



Short Article

## The Unheard Voice of ‘Third Gender’ - An analysis of the Transgender Person (Protection of Rights) Act, 2019

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**Abstract:** *In India, third gender was considered a taboo and those people were often treated as non-natives. One such example of the same is the Transgender Persons (Protection of Rights) Act 2019 in which the rights of the transgender people have been undermined. The Act although was formed for their protection but it snatches away their self-identity, dignity and privacy. The Act is ambiguous over the difference between gender and sex, procedure to be followed for registration and appeal and activities required to be done for the empowerment of this miniscule minority. Although it denies discrimination yet does not provide provisions for the punishment. A complicated surgery which was declared illegal by the honorable Supreme Court has been made compulsory for getting the Certification of Gender. The Act altogether keeps a blind eye towards the demands of this section, clearly construing them as different from the binary version of society.*

**Keywords:** *Transgender, Intersex, Self-identity, Discrimination.*

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## 1. Introduction

*“I am what I am. So, take me as I am.”*

- Johann Wolfgang Von Goethe

The landmark judgment delivered on 15<sup>th</sup> April 2014 by the Apex Court of India became a remarkable step towards granting of the transgender persons the dignity that they deserve. Justice D.Y. Chandrachud, in another judgment wherein transgender persons were conferred the freedom and equality which was due for a long time marked that, “*it is difficult to right a wrong by history, but we can set the course for the future*”.<sup>1</sup> Where judiciary managed to successfully provide the rights and respect that transgenders deserve, the other two organs of the system failed to incorporate the principles that were laid down to eliminate discrimination against this community.

In this following article the authors have critically analyzed the Transgender persons (Protection of Rights) Act, 2019, which is based on the directions and orders given by the apex court in *NALSA v. Union of India*.<sup>2</sup> The authors have emphasized that this Act is not in consonance with the directions given by the Court. This Act has certain limitations, from an inappropriate definition of transgender to an unacceptable penalty in case of any offence against them, all of which can cause trouble to the transgender community, if not dealt by the authorities. The authors have tried to incorporate certain suggestions that can help in mitigating the concerns of the transgender community regarding this act.

## 2. Evolution of Transgender Rights in India

Transgender community has substantial historical presence in Hindu Mythology which is evident from various religious texts. The epic Ramayana establishes the sanctity of the blessings given by transgender; the Mahabharata glorifies their role in the victory of *Pandavas* in the war of Kurukshetra. But with the arrival of colonial era in 18<sup>th</sup> century the situation got worst for transgender. The laws such as the Criminal Tribes Act and Section 377 of Indian Penal Code became the starting point of the series of discrimination and miseries to be faced by the transgender. In the post-independence era, the transgender movement lost its momentum. Although in 1990s it regained its spirits in Madhya Pradesh, and got submerged with the queer movement and

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<sup>1</sup> *Navej Singh Johar v Union of India* AIR 2018 SC 4321

<sup>2</sup> *NALSA v Union of India* AIR 2014 SC 1863

lost its presence. After a series of protests the matter again went to the court in the case of NALSA<sup>3</sup>. This case became the starting point of a new journey.

The NALSA judgment gave the transgender persons the right to have a self-perceived identity and recognized them as the ‘third gender’. “It laid down a series of measures for securing transgender people’s rights by prohibiting discrimination, recommending creation of welfare policies and reservation for transgender people in educational institutions and jobs.”<sup>4</sup> This made the legislation to formulate laws in consonance with the directions of the Court.

In 2014, the first bill for Transgender rights was introduced by the name of Rights of Transgender Persons Bill, 2014. After incorporating the changes required in the Bill, it was named as Rights of Transgender Persons Bill, 2015 and was introduced in Lok Sabha in 2016. While this Bill was still pending, the government introduced Transgender Persons (Protection of Rights) Bill, 2016 ultimately attracting high criticism and protest from the members of the Transgender community. The government tabled the new version of the bill after getting the report from the Standing Committee in December 2018. Unfortunately, this Bill also failed to incorporate the recommendation given by the Committee and was met with the same criticism. The bill got lapsed due to the dissolution of Lok Sabha and was reintroduced after the 2019 General Elections. While the protest and criticism of transgender community was going on, the Bill got presidential assent on 5<sup>th</sup> December 2019.

