

# Legislative Effectiveness From a Legislative Drafter's Perspective

## Analysing the Transgender Persons (Protection of Rights) Act, 2019

Devika Gulati\*

### Abstract

*This article discusses the effectiveness of Transgender persons (Protection of Rights) Act, 2019 and tests the legislation against Dr. Maria Mousmouti's Effectiveness Test. The author first attempts to trace the real purpose of the Act in terms of specific and broad purposes, and the micro, meso and macro goals. Secondly, the author examines the content of the Act in terms of the legislative techniques used, compliance and enforcement mechanism, and legislative communication. Thirdly, the author studies the context of the Act in terms of its coherence, accessibility and the choice of superstructure.*

*Finally, the author checks the Act against the element of result where she examines the monitoring, review and evaluation clauses of the legislation, and the mechanism to collect and assess the legislative results.*

**Keywords:** Effectiveness Test, legislative quality, drafting process, Transgender persons (Protection of Rights) Act, 2019.

### A Introduction

'Only if you're willing to learn and be educated by the people you are there to serve, will you make progress.'<sup>1</sup>

From the very first day when the Indian government resolved to recognize transgender rights till the day when the Transgender Persons (Protection of Rights) Act, 2019 (Act)<sup>2</sup> finally came to fruition, the legislative proposal has undergone many alterations owing to widespread condemnation by the transgender

\* Devika Gulati\_ is a former Legal Research Associate at the Legislative Department, Ministry of Law and Justice, Government of India. She holds an LLM in Drafting Legislation, Regulation, and Policy from University of London (IALS) The views expressed in this article are her own and do not reflect those of any organization.

1 Special Correspondent, 'Kamla Bhasin: Feminist, Poet, Protester, Secularist', *The Hindu*, 25 September 2021.

2 'Transgender Persons (Protection of Rights) Act, 2019, [www.indiacode.nic.in/handle/123456789/13091?sam\\_handle=123456789/1362](http://www.indiacode.nic.in/handle/123456789/13091?sam_handle=123456789/1362) (accessed 1 October 2021).

community.<sup>3</sup> Despite the sea change, even today, there is popular criticism of the Act.<sup>4</sup> The Act has been challenged as unconstitutional before the Supreme Court of India in two writ petitions where the court issued notice to hear them<sup>5</sup> and before the Karnataka High Court in a Public Interest Litigation where the court issued notice too.<sup>6</sup> Such instances make one wonder about the quality of this legislation. The concept of quality is elusive and vague, but one important constituent of quality is effectiveness, which can be operationalized using the 'Effectiveness Test', giving a comprehensive view of the quality of legislation.<sup>7</sup> Effectiveness test is universal. It focuses on the 'interrelation between the different phases of the life cycle of rules and the need to look at them as a continuum which leads to effectiveness'.<sup>8</sup>

This brings us to the hypothesis of this article, which is that the Act is not effective. To prove this statement, I will use Dr. Maria Moumouti's Effectiveness Test where I analyse the Act against its elements, namely, purpose, content, context and results.

The aim of this article is to familiarize the legislative drafters with this universal methodology so they have a modus operandi to guide them while drafting, vetting or assessing a piece of legislative instrument. The drafters can use this conceptual tool of the Effectiveness Test to supplement their current lawmaking toolkit to make conscious decisions on effective drafts.<sup>9</sup> As a disclaimer, I must point out that the scope of this article does not cover and analyse every fact related to the Act and, the bibliography is also by no means exhaustive. This is merely an attempt to apprise the reader about different elements through which the legislation may be viewed for an effective final legislative draft.

## B Purpose

### I Meaning and Importance

The purpose of the law helps in ascertaining *what* the law aims to accomplish.<sup>10</sup> Dr. Mousmouti states that the 'purpose dominates the lifecycle of the legislation', acting as the reference point for the reader to gain more clarity on any provision of

3 The Hindu Net Desk, 'Watch | The Transgender Persons Bill Explained', *The Hindu*, 30 November 2019.

4 K. Brindaalakshmi, 'Transgender Act in India: A Law That Replicates Existing Challenges with Digitisation?', *Gender IT*, 15 July 2021; Astha Khanna and Divesh Sawhney, 'Legislative Review of the "The Transgender Persons (Protection of Rights) Act, 2019"', *Human Rights Brief*, Vol. 24, No. 3, 2021, p. 155.

5 Debraj Deb, 'Supreme Court Notice to Centre Over Plea Challenging Transgenders' Rights Act', *Indian Express*, 27 January 2020.

6 Special Correspondent, 'HC Notice on Plea Challenging Constitutionality of Law to Protect Rights of Transgender Persons', *The Hindu*, 22 October 2020.

7 Maria Mousmouti, 'Operationalising Quality of Legislation through the Effectiveness Test', *Legisprudence*, Vol 6, No. 2, 2012, p. 191.

8 *Ibid.*

9 Maria Mousmouti, 'Making Legislative Effectiveness an Operational Concept: Unfolding the Effectiveness Test as a Conceptual Tool for Lawmaking', *European Journal of Risk Regulation*, Vol. 9, No. 3, 2018, p. 445.

10 Maria Mousmouti, *Designing Effective Legislation*, 1st ed., Edward Elgar Publishing, 2019, pp. 13.

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that law, setting the benchmark for the effectiveness of the law.<sup>11</sup> According to Fuller, ‘indeterminacy of aim’ is the source of several difficulties in the legal system.<sup>12</sup> Chief Justice NV Ramana commented that an unclear purpose of the law leads to a lot of litigation, inconvenience and loss to the government and to citizens alike.<sup>13</sup>

The analysis of the Act in the following sections helps in the determination of effective lawmaking.

## II Identification of the Purpose

The true and exact purpose of the legislation cannot be traced anywhere in the Act or the Statement of Objects and Reasons (SOR).<sup>14</sup> In India, there is no purpose clause in the legislation, but the SOR appended to the Bill helps in discerning the underlying aim of the statute.<sup>15</sup> When you read the SOR attached to the Act, you may find it difficult to locate the precise objective under the huge bundle of information. As identification of a problem, the objective of a legislation to solve that problem and the justification in choosing that solution under the decided objective are three completely different things, I will first segregate and categorize the three to make it easier for the readers to know where they can consistently locate the purpose.

A problem is a wider issue that requires to be solved, and it might indicate the necessity of the legislation.<sup>16</sup> The broad problem identified in Paragraph 2 of the SOR is that of marginalization of the transgender community as they do not fit in the category of male or female; as a result, they face exclusion from the society and also face discrimination, lack of employment, education, and health care facilities and are denied access to public places despite the existence of constitutional provisions such as Article 14 guaranteeing them equality before law, Articles 15(1), 15(2) and 16(2) prohibiting discrimination on grounds of sex and Article 19(1)(a) ensuring freedom of speech and expression to all citizens.

This is followed by the justification or the reason to introduce the Bill as under the order of the National Legal Services Authority (NALSA) Judgment; the central and state governments were directed to take steps for the welfare of the Transgender community and to treat them as a third gender. Thus, this legislative proposal was introduced in parliament as a step towards addressing the issue of marginalization. There were no discussion, reasons or justification about the weighing or balancing of possible options<sup>17</sup> in the SOR. Legislation was seen as the only resort.

Next, we move on to locating the position of the purpose in the SOR. Paragraph 4 of the SOR is termed as the purpose of this Act as confirmed by Paragraph 6, which uses the phrase, “The Bill seeks to achieve the above objects”.

11 *Ibid.*, pp. 17-18.

12 L. Fuller, *Anatomy of the Law*, Penguin, 1968, pp. 40-41.

13 Scroll Staff, “‘Sorry state of affairs’ in Parliament: Chief Justice Says There Is No Clarity in Laws”, *Scroll*, 15 August 2021.

14 The Transgender Persons (Protection of Rights) Bill, *As Introduced*, 2019, p. 8, [http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/169\\_2019\\_LS\\_Eng.pdf](http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/169_2019_LS_Eng.pdf) (accessed 1 October 2021).

15 *Union of India v. M/S Exide Industries Ltd.* (SC 24 April 2020).

16 Mousmouti (n. 10), p. 19.

17 *Ibid.*, p. 19.

