinent to note that any person or group that is not conforming to the binary version of sex or gender are termed as third sex or third gender. In the context of India, the ancient book *Kamasutra*

¹⁷ J.M. Bailey, *et. al*, “Genetic and Environmental Influences on Sexual Orientation and its Correlates in an Australian Twin Sample” 78 *Journal of Personality and Social Psychology* 524, 536 (2000).

has made reference to this third sex and thus *hijras* are considered to fall within that.¹⁸ It is interesting to identify that even though etymologically, this term refers to males who have been castrated, it also includes the modern day *hijra* community. This mostly pertains to the dysfunction of the male organs and is biological in nature, not psychological. However, the reason this community is looped into this research is because often the incidents of violence is pursuant to their being as transgender which connotes not only the trans identified persons discussed above, but also the eunuchs or *hijras*. In this context, it may be pointed out that when the hostilities are undertaken, they are carried on based on the “third gender” feature of the members of the community which as identified earlier engulfs like an umbrella term for all such sexual minorities. Furthermore, the *hijra* community encompasses the presence of transgender persons, intersex persons, castrated males and other gender queer. But, the present article is about the transgender persons and the *hijra* community only to the extent of the transgender persons who are looped in that.

In essence, both these groups discussed above are the subject-matter of atrocities across the world that become vulnerable because of their being as such. But, the question that is poignant here is whether this phenomenon is a chosen one or not- the question that runs across like a golden thread in all these discussions. These groups are permanent and irremediable which testifies to the propositions of groups that deserve protection against such atrocities. This work attempts to understand the concepts from both angles, i.e. from the perspective of the eunuchs as well those who are trans-identified persons or suffer gender dysphoria.

IV. Transgender Violence

Jawaharlal Nehru had once opined that community leaders should not exaggerate their egos to such an extent that community empowerment is lost as a result. This was primarily in the context of the *hijra* community of India when he lamented on the fact that being born as a transgender was a crime.¹⁹ However, ironically he and his team did practically nothing to ensure protection to this community. Like the various colonial baggage that we are still carrying with us, S.377 IPC²⁰ almost single handedly demeans the *pro bono public* reputation

¹⁸Jack Molay, *The Kama Sutra on Transgender People*, Crossdreamers About crossing gender lines – transgender, non-binary and queer issues, (February 12, 2012) available at: <https://www.crossdreamers.com/2012/02/kama-sutra-and-transgender.html> (last visited on April 19, 2022).

¹⁹Priti Sharma & Nishant Pal, “Transgender in India: Alimented from the Society” 2 *Human Rights International Research Journal* 58 (2014).

²⁰Unnatural offences. (Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished...).

that India portrays. While the provision has been outlawed, the reminisces of the hatred it created for centuries still lurks fresh in the minds of the society. The Indian tradition, unlike the western world, was to revere this community as god's men endowed with magical powers. Irrespective of the religion and religious dynastic rulers that India has traversed, the transgender community always had a respectable position in the society.²¹ Their mention in Indian epics and various religious texts endorsed their serenity, divinity and humanity. It was with the advent of the British Empire that they were looked down upon as unwanted beasts in the society who are impure and a burden.²² The legacy that we still embody. The story of transgender violence in India is sorrowful because it is a foreign imposition of thought and behavior without which we would have been able to maintain equality among human beings in the society.

The year 2017 had witnessed unprecedented hostilities against the transgender people alone in the United States of America. The official record of 28 murders is an increase of 7 on an average from the records of 2015²³ and 2016²⁴. In 2018, there were 26 reported cases of murder of transgender persons due to fatal hostilities and the majority of the victims were Black in the USA.²⁵ Moreover, it is appalling that at the start of 2019, there was already one case of transgender people being shot dead without reasons. In fact, the Trans Murder Monitoring Project could identify a total of 2982 reported murders of transgender persons across the world in a phase of ten years; i.e. 2008 to 2018²⁶.