### 3. Persons with Intersex Variation: Not a Part of Trans Umbrella

The Transgender Persons (Protection of Rights) Act 2019, under Section 2 defines ‘transgender persons’ as “*a person whose gender does not match with the ‘gender’ assigned to that person at birth and includes trans-man or trans-woman, person with intersex variations, genderqueer, and person having such socio-cultural identities as kinner, hijra, aravani and jogta.*”<sup>5</sup>

This definition, as per the Global Human Rights Defense Organization, has “incorrectly equated gender identity with biological sex”.<sup>6</sup> This claim by the organization can be substantiated by pointing out two defects

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<sup>3</sup> Kanwal DP Singh & Vinayak Jhamb, ‘Navigation Through the Troubled Waters: An Analysis of the Transgender Persons (Protection of Rights) Act, 2019’ [2020] 40 Studies in Indian Place Names 2817, 2819

<sup>4</sup> Venkatesan J, ‘Supreme Court Recognises Transgender as Third Gender’, (*The Hindu*, 15 April, 2014) <<https://www.thehindu.com/news/national/supreme-court-recognises-transgenders-as-third-gender/article5914572.ece>> accessed on 02 July 2020

<sup>5</sup> The Transgender Persons (Protection of Rights) Act, 2019, s. 2; *See also*: Vijayta Lalwani, ‘Explainer: Despite criticism, the Transgender Persons Bill was just passed. What’s next?’, (*Scroll*, 27 November 2019) <<https://scroll.in/article/944943/explaine>>, accessed on 04 July 2020

<sup>6</sup> ‘The Current Status of Transgender Rights in India’ (*Global Human Rights Defence*) <<https://ghrdorg.wordpress.com/transgender-rights-in-india/>> accessed on 04 July 2020

in the definition. First, the inclusion of ‘person with intersex variations’ in the definition of ‘transgender’ and second, using the word ‘gender’ in place of ‘sex’ to indicate the binary difference between a person’s gender identity and ‘sex’ that has been assigned to them at birth.

The meaning of transgender has changed radically over the time, as a result of which, the word “transgender” has become an “umbrella term”<sup>7</sup> for persons who’s “perceived gender and anatomic sex conflict with the gender expression”<sup>8</sup>. Though, this understanding of the term justifies the inclusion of trans–man, trans–women, genderqueer, *kinner*, *bijra*, *aravani*, and *jogta* within the definition, but cannot justify the inclusion of intersex within this umbrella. The reason for the same can be put forth in the words of global intersex activists who highlights that “*intersex is not about gender or transition rather it is about congenital physical differences in sex characteristics*”<sup>9</sup>. By assuming that both are same, the legislation undermines the discrimination faced by the intersexual and “*obscures the specific goals of the intersex human rights movement*”<sup>10</sup>.

Unfortunately, India’s anti-discrimination laws for the transgender have been incomprehensive regarding the intersex issues by perceiving it as a third gender issues and “*wrongly identifying the persons with intersex traits as transgenders*”<sup>11</sup>. This misplaced assumption will have less effect on the intersex or trans-people. But “the conflation of intersex with being transgender or gender diverse fails to recognize that most intersex people identify with sex assigned at birth”<sup>12</sup>.

#### 4. Need for Separate Recognition for Persons with Intersex Variation

In a landmark judgment of Madras High Court that imposed a legal ban on the sex-selective surgeries on intersex infants<sup>13</sup>, became a historic step towards recognizing the human rights of persons with intersex variation and the need of segregating them with the transgender. On a global platform where Australia enacted the first law that includes intersex-status as a standalone prohibited ground of discrimination<sup>14</sup>, Malta

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<sup>7</sup> *NALSA* (n 2)

<sup>8</sup> Paisley Currah, ‘Gender Pluralisms under the Transgender Umbrella’ in Richard M. Juang & Shannon Price Minter (eds), *Transgender Rights* (University of Minnesota Press 2006)

<sup>9</sup> ‘Intersex Intersectionalities with Gender Diversity, Intersex Human Rights Australia’ (*Intersex Human Rights Australia*, 13 June 2011) <<https://ihra.org.au/18194/differences-intersex-trans/>>, accessed on 04 July 2020

<sup>10</sup> Paisley Currah (n 8)

<sup>11</sup> APCOM, ‘Human Rights of Intersex Persons in India - Information Toolkit’ (2020) National Intersex Human Rights Conference <<https://www.apcom.org/storage/2020/05/Information-Toolkit-Intersex-Human-Rights-in-India.pdf>> accessed on 04 July 2020.