Paragraph 4 mentions the mechanisms of law reform<sup>18</sup> such as defining the expression 'transgender person', issuance of certificate of identity to transgender persons, establishing a National Council for Transgender Persons, punishing contraventions of the legislative provisions, thereby confusing the purpose with its instrumentality and these two are completely distinct in nature.<sup>19</sup> Moreover, this paragraph mentions wider policy goals such as prohibition of discrimination against transgender persons and that no establishment shall discriminate against transgender persons in matters relating to employment, recruitment, promotion and other related issues. None of the clauses (a) to (h) mention the specific targets they seek to achieve.<sup>20</sup> Though this is the location where the reader will consistently find an equivalent to a purpose clause in the Indian legislation but in the present case, Clauses (a) to (h) are a combination of the instrumentalities and wider policy goals. The real purposes of the Act are not expressed at all.

Additionally, in India, sometimes the reader also checks the long title to find the true purpose of the Act. This is because the role of the long title is contested and unclear. On one end, it is said to signify the principal purpose for which the legislation is enacted<sup>21</sup> and, on the other, to lay down what the legislation deals with in a nutshell,<sup>22</sup> but the long title should encapsulate the description of the contents of the statute<sup>23</sup> or the means to achieve the purpose. In either case, the present long title does neither. It is just a broad statement stating that it is an Act 'to provide for protection of rights of transgender persons and their welfare and for matters connected therewith and incidental thereto' which is essentially non-data.<sup>24</sup> It does not guide the readers on what to expect from the legislation in terms of the procedure for recognition of the transgender person's gender identity, any benefits and eligibility or procedure for conferral, criminalized acts and their penalties, and so on, neither does it express the true purpose.

At present, the clear purpose of the legislation is not expressed or is it traceable anywhere in the written form – neither in the legislation, nor in the SOR. Instead, the instrumentalities and broader policy goals are mentioned in the place of the real purpose which is misleading to the reader. Such confusion may lead to the 'indeterminacy of aim' as highlighted by Fuller.

The SOR and Long title should cover the purpose of the Act but one cannot fathom and deduce<sup>25</sup> the complete legislative purpose without going into the extraneous material<sup>26</sup> like the parliamentary debates and Supreme Court judgment.

18 Helen Xanthaki, *Drafting Legislation Art and Technology of Rules for Regulation*, 1st ed., Hart Publishing, 2014, p. 134.

19 Mousmouti (n. 10), p. 20.

20 *Ibid.*, p. 19.

21 *Manoharlal v. State of Punjab* AIR 1961 SC 418.

22 T.K. Vishwanathan, *Legislative Drafting – Shaping the Law for the New Millennium*, 2nd ed., New Delhi, Indian Law Institute, 2007, p. 168.

23 William Dale, 'Legislative Drafting: A New Approach- Reviewing the Reviewers', *Statute Law Review*, Vol 2, No. 2, 1981, p. 74.

24 Xanthaki (n. 18), p. 134.

25 Mousmouti (n. 9), p. 454.

26 *Ibid.*, p. 452.

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The specific and broad objectives can also be deduced from the Act itself. This is discussed in the next section.

### *III What Are the Specific and Broad Purposes?*

The goals can be specific, making direct legal changes, resulting in outputs or direct results, and broader ones that make changes in the social or legal surroundings leading to outcomes and effects.<sup>27</sup> The goals can also be categorized into micro, meso and macro goals that intend to influence a specific legal arena, an entire legal area or society at large.<sup>28</sup>

Here, I attempt to deduce the specific and broad purposes of the legislation, mention the means to achieve those goals, and also categorize the purposes into micro, meso and macro purposes and mention their possible influence in different areas. This is a demonstration on how the legislative drafter can deduce and categorize the purposes that may go in the SOR.

Considering direction no. 2 of the NALSA Judgment to grant legal recognition to the third gender and Chapter III of the Act that recognizes the identity of the transgender persons, one of the specific goals deduced is to *identify the transgender persons*. This may be achieved by Section 4 of the Act that gives them a right to self-perceived gender identity and Sections 5 to 7 which prescribe a procedure of identification.

Considering direction nos. 3 and 4 of the NALSA Judgment to provide health care measures and Chapter VI of the Act on the transgender community's education, social security and health, while another specific goal is to *improve the physical, sexual and mental health of the transgender community*. This is attempted to be done by making a provision for special health care facilities under Section 15 of the Act like establishment of HIV sero-surveillance centres, pre- and post-surgery or therapy counselling and so on. Another one is to *improve the employability of transgender persons* by setting up vocational training centres for them under Section 14 of the Act.

Relying on parliamentary debates<sup>29</sup> and deducing from Chapters II, V, VI and VIII of the Act, we must also aim to *reduce discrimination in educational establishments, workplace, health care centres, residences and public places*. This is done by prohibiting discriminatory behaviour in such areas, penalizing that behaviour, and mandating the establishments to set up a grievance redressal mechanism.

The broader objective here is to *promote equality among the male, female and the transgender persons and recognize their right to life, their freedom to express themselves in the society*. This is deduced from the NALSA Judgment which recognizes their rights under Part III of the Indian Constitution which is their right to equality before law and equal protection of law under Article 14, social equality under Articles 15 and 16, right to life and personal liberty under Article 21, and the right

27 Mousmouti (n. 10), p. 20.

28 *Ibid.*, p. 21; Mauro Zamboni, 'Goals and Measures of Legislation: Evaluation', in Ulrich Karpen and Helen Xanthaki (eds.), *Legislation in Europe. A Comprehensive Guide for Scholars and Practitioners*, 1st ed., Hart Publishing, 2017, p. 97.

29 Lok Sabha Debates 5 August 2019, Seventeenth Series Vol IV, First Session, 2019/1941.

to privacy, self-identity, autonomy and personal integrity as a part of the freedom of speech and expression under Article 19(1)(a).

The specific and broad objectives can further be arranged incrementally, which may help in anticipating direct results, outcomes and impact. The micro goals are identification of the transgender persons; then subject the identified transgender persons to welfare benefits in areas of health care, education and employment; and reduce discrimination in employment, health care, residence, education and in public places. The meso goals are to recognize their self-perceived gender identity as a transgender, to improve their physical, mental and sexual health, education, employability, and to protect the transgender community from discrimination in employment, health care, residence, education and in public places. The macro goal is to recognize their right to life, right to equality and freedom of expressing themselves in society.

The specific and broad objectives and the micro, meso and macro goals as identified are helpful in framing the benchmark questions, as discussed in the next section.

#### *IV Making Purposes as Benchmarks*

The purpose of the legislation is to help in formulation of a benchmark question to assess if the legislation has achieved what it set out to achieve, and the scope of the purpose, in terms of it being narrow or broad, affects the kind of benchmark question we ask after implementation of the Act.<sup>30</sup> Depending on the nature of the purpose, Dr. Maria discusses the typology to categorize such provisions.<sup>31</sup> I use this typology to assess the way the purposes are currently expressed in the SOR and the long title, and the way the purposes should be expressed in the SOR to enable the reader to ask the right benchmark questions. I do this by redrafting the purposes.

It is seen that the SOR has a combination of broad policy aims along with narrow ones that are technical, procedural and legally oriented.<sup>32</sup>

Paragraphs (d), (f), (g) and (h) talk about making provisions for issuance of identification certificate, establishing grievance redressal mechanism, establishing National Council for Transgender Persons and punishment for contravention, respectively. Though accurate, they are very narrowly phrased in that they mention only the procedural information.<sup>33</sup> The benchmark question for one of them is, 'Has the provision for issuance of certificate been made?' and the answer can be, 'Yes', but this is a self-fulfilling prophecy. Another question is, 'Has the National Council for Transgender Persons been established?' The answer to this can be 'Yes' but the effect of establishment of the council cannot be questioned. Such questions set a very narrow benchmark for the law and have a limited usefulness in judging the effectiveness of the legislation.

On the other hand, paragraph (b) talks about prohibiting discrimination against transgender persons, and the long title provides for the protection of rights and welfare of the transgender persons. These statements do not venture into

30 Mousmouti (n. 10), p. 36.

31 Mousmouti (n. 9), p. 453.

32 *Ibid.*, p. 454.

33 Mousmouti (n. 9), p. 453.

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specifics, and are ambitious, broad and declaratory policy declarations which may be used for an educative or symbolic function but cannot possibly set a meaningful benchmark for what this legislation aims at.<sup>34</sup>

The benchmark question here is, 'Has the legislation prohibited all discrimination against the transgender?' The answer to that is 'No' as the Act does not prohibit all kinds of discrimination without a definition in unspecified fields against this community. The Act prohibits only those actions that are mentioned in the Act but the benchmark question to that reframed, legally oriented sentence turns out to be too narrow, for instance, 'Has legislation prohibited unfair treatment in public places?' It is self-fulfilling as the prohibition in public places is done by the legislation itself.

