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Policy Paper

Critical Analysis of Transgender Persons (Protection of Rights) Act, 2019

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1. EXECUTIVE SUMMARY

This policy paper provides a comprehensive overview of the Transgender Persons (Protection of Rights) Act 2019 which was approved by the Union Cabinet of India on 5th December 2019.

The new policy aims to bring revolutionary changes for the Transgender community of India. This policy paper will be giving a summary of recommendations made by the Transgender Persons (Protection of Rights) Act in education, employment and other important spheres and also providing a critique of the policy along with recommendations for imparting a holistic point of view.

2. INTRODUCTION

The Transgender Persons (Protection of Rights) Act, 2019 was passed in Rajya Sabha on November 26, 2019. It was introduced in Lok Sabha on July 19, 2019, by the Minister for Social Justice and Empowerment, Mr. Thaawarchand Gehlot to replace the 2016 Bill. It was passed by the Lok Sabha on August 5, 2019.

In 2013, the government set up an Expert Committee to examine issues related to transgender persons. The Committee stated that transgender persons faced issues of social stigma and discrimination which affected their access to education, healthcare, employment and government documents. In 2014, the Supreme Court recognised a transgender person's right to self-identification as male, female or the third gender. Furthermore, the Court directed central and state governments to grant legal recognition to transgender persons, address issues of social stigma and discrimination, and provide social welfare schemes for them. A private member Bill was introduced in the Rajya Sabha by Mr. Tiruchi Siva in 2014 to guarantee rights and provide welfare measures for transgender persons.

In August 2016, the government introduced the Transgender Persons (Protection of Rights) Bill, 2016 in Lok Sabha. The 2016 Bill was referred to the Standing Committee on Social Justice and Empowerment. The Committee submitted its report on July 21, 2017. The Committee gave several recommendations concerning: (i) definition of transgender persons; (ii) process of certification as a transgender person; (iii) inclusion of the definition of discrimination against transgender persons; and (iv) requirement of complaints officer in all establishments. However, the 2016 Bill lapsed with the dissolution of the 16th Lok Sabha.

2.1 THE NALSA JUDGEMENT

National Legal Services Authority v. Union of India (NALSA judgement) was a landmark decision by the Supreme Court of India, which declared transgender people the 'third gender', affirmed that the fundamental rights granted under the Constitution of India would be equally applicable to them, and gave them the right to self-identification of their gender as male, female or third gender.

This judgement has been distinguished as a major step towards gender equality in India. Moreover, the court held that because transgender people were treated as socially and economically backward classes, they will be granted reservations in admissions to educational institutions and jobs.

Who is a Transgender person?

A "transgender person" means a person whose gender does not match with the gender assigned to that person at birth and includes trans-men or trans-women (irrespective of whether or not such person has undergone Sex Reassignment Surgery, hormone therapy, laser therapy or other such procedures), people with intersex variations, genderqueer people and people having such socio-cultural identities as Kinnar, Hijra, Aravani and Jogta.

Certification of Identity

The bill mandates a two-step process for legal gender recognition. First, it requires a trans-person to apply for a "transgender certificate." This can be done on the basis of a person's self-declared identity. Then, a

certificate holder applies for a “change in gender certificate,” which signals the authorities to change their legal gender to male or female. However, this second step requires the person to provide proof of surgery, issued by a hospital official, to the District Magistrate for a second evaluation, and the official must be “satisfied with the correctness of such certificate.”

The Transgender Persons (Protection of Rights) Act, 2019, is unclear on a transgender person’s right to self-identify, which India’s Supreme Court recognized in the NALSA judgment in 2014. The NALSA judgement lays out a broad and inclusive definition of “transgender persons”. However, even though the bill says that a transgender person “shall have a right to self-perceived gender identity,” its language could be interpreted to mean transgender people are required to have certain surgeries before legally changing their gender.

Offences and Penalties: The Act recognizes the following offences against transgender persons:

- (i) forced or bonded labour (excluding compulsory government service for public purposes),
- (ii) denial of use of public places,
- (iii) removal from household, and village,
- (iv) physical, sexual, verbal, emotional or economic abuse.

Penalties for these offences vary between six months and two years, and a fine.

