

A FAILED ATTEMPT AT TRANSGRESSING THE GENDER BINARY: THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019 AND THE DRAFT TRANSGENDER PERSONS (PROTECTION OF RIGHTS) RULES, 2020

Written by *Shivali Srivastava** & *Anushka Merchant***

** Advocate, Bombay High Court, Mumbai, India*

*** Advocate, Bombay High Court, Mumbai, India*

ABSTRACT

The journey of questioning, discovering and expressing one's identity is regarded to be the most significant part of one's life. For some, limited public knowledge and understanding of sexual orientation together with the lack of sufficient legislative safeguards causes this path to be more daunting than it is for others. Over the last decade, several attempts have been made to transgress from the heteronormative social order and gender binary prevalent in India. In 2014, the Supreme Court of India passed a landmark judgment whereby it recognized the existence of a third gender, affirmed their fundamental rights and acknowledged their hardships, for the very first time. In its judgment, in *National Legal Services Authority v. Union of India* ('NALSA Case'), the Apex Court called upon the central and state legislatures to make appropriate laws to safeguard the rights and interests of this third gender. The NALSA Case was followed by the introduction of three legislative bills for the empowerment of transgender persons and for the protection of their rights in 2014, 2016 and 2019, respectively. In order to create an LGBTQIA+ friendly environment in the country, it is imperative to scrutinize the legislature's efforts in creating policies that affect different aspects of the life and environment of transgender persons. This article analyses the NALSA Case, the legislative history, various recommendations of an expert and standing committee and the events that ultimately led to the passing of the Transgender Persons (Protection of Rights) Act, 2019 ('2019 Act') and the circulation of the Draft Transgender Persons (Protection of Rights) Rules, 2020 ('Draft Rules')

in order to highlight their shortcomings and the legislative lacunae with which they are burdened.

Keywords: LGBTQIA+, Trans Rights, Transgender, Hijra, Human Rights, Indian Constitution, Delegated Legislation, Transgender Act, Transgender Rules.

INTRODUCTION

The foundation of freedom, justice and peace is based on recognising the inherent dignity and, the equal and inalienable rights of all human beings. Gender identity and expression being integral parts of human personality constitute the most basic aspects of dignity and freedom.

In modern society, the gender binary of ‘male’ or ‘female’ operates as a parochial normative order for generating and abetting social differentiation, which has become arduous to tackle due to consistent legislative oversight coupled with oppressive heteronormative social practises. The failure to provide legal protection to and to recognize the civil, political, social and economic rights of individuals with subaltern gender identities has festered a vicious cycle of abuse against them.

In *National Legal Services Authority v. Union of India*ⁱ (‘NALSA Case’), Justice Sikri of the Supreme Court of India observed that:

There appears to be limited public knowledge and understanding of same-sex sexual orientation and people whose gender identity and expression are incongruent with their biological sex. As a result of this approach, such persons are socially excluded from the mainstream of the society and they are denied equal access to those fundamental rights and freedoms that the other people enjoy freely.

In 2001, a study on human rights violations against sexual minorities in India documented harrowing accounts of sexual violence, social ostracism, police atrocities and discrimination against Transgender Persons (‘TPs’).ⁱⁱ However, the last decade has been marked with political and judicial action, which aimed at removing and reforming the aforementioned

entrenched systemic norms and focused on empowering TPs by attempting to recognize their identity and personhood. This article touches upon the chain of events that ultimately led to the passing of The Transgender Persons (Protection of Rights) Act, 2019 ('2019 Act') and the impact of these landmark initiatives on the socio-political status of TPs in India.