As per the largest LGBTQ organization in the USA (that has been consistently documenting violence across the world, with emphasis in USA) records, these victims are killed year after year by acquaintances, partners and strangers, some of whom have been arrested and charged, while others have yet to be identified. It is shocking to witness that the violence so committed is qualified as per color, intersections of racism, sexism, homophobia and transphobia to conspire to deprive them of employment, housing, healthcare and other

²¹Sridevi Nambiar, *A Brief History Of Hijra India's Third Gender*, The Culture Trip, (January 1, 2017), available at: <https://theculturetrip.com/asia/india/articles/a-brief-history-of-hijra-indias-third-gender/> (last visited on April 19, 2022).

²²Supra note 21.

²³Megan Sommerville, *The ongoing genocide of the transgender community*, ChicagoNow, (April 17, 2016), available at: <http://www.chicagonow.com/trans-girl-cross/2016/04/transgender-genocide/> (last visited on April 19, 2022).

²⁴Human Rights Campaign, *Violence Against the Transgender Community in 2016*, HRC, (January 20, 2017), available at: <http://www.hrc.org/resources/violence-against-the-transgender-community-in-2016> (last visited on April 19, 2022).

²⁵Ibid.

²⁶TvT, *Transrespect-Transphobia* (2018) www.transrespect-transphobia.org/uploads/downloads/Publications/TvT_research-report.pdf (last accessed Apr. 15, 2021).

necessities, barriers that make them vulnerable.²⁷ It is quite evident that the community is under immense threat from the fellow communitarians which is not likely to change soon because President of USA Donald Trump has represented his antagonistic feelings towards the community with the proposal of a bill to restrict the members of the community from enrolling into the army²⁸ which has somehow been hushed up for now by the Pentagon.

On the other hand, Australia has recently legally recognized the community, but whether the judicial pronouncement and legislative orders have been well received by the citizens is doubtful. News of atrocities against this community is pouring in from various mediums. Despite well-known Australians like model Andreja Pejic, military officer Cate McGregor²⁹ and Judge Michael Kirby proclaiming their transgender identity the acceptance of the same has not yet seeped into the society surrounding them which provokes atrocities against them even today.

The fight for social inclusion and recognition seems to never end for the community. The amendment by the World Health Organization (WHO) in the list of behavioral and psychological diseases³⁰ brought greater challenges and more oppression than a sigh of relief.

The Indian scenario, like that of USA holds a similar outlook whereby the cases of suicides and other forms of unnatural deaths of transgender persons are being recognized by the National Crime Records Bureau (NCRB)³¹, even though exceptions like Advocate Swati Bidhan Barua or Lok Adalat Judge Joyita Mondal are slowly coming to the limelight,³² yet the question of how far there is social acceptability to these remains unexplored. Intriguingly, the NCRB Report of the last three years has incorporated violence or crimes against

²⁷ Human Rights Campaign, *Fatal Violence Against the Transgender and Gender Non-Conforming Community in 2021*, available at: <https://www.hrc.org/resources/fatal-violence-against-the-transgender-and-gender-non-conforming-community-in-2021> (last visited on July 28, 2022).

²⁸ The New York Times, Helene Cooper & Thomas Gibbons-Neff, "Trump Approves New Limits on Transgender Troops in the Military", (March 24, 2018), available at: <https://www.nytimes.com/2018/03/24/us/politics/trump-transgender-military.html> (last visited on April 19, 2022).

²⁹ The Vice, Paul Gregoir, *Australia Is Making Progress but Trans People Are Still Being Attacked*, (February 04, 2016), available at: https://www.vice.com/en_au/article/bnk73a/trans-people-are-still-being-attacked (last visited on April 19, 2022).

³⁰ Susan D Cochran, *et. al*, "Proposed declassification of disease categories related to sexual orientation in the International Statistical Classification of Diseases and Related Health Problems"(ICD-11), 92 *World Health Organization* 672-679 (2014).

³¹ NCRB, Ministry of Home Affairs, *Accidental Deaths and Suicides in India*, 24, 31 (2015).