THE 2016 TRANSGENDER RIGHTS BILL VS THE 2019 TRANSGENDER RIGHTS ACT: A COMPARISON

Reservations:

The Clauses 21 and 22 of Chapter V in the 2014 Transgender Rights Act aimed to reserve 2% of seats in primary, secondary and higher education institutions funded by the government, and in government jobs while there is no such provision for reservations under the 2019 draft.

Employment:

Clause 24 for Chapter V also mandated the formation of special employment agencies for transgender people while the 2019 version directs both the levels of government to improve the employability of transgender persons in whichever way deemed fit by them, including but not limited to formulation of welfare programmes, promotion of vocational training etc.

Redressal mechanism:

Chapter VII details the formation of national and state-level commission for transgender people and the Chapter VIII lays out the formation of special transgender rights courts, which is absent in the 2019 Act. Penalties: Chapter IX details the offences and penalties. The maximum penalty for hate speech against transgender people is 1-year imprisonment with a fine. This finds no mention in the newer version of the Transgender (Protection of Rights) Act, 2019.

Lodging:

Clause 11 of Chapter II specifies the right of a transgender child to a home which is similar to the 2019 Bill because it specifies the right of the transgender individual to not be refused a home too.

STRENGTHS OF THE 2019 ACT (IN COMPARISON TO TRANSGENDER PERSONS BILL 2016)

The earlier version of the Bill was also subjected to criticism from the transgender community. It was passed in Lok Sabha with 27 amendments on December 17, 2018. The Bill later lapsed in the Upper House.

The establishment of a National Council for Transgender persons:

A National Council for Transgender (NCT) persons will be set up to advise the central government on policies and legislation related to transgender persons. It will also monitor and evaluate such policies. The NCT will consist of representatives from (i) the social justice and empowerment, health, minority affairs departments; (ii) NITI Aayog; (iii) National Human Rights Commission and National Commission for Women; (iv) state governments; (v) nominated members from the transgender community; and (vi) experts from non-governmental organisations.

Better Employment and education:

The Central or State governments shall provide welfare schemes and programmes to facilitate and support livelihood for transgender persons. Every educational institution funded or recognised by the appropriate Government is also mandated to provide inclusive education and opportunities for sports, recreation and leisure activities to transgender persons without discrimination on an equal basis with others. This will include vocational training and self-employment.

Improved Healthcare facilities:

The central and state governments shall take steps to provide healthcare facilities to transgender persons including (i) separate HIV surveillance centres; (ii) sex reassignment surgery and hormonal therapy counselling; (iii) review of the medical curriculum; and (iv) a comprehensive insurance scheme.

Prohibition of discrimination against transgender persons:

The Bill prohibits discrimination against a transgender person, including unfair treatment or denial of service in relation to (i) education; (ii) employment; (iii) healthcare (iv) access to public goods and facilities; (v) right to movement; (vi) right to rent or own property; (vii) opportunity to hold public or private office; and (viii) access to a government or private establishment which has custody of a transgender person. All public and private establishments are prohibited from discriminating against a transgender person in employment matters, including recruitment and promotion. Every establishment is required to designate a person to be a complaint officer to deal with complaints in relation to the bill.

Decriminalisation of Begging:

The 2016 version of the bill criminalised begging, which was removed in the 2019 Act. The community has historically depended on '*badhai*' on several auspicious occasions which is a major source of income for them.

WEAKNESSES:

The bill has attracted views and critical insights, not only from the transgender community, but also from NGOs, legal organisations, members of the civil society and other organisations. The vehement opposition is due to several reasons. The Bill was passed without any debate amid chaos due to the abrogation of Article 370 in Jammu & Kashmir on the same day.

The Essentiality of Surgery for Recognition:

The act makes it mandatory for individuals to get a sex reassignment surgery done to obtain a certificate from the district magistrate in order to be recognised as a transgender individual. This violates their autonomy to self-identify granted to them under the NALSA judgement. It asserts that their identity would only be complete if they make physical changes to their body. While reassignment surgeries do help in alleviating gender dysphoria for many transgender people, this cannot be universalised as criteria to measure if somebody is transgender 'enough' for official recognition.