I. CHAIN OF EVENTS

A. Expert Committee Report on the Issues relating to TPs

In 2013, an Expert Committee was constituted by the Ministry of Social Justice and Empowerment ('Ministry') to conduct an in-depth study of the problems encountered by TPs and to suggest suitable measures to ameliorate their conditions ('Expert Committee'). On January 27, 2014, the Expert Committee submitted its report wherein it recommended that 'transgender' be declared as a third gender, that the term 'transgender' be given an inclusive definition covering all gender identities and expressions, that the term 'sex' be replaced by the word 'gender' in all government documents and that all the legal provisions relating to workplace sexual harassment and sexual assault be made transgender inclusive.ⁱⁱⁱ The Expert Committee further proposed that a Certificate of Identity ('Certificate') should be granted to TPs by a duly constituted state level authority based on the recommendation of a district level screening committee ('Screening Committee') and that steps should be taken at the central and state levels for alleviating discrimination against TPs in education, healthcare and employment.

B. Landmark judgment passed by a two-member bench of the Supreme Court of India in the NALSA Case

On April 15, 2014, the Apex Court passed its first landmark judgment recognising the existence of a third gender and advocating the self-determination model for navigating gender identity and expression. The Court acknowledged the gender based discrimination faced by TPs and observed as follows:

Both gender and biological attributes constitute distinct components of sex. The biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes include one's self-image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of 'sex' under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity. The expression 'sex' used in Articles 15 and 16 is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male nor female.

In stating so, the Court threw light upon the hardships faced by TPs and the blatant disregard of their fundamental rights in respect of their access to public places, their advancement as a socially and educationally backward class of citizens, their opportunities for public employment and office, their representation in public services, in healthcare and in education, which catalyse their social exclusion. Thus, the Court called upon the central and state governments to grant legal recognition of their identity as male, female or third gender and to take necessary steps for enforcing their constitutional rights to life, equality before the law, non-discrimination and freedom of expression. In reaching its decision, the Court stated that gender identity is one of the most basic aspects of self-determination, dignity and freedom and that no person can be forced to undergo medical procedures including Sex Re-assignment Surgery ('SRS'), sterilisation or hormonal therapy as a requirement for legal recognition of their gender identity. It was further urged that in determining the sex of an individual, priority should be given to psychological sex rather than biological sex, which includes chromosomal sex, genitals, assigned birth sex, or implied gender roles.^{iv}

Although the ruling was a step in the right direction it suffers from the following two theoretical contradictions that wear down the very principles it seeks to champion:

1. *Meaning of TPs:* The judgment first employs a wide, umbrella definition of TPs, which covers a range of non-conforming gender identities and provides that TPs have the right to self-identify their gender and that it is the duty of the state to grant legal recognition of their choice. However, later references to TPs limit

the definition to only male-to-female transsexual persons and the *hijra* community.^v

Using the term '*hijra*' almost synonymously to TPs, was a failure on the Court's part to realise that the former is a community and the latter is a gender-identity. Keeping with social prejudices, it also generalized all members of the *hijra* community as belonging to a third gender.

2. *Inconsistent construction of the 'Self-determination Model'*: On one hand, the Court portrayed the self-determination model to be reflective of freewill without any interference from the state and on the other hand, it placed reliance on state agencies to understand gender identity and to decide favourably as regards the recognition of TPs in consonance with the recommendations of the already constituted Expert Committee.^{vi}

Ideally, self-determination should be as simple and literal as the declaration, by an individual, of their self-perceived gender identity to the State by the completion of a requisite application process. On having successfully completed the aforesaid application process, the applicant could be granted an identity certificate, which could be used to change gender related details in other official documents. However, the Court, in an attempt to easily accept and advocate for the self-determination model, overcomplicated it by the introduction of screening processes. Thus, the grant of an identity certificate to TPs would be subject to the decision of a screening committee. Cis-gendered individuals are not subjected to the same screening processes and face no obstacles for the purpose of gender identification. Therefore, this judgment clearly highlights how difficult it still is for the country to simply and openly identify individuals who do not conform to the gender binary.

C. The Rights of Transgender Persons Bill, 2014

On December 12, 2014, a private member bill guaranteeing the rights of and providing welfare measures for TPs was introduced by Mr. Tiruchi Siva in the Rajya Sabha, which passed it on April 24, 2015 ('Private Member Bill').^{vii} After being transmitted to the Lok Sabha it was never taken up for discussion.