<sup>12</sup> Paisley Currah (n 8)

<sup>13</sup> *Ibid*

<sup>14</sup> UN Human Rights, ‘Intersex Fact Sheet, Free & Equal United Nations for LGBT Equality’ <<https://www.unfe.org/wp-content/uploads/2017/05/UNFE-Intersex.pdf>>, accessed on 05 July 2020

introduced “the first law that prohibit surgery and treatment on the sex characteristics of minors without informed consent”<sup>15</sup>. In 2014, the Supreme Court of India in its landmark judgment discussed the distinction between the “sexual orientation, gender identity, and sex characteristics and recommended the creation of a legal protection regime.”<sup>16</sup> But the Transgender Persons (Protection of Rights) Act 2019 completely turns a blind eye towards the aforementioned propositions and ignores another group of population which faces discrimination on the basis of sexual orientation *i.e.*, the intersexual.

“A particular difficulty faced by many intersex people who change sex/gender marker is the risk of forced and irreversible medical treatment to make their bodies appear more like their incorrect assigned sex.”<sup>17</sup> The defects of the definition of ‘transgender’ in the Act shows that there is an urgent requirement to establish mechanism that could protect the rights of the intersexual, but not by including them within the ambit of transgender rather by giving them a separate recognition and right to self- identity.

## 5. Disregarded Discrimination against “Miniscule Minorities”

“Every human being is guaranteed inalienable human rights in accordance with international legal standards. For many trans-people, these rights exist only in form, not in substance. Trans people are denied not only fundamental rights to equality, dignity, health and security of being, but their very personhood.”<sup>18</sup> The Transgender Bill, 2019 in Chapter II, Prohibition against Discrimination, provides that no person or establishment shall discriminate amongst the transgender persons on different grounds stated, “including educational establishments, employment, healthcare services, any goods, accommodation, service, facility meant for public use, right of movement, right to purchase reside, purchase, rent, or otherwise occupy property, opportunity to stand for or hold public office; and government or private establishment in whose care or custody a transgender person”.<sup>19</sup>

“Transgender people in India cheered in April 2014 when the Supreme Court of India allowed them to officially identify themselves as a third gender.”<sup>20</sup> The golden thread that runs through the equality scheme of

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<sup>15</sup> Intersex Fact Sheet (n 14)

<sup>16</sup> *NALSA* (n 2)

<sup>17</sup> *APCOM* (n 11)

<sup>18</sup> United Nations Development Programme, ‘Stigma, Discrimination, Violence & Human Rights’ <[https://www.undp.org/sites/g/files/zskgke326/files/publications/3\\_TRANSIT\\_Chapter%202.pdf](https://www.undp.org/sites/g/files/zskgke326/files/publications/3_TRANSIT_Chapter%202.pdf)> accessed 23 June 2020

<sup>19</sup> Ius Laboris, ‘Transgender rights, the ‘Third Gender’ and transforming the workplace in India’ (*Lexology*, 12 March 2020) <<https://www.lexology.com/library/detail.aspx?g=b49d9488-c484-4d00-882c-2c386a041a07>> accessed on 23 June 2020

<sup>20</sup> Priyanka Borpujari, ‘India’s Trans Community Faces Continued Discrimination’ (*The Diplomat*, 24 January 2019) <<https://thediplomat.com/2019/01/indias-trans-community-faces-continued-discrimination/>> accessed on 23 June 2020

the Indian Constitution (Articles 14, 15, 16, 19, and 21) is enjoyment of life by all citizens and an equal opportunity to grow as human beings irrespective of their race, caste, religion, community, social status and gender.”<sup>21</sup>

## 6. Infringement of Fundamental Rights

“Article 14 has the expression ‘person’ and the Article 15 has used the expression ‘citizen’ and ‘sex’ so also under Article 16. Article 19 has also used the expression ‘citizen’. Article 21 has used the expression ‘person’. All these expressions, which are ‘gender neutral’ evidently, refer to human-beings”.<sup>22</sup> Therefore, they include male, female and the third gender peoples.