³² Mirror Now Digital, Assam gets its first Transgender Judge in Swati Bidhan Baruah, *MirrorNews.com*, July 14, 2018), available at: https://www.timesnownews.com/mirror-now/society/article/assam-gets-its-first-transgender-judge-in-swati-bidhan-baruah/254507?utm_source=pushengage&utm_medium=pushnotification&utm_campaign=pushengage (last visited on April 19, 2022).

transgender persons as a separate category. In this, the number of missing cases of transgender persons is not very high, but the media reporting accounts for much more than those recorded in all those years. So, the vulnerability of the community cannot be overstressed.

Thus, we realize that there are great deals of human rights abuses that have been ensued in the past as well as are underway and the effort should now be towards lessening and mitigation of these abuses and any aberration of this should lead to criminal trials. However, what this work attempts to put forth is the idea that there is a systematic and patterned violence that is undertaken against this community, thus, it is not the human rights violations only that is the concern of the researcher, it is much graver and shocking than that. Until recently, laws were stereotypically made out for binary gender identification, like in the USA where the laws required people to wear at least three articles of clothing that were associated to their sex assigned at birth, which eventually was their gender too! Scholars of critical transgender studies have argued on this line extending it to the discriminatory prison administration that is based on the binary construction of gender.³³ As a result of which mental harassment, ridicule and consequent disharmony amongst the inmates are not uncommon. There are definitely elements of human rights violations in these examples, but the kind of human rights abuses meted out to this community is endowed with a specialized specific intention which is genocidal in nature giving rise to massive violation of human rights.

The aggressions, that is the crux of this article, is one that has now spread all over the world and reports of sexual harassment, manhandling, oppression, denial of basic human rights³⁴, murders and suicides³⁵ out of shame, members of the community have become common.³⁶ In the opinion of the author, the characteristics of this violence are different from the violence that is otherwise protracted in the society.³⁷ The foundation on which it is perpetrated is in itself inhumane, derogatory and obnoxious. There is an element of special

³³Sarah X. Pemberton, "Prison", in *The Oxford Handbook of Feminist Theory* 22, 15 (Oxford ed., 2016).

³⁴ GLAAD, Doubly Victimized: Reporting on Transgender Victims of Crime, (November 09, 2016), available at: <https://www.glaad.org/publications/transgendervictimsofcrime> (last visited on September 06, 2020).

³⁵ TGEU Under the radar 2015-2021; available at: <https://tgeu.org/wp-content/uploads/2021/04/tgeu-under-the-radar.pdf>. Cases reported of psychological violence (last visited on September 06, 2020).

³⁶ TvT, Transrespect-Transphobia, (November 11, 2020) available at: <https://transrespect.org/en/tmm-update-dor-2020/> (last visited on November 15, 2020).

³⁷ Victoria Steinberg, "A Heat of Passion Offense: Emotions and Bias in "Trans Panic" Mitigation Claims" 25(2) *Boston College Third World Law Journal* 488, 499-500 (2005).

intent³⁸ attached to such killings. The fact that killings are protracted and widespread portrays an essence of some kind of planned attack on the minority. These incidents individually might seem like homicide, but a totalitarian view of the same exposes us to the idea of planned mass killing.³⁹ The intent of the perpetrators in these murders, though not necessarily connected to each other, is destruction and vanquishing the transgender as such.⁴⁰ But, the laws across the world, and here, in specific, India is in complete disregard of these realities, thereby proving that the laws have not been able to tap the violence meted out against the transgender community. The Indian law too falls victim to this ignorance.

V. Probable Roots for the Violence

Trans violence is primarily premeditated amongst the most orthodox members of the “civil” society who while attempting to maintain “normalcy” in the world undertakes acts that are aimed at this apparent purification. However, some roots that instigate the causation can be identified as below:

- I. Ignorance of the general public about transgender identities makes them easy targets for manipulation. They merely know that their targets of violence-transgender persons do not adhere to the norms of the society and hence must cease to exist;
- II. The misguided conflation of gender and sex is a major problem when it comes to identifying one’s self in these distinct terms. The ones who are under misconceptions are reluctant to accept any other combination apart from biologically constructed XY chromosomes for male and XX chromosomes for females. To them, this is an established fact, anything apart from this is not possible. But, they falter to understand that the biological composition has nothing to do with the gender ‘identification’ of the persons concerned;

³⁸T.M. Witten and A.E. Eyler, *HIV, AIDS and the elderly transgendered/transsexual: Risk and invisibility*, Gerontological Society of America, Cincinnati(1997); See also Jeremy Kidd, and Tarynn Witten, *Understanding spirituality and religiosity in the transgender community: Implications for aging*, 20(1-2) *Journal of Religion, Spirituality & Aging* 29-62 (2007).