The long title states that the Act is to protect the rights of transgender persons and their welfare along with the connected matters. Again, protecting 'rights and welfare' has a very wide ambit. The benchmark question, 'Is the legislation successful in securing the transgender rights and welfare?' can have no definite or concrete answer.

Paragraph (a) is a legally oriented objective<sup>35</sup> which aims at defining transgender persons and the benchmark question here is, 'Have the transgender persons been defined?'

Such a statement, though accurate, has a self-fulfilling nature as the fact of the Act being enacted to define the transgender person is fulfilled; thus, its wider functionality as a benchmark of achievement is limited.<sup>36</sup>

It is seen from the above analysis that the purposes already framed in the SOR and the long title are not benchmark objectives. During the assessment of the legislation, the evaluator may not be able to assess if the legislation has achieved what it set out to achieve in the first place, thus making the purpose provisions in the SOR ineffective.

The appropriate way to write the purpose is to express it in the statute by merging narrow and broader objectives, specifying the legal means, thereby providing for a more meaningful benchmark towards more effective legislation.<sup>37</sup> An attempt to redraft the purpose of the Act by incorporating the narrow and broader objectives with the help of the identified micro, meso and macro goals follows:

The purpose of this Act is:

- a to identify the transgender persons and recognize their right of self-perceived gender identity by introducing a legal framework to issue a certificate of identity and change in gender;
- b to subject identified transgender persons to various welfare benefits in areas of health care, employment and education so as to improve their physical, mental and sexual health by providing special health care facilities, to improve their employability by setting up of vocational

34 Mousmouti (n. 10), p. 23.

35 Mousmouti (n. 9), p. 453.

36 *Ibid.*

37 *Ibid.*

- training centres, to improve their education by providing inclusive education and opportunities for sports, recreation and leisure activities; and
- c to reduce discrimination against transgender persons in places of employment, health care, residence, education and public places by introducing a grievance redressal mechanism in establishments and criminalizing acts of discrimination;

in order to reinforce the transgender persons' right to life, right to equality and freedom of expression under the Constitution of India.

The benchmark questions that can have concrete answers to what the legislation aims to achieve are, – 'To what extent are the transgender persons identified by issuance of an identification certificate in a given period of time?' 'Have the cases of discrimination reduced in different areas, like workplaces or educational institutions, in a given period of time? To what extent?' 'Have the transgender persons been provided with medical care? To what extent?'

There is also a matter of quantifying the targets and the time frame within which the results are expected to be achieved.<sup>38</sup> Such an expression of tangible regulations aims at assessing the legislative results, enhancing transparency<sup>39</sup> and bridging the gap between legislative intent and effects.<sup>40</sup> For instance, one of the notional purposes of the Act can be, 'Reducing the cases of discrimination against transgender persons in places of work by 50% in one year'. This purpose can be juxtaposed with the results to see the degree of coincidence to assess the legislative achievement and ultimately the legislative effectiveness.<sup>41</sup> This adds to the effectiveness of the Act.

In conclusion, it is observed that the real purpose of the Act cannot be found in the Act or the SOR. The statements disguised as purpose are not the true purpose but instrumentalities and wider policy goals. They are a combination of very narrow, very broad and legally oriented statements. Together, they cannot act as benchmark objectives and aid in assessment of the results, thus reducing the effectiveness of the Act.

38 Mousmouti (n. 10), p. 121.

39 Maleiha Malik, 'From Conflict to Cohesion: Competing Interests in Equality Law and Policy', 2008, pp. 12-13, [www.equallyours.org.uk/wp-content/uploads/2009/02/competing-rights-report\\_web.pdf](http://www.equallyours.org.uk/wp-content/uploads/2009/02/competing-rights-report_web.pdf) (accessed 1 October 2021).

40 Xanthaki (n. 18), pp. 186-187.

41 Mousmouti (n. 9), p. 462.



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## C Content

### I *Meaning and Importance*

The content expresses the legislative solution to the problems aimed to be resolved by the legislation.<sup>42</sup> The substantive content, that is the legislative solution and the internal ‘mechanics’, answers the question of *how* the law will achieve the desired result and communicate the message to the legislative audiences.<sup>43</sup> In the words of Dr. Mousmouti, ‘Designing the content of the law is the heart of lawmaking’.<sup>44</sup>

The elements that determine the content of the law are the type of substantive rules, implementation (compliance and enforcement mechanism) and communication, and it is the duty of the lawmaker to finalize a mix of these elements in appropriate quantities in the legislation to make it a coherent whole.<sup>45</sup> These elements are discussed against the Act in the following text.

### II *Legislative Techniques Used in the Substantive Rules*

It is observed that the Act has attempted to adopt a repressive approach to deal with the discrimination against the transgender community by criminalizing certain behaviour. An important point to note is that though an attempt has been made to apply the command and control technique, it is not complete on its own. The link between the prohibition of discrimination under Section 3 and the penalties under Section 18 is unclear. Here, not every prohibition has a remedy stipulated in the Act, not every condemned act is backed by a sanction.<sup>46</sup> For instance, there is prohibition of discrimination in the form of denial, discontinuation, unfair treatment in educational establishments, employment or occupation, health care services, public places, residence under Section 3 but only certain acts under Section 18, such as compelling or enticing a transgender person to perform forced or bonded labour [Section 18 (a)], denial of right to passage in a public place [Section 18(b)], forcing the transgender person to vacate the place of residence [Section 18(c)] which is punishable with imprisonment for a term between 6 months and 2 years with fine. The offences of harm, injury, causing danger to life, safety, health and well-being of the transgender persons are penalized as well. The same point is reiterated in the Standing Committee Report when it says that there exists no remedy for the discrimination faced by the transgender in the listed fields.<sup>47</sup> Neither are the discriminatory acts specifically spelt out, nor is the procedure to bring in a discrimination claim by the victim and presumption in

42 Mousmouti (n. 7), p. 201; Maria Mousmouti, ‘Effectiveness as an Aspect of Quality of EU Legislation: Is it Feasible?’, *The Theory and Practice of Legislation*, Vol 2, No. 3, 2014, p. 309; Mousmouti (n. 9), p. 452.

43 Mousmouti (n. 9), p. 452.

44 Mousmouti (n. 10), p. 40.

45 *Ibid.*, p. 40.

46 Helen Xanthaki, *Thornton’s Legislative Drafting*, 5th ed., Bloomsbury Professional, 2013, p. 429.

47 Standing Committee on Social Justice and Empowerment (2016-2017), [*The Transgender Persons (Protection of Rights) Bill, 2016*] *Forty-Third Report* (21 JULY 2017), p. 32, [http://164.100.47.193/lssccommittee/Social%20Justice%20&%20Empowerment/16\\_Social\\_Justice\\_And\\_Empowerment\\_43.pdf](http://164.100.47.193/lssccommittee/Social%20Justice%20&%20Empowerment/16_Social_Justice_And_Empowerment_43.pdf) (accessed 1 October 2021).

favour of the victim.<sup>48</sup> Due to an unclear link between the prohibitions and the penalties, the legislative message regarding the immorality of discrimination may not be strong.

It is also observed that the exact approach utilized in Section 11 is unclear. Although Section 11 mandates every establishment to have a grievance redressal mechanism where a complaint officer is to be appointed to hear the complaints of the violations of the Act there is no mention of any remedies in the Act.<sup>49</sup> The Standing Committee Report too pointed to the absence of a mechanism through which prohibited actions committed by the government or the establishment be made liable.<sup>50</sup> The Transgender Persons (Protection of Rights) Rules, 2020 (Rules) through Rule 13 lays down the procedure where the head of the establishment will take 'action' on the enquiry report submitted by the complaint officer. The kind of action that can be taken remains unknown. Moreover, the Rules talk about the grievance redressal system established by the appropriate government to impose penalties under Section 18 of the Act. The power to impose penalty resides with the criminal court and such a capacity of the grievance redressal system under the appropriate government is neither mentioned in the Act nor is it called for making Rule 13 outside the scope of the Act due to the lack of an enabling clause.<sup>51</sup>

The technique of the public benefit conferral is applied incorrectly in Sections 13 and 14 of the Act. It employs ambitious and wide phrases such as 'inclusive education' and 'equal opportunities in sports, recreation and leisure activities' by the government educational institutions in Section 13, 'welfare schemes and programmes' for vocational training and self-employment by the appropriate government under Section 14. It is lacking in a description of benefits to be given, and also a list of terms and conditions on the basis of which they will obtain such benefits, or any provision on restructuring the organizational set up to implement such benefits.<sup>52</sup> Moreover, this task for specifying the benefits is delegated to subordinate legislation where Rule 10(3) of the Rules further gives a suggestive list of welfare schemes to be considered by the appropriate government in Annexure II. All in all, in the application of the technique of public benefit conferral, the benefit itself is nowhere to be found, making it faulty in its application.