“Although the legislation talks about discrimination, but it does not explicitly define what constitutes discrimination in the context of the transgender community. It also fails to specify punishment for those who discriminate against transgender persons.”<sup>23</sup> Every human in this world is important irrespective of their orientation or even if they are in “miniscule minority”<sup>24</sup>. The landmark judgment of 2014 provided for treating the transgender community as economically and backward section and asked it to provide for reservations in education and employment sectors so as to uplift their status in the society but the bill only provides for safeguard against the discrimination in these places and does not even talk about reservations to the community. Even Justice Radhakrishnan had concluded in the same judgment with the words, “*these transgender people, even though insignificant in numbers, are still human beings and therefore they have every right to enjoy their human rights.*”<sup>25</sup>

## 7. The Overlooked Aspect of “Self-Dentity”

The act provides for recognition of identity of Transgender Person in which it establishes that for a person to be considered a transgender, he needs to issue a certificate from the District Magistrate. But if a transgender person wants a certificate of male or female gender after the Sex reassignment surgery (SRS) or Gender reassignment surgery (GRS), a medical proof from the “Medical Superintendent or Chief Medical Officer of

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<sup>21</sup> Alok Tewari, Shivika Upadhyay & Vishal Singh, ‘Transgender Rights, The ‘Third Gender’ And Transforming The Workplace In India’ (Mondaq, 20 March 2020) <<https://www.mondaq.com/india/discrimination-disability-sexual-harassment/905918/transgender-rights-the-third-gender39-and-transforming-the-workplace-in-india>> accessed on 20 June 2020

<sup>22</sup> *NALSA* (n 2)

<sup>23</sup> Vijayta Lalwani (n 5)

<sup>24</sup> *Suresh Kumar Koushal and Anr v NAZ Foundation and Ors.* (2014) 1 SCC 1

<sup>25</sup> *NALSA* (n 2)

the medical institution in which the person has undergone surgery”<sup>26</sup> will be granted a revised certificate of the gender claimed, if the DM is satisfied with the proof. Section 5 of the Bill provides that the parents may apply for the Transgender Certificate for their children, but it is not possible in a country like India where third gender people are still not considered as part of society. Parents being of orthodox mentality think more about their reputation in society and consider it as a mental state or an illness.

## **8. Provision in Contradiction to NALSA Case of 2014**

The order of the judgment states that, “The Centre and State Governments should seriously address the problems being faced by hijras/transgender such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma, etc. and any insistence for SRS for declaring one’s gender is immoral and illegal.”<sup>27</sup> The Act is in complete opposition to it as it has made the certificate compulsory and for claiming of being of a particular gender SRS certificate is necessary. People have psychologically identified themselves of a different gender as compared to the sex they have at birth and this cannot be proven as it is a mental state of an individual.

### **8.1. Violation of Right to Privacy**

The Supreme Court in *Justice K. S. Puttaswamy v. Union of India*<sup>28</sup> provides that “Right to privacy is a fundamental right in our Indian Constitution” and the ‘third-gender’ people even after being the citizens have been denied this right in this Act. Self-identity and personal integrity given to them in NALSA judgment have been snatched away forcing them to apply for a certificate for their identity. The same demand is against the morality of the society as it gives them the status of being different from the binary gender. Being a male or female does not force you to apply for a certificate. This Act does not even suggest the measures or steps to be taken is one is denied certification by the District Magistrate. “The state is bound to take some affirmative action for their advancement so that the injustice done to them for centuries could be remedied”<sup>29</sup>

### **8.2. Ambiguous Entitlement for Transgender Persons**

The Act protects the ‘transgender’ from facing discrimination in educational institution and obliges the ‘appropriate governments’ to form welfare schemes to support their livelihood including their “vocational

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<sup>26</sup> The Transgender Persons (Protection of Rights) Act 2019, s 7(1)

<sup>27</sup> *NALSA* (n 2)