³⁹ChicagoNow, Megan Somerville, “The ongoing genocide of the transgender community”, April 17, 2016, available at: <http://www.chicagonow.com/trans-girl-cross/2016/04/transgender-genocide/> (last visited on April 19, 2022).

⁴⁰ Boglarka Fedorko, *et. al*, *Transgender Europe, A brief guide to monitoring Anti-Trans violence*, 7 (2020), available at: https://transrespect.org/wp-content/uploads/2020/09/TvT-PS-Vol21-2020_EN.pdf (last visited on May, 17, 2020).

- III. The plight of the trans identified persons increase as they age that makes them more vulnerable to atrocities against them since at that age they are of no use for the ignorant, insensitive society;
- IV. The motive of preserving and reinforcing the binary system of genders and maintaining the power structure, the perpetrators feel is absolutely necessary because giving scope for non-conformity can give way for disasters and
- V. This group is an easy target for violence by which in general power structure can be maintained by the dominant ones, so the stereotypical ideas are mingled with political and social agenda of the majority in a way much to their advantage and disadvantage to the community.⁴¹

The most significant root of all these is the embedded hatred towards this community simply for who and what they are. However, can this be simply classified as another kind of hate crime?

VI. Much more than Breach of human Rights

The opening words of UDHR are unequivocal: *All human beings are born free and equal in dignity and right*".⁴² This implies that equality and non-discrimination provided by international human rights law applies to all people, regardless of sex, sexual orientation and gender identity or other status.⁴³ This is the starting point of violation of the rights of the transgender population across the world; neither are they treated with dignity nor are they given the basic human rights. They are basically considered as the unwanted weeds of the society, the pests who are polluting the mankind and hence must desist from existence. In the opinion of the researcher, the Preamble itself encapsulates the idea of "human rights" and humane treatment which in itself remains unavailable to the trans community and thus, the other rights protected under the mother document or other human rights treaties get defeated by default.

⁴¹ Rebecca L. "Stotzer, Bias Crimes Based on Sexual Orientation and Gender Identity: Global Prevalence, Impacts, and Causes" in Dana Peterson and Vaneesa Panfil, *Handbook of LGBT Communities, Crime, and Justice* 58 (2014).

⁴² Universal Declaration of Human Rights, Preamble.

⁴³ Free & Equal United Nations for LGBTQ Equality, International Human Rights Law & Sexual Orientation & Gender Identity, *UN Human Rights Office of the High Commissioner*, March 24, 2019, available at: <https://www.unfe.org/wp-content/uploads/2018/10/International-Human-Rights-Law-English.pdf> (last visited on April 19, 2022).

The various portrayals made above make it amply clear that there is an inherent discrimination or bias against this community, whether in the form of discriminatory criminal laws, discriminatory treatment in offices, schools, homes or discriminatory curbing of free speech.⁴⁴ This is *prima facie* in violation of the right to freedom from discrimination.⁴⁵ Additionally, they are not free, not free to express themselves in their own way which is a violation of their right to freedom of expression.⁴⁶ This essentially curtails their liberty to be what they are pursuant to pressures both from the state as well as people. The states in this sense, thus fail to provide the security that even these human beings are entitled to. This is universally applicable and violates the universal right to liberty and security of persons⁴⁷. We have seen many such instances above that make this amply clear.