It is also interesting to note that the public benefit conferral technique is applied appropriately in Section 15 which confers public benefit by providing for HIV sero-surveillance Centres, facilities sex reassignment surgery and hormonal therapy and counselling, introducing a health manual on sex reassignment surgery, reviewing the medical curriculum of doctors, introducing a comprehensive insurance scheme to cover medical expenses for medical procedures like sex reassignment surgery, hormonal therapy, laser therapy and so on.

48 *Ibid.*, p. 33.

49 Robert Summers, 'The Technique Element in Law', *California Law Review*, Vol. 59, No. 3, 1971, p. 736.

50 Standing Committee Report (n. 47), p. 39.

51 Xanthaki (n 18), p. 257.

52 Summers (n 49), p. 740.

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There are other combinations of techniques which are used in the Act that are complete. The administrative technique in Sections 1 and 2 cover the short title, extent and commencement, and the definitions, respectively, Section 5, 6 and 7 lay down the procedure for the recognition of the transgender persons, that is application, issue of certificate of identity and change in gender, respectively. Sections 16 and 17 establish the National Council for Transgender Persons, and lay down the functions of the council, respectively. The technique of rights and obligations where Section 4 grants the transgender persons the right to be recognized and to have a self-perceived gender identity, while Section 8 creates an obligation for the appropriate government to take steps for the welfare of the transgender persons, Sections 9, 10 and 11 create obligations on the establishment not to discriminate in employment including in recruitment and promotion, to provide prescribed facilities, and to appoint a complaint officer. Section 12 gives the transgender person the right to reside in the family household. The central government is obligated by Section 19 to grant funds to the Council, and Sections 22 and 23 empower the appropriate government to make rules and remove difficulties.

The transgender community faces extreme discrimination in education, employment, health, residence and in public places due to their non-recognition, depriving them of equal protection of law, right to life and freedom of expression, leaving them vulnerable to violence, as pointed out in the NALSA Judgment. The choice of the legislative technique that intervenes in this social reality should offer an optimal solution.<sup>53</sup> The right of the transgender persons to have a self-perceived gender identity, the administrative provision of recognizing them, the technique of conferring public benefit to uplift them, the penal provisions to deter the violence seem like appropriate legislative techniques in the given context and to fill the void expressed by the Supreme Court in NALSA Judgment when it noted that there was no legislation in India that dealt with the rights of transgender community due to which they encountered discriminatory behaviour and the courts find it necessary to resort to the international principles and conventions to which India is a party. A legislation in this regard seems appropriate though it may not result in an ideal level of compliance but there is an assurance of the force of law, making compliance compulsory.<sup>54</sup> India is in its early days in its transgender rights legislation. It is evolving by trial and error and it may take some time for it to become adaptive to 'real' expressions of discrimination, similar to the UK in the early days of equality legislation.<sup>55</sup>

Thus, the choice of the combination of techniques seems relevant in the given context for the time being but the weakness is that some of them are not applied completely. The Act promises to prohibit actions but does not provide for sanctions for all types of prohibited behaviour. It promises benefits to the public but further delegates the task to the executive, without mentioning all the details. It is also unclear in its approach when it comes to setting up a grievance redressal mechanism.

53 Mousmouti (n 10), p. 44.

54 Jill Rutter and William Knighton, 'Legislated Policy Targets Commitment Device, Political Gesture or Constitutional Outrage?', p. 6, [www.instituteforgovernment.org.uk/sites/default/files/publications/Legislated%20policy%20targets%20final.pdf](http://www.instituteforgovernment.org.uk/sites/default/files/publications/Legislated%20policy%20targets%20final.pdf) (accessed 1 October 2021).

55 Mousmouti (n 10), p. 43.

This Act tries to do these many things at the same time without actually having developed a proper design, making it largely ineffective.

### III Implementation (Compliance and Enforcement)

One of the ways to anticipate reaction of the subjects and their compliance with the legislation is through consultation and through their involvement, the information gathered might aid compliance<sup>56</sup> but in the present case there has been low involvement of the transgender community in making the Rules. On 18 April 2020, the Ministry of Social Justice and Empowerment pre-published the draft of the Rules in the public domain for stakeholder consultation for a period of 12 days which went against the 30-day time limit for consultation laid out in the Pre-Legislative Consultative Policy, 2014.<sup>57</sup> This was released during the COVID-19 lockdown period when the lay audience that is the transgender community could not gather together to discuss and share feedback, and neither were these rules proactively shared.<sup>58</sup> Though the deadline was extended by 18 more days on the request of the stakeholders but still, this time period coincided with the lockdown imposed and the draft was accessible to only those with Internet connection and who were adept in the English language.<sup>59</sup> Thus, adequate information or evidence from the transgender persons belonging to different strata of society might not have been gathered and their reaction might not be known, anticipating half-hearted compliance in matters of procedure, for instance in disclosing their medical history in order to change their gender under Rule 2 read with Section 7 of the Act. This may not be complied with by the transgender community due to a violation of their right to privacy.

Another way to check if compliance is in place is through mapping the user-journeys.<sup>60</sup> The case of *Veera Yadav v. The Chief Secretary*<sup>61</sup> is an example where the court noted an absence of a proposal by the state government for setting up of a separate HIV Surveillance Centre. This reflects non-compliance of Section 15(a) of the Act by the user that is the state government. It is interesting to note that the answer to the question of 'who' will establish the centre remains unknown in the Act and the Rules. Both Section 15(a) of the Act and Rule 12(5) of the Rules obligate the 'appropriate government' to take this measure, where the appropriate government itself may be a central or state government as per the definition of

56 *Ibid.*, p. 57.

57 Legislative Department, *Pre Legislative Consultative Policy* (5 February 2014), <https://legislative.gov.in/sites/default/files/plcp.pdf> (accessed 1 October 2021).

58 Prashant Singh and Gopi Shankar, 'Modi Govt Releasing Draft Rules on Transgender Persons Act in Lockdown a Blow to Community', *The Print*, 5 May 2020, <https://theprint.in/opinion/modi-govt-releasing-draft-rules-transgender-persons-act-lockdown-a-blow/414331/>, accessed 1 October 2021.

59 G. Ram Mohan, 'Halt Implementation of the Trans Act 2019: Activists', *The Wire*, 5 June 2020; Jayna Kothari, R. Kruthika, Almas Shaikh, A.J. Agrawal, and Vikramaditya Sahai, 'CLPR | Trans Law Quarterly | Issue I' (*Centre for Law & Policy Research*, 10 June 2020), <https://clpr.org.in/blog/clpr-trans-law-quarterly-issue-i/> (accessed 1 October 2021); Jayna Kothari, Vikramaditya Sahai, Almas Shaikh, AJ Agrawal, R. Kruthika and Ritambhara Singh 'CLPR | Trans Law Quarterly | Issue I' (*Centre for Law & Policy Research*, 7 September 2020), <https://clpr.org.in/blog/clpr-trans-law-quarterly-issue-ii/> (accessed 1 October 2021).

60 Mousmouti (n 10), p. 57.

61 HC (21 September 2020).

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‘appropriate government’ under Section 2(a) of the Act. Another reason for non-compliance could be compliance costs. Thus, due to a lack of knowledge or clarity, or high compliance costs,<sup>62</sup> the user may not be in a position to comply.

Another user-journey can be demonstrated by the case of *Pallabi Chakraborty v. The State of West Bengal & Ors*,<sup>63</sup> where the West Bengal Police as a user failed to comply to Section 11 of the Act. The victim wanted to lodge a complaint on violation of the Act but there was no grievance redressal mechanism established by the West Bengal Police, so the court ordered it to establish one. The reason for this is a poor implementation plan which results in lack of enforcement and compliance.