The Private Member Bill made recommendations for (i) a Special Employment Exchange for TPs; (ii) National and State Commissions for TPs; (iii) Transgender Right Courts; and (iv) reservation in primary, secondary and higher educational institutions, which were not acceptable to the Ministry.^{viii} Therefore, the Ministry decided to draft its own bill based on the report of the Expert Committee.^{ix}

D. The Transgender Persons (Protection of Rights) Bill, 2016 ('2016 Bill') and the 43rd Report of the Standing Committee on Social Justice and Empowerment ('Standing Committee') on the 2016 Bill

The 2016 Bill was introduced by the Ministry in the Lok Sabha on August 2, 2016^x and was thereafter analysed by the Standing Committee. The Standing Committee submitted its report on July 21, 2017 based on the views of several important stakeholders adept in the field.^{xi} The relevant portions of the 2016 Bill, along with the recommendations and observations of the Standing Committee are discussed below:

1. Definition of a TP: The 2016 Bill defined a TP as follows:

[A] person who is (A) neither wholly female nor wholly male; or (B) a combination of female or male; or (C) neither female nor male; and whose sense of gender does not match with the gender assigned to that person at the time of birth, and includes trans-men and trans-women, persons with intersex variations and gender-queers.^{xii}

The Standing Committee opined that instead of only focusing on the 'psychological test' as accentuated in the NALSA Case the definition also unnecessarily focused on the jurisprudentially denounced 'biological test'. Additionally, it urged that 'gender identity' being internal, personally defined and not visible to others and 'gender expression' being

external and socially perceived, should not be used interchangeably. It also recommended that the definition should be extended to include persons with intersex variations.^{xiii}

2. *Prohibition of Discrimination:* The 2016 Bill captured the recommendations made in the NALSA case and prohibited discrimination against TPs in education, employment, healthcare, residence, etc. and recognized their right to enjoy and have all the privileges, rights and benefits that are available to the general public. The 2016 Bill also deals with the sensitization of healthcare institutions to deal with TPs.^{xiv}

While the 2016 Bill defines 'inclusive education' as a system of education wherein transgender students learn together along with other students, the Standing Committee suggested that the phrase 'transgender students' be replaced with 'transgender and gender non-conforming students' as children may not always be in a position to identify themselves as TPs. The report also pointed out that unlike most anti-discrimination legislations, the 2016 Bill failed to enlist specific acts or omissions that would be considered discriminating and failed to establish a system of redressal with a presumption of guilt in favour of the accused.^{xv}

The 2016 Bill prohibits discrimination in a generalised manner and is therefore, more performative than effective. It fails to acknowledge that the intensity, impact and mode of discrimination differs in different circumstances and environments. Discrimination in an educational or employment setting may come from the administration, peers or colleagues, whereas in a healthcare environment it may come from an individual healthcare worker or the organisation itself. It also fails to make a distinction between the discrimination faced by minors and that faced by adults.

3. *Recognition of the Identity of TPs:* The 2016 Bill provides that a TP would have a right to self-perceived gender identity and would have to make an application to the District Magistrate ('DM') for issuing a Certificate in that respect. The role of the DM was to refer such an application to the District Screening Committee

comprising of a (i) Chief Medical Officer ('CMO'); (ii) District Social Welfare Officer; (iii) psychologist/psychiatrist; (iv) representative of TPs; and (v) Government officer. The Screening Committee would recommend whether or not the Certificate should be granted to the applicant, which if granted would serve as proof of their identity. Thereafter, if such person desired to change their gender identity, a revised Certificate would have to be obtained after following the aforementioned procedure and upon providing proof of SRS.^{xvi}