<sup>28</sup> *Justice K. S. Puttaswamy v Union of India* (2017) 10 SCC 1

<sup>29</sup> Vijayta Lalwani (n 5)

training and self–employment”. The Supreme Court in *NALSA v. Union of India* pointed out that “*TGs have not been afforded special provisions envisaged under Article 15(4) for the advancement of the Socially and Educationally Backward Classes (SEBC) of citizens, which they are, and hence legally entitled and eligible to get the benefits of SEBC.*”<sup>30</sup> Though Chapter VI, (Section 13-14) of the Act prohibits discrimination in educational institutions and calls for the formulation of welfare scheme helping them in earning their livelihood, but it remains silent over the issue of reservation for education and employment that should be given to them if they are considered as socially and educationally backward class. It fails to provide a mechanism to give transgender due representation in public services.

### 8.3. Right to Healthcare

Section 15 specifically talks about measures that need to be taken to provide them adequate healthcare facilities. These measures include setting up of separate HIV Sero Surveillance centers, providing medical care facilities including “sex reassignment surgery and hormonal therapy, bringing out a health manual related to SRS”<sup>31</sup> and providing them a thorough insurance scheme for covering medical expenses arising from SRS, hormonal therapy, laser therapy or any other health issue. But the act does not specify whether these health services will be available for free or subsidized by the government.

As per Rule 10(5) of the draft of Transgender Persons (Protection of Rights) Rules, 2020, the government shall create institutional and infrastructural facilities that will include separate washrooms among other things “in establishment within two years from the notification of the rules”. The definition of ‘establishment’ in the act includes “central and state government funded or controlled bodies, and any other company, body corporate, association or body of individuals, firm, society, trust, agency, or institution”<sup>32</sup>. This wide ambit of this definition will make it unfeasible for the government to provide the above-mentioned facilities in all private and public establishments.

## 9. Denial of Equality and Equal Protection of Laws

Certain laws in India against some specific crimes favor a particular group of society based on gender identity. The debate over making these laws ‘gender neutral’ has been going on since 1996, but unfortunately the issue

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<sup>30</sup> *NALSA* (n 2)

<sup>31</sup> Neha Tripathi & Soumya Raj Singh, ‘Critical Analysis of Transgender Persons (Protection of Rights) Act, 2019’ (*Legit Eye*, 2019) <<https://legiteye.com/critical-analysis-of-transgender-persons-protection-of-rights-act-2019-by-neha-tripathi-and-soumya-rajsingh/>> accessed on 05 July 2020

<sup>32</sup> Draft Transgender Persons (Protection of Rights) Rules, 2020



was never taken as seriously as it should be by the law makers over the years, which is evident from the recent law enacted to protect rights of the Transgender. “Chapter VIII (Offences & Penalties) of the Act prescribes the punishment of imprisonment for minimum 6 months and maximum 2 years and fine for the following offences against transgender:

- i. Indulging a transgender into forced or bonded labor,
- ii. Denies access to a public place,
- iii. Forces the transgender to leave his household, village or other place of residence,
- iv. 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.”<sup>33</sup>

This provision shows a pattern of discrimination that takes away their right to equal protection of law and in turn increases their chances of getting targeted even more. As per the judgment in *NALSA v. Union of India*, transgender fall within the expression ‘persons’ in Article 14 of the Indian Constitution and therefore are entitled equality and equal protection of laws.<sup>34</sup> When the crime of sexual assault is committed on a female body, the laws prescribe punishment of minimum seven years of imprisonment along with fine<sup>35</sup>. But when intensity of the crime is same but was committed on a transgender the punishment decreases to two years of imprisonment. This shows a regressive pattern of law where punishment for the same crime is different for different section of the society. It denies them (transgender) equality and equal protection of law.

“Four of ten transgender people face sexual abuse before completing 18 years, according to a survey by Swasti Health Resource Centre – a Bangalore-based non-profit organization—among 2,169 respondents across three states: Maharashtra, Tamil Nadu, and Karnataka.”<sup>36</sup> The discrimination and poverty faced by them makes them even more vulnerable to sexual abuse. But the legislation not only conveniently ignored the daily oppressions, discriminations, and exploitation (both mental and physical) faced by this community but it altogether failed to even define ‘sexual abuse’. Also “the petition filed by advocate and trans-activist Swati

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<sup>33</sup> The Transgender Persons (Protection of Rights) Act 2019, s 18.