Lack of Reservations:

The NALSA judgement directs that the transgender community shall be granted reservations in public employment and education, but this legislation does not provide any such reservations.

Lack of Confidentiality:

The process of applying for a *Certificate of Identity* to District Magistrate and following a certain procedure, which entails a transgender person making an application to the District Magistrate for issuing a certificate of identity as a transgender person, which is contrary to the spirit of the NALSA judgment – which identifies privacy, self-identity and personal integrity as fundamental rights of transgender persons.

Lack of Addressal to marriage issues:

The bill does not address issues on marriage (either before issuance of Certificate or in case of change in gender after issuance of the Certificate), inheritance, parenthood and adoption.

Vague understanding of Gender and Sexual Identity:

The bill does not differentiate between transgenders, transsexuals, genderqueer and intersex persons. Putting them under the same category increases their difficulty in the explicit articulation of the problems specific to each community.

Crimes against Transgender people:

The Bill postulates that sexual violence against trans persons will face punishment from 6 months to 2 years, in comparison with the 7 years of imprisonment for sexual violence against women. In this way, the Act directly discriminates against transgender, intersex and gender non-conforming people.

Residing with the natal family:

Right of residence, provided in Section 12 of the Act, compels a transgender person under the age of eighteen to reside with their natal family, and the only way to separate from them is by an order of a competent court. Therefore, through this provision, minors face the risk of more discrimination and violence at the hands of their families. The right to move out and sever their familial ties is restricted through this clause.

The section further specifies that if the family or any member of the immediate family is unable to take care of a transgender person, the latter is to be placed under the care of a rehabilitation centre by the Court. However, the working of these centres is not specified, this inadequacy in information can make these centres a source of abuse and discrimination for transgender persons.

Vagueness of ‘rehabilitation’:

The only alternative for transgender children and adults facing abuse at their natal home is institutionalized rehabilitation by a court order. It is unclear whether such institutionalization can happen only at the behest of a transgender person, or if the court can direct otherwise. The act effectively allows involuntary detention of adults in rehabilitation centers.

Inclusion of intersex people within this term:

Activists pointed out that it is inappropriate to include the intersex community in the definition of transgenders, which the bill does, as not all intersex people identify themselves as trans-people. It dilutes their rights. The mention of intersex persons in the Indian bill is an important inclusion, but the bill should be renamed the Rights of Transgender and Intersex Persons Bill and include explicit protections for intersex people in line with India’s international human rights obligations

Penalties for crimes against transgender people:

The Act mentions provisions for crimes against transgender people, however, no penalty has been prescribed for a person who discriminates against a transgender person. The transgender person is also not entitled to any monetary compensation if such a person faces discrimination. In the absence of any relief under the Act, it appears that the protection sought to be given to transgender people will be, in reality, quite ineffective.

‘Discrimination’ undefined, grievance redressal mechanism unclear:

The Bill prohibits discrimination against transgender persons in nine instances, which are exhaustive. However, what constitutes ‘discrimination’ has not been defined. It is unclear what remedies are available to a transgender person who suffers discrimination i.e. whether they have to contact the complaint officer of an establishment, approach the National Council for redress, file a suit, or file writ petitions for violation of rights recognized under the law. The Bill does not lay down the powers of a complaint officer or the National Council, the nature of actions they can take or whether their decisions can be enforced and appealed against. There is no provision indicating the consequences if a Government or private establishment does not designate a complaints officer, nor are there specific penalties for failure to comply with provisions, or for violating provisions of the Bill.

Inefficiencies in National Council for Transgender Persons:

The National Council is criticized for being top-heavy and not having adequate representation from the transgender community. The functions of the Council are too general, and the minimum meetings to be held, the quorum for meeting and decision-making are not specified. There are no Councils at the State or District level, hindering approachability and accessibility.

There is no provision for the establishment of State Welfare Boards, even though they have been instrumental in facilitating access of transgender persons to social schemes and benefits such as housing, income assistance, education, employment and healthcare.

Civil rights and entitlements under other laws are missing:

The Bill is silent on civil rights such as marriage, civil partnership and adoption, as well as rights to succession, inheritance and property. The NALSA judgment had specifically noted the widespread discrimination suffered by transgender persons due to the binary notion of gender in laws relating to marriage, divorce, adoption, inheritance, succession, taxation and welfare.