The Standing Committee pointed out that the main purpose of issuing a Certificate to TPs was for their *identification* and not for their *recognition* and that the 2016 Bill wrongly focused on the latter. It was also pointed out that the Screening Committee should exclude medical examiners so as to eliminate the risk of the application of the 'biological test' to determine gender identity. It was recommended that an individual should be entitled to change their gender on their birth certificate upon attaining the age of eighteen years and that the same should be sufficient proof for indicating their sex on official documents like driving license, ration card, passport, etc. As regards the procedure for obtaining a revised Certificate, the Standing Committee didn't see the logic in subjecting TPs to undergo another screening procedure, it being a tedious process in the first place. Further, it opined that showing proof of having undergone an SRS seemed to be restrictive, invasive and ignored the basic principles of autonomy.^{xvii}

4. *Welfare Measures*: The 2016 Bill called upon the 'appropriate government' to protect the rights and interests of TPs, to formulate welfare schemes and programmes, to provide for their rescue, protection and rehabilitation and to take steps to secure their full and effective participation in society.^{xviii}

The Standing Committee recognized a lack of clarity in the division of responsibilities between the centre and the states, which could lead to administrative delays, confusion and added regulatory costs, all of which would be an impediment to the effective implementation and enforcement of the provisions of the 2016 Bill.^{xix}

5. *Obligation of Establishments and Other Persons*: The 2016 Bill imposes obligations on establishments to operate in a non-discriminatory fashion in respect of recruitments, promotions and other related matters with regard to TPs. The 2016 Bill has also imposed an obligation on the parents or immediate relatives to not remove or separate from their child who identifies themselves as a TP. The 2016 Bill accentuates the right of a TP to remain and enjoy residing with their parents or immediate family and when this is not possible, a competent court may direct that the TP be placed in a rehabilitation centre.^{xx}

While it is important to recognize and provide a legal right to a TP to remain in their domestic setting, the Standing Committee has rightly pointed out that the 2016 Bill overlooked the fact that the family or natal home of TPs are usually places where their rights of self-determination and expression are severely curtailed. TPs are often victims of domestic abuse and prefer to find refuge amongst other similarly identifying individuals and not in rehabilitation centres. Also, a child who does not conform to the gender-binary does not immediately identify as a TP. Children often have very little knowledge about their rights and sexual orientation and also do not have the resources required to approach Courts for redressal or relief.^{xxi} The 2016 Bill has also failed to make provisions to secure the inheritance rights of TPs that would prevent their disinheritance from parental property solely on the ground of their gender identity.

6. *National Council for TPs ('Council')*: The 2016 Bill envisages the establishment of a thirty-member Council by the Central Government with the powers to advise, review, monitor and evaluate the policies, programmes, legislations and projects relating to TPs.^{xxii}

The Standing Committee observed that the Council was neither empowered to penalize a person or an establishment nor to redress the grievances of TPs. If the 2016 Bill was not amended to include the same, the Council would be conferred with superficial responsibilities and minimal accountability.^{xxiii}

7. *Offences*: Under the 2016 Bill, compelling or enticing a TP to indulge in the act of begging, forced or bonded labour; denying the right of passage, access, movement and residence; harming or injuring or endangering the life, safety, health, or well-being (mental or physical); causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse to TPs is punishable with imprisonment of not less than six months and which may extend to two years and with fine.^{xxiv}

The Standing Committee observed that the 2016 Bill did not fully recognize the range of violence faced by TPs and that a greater onus should be imposed on public officers and authorities for complying with the provisions of the 2016 Bill.^{xxv}

The 2016 Bill was amended to a limited extent based on the Standing Committee report and was thereafter passed by the Lok Sabha on December 17, 2018. However, the 2016 Bill lapsed with the dissolution of the Lok Sabha.

E. Transgender Persons (Protection of Rights) Act, 2019

The Transgender Persons (Protection of Rights) Bill, 2019^{xxvi} ('2019 Bill') was introduced by the Ministry in the Lok Sabha on July 19, 2019. On August 5, 2019, amidst the chaos brought about by the abrogation of the special status of Jammu and Kashmir by the Indian government under Article 370 of the Constitution of India, the Lok Sabha passed the 2019 Bill.^{xxvii} On November 26, 2019, the Rajya Sabha went on to pass the 2019 Bill without any amendments. This was also amidst the unstable political climate caused by the 2019 Maharashtra Election results^{xxviii}. The 2019 Act^{xxix} only incorporated a few recommendations of the Standing Committee. Firstly, the definition of 'TP' was amended as follows:

[A] person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations,

genderqueer and person having such socio-cultural identities as *kinner*, *hijra*, *aravani* and *jogta*.