Additionally, in reference to the discussions above, torture and inhuman treatment that they are subjected to⁴⁸, whether sponsored by the states or the people are intolerable and abrogates their right against such degrading treatment. Acts of rape, beatings, forcefully engaging in odd jobs like prostitution, denial of food during crisis, public body shaming- all form illustrations of the right against torture that is abused extensively in derogation to UDHR⁴⁹ and ICCPR⁵⁰. Finally, the members of this community are more often than not arrested for arbitrary charges including while trying to lodge complaints against people who harass them. They are falsely implicated and maliciously brought to prosecution. This is a direct violation of Art. 9 of UDHR and ICCPR.⁵¹ As a result of this violation taking place, the effective remedy⁵² is almost never granted to them and the consequence of a judgement convicting them too is laden with discriminatory and torturous treatment in the jails. These acts are in violation of the provisions of the Convention Against Torture as well.

Thus, the liability of the states in curbing these and ensuring protection to these unfortunate beings is enormous which too is violated by the States which also fail in

⁴⁴ *Ibid.*

⁴⁵ Universal Declaration of Human Rights, 1948, arts. 1, 2, 7; *See also*: International Covenant on Civil and Political Rights, 1976, arts. 2, 16.

⁴⁶ Universal Declaration of Human Rights, 1948, art. 19; *See also*: International Covenant on Civil and Political Rights, 1976, art. 19.

⁴⁷ Universal Declaration of Human Rights, 1948, art. 3; *See also*: International Covenant on Civil and Political Rights, 1976, art. International Covenant on Civil and Political Rights, 1976, arts. 6, 9.

⁴⁸ Convention Against Torture, 1987.

⁴⁹ *Id.*, art. 5,

⁵⁰ *Id.*, art. 7,

⁵¹ No one shall be subjected to arbitrary arrest, detention or exile.

⁵² Universal Declaration of Human Rights, 1948, art. 8.

providing good standards of health and sanitation.⁵³ It is important to mention that people with this kind of bodily framework seldom require medical help, but unfortunately such facilities are not provided by the States to the community. The UN Committee on Economic, Social and Cultural Rights observed that:⁵⁴

...the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health...

Thus, we recognize that a large number of basic human rights are violated. These basic rights are such that none of them allow any exception to confer rights to some and withhold the same from others on the basis of sexual orientation and gender identity. Moreover, it is of much importance that all these violations listed above are unlawful because human rights treaties adopted by the world community prohibit discriminated implementation on grounds of sex or gender. This essentially means that every state who commits or supports or silently observes the violations are in effect liable under public international law and have international responsibility. In fact, the most reprehensible of all these instances is the violence the children face. Thailand has reported innumerable cases of bullying and teasing in the secondary level of schooling due to the children expressing themselves as being transgender persons.⁵⁵ Such instances are in direct incongruity with the obligations under the Convention on Rights of the Child, 1989.

However, as identified earlier, it is noticeable here that there is a kind of intention attached to this- a common intention that runs across all violations of human rights of the community. This is the special intention to kill and destroy the trans community in totality through their individual and collective efforts.

⁵³ International Covenant Economic, Social and Cultural Rights, 1966, art. 14.

⁵⁴ International Covenant Economic, Social and Cultural Rights, 1966, General Comment on art. 14.

⁵⁵ UNESCO Office Bangkok and Regional Bureau for Education in Asia and the Pacific, PLAN International & Mahidol University (Thailand), *Bullying targeting secondary school students who are perceived or even-sex attracted: types, prevalence, impact, motivation and preventivemeasures in 5 provinces of Thailand*, at 77 (2014).

VII. Evaluating the Transgender Persons (Protection of Rights) Act of 2019

The mini constitution within the Constitution i.e. Art. 21 come 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 transgender persons. The human rights derogations have been and are obviously covered under Art. 21. The famous *NALSA v. Union of India*⁵⁶ judgement of 2014 was pronounced taking into account the tenants as enshrined through expansive interpretation of the provision (Art. 21) as interpreted by the Court. The guidelines pronounced by the Apex Court came handy and the recognition of the “Third Gender” was a milestone achieved by the diverse country. This legislation proposed is in furtherance to the court decision and the international obligations on the subject-matter and apparently in consideration of the abuses faced by the community.