Under Section 11 of the Act, the establishments have sought to create a new mechanism called the *grievance redressal mechanism* to hear the complaints of the transgender persons on the prohibited discriminatory behaviour but there is confusion as to how the mechanism will be carried out and by whom. The Ministry of Social Justice expressed in their written submission to the Standing Committee, that the National Council of Transgenders will address the transgender persons’ grievances as one of the functions under Section 17 of the Act.<sup>64</sup> This was criticized by in the Standing Committee Report as the Council is not empowered to do so due to non-definition of such powers in the Act. On the other hand, Rules vide Rule 13(5) empowers the appropriate government to set up a grievance redressal mechanism too. This leads to confusion as to who will set up and administer the mechanism – the Council, the establishment or the government? The design of the implementation plan is poor due to the indecision with respect to not only as to ‘what’ needs to be done, but also by ‘whom’?<sup>65</sup> This confusion lowers the potential of smooth enforcement because of which there is no actual compliance by the actor, that is, the West Bengal Police acting as the establishment in this case.

Another flaw in the implementation plan is the contradiction between the pre-requirements for a change in gender. The transgender person is required to undergo ‘surgery’ to be able to apply for a change in gender under Section 7 of the Act and a ‘medical intervention’ towards a gender affirming procedure under Rule 6 of the Rules. ‘Medical intervention’ is defined under Rule 2(h) to have a much wider scope as opposed to ‘surgery’. The enforcement agencies may not be clear on what is required from the transgender person for a gender change. The transgender person may be unsure about how to comply to this provision to get their gender changed. Thus, these provisions act as potential barriers to compliance and enforcement.<sup>66</sup>

In light of the above, it is seen that there is low anticipated and actual compliance and enforcement due to a poor implementation plan.

62 Mousmouti (n 10), p. 57.

63 HC (11 February 2021).

64 Standing Committee Report (n. 47), p. 38.

65 Mousmouti (n. 10), p. 59.

66 *Ibid.*, p. 122.

#### IV *Communicating the Law*

Legislation as a form of communication informs us on 'what we can do or cannot do'<sup>67</sup> It is sought through clear, precise, unambiguous and gender-neutral law drafted in plain language.<sup>68</sup>

On examination of the Act, it was found that the language of the Act is not gender inclusive and has a narrow outlook towards the gender-binary hegemony.<sup>69</sup> This is evidenced by Section 2(i) that defines a person with intersex variations and uses the pronouns 'his or her'. Section 6 that talks about issuance of a certificate of identity to a transgender person and through subsection (3) confirms the certificate to be a proof of recognition of 'his' identity as a transgender person. The same folly is committed in Section 12(3) where 'his' family is unable to take care of the transgender person, the court orders to send such persons to a rehabilitation centre. Another instance to be noted is when Form 3 of the Rules which is a form for the certificate of identity to be issued by the transgender person by the District Magistrate under Rule 5 of the Rules and Section 6 of the Act uses titles such as Smt. (Mrs.), Shri. (Mr.), Km. (Ms.) and terms such as son or daughter for the transgender person. The use of gender inclusive language is recommended here. Such language, which is one step ahead of gender-neutral drafting, removes gender and sex from the expression of the legislative subjects<sup>70</sup> by using singular 'they'<sup>71</sup> for 'his' or 'her,' and gender-neutral honorific 'Mx' instead of 'Mr.', 'Mrs.', 'Ms.' and so on. The LGBTQI+ community recognizes inclusive language to go beyond gender equality between the male and female, indicating the continuous evolution of their community's movement.<sup>72</sup> Thus, a legislation particularly enacted for the upliftment of the transgender community should support their cause both in letter and in spirit.

It is also found that the definition of the transgender person under Section 2(k) of the Act is not as precise as intended. It leaves out certain transgender communities having socio identities such as *Shiv Shakti*, *Eunuchs*, *Kothi*, *Thirunangais* recognized by the Supreme Court as transgender in the NALSA Judgment. Moreover, *Nupa Maanba*, *Nupi Maanbi* and *Khusra*<sup>73</sup> are excluded from the definition too. The main beneficiary of the Act is a transgender person and without a precise definition of the beneficiary, they may not be subjected to the benefits as intended. The definition is recommended to be made into an inclusive one to avoid identifying and listing every kind of transgender person with distinct sociocultural identities.

Additionally, several provisions employed in the Act use vague terms that warrant for more details.<sup>74</sup> For instance, Section 8 mandates the appropriate

67 Constantin Stefanou, 'Drafting as a Form of Communication', in Luzius Mader and Marta Tavares de Almeida (eds.), *Quality of Legislation. Principles and Instruments*, Nomos, 2011, p. 308.

68 Helen Xanthaki, 'On Transferability of Legal Solutions', in Constantin Stefanou and Helen Xanthaki (eds.), *Drafting Legislation. A Modern Approach*, Ashgate, 2008, pp. 9-10; Mousmouti (n. 7), p. 194.

69 Astha Khanna and Divesh Sawhney (n. 4), p. 161.

70 Helen Xanthaki, 'Gender Inclusive Legislative Drafting in English: A Drafter's Response to Emily Grabham', *feminism@law*, Vol 10, No. 2, 2020, p. 5.

71 *Ibid.*, p. 9.

72 *Ibid.*, pp. 9-10.

73 Astha Khanna and Divesh Sawhney (n. 4), p. 159.

74 VCRAC Crabbe, *Legislative Drafting*, 1st ed., Cavendish Publishing Limited, 1993, p. 27.

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government to take 'steps', 'welfare measures' and 'appropriate measures,' formulate 'welfare schemes' for the benefit of the transgender persons; Section 10 mandates the establishment to provide 'such facilities' to the transgender persons as prescribed; under Section 12, the child may be separated from the family for being a transgender by the order of a court in the 'interest' of the child; Section 13 mandates government educational institutes to give transgender persons equal 'opportunities' for sports, recreation and leisure activities; Section 14 mandates the government to make 'welfare schemes and programmes' for vocational training and self-employment and so on. Due to these terms being so imprecise, the delegated legislation that is Rules do not have a limitation set by the enabling clause that empowers the government to make rules, thereby violating the principle of separation of powers between the legislature and the executive.<sup>75</sup> This leaves the Act as a bare 'skeleton' legislation.<sup>76</sup> For instance, constitution of a welfare board under Rule 10 is justified by the government under Section 22(e) that is obligation of government to take welfare measures under Section 8(2). In the absence of any guidelines in the Act, the legislature has delegated essential parliamentary function of formulating the legislative policy to the executive which is an invalid action.<sup>77</sup>

There are some unclear provisions in the Act too, for example, Section 3 that prohibits discrimination against a transgender person on a list of grounds. The introductory words in this provision have a poor sentence construction as clauses (a) to (i) are not grounds but acts of discrimination in different areas. The sentence is drafted in such a manner that the readers anticipate the grounds on the basis of which discrimination is prohibited, and not the discriminatory acts. Due to this confusion, the provision is unclear. The lack of clarity in this provision does not convey the legislative message that is kind of behaviours that are discriminatory and are thus prohibited. The introductory sentence is redrafted below:

' 1. No person or establishment shall discriminate against a person on the ground of them being a transgender.

2.The following acts are discriminatory:'

Section 18 lays down the offences and penalties. It is observed that the penalty of imprisonment of 6 months to 2 years with fine is only applicable to clause (d) and not to clauses (a) to (c), rendering them meaningless. Both the elements of penal offences are missing, that is the introduction of an offence and the sanction.<sup>78</sup> The intended deterrence associated with the offence of forced or bonded labour, denial of right to passage and forcing the transgender person to leave the household is not followed by a criminal sanction, thus makes their presence unclear.

75 Xanthaki (n 18), pp. 257-258.

76 VCRAC Crabbe, 'Shorter Parliamentary Enactments and Longer Regulation', *Statute Law Review*, Vol 7, No. 1, 1986, p. 6.

77 Vishwanathan (n 22), p. 455.

78 Xanthaki (n 18), p. 246.

It is seen from the above discussion that the Act does not express the legislative messages in a clear, precise and gender inclusive manner. This affects the legislative communication, thereby, lowering the overall effectiveness of the Act.

## D Context

### I *Meaning and Importance*

Context is the overarching structure of the legislation.<sup>79</sup> Law as a medium of communication with its legislative audience<sup>80</sup> not only expresses the content but also gives an insight into its superstructure with respect to the surrounding existing laws, thus it should gel seamlessly with the legal system without causing contradiction amongst other laws in force.<sup>81</sup> The interference from the competing legislative messages may lead to a difficult relation between them.<sup>82</sup> The overarching structure of legislation influences the coherence and the accessibility of legislation<sup>83</sup> which are discussed below. I also discuss the choice of superstructure of the Act.