This definition is more comprehensive than the one provided for in the 2016 Bill. It has successfully created a wide umbrella under which any gender non-conforming individual could fall. It also emphasises on the psychological test by acknowledging the fact that although TPs sometimes undergo SRS, SRS is not an essential prerequisite for identifying as a TP.

Secondly, the provisions relating to discrimination were extended to establishments whereas the 2016 Bill only dealt with discrimination by persons and thirdly, the Council was empowered to redress the grievances of TPs.^{xxx} However, as regards the issuance of a Certificate, the 2019 Act brought about two major changes. Firstly, it did away with the concept of a Screening Committee and secondly, it altered the provisions relating to the grant of a revised Certificate. Under the 2019 Act, if a TP desires to change their gender to 'male' or 'female' by obtaining a revised Certificate, they can do so only after obtaining a certificate from the Medical Superintendent or CMO to that effect, which shall be issued only upon providing proof of SRS. Further, the correctness of the certificate issued by the Medical Superintendent or CMO is subject to adjudication by the DM.^{xxxi}

F. Draft Transgender Persons (Protection of Rights) Rules, 2020

Following the notification of the 2019 Act, on April 16, 2020, the Ministry circulated the draft rules to the 2019 Act for public feedback.^{xxxii} Under these draft rules, an application form for obtaining a Certificate under the 2019 Act had to be accompanied with (i) an affidavit whereby the applicant declared themselves to be transgender; and (ii) a report from a government hospital psychologist.^{xxxiii} The requirement of a psychologist's report was controversial because it was in contravention of the 'self-perceived gender identity' model and made the applicant's gender identity vulnerable to psychological assessment. The draft rules neither provided for any set procedure nor any trans-affirmative specifications for the purpose of making the report, thus, leaving room for widespread inconsistency. In a country with a requirement of 20,250 clinical psychologists and only

898 available, and at least 4,87,803 individuals who do not conform to the gender binary, this provision apart from being questionable also seemed burdensome.^{xxxiv}

After modifications, on July 13, 2020, the Ministry circulated the draft Transgender Persons (Protection of Rights) Rules, 2020^{xxxv} ('Draft Rules') for public feedback, which omitted the requirement of the psychologist's report. The following are important provisions of the Draft Rules:

1. *Application Form:* A TP desirous of obtaining a Certificate shall have to submit (i) an application (in Form-1) and (ii) an affidavit containing proof of address for the past 1 year and a declaration of their gender identity (in Form-2) to the DM in the prescribed forms appended to the Draft Rules. In the event the applicant is desirous of obtaining a revised Certificate, then in addition to the application form and affidavit, the applicant would have to submit a certificate issued by the Medical Superintendent or CMO of the medical institution in which that person had undergone SRS. The correctness of this medical certificate would then be verified by the DM. Further, it is also necessary for the applicant to have been a resident of the area under the jurisdiction of the DM for a continuous period of 1 year, immediately preceding the date of the application.^{xxxvi}
2. *Issuance of Certificate of Identity:* A Certificate will be issued within thirty days and a revised Certificate will be issued within fifteen days of the date of receipt of the duly submitted application. Simultaneously, the DM will issue an identity card to the TP, which will enable them to change their gender, photograph and name, if required, in official documents (enumerated in Annexure-1). This process would have to be completed by the concerned authorities within fifteen days from the date of receipt of an application made in this regard. The Certificate and identity card are to be included in the records of the appropriate governments for the purposes of public services.^{xxxvii}
3. *Rejections and appeal:* In case an application is rejected, the DM shall communicate the reasons for the same to the applicant. The DM may review its decisions upon a request by the applicant within thirty days of such rejection. The applicant will also

have a right to appeal to the appellate authority designated by the state government within sixty days from the date of intimation of rejection, for a final order.^{xxxviii}