Removal of medical screening committees:

The 2019 version of the act has also removed the medical screening committees (The District Screening Committee will comprise a: (i) Chief Medical Officer; (ii) District Social Welfare Officer; (iii) psychologist or psychiatrist; (iv) representative of the transgender community; and (v) government officer) which was a feature of the 2016 Bill.

STAKEHOLDERS’ REACTION

The Transgender Protection of Rights Act of 2019 has definitely attracted a lot of reactions from various people in the status quo, ranging from civil society organisations to Rajya Sabha members, when it was yet to be passed as an Act.

Civil society organisations are supporting the trans, GNC and intersex community in their fight against the Act. Jhatkaa.org, a human rights campaigning organisation, has a petition to support the community’s demands regarding the bill.

“We must avail of all the democratic processes that have been granted to us by the Constitution to stop this bill. The President’s signature can make or break this Bill. That’s why we have a petition asking him not to sign, but to send it back to Parliament for redrafting in consultation with the trans community. We also have a petition to the UN India Resident Coordinator to make a public statement condemning the Bill, and ask for consultations with the trans community,” says Jyotsna Sara George, gender and sexuality campaigns manager, Jhatkaa.org.

In a statement, the People's Union for Democratic Rights, an organisation based in Delhi that is committed to legally defend "civil liberties and democratic rights" of the people has said:

“PUDR vehemently opposes the passage of the Transgender Persons (Protection of Rights) Bill, 2019 which dilutes the rights and protection recognized by NALSA, and furthers injustice and violence against trans and gender non-conforming persons. PUDR demands that, the President should withhold assent to The Transgender Persons (Protection of Rights) Bill 2019 and refer it back to Parliament for reconsideration.

Rajya Sabha members, including TMC's Derek O'Brien and Congress's Rajeev Gowda, on Friday, December 28, assured the transgender community they will not let the Transgender Persons Protection of Rights Bill pass the upper house in its present form and ensure it is sent to the select committee for modifications. Tiruchi Siva, a DMK Rajya Sabha member, said the bill is "absurd".

"The government does not even have an idea as to what is a transgender. Going through a medical test to prove that you are a transgender is an insult rather than a right given through the bill," he said.

"We saw that without much discussion a bill was passed in Lok Sabha. The bill which claims to protect the rights of the transgender community is actually doing the exact opposite," the Congress spokesperson said.

"When it comes to Rajya Sabha, there is a whole group of us gathered across party lines who will send it to the select committee. That will give us a chance to sit with it, to work on improving it and to counter all the negativity infused by the government into the bill," he said.

Grace Banu is a Dalit and Transgender rights activist. For Banu, the non-inclusion of affirmative action for the transgender community, which exists in India in education and government jobs for historically marginalized communities, marks an institutional failure.

“Don't sign that regressive, poisonous bill,” says Grace Banu, a trans rights activist based in Chennai. “This is what I want to tell the President. Please send it back to the Parliament. If you pass it, it will kill people.”

Thousands of people descended on the streets of Delhi Sunday to participate in the 12th Queer Pride Parade celebrating homosexuality. Carrying posters and multi-coloured flags, protesters marched from the Barakhamba Road intersection to Jantar Mantar in support of trans rights, and condemned the Transgender Bill 2019. The procession had a dual motive wherein the participants marched the streets to fight homophobia as well as spread inclusivity. Having said that, something that was of utmost importance this time was to show their dissent for the Transgender Persons (Protection of Rights) Bill, 2019.

UNANSWERED QUESTIONS IN THE BILL

1. What procedure is to be followed / checks (medical or otherwise) need to be undertaken before issuance of a Certificate?
2. Is there any requirement to provide reasons while refusing a Certificate?
3. Can a transgender person appeal if the Certificate is refused?
4. What is the procedure to rectify defects in a Certificate?
5. However, Courts can place TG Persons in 'rehabilitation centres' if family members are unable to take care of the transgender person, or it is in the interest of a transgender child?