### II *Coherence*

Coherence in legislation requires that the law is free from contradictions in the legal system and is aligned in a way that the things 'make sense as a whole'.<sup>84</sup> Dr. Maria talks about coherence in terms of vertical and horizontal dimensions where in vertical coherence, one deals with the constitutional and international law and horizontal coherence relates to the relationship and coexistence of the Act with other existing legislation.<sup>85</sup>

In light of the vertical dimension, it is significant to point out certain provisions of the Act that appear to be incoherent with the fundamental rights enshrined in the Constitution of India. One of such provisions includes Section 4 which gives the right of self-perceived gender identity only to come out as a transgender who is not male or female, which may be the self-perceived gender of the person, thus violating the freedom of expression under Article 19; Section 7 mandates the transgender person must undergo a surgery to identify as male or female, thus violating the right to personal autonomy and bodily integrity as a right to life under Article 21; Section 12(3) that does not distinguish between a child and an adult and mandates the transgender person must either continue residing with the birth family or be placed in a rehabilitation centre on the order of a court, without being given the choice to reside at any third place, thus violating the right to life and liberty under Article 21. The same concerns are shared in *Swati Bidhan Baruah*

79 Mousmouti (n. 9), p. 459.

80 Stefanou (n. 67), p. 308.

81 Mousmouti (n. 10), p. 64.

82 Antony N. Allott, *The Limits of Law*, Butterworths, 1980, pp. 121-122.

83 Maria Mousmouti, *The 'Effectiveness Test' as a Measure of Legislative Quality: Equality in Law, Inequality in Practice, and Quality in Legislation* (PhD Thesis), University of London, 2013, p. 3.

84 Ken Kress, 'Coherence', in Dennis Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*, Blackwell Publishing, 2010, p. 521.

85 Mousmouti (n 10), p. 81.



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*v. Union of India*<sup>86</sup> and *Grace Banu Ganeshan & Ors. v. Union of India & anr*<sup>87</sup> (petitions) that challenge the constitutionality of the Act before the Supreme Court.

With respect to the international rules too there have been some discrepancies. To point out a few, attention is drawn to the NALSA Judgment where Supreme Court referred to the Yogyakarta Principles<sup>88</sup> for giving directions. Principle 3 talks about the Right to Recognition before the law where it states that no one should be forced to undergo medical procedures for the purpose of legal recognition of their gender identity but the Act goes against it as it requires the transgender person to undergo surgery to apply for a change in gender under Section 7. Principle 6 talks about the right to privacy where the persons may choose to disclose information on their gender identity and they should be protected from unwanted disclosure but the Act contradicts it as it requires the transgender person to furnish documents disclosing personal information like medical history to the District Magistrate for the purpose of changing gender under Rule 6 of the Rules read with Section 7 of the Act. Principle 18 and Principle 32 mandate that the state must ensure that the minor has the right to choose own gender identity after having maturity and understanding of one's identity. The Act is again in derogation of these principles as the Act gives the power to the parents or guardian of the child to choose the gender of the child by way of making an application on their behalf under the proviso to Section 5.

Considering the horizontal dimension, it can be seen that there are several inconsistencies between the Act and the Indian legal order, one of them being an inconsistency between the penal provisions of the Act and the Indian Penal Code, 1860 (IPC). For instance, Section 18(d) of the Act provides a maximum punishment of two years for sexual offences against transgender persons which is considerably lower than the punishment provided under the IPC like assault and criminal force against a woman with intent to outrage her modesty under Section 354, sexual harassment under Section 354A, assault or criminal force to a woman with an intent to disrobe under 354B, rape under Sections 375 and 376, sexual intercourse by a person in authority under 376C, voyeurism under Section 354C, stalking under 354D, ranging from three years to life imprisonment. This is not only an issue in the horizontal dimension but in the vertical dimension too as it infringes the transgender person's right to equality under Article 14 of the Constitution as the Act discriminates against the transgender persons on the basis of their intrinsic and core trait which cannot be a reasonable classification based on an intelligible differentia.<sup>89</sup>

Despite recognizing the transgender persons and declaring under Section 20 that the Act is in addition to and not in derogation of other existing laws, it does not mention how the laws with gender specific provisions apply to the transgender community. Some examples of gender specific provisions and their respective Acts

86 Writ Petition (Civil) No. 51 of 2020.

87 Writ Petition (Civil) No. 406 of 2020.

88 The Yogyakarta Principles. Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (March 2007), [http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles\\_en.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf) (accessed 1 October 2021).

89 *Navej Singh Johar and Others v. Union of India* (2018) 10 SCC 1.

include medical examination of female rape victims, restoration of liberty of unlawfully detained women under the Code of Criminal Procedure, 1973; protection of women from violence in a domestic relationship under the Protection of Women from Domestic Violence Act, 2005; indecent representation of women in publication under the Indecent Representation of Women (Prohibition) Act, 1986; marriage between a man and a woman under the Special Marriage Act, 1954 or the Hindu Marriage Act, 1955; criteria for a man and a woman for child adoption under Hindu Adoption and Maintenance Act, 1956 and so on.

Moreover, in Section 13 of the General Clauses Act, 1897 (GCA), the masculine gender includes the feminine gender, as long as there is no contradiction in the subject or context of the legislation. This has not been amended to take into account the transgender persons. Their status remains unclear in those legislations where there is no express mention of their inclusion. In the present context, such legislations do not cover transgender persons in their legislative ambit. For instance, a will is a legal declaration of a testator's intention regarding 'his' property which 'he' desires to be carried into effect after 'his' death.<sup>90</sup> As the masculine pronouns do not include the transgender pronouns, this legislation does not apply to transgender persons. This could affect an array of rights like the property and residence rights, part of which are connected to the Act under Section 12. This legislation could include a provision amending the GCA so as to make sense of the Act in the existing legal order as a coherent whole.

It is seen from this discussion that the Act has questionable coherence in terms of horizontal and vertical dimensions, thus affecting the effectiveness of the Act.

### III Accessibility

Accessibility is the easy access to online or published legislative text<sup>91</sup> to ensure that the readers are able to examine the text they are searching for.<sup>92</sup> It is not only limited to its physical access (textual or electronic) but also to the information regarding its validity and applicability at a given moment.<sup>93</sup> It promotes legal certainty<sup>94</sup> through drafting principles of availability, navigability and inclusivity.<sup>95</sup>

90 The Indian Succession Act, 1925, s 2(h).

91 Edward Donelan, 'European Approaches to Improving Access to and Managing the Stock of Legislation', *Statute Law Review*, Vol 30, No. 3, 2009, p. 182; Timea Drinoczi, 'Communication in Legislation – Using ICT', in Luzius Mader and Marta Tavares de Almeida (eds.), *Quality of Legislation. Principles and Instruments*, Nomos, 2011, p. 285.

92 Mousmouti (n. 10), p. 81.

93 *Ibid.*, p. 80; Daniel Greenberg, 'Access to Legislation – The Drafter's Role', *The Loophole*, October 2009, p. 7.

94 Drinoczi (n. 91), p. 285.

95 Ronan Cormacain, *Legislative Drafting and the Rule of Law* (PhD Thesis), University of London, 2017, pp. 48-62.

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It is seen that the legislation is available in electronic form on the websites of Lok Sabha,<sup>96</sup> Rajya Sabha,<sup>97</sup> E-gazette<sup>98</sup> as originally published and India Code<sup>99</sup> as consolidated. It is cumbersome to navigate to find the Act on the websites of Lok Sabha, Rajya Sabha and E-gazette but a simple short title search or a free text search will direct you to the Act in a consolidated form on India Code which is much easier to navigate. The problem is with inclusivity as none of the websites are comprehensive in terms of subordinate legislation or any information on its existence, whether it is in force or valid. India Code claims to be a database of all central primary legislations along with their subordinate legislations in a simplified and user-friendly form which is accessible at push of a few buttons<sup>100</sup> but on searching the Act, the Rules were not uploaded. There are several other subordinate legislations by the states that originate from the Act but they do not find a place on India Code, or the state's official websites. No information on their validity or applicability is indicated in the electronic format. Their existence is known only when one takes actions in their pursuance. For instance, through press releases like separate toilets for transgender persons created in Delhi Metro by the Delhi Government,<sup>101</sup> or the Welfare Board created by the Government of Uttar Pradesh.<sup>102</sup> It also does not consist of any links to extraneous material like the Expert Committee Report, Standing Committee Report, parliamentary debates, NALSA Judgments which can help the reader in ascertaining the purpose of the Act and understanding the law.<sup>103</sup> It is not a one stop website for all the relevant information. It is limited and restricted with regard to the material required by the reader to gain a better comprehension of the Act. This lack of inclusivity makes the Act inaccessible, influencing its effectiveness.