4. *Welfare Measures and Non-Discrimination Provisions:* The responsibility to implement the welfare measures and non-discrimination provisions in education, employment, healthcare, public transportation and participation in society, as stipulated under the 2019 Act, have been placed on the central and state governments/union territories ('UT'). Further, within 2 years of the Draft Rules coming into force, (i) the state/UT governments are required to create certain institutional and infrastructure facilities; and (ii) the appropriate government has been called upon to formulate a comprehensive policy on the measures and procedures necessary to protect TPs as provided for in the 2019 Act.^{xxxix}
5. *Grievance Redressal:* A grievance redressal mechanism is to be set up within 1 year of the Draft Rules coming into force, which will operate through helplines and outreach centres so as to ensure the proper implementation of the provisions (including the penal provisions) of the 2019 Act. Under this mechanism, any issues raised and complaints made are to be resolved within thirty days. Further, every establishment needs to designate a complaint officer within thirty days of the Draft Rules coming into force, who is required to act within 2 days from the date of receipt of a complaint.^{xi}
6. *Institute of Social Defence:* The National Institute of Social Defence under the Ministry has been appointed as the secretariat to the Council and shall co-ordinate with the Council in discharging its functions of monitoring, reviewing and evaluating transgender welfare and the protection of their rights at the state and local levels.^{xli}

II. ISSUES FOR CONSIDERATION

- A. **Transgender Identity:** In the NALSA Case, the concept of 'self-determination of identity' as a man, woman or third gender was upheld and it was held that such self-

determination was a part of the fundamental right to dignity, freedom and personal autonomy guaranteed under art 21 of the Constitution of India. However, the 2019 Act on one hand states that a person will be recognised as ‘transgender’ on the basis of a Certificate to be issued by the DM and on the other hand, it confers on them the right to a ‘self-perceived gender identity’. Thus, in reality, the 2019 Act and the Draft Rules lean towards adjudication on a TPs’ identity rather than adhering to the ‘self-perceived gender identity’ model when it comes to the granting of a Certificate and a revised Certificate. The lack of an exhaustive list of grounds under which an application can be rejected may allow the DM to adjudicate on the correctness of the application and thus, invariably on the gender identity of a TP. The 2019 Act does not stipulate the grounds for rejection of an application, which means that the DM could reject an application on grounds other than procedural or technical grounds, which is contradictory to the self-determination model. This could result in a lack of uniformity and certainty with different precedents being set in cases with differing facts and circumstances.

B. Certificate of Identity:

1. *Screening Committee:* The 2016 Bill provided that a person will be recognised as ‘transgender’ on the basis of a Certificate to be issued by a DM based on the recommendations of a Screening Committee.^{xlii} However, the 2019 Act does away with the screening procedures and leaves the power to issue the Certificate with the DM, based on a procedure provided in the Draft Rules.^{xliii} The legislature has obstinately ignored the recommendations of the Standing Committee and has simply eliminated the body which originally was to adjudicate on a TP’s gender identity and has now devolved that power on the DM.
2. *Proof of Residence:* Under the Draft Rules a DM may only issue a Certificate to an applicant who has been residing in the area within its jurisdiction for a continuous period of 1 year, immediately preceding the date of the application.^{xliv} However, TPs are often homeless and unemployed because they

face social ostracism and abuse in their domestic and social settings and often move from one place to another,^{xlv} by exercising their rights under art 19 of the Constitution. Therefore, it may be difficult for them to provide the proof of residence as required under the Draft Rules.