Act is only a civil rights legislation

In recognition of the International Bill of Rights, the civil rights have been adequately guaranteed in this document. The constitutional scheme has accordingly been given effect under Chapters II (S. 3) and IV of the Act (S. 8) that is amenable to Right to Equality under Arts. 14 to 16 envisioning equality of opportunity and outcome for education, promotion and welfare schemes. But while attaching liability pertaining to the gross abhorrent human rights violations inclined more towards criminal liability, the proposed Act seems to have completely ignored it, as if such incidents are infrequent. This could also be understood as a conscious effort to sideline and ignore the abuses faced by the transgender community. Moreover, whether there is any kind of political motive entangled in this, it is the test of time that shall bring out the truth.

Some of the pivotal guidelines of the *NALSA* judgement⁵⁷ encompass the freedom of expression of one’s own choice of gender or to be a recognized transgender *sans* any state interference, especially in terms of a strict prohibition to the certification model i.e. obtaining certificate from the state authorities identifying them as transgender individuals among many others. But, this instrument has been formulated in blatant disregard of all these principles of the Apex Court by framing provisions compelling to undertake most of those that have been forbidden by the Supreme Court.

⁵⁶ AIR 2014 SC 1863.

⁵⁷ *Ibid.*

In fact, right to privacy that is unequivocally recognized by the Supreme Court in a catena of cases and most recently recognized as a Fundamental Right in the *Retd. Justice K.S. Puttaswamy v. Union of India*⁵⁸ has met this fate. Unfortunately, in complete derogation of this idea, the Act has made provision for the transgender community members to approach the District Magistrate to get a certificate declaring the person as a transgender also after attestation from a medical practitioner. This attempts to all the more push the community to further humiliation. Considering the situation persisting even today, such a move will see repetition of the same kind of treatment, now, more legally. This will breed corruption and under-the-table settlements which these unfortunate individuals either will fall victim to or will give up their struggle for seeking a dignified life. However, this has been indirectly modified through the Rules of 2020.

In light of such realities and with the experiences and incidents shared above, the statement of transgender activist Grace Banu comes useful while discussing the draconian legislation proposed. The activist state that the Bill proposed, as it was pre 2019, is equivalent to killing the trans people and that the duty of the government to formulate schemes for the welfare of the people was totally sidelined⁵⁹. In the opinion of the researcher, this exercise is almost a mechanical effort to win over the people of India and to account for yet another new law being passed that will go down the books of records! The struggle of the community for years brought no ray of hope yet again with this shallow foresightedness of the government and as explained above such provisions will compel them to meet uncompassionate officials whose humiliation is as good as and has the probability of in reality killing themselves. The right to self-determination⁶⁰, a basic tenet of right to life under Art. 21 have totally been ignored with formulation of such a kind of provision that nearly dehumanizes them into a commodity requiring attestation and certification. From the voice of the veteran actor, Jaya Bacchan, this move is unthinkable from a human being to another, especially because the proposed law has failed to provide any appeal mechanism in case of rejection of the application by the District Magistrate. Sections 4 and 5 of the Act envisages the application procedure and issuance of certificate, but no other forum has been provided for this purpose which is an abrupt erosion

⁵⁸ Writ Petition (Civil) No 494 of 2012, Supreme Court of India.

⁵⁹ TNM, Amid opposition from trans community, Rajya Sabha passes Transgender Persons Bill, *available at*: <https://www.thenewsminute.com/article/amid-opposition-trans-community-rajya-sabha-passes-transgender-persons-bill-112971>(last visited on April 19, 2022).

⁶⁰ Dipen Saharwal & Abhay Kumar Sinha, "The Right to Self Determination: A conceptual analysis" 9 Stud Adv (1997) 82.

of rule of law and breaches the fundamental hierarchy under administrative law. So, the fundamental right to have a remedy and an effective, unbiased one is totally ignored.