#### IV Choice of Superstructure

The legislative superstructure, that is the new legislation built on top of the existing legal order, must be an independent and conscious one, especially in terms of how the legislative message will be communicated to the reader as a package and connect the points in a wider context.<sup>104</sup> It is of four types: Legislation that conveys all-in-one messages covers all the issues in a single legislation to exhaust the objects

96 Parliament of India Lok Sabha, 'Parliamentary Bills Information System', <http://loksabhaph.nic.in/Legislation/NewAdvsearch.aspx> (accessed 1 October 2021).

97 Parliament of India Rajya Sabha, 'Parliamentary Bills Information System', [http://164.100.47.5/newsite/newbios\\_search/newadvsearch.aspx](http://164.100.47.5/newsite/newbios_search/newadvsearch.aspx) (accessed 1 October 2021).

98 Directorate of Printing, Department of Publication, 'The Gazette of India', [https://egazette.nic.in/\(S\(vh4jrd2tbsz2cdppbfpq4ane\)\)/default.aspx](https://egazette.nic.in/(S(vh4jrd2tbsz2cdppbfpq4ane))/default.aspx) (accessed 1 October 2021).

99 India Code Digital Depository of All Central and State Acts, 'The Transgender Persons (Protection of Rights) Act 2019', [www.indiacode.nic.in/handle/123456789/13091?view\\_type=browse&sam\\_handle=123456789/1362](http://www.indiacode.nic.in/handle/123456789/13091?view_type=browse&sam_handle=123456789/1362) (accessed 1 October 2021).

100 India Code Digital Depository of All Central and State Acts, 'About Us', [www.indiacode.nic.in/about.jsp](http://www.indiacode.nic.in/about.jsp) (accessed 1 October 2021).

101 Delhi Metro Rail Corporation Ltd., 'Delhi Metro Makes Provision of Separate Toilets for Transgenders', [www.delhimetrorail.com/press\\_reldetails.aspx?id=PQfd27AlG4lld](http://www.delhimetrorail.com/press_reldetails.aspx?id=PQfd27AlG4lld) (accessed 1 October 2021).

102 HT Correspondent, 'Uttar Pradesh to Set Up Transgender Welfare Board', *The Hindustan Times*, 15 September 2020.

103 Cormacain (n. 95), p. 58.

104 Mousmouti (n. 10), p. 79.

and the content, and communicate the entire message in one go. The next type is when the message is diffused in different sectors of law at different levels and layers, and instead of a general all-encompassing message, several sectorial messages are transmitted and this diffusion may be horizontal that is in different legal areas, or vertical that is different levels of provisions. The third type is to slice the message into several sectorial or thematic fragments to create different legislations. Another type is to assemble unrelated messages into one law which modifies numerous existing statutes.<sup>105</sup>

On the first reading, it may appear that the Act contains an all-in-one message of non-discrimination against the transgender community in certain spheres and identification of transgender persons, having its distinct identity in the statute book. The lack of this distinct identity in the Indian legal field was pointed out by the Supreme Court in the NALSA Judgment. On a deeper scrutiny, it is seen that the Act, though a stand-alone Act, encompasses a fragment of the message of non-discrimination and equality under Article 14 of the Constitution. Other fragments of this larger message can be seen in legislations such as The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, Sexual Harassment of Women at Workplace Act, 2013, Protection of Women from Domestic Violence Act, 2005 and so on. Each legislation is a legal area of specialized study. The advantage of this approach is that the Act is more visible to the concerned audience, that is, the LGBTQ Community, it enhances the specialization in law,<sup>106</sup> and transmits more detailed messages.<sup>107</sup> The disadvantage in this choice is that the legislation is not adequately aligned in the wider context,<sup>108</sup> neither horizontally nor vertically, as already pointed out under Coherence. Additionally, there is a problem with the physical and electronic accessibility of an inclusive legislation which affects its effectiveness and the overall quality, as explained under accessibility in the preceding paragraphs. The disadvantages outweigh the advantages.

Thus, due to a lack of coherence and accessibility, the choice of the superstructure to have a fragment of the message of non-discrimination and equality in the Act is not utilized to its full potential, making the Act less effective.

## D Results

### I Meaning and Importance

Results are the exclusive and direct consequences of the law.<sup>109</sup> The lifecycle of legislation starts off with a vision, works in real life, and ends with the actual results, and without any understanding and foresight of its actual implementation

105 *Ibid.*, pp. 69-71; Patricia Popelier, 'Mosaics of Legal Provisions', *European Journal of Law Reform*, Vol. 7, No. 3, 2005, p. 47.

106 Patricia Popelier, 'Codification in a Civil Law Jurisdiction: A Northern European Perspective', *European Journal of Law Reform*, Vol. 19, No. 4, 2017, p. 253.

107 Mousmouti (n. 10), p. 73.

108 *Ibid.*

109 Robert K. Merton, 'The Unanticipated Consequences of Purposive Social Action', *American Sociological Review*, Vol 1, No. 6, 1936, p. 895.

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and results, it is just a shot in the dark.<sup>110</sup> The information collected during monitoring, review and evaluation on how the rules are used, unused or misused can be utilized to make necessary corrections in the legislation.<sup>111</sup> It is to prevent potential violations of human rights by the legislation,<sup>112</sup> particularly in anti-discrimination legislation.<sup>113</sup> So, it is the duty of a lawmaker to anticipate the result of law and decide how it will be captured, managed and used to upgrade and rectify the law.<sup>114</sup>

The link between the purpose and the anticipated result is done to facilitate the purpose's operationalization by identifying the specific elements that will be captured through monitoring, review and evaluation.<sup>115</sup> The results need to be anticipated by the lawmaker and measured when the law is implemented.<sup>116</sup>

Below I discuss the anticipated results to the purpose of the Act and the measurement of those results.

## II *Anticipated Results*

I attempt to link the micro, meso and macro objectives as discussed in the preceding paragraphs, to the anticipated direct results, outcomes and impacts, respectively.

One of the micro objectives of the Act is to identify the transgender persons. The direct and immediate anticipated result of this micro aim is that more transgender persons should be officially identified over a period of time, more transgender persons should apply to the District Magistrate for identification, the relevant procedures should be in place for registration of gender identity, the District Magistrate should issue identification certificates.

Another micro objective of the Act is to subject the identified transgender persons to welfare benefits in areas of health care, employment and education. In the field of health care, a direct anticipated result is setting up of working HIV sero-surveillance centres as per the National AIDS Control Organisation guidelines and such centres should identify the seropositive transgender persons, setting up special medical care facilities such as sex assignment surgery and hormonal therapy along with pre and post-surgery/therapy counselling services across medical centres and the transgender community availing these services, introducing a health manual on the sex reassignment surgery, an insurance scheme to cover transgender people's medical expenses and payment of medical expenses through such a scheme.

One of the immediate anticipated results in employment is setting up of vocational training centres for transgenders and their training taking place. Moreover, the National Council for Transgender Persons is expected to be established to carry out its functions.

110 Mousmouti (n. 10), p. 84.

111 *Ibid.*

112 Mousmouti (n. 83), p. 207.

113 *Ibid.*, p. 211.

114 Mousmouti (n. 10), p. 85.

115 *Ibid.*, p. 102.

116 *Ibid.*, p. 87.

In education, with respect to the welfare benefits, the direct results cannot be anticipated as the 'opportunities' for sports, recreation and leisure activities are not laid out; thus, the reader does not know what result to expect.

One more micro objective is to prohibit discrimination in places of employment, health care, residence, education and in public places. A direct anticipated result is setting up of a grievance redressal mechanism in different establishments ranging from the workplace to educational institutions to health care centres [owing to the wide ambit of the term 'establishment' under Section 2(b)] and appointment of a complaints officer who registers complaints on violations at these establishments. Other anticipated results include registration of first information reports for the offences under Section 18 of the Act, an increased level of prosecution, decisions or cases solving disputes, and the extent to which the people, establishments and governments comply with obligations and exercise their rights.

The meso goal is to recognize their self-perceived gender identity as a transgender, to improve their employability, physical, mental and sexual health, and education and to protect the transgender community from discrimination. The anticipated outcome due to the identification of the transgender persons is the recognition of their self-perceived gender identity as a transgender, due to the welfare benefits in employment and health care is their improved employability and earning capacity, and improved physical and sexual health; prohibition in discrimination in the earlier mentioned areas should improve the protection of this targeted disadvantaged group against discriminatory behaviour and ensure a dip in crime against the transgender community. With respect to education, due to an absence of the anticipated direct results, outcomes cannot be predicted.