<sup>34</sup> Justice K. S. Puttaswamy (n 28), p 70

<sup>35</sup> Indian Penal Code 1860, sec 376

<sup>36</sup> Sumit Chaturvedi, ‘Abuse of Transgender Indians Begin In Early Childhood’ (*India Spend*, 6 January 2017) <<https://archive.indiaspend.com/special-reports/abuse-of-transgender-indians-begins-in-early-childhood-94265>> accessed on 06 July 2020

Bidhan Baruah challenged the validity of the Transgender Persons (Protections of Rights) Act, 2019, criticizes Section 18 of the act on the ground that it clubs dissimilar offences together, and prescribes a common punishment for the same<sup>37</sup>. This Act further institutionalizes crimes against transgender by making the crime against transgender look as less violent and viewing those crimes like sexual assault and harassment not of serious nature when committed upon them. This shows an urgent need for legislations to be gender – neutral.

## 10. Suggestions

The Transgender Persons (Protection of Rights) Act, 2019 was formed with the objective of giving equal importance to the third gender people but the whole thing turned out the other way. The day when the Bill was passed, it was described as “Gender Justice Murder Day”<sup>38</sup> by some of the transgender community people. To correct it, some of the measures can be taken like the establishments, institutions, education sectors, and public sector should try to create a familiar workplace for these people. The biggest concern is the behavior of the society towards them; they should feel accepted and not like an alien.

There are reservations for the backward class people but none for the transgender people. Companies should review their policies and extend a hand to the talented people of the community ensuring equal opportunity to all. The Act provides going for Sex Reassignment Surgery for getting a certificate of a particular gender but this should be exempted as the surgery is costly as well as a difficult process. There should be separate washrooms in public places for third gender people. This is because “Trans-women are often subject to humiliation and harassment as they are forced to use male washrooms.”<sup>39</sup> There is discrimination in the punishment criteria of sexual assault against common people and them which should be nullified and only one system should be followed, to show no difference among them.

The process of obtaining a certificate is ambiguous as there is no procedure mentioned in case of refusal, appeal or if the person is not satisfied. Showing certificate so as to identify one’s gender is not appropriate. A person from the binary gender is not asked to certify its gender or sex but forcing this community people to do so is against the morality. In the draft rules for implementation the community people are required to have

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<sup>37</sup> HT Correspondent, ‘Supreme Court Notice to Centre on Plea Against Transgender Act’ (*Hindustan Times*, 28 January 2020) <<https://www.hindustantimes.com/india-news/supreme-court-notice-to-centre-on-plea-against-transgender-act/story-HfBrPZBTFmusm9theecWoL.html>> accessed on 6 July 2020

<sup>38</sup> Aman Gera, ‘Analysis – Transgender Persons (Protection of The Rights) Bill, 2019’ (*Mondaq*, 7 October 2019) <<https://www.mondaq.com/india/employee-rights-labour-relations/851520/analysis-transgender-persons-protection-of-the-rights-bill-2019>> accessed on 22 June 2020

<sup>39</sup> *Ibid*

a psychological test too which satisfies the conditions of the DM. Even the Act gives a vague definition of transgender without differentiating between sex and gender. Therefore, before any implementation or further steps, the community people should be consulted and their demands should be given priority reference.

## 11. Conclusion

It is the duty of every responsible citizen of the country to respect and consider transgender people as third gender to erase all the conflicts and inconveniences caused because of the non-acceptance by the society. Children born with different sex and gender should not feel neglected by their parents and relatives. “Right to residence is available to all of them and no child can be separated from their parents on the ground of being a transgender<sup>40</sup>. One of the basic tenets of the equality scheme lies in the recognition and acknowledgement of the ‘right of choice and self-determination’. Determination of the gender to which a person belongs and relates is intrinsic to their right of self-determination and their dignity’<sup>41</sup>.”

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<sup>40</sup>Ajita Banerjee, ‘Transgender Persons Bill has let down the community’s long struggle for Self-respect’ (*Indian Express*, 2 December 2019) <<https://indianexpress.com/article/opinion/columns/transgenders-rights-bill-parliament-winter-session-6145980/>> accessed on 11 July 2020

<sup>41</sup> *Ibid*