Act in derogation of real benefits

The Bill introduced by Tiruchi Siva in 2014 and passed in Lok Sabha in 2015 provided under Clause 22, 2% reservation for posts for the Transgender persons in every sector under the appropriate government.⁶¹ This Bill had also provided under clause 46 for a special court like the other special courts established under the special legislations called the Special Transgender Rights Courts⁶² for hearing and disposal of such suits and criminal cases. Dissecting the attitude of the 2014 Bill, a sense of progressives can be witnessed, especially because, the idea for protecting the rights of the transgender persons is not only by guaranteeing civil rights such as shelter, food, access to basic utilities of life, employment, equal treatment, but also by protecting them against the barbaric and inhumane elements in the society that threaten their existence and shuns them into a life full of dullness. In the opinion of the researcher, unless safety is assured which primarily comes down from the protection against acts criminal in nature, the realisation of the civil rights being granted in furtherance to human rights obligations (from international agreements) cannot be realised and effectuated adequately. Similarly, another striking feature of the 2014 Bill was the fact that it gave recognition to the age-old verbal abuse of this community and accordingly provided for punishment in the form of imprisonment.⁶³ This Bill was a better researched and better compassionate piece of legislation that failed to meet the conditions for fulfilling the legal requirement to be passed as law. The present Act has failed to take note of the moral failure of the society in respecting these fellow human beings that the earlier Bill could have attempted to dissuade. Despite Section 3 being enshrined in the present Act, the provisions appear to be amply superfluous and a mere replication of the human rights principles. It does not dig deep to analyze taking into account the untouchable kind of treatment extended to them. Basically, it lacks the incorporation of the reality at hand- the crux of what this paper seeks to convey. A glance at this proposed legislation gives an impression that the government simply smirked the responsibility by making a law somehow to ensure that this topic fades from the public discourse and another item from the bucketlist is being accomplished!

⁶¹ Clause 22 Bill of 2014.

⁶² *Ibid.*

⁶³ *Id.*, Clause 50.

Chapter V (Sections 9 and 10) of the Act definitely casts obligations on establishments and persons to act in adherence to Arts. 14 to 16 also by giving way to administrative law principles of internal monitoring or complaint officers.⁶⁴ But, the Act fails to protect the Right to life and liberty of the members of the transgender community despite its apparent outlook on extending protection to them because it is incongruent or disproportionate to the harm that is caused or inflicted to the community. In concurrence to the opposition that voiced their opinions in Lok Sabha and Rajya Sabha, it is opined that the fast paced passage of the Act with less deliberations point at some kind of underlying ill motive in the minds of the framers of the Act. In fact, the opposition had very aptly asked for a Select Committee review before passing the Bill, but the same was brushed aside and hurriedly the Bill was passed. It is of utmost importance to recognise that the categorisations of Other Backward Classes or the most recent conceptualisation of the Economically Weaker Section could also have been extended to the members of the community especially because the majority of them live in perishable conditions and are poor who truly require the benefit of some laws.

In this regard, section 8 of the Act is very vaguely drafted. Indeed, it is in recognition of the principles of equality envisaged under the Constitution, but it only seeks to formulate and adopt measures for welfare of the transgender community in the country. But, it lacks the much needed enforcement bodies for the effectuation of such schemes, authorities to conduct the rescue, protection and rehabilitation sought in the provision⁶⁵ and surely the setting up of the rehabilitation centers have been overlooked. The Clause also fails to bring clarity to what the welfare schemes would construe because the wording of the Clause *prima facie* gives only a directive but the abominable acts of violence require much more than flowery words like this.

Act establishing a mega council

Another confusing element in the Act is the provisions under Chapter VII that seeks to establish a National Council for Transgender Persons.⁶⁶ Apart from the composition of the Council with predominantly political heads, the functions of the Council⁶⁷ includes also grievance redressal and dispute resolution, but without any adjudicatory features ingrained into the Council, the fructification of the provision will fall flat and a mere grievance

⁶⁴ S. 11 Act of 2019.

⁶⁵ *Id.*, s.8(4).

⁶⁶ *Id.*, s. 16.