3. *Invasion of Privacy*: Form-1 of the Draft Rules requires an applicant to provide educational, employment, income related and other personal information along with documentation while submitting an application. The rationale behind these requirements has not been made clear. Form-1 also states that the information provided shall be treated as confidential and shall not be shared with any person or organisation save and except the central and/or state security agencies and any other agency as provided by law; and shall be used for statistical and policy framing purposes.^{xlvi} These requirements violate a TP's right to privacy under art 21 of the Constitution and goes against the principles of data minimisation as postulated in the landmark judgment passed by the Supreme Court of India in *Justice K S Puttaswamy (Retd) v. Union of India*.^{xlvii}
4. *Change of Gender Identity*: Under the 2019 Act, once a Certificate has been issued, if a TP desires to change their gender, they will have to apply for a revised Certificate, which shall only be granted upon proof of SRS.^{xlviii} These provisions shall be detrimental to persons with gender fluid identities. The 2019 Act also disregards the fact that SRSs often involve complicated medical procedures and are expensive. The object of the 2019 Act and Draft Rules was to adopt the principles of equity and equality and to uplift TPs. Although some TPs wish to undergo SRS in order to bring about physical changes that are coherent with their gender identity, SRSs are expensive, need psychological evaluation, which need not be trans-affirmative and are also inaccessible to marginalised groups in the country that live below the poverty line and in rural and backward areas. Instead of focusing on SRS as being a prerequisite for obtaining a revised Certificate, the 2019 Act should have stayed true to its definition of TPs, which focuses on the psychological aspects of gender identity. Using the self-determination model as a guiding principle, the 2019 Act should

have permitted individuals with gender fluid identities to make alterations or amendments to their Certificate by way of an application process. The insistence on SRS for the purpose of obtaining a revised Certificate is contrary to the rights of freedom of expression and equality under arts 14 and 19 of the Constitution of India.

C. Status under Existing Laws and Penal Provisions: There are several existing laws that only recognise the gender binary of ‘male’ or ‘female’. These laws have gender-specific provisions as can be seen under the Indian Penal Code, 1860, the National Rural Employment Guarantee Act, 2005, Hindu Succession Act, 1956, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, the Maternity Benefit Act, 1961 etc. The 2019 Act does not clarify how the existing laws will apply to TPs, it has failed to include TPs within the scope of these statutes and it has not clarified how the gender-based offences under these statutes would apply to TPs. If any offence is committed against a TP, the 2019 Act stipulates imprisonment for a term which shall not be less than six months but which may extend to two years and with a fine.^{xlix} This leads one to assume that offences against TPs have been dealt with in a discriminatory manner and are treated as mere ‘petty’ offences. Violence, abuse and discrimination, especially when sexual in nature transgress the gender binary. Therefore, combative legislation, which protects the rights of more individuals than just cis-gendered and heterosexual men and women, is the need of the hour.

D. Absence of Time-lines: The 2019 Act and the Draft Rules have delegated many responsibilities to the central, state and UT governments in relation to welfare and non-discrimination measures. Although these efforts are welcomed and appear to be in the interest of TPs, in most cases, no time-frame has been stipulated for the implementation of the same. The inclusion of the National Institute of Social Defence under the Draft Rules adds yet another body whose role under the 2019 Act has not been precisely enumerated or highlighted. These drafting techniques absolve the authorities of any responsibility and accountability and ultimately, negates the benefits of the provisions.¹

- E. Reservation:** The NALSA Case and the Private Member Bill made recommendations for the centre and states to take steps for treating TPs as socially and educationally backward classes of citizens and to provide reservations in educational institutions and public appointments.^{li} The 2019 Act is silent on the aspect of reservation and also does not contemplate any objective criteria to verify the eligibility of the applicants to receive these benefits.
- F. Budgetary Expenditure:** While the 2016 Bill allocated a sum of Rupees 15 Crores as the budgetary expenditure for the TP's scheme for that relevant financial year,^{lii} the 2019 Bill allocated only a meagre sum of Rupees 1 Crore towards the same.^{liii} However, the 2019 Act makes no reference to budgetary expenditure.
- G. Retrospective Application:** According to the Draft Rules, TPs who have already officially recorded their gender identity as transgender, prior to the coming into force of the 2019 Act, need not make a fresh application for a Certificate.^{liv} The 2019 Act is silent on whether the recognition of a TP would have prospective or retrospective effect. It also does not provide any clarity as regards the recourse or the remedies available to a TP for acts or omissions done by and against them before the grant of the Certificate.