RECOMMENDATIONS

The bill has been subject to public scrutiny, with opinions coming from various groups and individuals on what could make it more inclusive, and acceptable. Here are a few recommendations:

Consent:

The bill should require the informed consent of intersex individuals before non-emergency surgical procedures are conducted and prohibit medically unnecessary procedures on children. Intersex persons should be issued legal identity documents that reflect their preferred gender and the government should ensure that intersex persons and organizations are consulted with regard to laws and policies that have an impact on their rights.

Training Faculty:

The bill should be revised to emphasize training teachers to help them adopt inclusive teaching methods to ensure these children are not harassed or discriminated against by staff or other children.

Right of self-identification:

The Act should clearly uphold the right of self-identification of transgender people. It should not be contradictory to the judgement passed by the Supreme Court and work according to the 2015 NALSA vs Union of India judgement.

Definitions:

The bill should clearly differentiate between transgenders, transsexuals, genderqueer and intersex person. And not treat them the same.

A concrete plan for healthcare:

The bill provides for measures like healthcare and medical facilities but fails to give any timeline for implementing such measures, thus the state should come up with models of implementing the same, supplemented with changes within the structure and providing redressal mechanisms for the same.

Better access to institutions:

Transgender people are discriminated against when they access healthcare institutions, and if that does not happen, most doctors are not equipped with enough knowledge on how to deal with non-cisgender patients. 65% of transgender people have reported discrimination in one or more public accommodative settings, according to the report by Fenway Health in 2015. Thus, sensitisation programmes for doctors and nurses should be implemented, telling them how to make these institutions more accessible and inclusive.

Better response to affirmative action:

The transgender people, who are directly affected by this legislation argue that the bill only superficially touches upon the concept of affirmative actions and provides no real mechanism to improve the lives of Transgender people. So unless there is a definite plan with concrete steps to implement such measures, this may as well only be on paper i.e. a theoretical right. Thus, the government should come up with institutionalising these affirmative actions they suggest in the form of fixed reservations in educational institutions and government jobs.

Discrimination policies:

Private entities (such as companies, body corporates, firms, associations of individuals, cooperative societies etc.) are specifically required to –not discriminate against transgender people, provide them certain prescribed facilities, and designate a compliance officer to deal with complaints in relation to violation of the Bill when it becomes law. However, again, there are no penal consequences in the event such private entities do not comply with these provisions. Thus, an incision of a section that defines the penalties for these private companies who discriminate against the community should be included.

Inclusion of civil issues:

There should be an inclusion of issues pertaining to marriage (either before issuance of Certificate or in case of change in gender after issuance of the Certificate), inheritance, parenthood and adoption. Given that these are basic human rights and that the Judgment recognizes the fundamental rights of transgender people, abstaining from addressing these issues seems to be a glaring gap for the rights and welfare of transgender people.

LGBT inclusive curriculum:

The existence of transgender people has also been systemically erased and their roles have been minimised from various historical texts, like those from Akbar's rule. This leads to essential insensitivity towards these communities. Thus, instead of this, there should be a curriculum that is LGBT inclusive, so that more people can understand their issues.

Sensitisation at school:

Since schools are agents of primary socialisation, they should actively initiate programmes addressing the LGBT+ community and their issues, further preventing bullying and marginalisation of the children who identify on the spectrum within a school.

5. CONCLUSION

The Transgender Persons (Protecting of Rights) Act, 2019 has made sweeping changes in the existing state of affairs for the community, with these changes affecting their private and public spheres of life. For its stakeholders, the bill has left many questions unanswered than the concerns it aims to address. It appears to be a check in the box. There have been serious concerns over the passage of the Bill in the Lok Sabha. The Bill was passed, almost without debate, on the same date when the proposal to abrogate Jammu and Kashmir of its special status was introduced in the Rajya Sabha. In some circles, this date is referred to as the 'Gender Justice Murder Day' by the transgender community. It has also been alleged that the Bill was not made available to relevant communities until the date it was tabled in the Lok Sabha. In light of these concerns and certain critical shortcomings identified above, the Act in its present form requires reconsideration.

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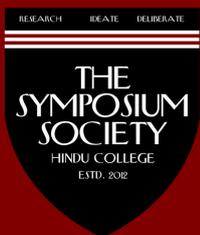
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