⁶⁷ *Id.*, s. 17.

redressal cell without any special court or tribunal or commission like the POCSO courts, Juvenile Justice Boards, Green Tribunal, Industrial Disputes Tribunal, National Company Law Tribunal, National Consumer Forum, National Consumer Redressal Commission, National Human Rights Commission, will be of no value. It is pertinent to note that the Consumer Grievance Redressal Cell has been effectively working in several states and they are a success, but that was not solely because of the Redressal Unit or Cell but for a hierarchy that was available for the aggrieved consumers to approach and the Cell be guided by the directives of the State and National Consumer Forums. Here too, like the no appellate forum for appealing in case of rejection of application before the District Magistrate (under Chapter III), there is no structured institutionalization of adjudication of the victimisation of the trans persons.

Act that fails to protect life, liberty and safety

The greatest disadvantage of this Act of 2019 stands is that it fails to identify, recognize, criminalise and prosecute for the acts explained above. As a result of this blatant disregard of human rights, the mitigation and protection strategies are ill conceived or not conceived at all. Even though section 18 of the Act lays emphasis on the penalties for offences those are primarily based out of the derogation of the welfare provisions stated in the Act that are basically protection against breach of civil rights. But, the Act has neither envisaged nor left the possibility for having a provision for penalising the grave offences of violence against transgender persons, especially because, as mentioned above, fall under the category of hate crimes. Merely to state under clause (d) of section 18 - *harms or injures or endangers the life, safety, health or well-being, whether mental or physical, of a transgender person or tends to do acts including causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse...* does not encapsulate within its fold the abhorrence of Acts portrayed above. Similarly, the penalty provided in the section- *shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years and with fine.* does very little in making sense of the grave crimes committed and instead of attaching greater gravity, it demeans the offences making it seem some trivial and petty offences. This legislative attitude actually goes against the very basis of special legislations that are otherwise promulgated to specially penalise as well apart from conferring civil welfare benefits.

Accordingly, there has been utter dilution of the reality that this paper aims to highlight whereby offences and penalties, with severity of all degrees being brought under one category as 'offences' have been grouped together for all the acts of derogations. The dilution makes all such awful actions, noted earlier, seem mere injury or endangering the life, safety, health or well-being of transgender persons and accordingly suggest meagre penalties. So, whether rape of transgender persons or abuse of transgender individuals, the penalty envisaged as same! Also, the degree of insult pertaining to verbal abuse alone is peculiar and of a much higher threshold as compared to abuse to even a woman. In this sense, the Act grossly ignores incorporation of other special statutes that have relevance and immense significance for the cause of the transgender almost in every stage of their lives. Domestic Violence Act (or similar provisions inspired from this welfare legislation) at their household front from the childhood days. Sections 5 and 12 have sparingly taken the idea of extending protection to the children suffering from gender dysphoria but yet again stricter provisions like POCSO Act⁶⁸ along with preventive and maintenance clauses like Domestic Violence Act⁶⁹ are truly required. Finally, at the later stages of their lives, if some manage to find a job, provisions akin to that of Sexual Harassment at Workplace Act are required to ensure a deterrent effect on the society and impose stricter punishments on the perpetrators. So, the amalgamation with all other relevant statutes is highly missing in the Act that will achieve only a part of the objects stated in the Statement of Objects and Reasons.

VIII. Conclusion

Having discussed in detail the construction of reality vis-à-vis the Transgender Persons (Protection of Rights) Act, 2019, it can be well understood that the work is half done. It is true that in extension to the Constitutional safeguards provided to every person in the country, this law too has been drafted keeping in mind the rights of the transgender persons. But, what it has missed is the implanting of the realities into the law because of which the much needed force to drive the legislation is left untouched. With the suggestions put up from the perspective of a passionate transgender rights observer, the researcher is of the opinion that the evaluation of the Act will be incomplete if an analysis of the community of transgender persons or the experiences they go through are not undertaken. This paper has thus been trying to emphasize the reality in order to assess how far the law needs to strive to meet the expectations of the community that has been vividly opposing the Act claiming they

⁶⁸Protection of Children from Sexual Offences Act, 2012.

⁶⁹ Protection of Women from Domestic Violence Act, 2005.

were not heard before drafting this. In order to ensure an effective justice, this paper has attempted to delve into the gravity of the lacunas in the law, especially for the sheer disregard it has shown towards the transgender realities of violence and victimization that single-handedly demeans every other provision of welfare envisaged under the Act.