III. CONCLUSION

On September 6, 2018, a five-member bench of the Supreme Court of India in *Navtej Singh Johar v. Union of India*^{lv} unanimously ruled that Section 377 of the Indian Penal Code, 1860 was unconstitutional in so far as it criminalises consensual sexual conduct between adults of the same sex. This was the first landmark initiative for the empowerment of the LGBTQIA+ communities in India. Although the 2019 Act and Draft Rules should have followed suit, they are inadequate and have given precedent to delegated legislation, leaving behind little to substantiate the provisions actually mentioned therein.

Notwithstanding the fact that the 2019 Act blatantly disregarded most of the recommendations of the Standing Committee, it was passed by the Lok Sabha amidst the political turmoil

surrounding the infamous abrogation of Article 370 and by the Rajya Sabha during the 2019 Maharashtra Election controversy without any amendments and by a mere voice vote.

The 2019 Act and Draft Rules wrongly focus on the recognition rather than the identification of TPs and the concept of ‘self-perceived gender identity’ provided thereunder is completely camouflaged by a system subsumed with tedious certification procedures and medical assessments.

TPs are quintessential victims of sexual offences and instead of incorporating inadequate penal provisions of its own, the 2019 Act should have incorporated blanket provisions whereby the protection available under the various Indian punitive laws could have been extended to TPs.

The Parliament made an attempt to create a statute for the upliftment, protection and rightful recognition of TPs while completely disregarding the points urged by the Apex Court in the NALSA Case as well as the recommendations made by the Standing Committee. The resultant 2019 Act and Draft Rules are, therefore, burdened with legislative lacunae and the haste with which the 2019 Act was passed by the houses of parliament may have jeopardized the entire purpose it intended to serve.

ENDNOTES

ⁱ (2014) 5 SCC 438.

ⁱⁱ People’s Union for Civil Liberties, Karnataka, *Human Rights Violations against Sexual Minorities in India* (Apr. 17, 2020, 11:20 pm), <https://feministlawarchives.pldindia.org/wp-content/uploads/sexual-minorities.pdf>.

ⁱⁱⁱ Ministry of Social Justice and Empowerment, *Report of the Expert Committee on the Issues relating to Transgender Persons* (Mar. 24, 2020), https://www.prindia.org/sites/default/files/bill_files/Expert_Committee_Report_%282014%29_1.pdf. (‘Expert Committee Report’).

^{iv} NALSA Case, *supra* note 1, para 63-68.

^v *Id.*, para 113-114.

^{vi} *Id.*, para 21, 135 and 136.

^{vii} The Rights of Transgender Persons Bill, 2014, No. XLIXC-C, Rajya Sabha, 2014 (‘Private Member Bill’).

^{viii} *Id.*, cls. 21, 24, 26-45 and 46-48.

^{ix} Standing Committee on Social Justice and Empowerment of the Sixteenth Lok Sabha, *Forty Third Report - The Transgender Persons (Protection of Rights) Bill, 2016* (May. 5, 2020), https://www.prindia.org/sites/default/files/bill_files/SCR-%20Transgender%20Bill.pdf. (‘Standing Committee Report’).

^x The Transgender Persons (Protection of Rights) Bill, 2016, No.210, Lok Sabha, 2016 (‘2016 Bill’).

^{xi} Standing Committee Report, *supra* note 9.

^{xii} 2016 Bill, *supra* note 10, cl. 2(i).

^{xiii} Standing Committee Report, *supra* note 9, at 25-29, 41-43.

^{xiv} 2016 Bill, *supra* note 10, cls. 3 and 16.

^{xv} Standing Committee Report, *supra* note 9, at 19-20, 33, 75-76.

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- xix Standing Committee Report, *supra* note 9, at 60-64.
- xx 2016 Bill, *supra* note 10, cls. 10-13.
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