The macro goal is to recognize their right to life, right to equality and freedom of expressing themselves in society. Anticipated impact is normalization of the existence of the third gender by an increased presence of transgender persons in places of education, work, public, household and health care.

Thus, the elements identified under the anticipated results of each micro, meso and macro goal can be measured and assessed using the process of monitoring, review and evaluation.

### *III Measurement of Results*

The anticipated results of legislation can be captured through the three distinct processes, namely, monitoring, review and evaluation of legislation where monitoring is a constant supervision and gathering of information on the implementation process, review is an interim appraisal on the functioning of the Act, and the evaluation is a one-time, holistic assessment of the Act in light of the purposes of the legislation.<sup>117</sup>

In the instant Act, Section 17(b) mandates the National Council for Transgender Persons to monitor the 'impact of policies and programmes designed for achieving equality and full participation of transgender persons' but it mentions nothing about monitoring the implementation of the Act to get specific and direct anticipated results, and neither mentions about any reporting obligations or time

117 Mousmouti (n. 10), p. 88.

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period. In the present case, an example of an ideal monitoring clause in relation to an anticipated result of issuance of certificate of gender identification is Section 6 of the Gender Recognition Act 2015 in Ireland which is about Records and Annual Report where the Minister keeps a record of their decision on the grant of gender recognition certificate and prepares a report in a given period of time and presents it before the legislature of Ireland. Through such a timely report, data on the number of persons identified and issued the identification certificate can be tracked and monitored.

This information can help in comparing the anticipated result of increased number of identified transgender persons with real results.

The Act through Section 17(c) names National Council for Transgender Persons as the body to review the activities of all governmental departments and the NGOs involved in the matters relating to the transgender persons, but there is no mention as to the point of time or procedure of review.<sup>118</sup> On the face of it, this clause appears to be a general, 'core' review clause covering all activities undertaken by the governmental and non-governmental organizations under this Act.<sup>119</sup> Reviews are followed by reports which may or may not be submitted to the legislature,<sup>120</sup> but this clause does not mention any reporting mechanism. As review clauses can be fairly flexible,<sup>121</sup> this review could be more focussed on the specificities of the Act.

In the Act, Section 17(b) mentions one of the functions of the Council as evaluation of the impact of the policies and programmes designed to achieve equality amongst the transgender persons and their full participation. This makes the Council as the authority in-charge to present the evaluation results but at the same time, this clause suffers from imprecision as the 'policies' or the 'programmes' are not listed anywhere in the legislation, the purpose of 'achieving equality and full participation of transgender persons' is too wide and vague, the criteria of investigation is not mentioned and neither is the manner in which the evaluation is to be presented, nor the authority that will receive the evaluation results, neither is the evaluation period<sup>122</sup> given and as a result there will be poor implementation of this evaluation clause and thus poor assessment of the effectiveness of the legislation. Moreover, there is no compulsory ex-post evaluation of laws in India<sup>123</sup> so it is uncertain if parliament will conduct a post-legislative scrutiny of the Act at all.

118 *Ibid.*, p. 92.

119 European Parliament, *Review Clauses in EU Legislation. A Rolling Check-List*, p. 15, [www.europarl.europa.eu/RegData/etudes/STUD/2018/621821/EPRS\\_STU\(2018\)621821\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/621821/EPRS_STU(2018)621821_EN.pdf) (accessed on 1 October 2021).

120 Mousmouti (n. 10), p. 93.

121 European Parliament (n. 119), p. 14.

122 Damien Wirths, 'Procedural Institutionalization of the Evaluation Through Legal Basis: A New Typology of Evaluation Clauses in Switzerland', *Statute Law Review*, Vol. 38, No. 1, 2017, p. 24.

123 Lok Sabha Secretariat, *Post Legislative Scrutiny (PLS) – A Dimension of the Oversight Function of Parliament*, p. 7, [http://164.100.47.193/Refinput/Research\\_notes/English/04122019\\_174605\\_102120495.pdf](http://164.100.47.193/Refinput/Research_notes/English/04122019_174605_102120495.pdf) (accessed 1 October 2021).

Overall, it is observed that none of the earlier mentioned clauses determine when, how and against what criteria monitoring, review or evaluation is to be conducted.<sup>124</sup> Due to the absence of such elements, the existence of the clauses may lead to just a bureaucratic and formal exercise<sup>125</sup> and one may not know if the anticipated results of the legislative aims are actually achieved. There are also no sufficient mechanisms outside the Act that warrant proper monitoring of the implementation of the Act, review and evaluation of results, thus, putting the effectiveness of the Act in question.

## E Conclusion

Owing to the popular criticism by the transgender community and the frequent constitutional challenges against the Act, I decided to assess the quality of this Act against the Effectiveness Test propounded by Dr. Maria Mousmouti. First, I examine the Act against the element of Purpose where I try to identify the true purpose of the Act but cannot trace it anywhere in the Act or the SOR. I attempt to segregate the problem, justification and the purpose statements to find that the statements cloaked as the purpose statements in Paragraph 4 of the SOR are misleading. They are a combination of instrumentalities and wider policy goals, and not the specific targets that the Act seeks to achieve. The long title is also non-data. Such statements consist of a mix of very narrow, very broad and legally oriented statements that do not act as benchmark objectives that can aid in collection and assessment of the results, thereby reducing the effectiveness of the Act. Additionally, I try to deduce the real purpose of the Act in terms of specific and broad purposes, and micro, meso and macro goals with the help of the NALSA Judgment, parliamentary debates and the Act itself, and use the deduced purposes to redraft Paragraph 4 of the SOR as benchmark objectives.

Next, I view the Content of the Act where I find that the substantive rules consist of a combination of several legislative techniques namely, command and control, public benefit conferral, administrative, rights and obligations. To me, for the time being, these techniques seem appropriate in the given societal context but a major weakness lies in their incomplete application. For instance, the prohibitions are not accompanied by sanctions, the approach adopted in the complaint redressal mechanism is unclear and no concrete benefits are mentioned anywhere in the primary or secondary legislation. This is proof of a poor legislative design, rendering the Act ineffective. Moreover, I cite evidence of possible non-compliance by the transgender community due to a lack of public consultation, examine user-journey of the non-complying state governments, point out flaws in the implementation plan that result in potential and actual non-enforcement and non-compliance of the Act by different users. I also find that the law is not communicated effectively to the relevant audiences as the language is not gender inclusive indicated by the usage of male and female pronouns and honorifics to address transgender persons. The language in certain substantive provisions is also imprecise and unclear,

124 Mousmouti (n. 10), p. 104.

125 *Ibid.*



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affecting the legislative communication, and thus, the overall legislative effectiveness.

Next, I check the Context of the Act where I find that the Act does not fit well in the vertical or the horizontal dimension of coherence. It is contrary to the right to equality, freedom of expression and right to life under Articles 14, 19 and 21 of the Indian Constitution. It is also contradictory to the Yogyakarta Principles which were relied upon by the Supreme Court in the NALSA Judgment to legally recognize transgender persons. Further, it is observed that the Act is incompatible with the current legal order with regard to IPC, GCA and a list of legislations with gender specific provisions. Though the legislation is available and navigable electronically but no website provides an inclusive version of the legislation in terms of all subordinate legislation and extraneous material that would help the reader in understanding the law, making it inaccessible to the general public. The choice of superstructure is such that the legislative message is a fragment of the wider message on non-discrimination and equality under Article 14 of the Constitution. It has its advantages of being visible to the transgender audience, enhances specialization in law, and transmits more detailed messages but the disadvantages of incoherence and inaccessibility outweigh the positives. This makes the Act ineffective.

Finally, I check the Act against the element of Results where I refer back on to the Purpose to link the anticipated direct results, outcomes and impacts to the micro, meso and macro goals in order to identify the particular elements that can be recorded through the process of monitoring, review and evaluation. Then I examine the monitoring, review and evaluation clauses in the Act and find that none of the clauses determine when, how and against what criteria monitoring, review or evaluation will be conducted. Outside the Act too there exists no such mechanism to collect and assess the results. Due to this absence, one may not know if the anticipated results are actually achieved, thereby, making the Act ineffective.

In light of the four elements of the Effectiveness Test, it is concluded that the Act is not effective.