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

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ABSTRACT

As per the 2011 census, there are over 480,000 transgender people in India. Transgender persons are the most marginalised and vulnerable group within the LGBTQ community. Transgender persons have historically faced a range of discrimination by the State and citizens. The society, often, fails to realize and care for the trauma, torture and pain which the members of transgender community go through. Transgender persons have been routinely criminalised, discriminated against, deprived of access to education and employment. They had to bear the brunt of criminal threats as they were on the streets forced into begging and sex work. They have faced sexual and physical violence, even been killed due to their gender choices. To protect the trans community from the historic abuses the Transgender Persons (Protection of Rights) Bill was introduced by Ministry of Social Justice and Empowerment on 19 July 2019. The Bill received presidential assent on 5 December 2019. The Act came has been in effect since 10 January 2020. The 2019 Act and the immediately preceding 2018 Bill, were both preceded by a 2016 version. They were met with protests and criticism by transgender people, lawyers, and activists in India. The government 2016 Bill was sent to a standing committee which incorporated, the Supreme Court judgment on National Legal Services Authority v. Union of India (2014), in its recommendations. The NALSA judgment and Standing Committee report tried to provide a “comprehensive approach”. They have mentioned transgender community ranging from social stigma, discrimination, public health care to employment opportunities, issue of various government documents. Unfortunately, the Act ignore many recommendations of the Standing Committee. It also fails to accommodate the Supreme Court directions. As a result, it caused outcry among the transgender community, lawyers and activists in India. In this article the researcher tries to analyse the loopholes of the Act and why it is failed to stand up to the expectation.

I. INTRODUCTION

Transgender people are, often, ridiculed and abused. They are treated like untouchables. As a society, we often omit to realize and care for the trauma, anguish and pain which the

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members of transgender community undergo, especially of those whose mind and body disown their biological sex. The historic unfairness would only be corrected through an active effort of the state, to recreate a discourse. The state must assure to the trans community that it is a shared struggle. A transgender is not an anomaly. It is a part of the spectrum of people's realities. Issues relating to transgender community range from social stigma, discrimination, lack of education, public health care to employment opportunities, issue of various government documents.

For this purpose, the Transgender Persons (Protection of Rights) Act, 2019 was passed in Indian Parliament with the objective of the overall welfare of the transgender people in India. The Bill was introduced by Ministry of Social Justice and Empowerment in the lower house of Parliament on 19 July 2019.² The first Rights of Transgender Persons Bill was introduced in 2014 as a private member Bill by Tiruchi Siva. The Bill was passed in Rajya Sabha in 2015. However, there was an unanticipated delay in discussing the Bill in Lok Sabha and it remained pending in the Lok Sabha.³ Meanwhile, a writ petition was filed before the Supreme Court of India - *National Legal Services Authority v. Union of India*⁴ (commonly known as *NALSA* judgement). The judgment remains significant in many respects. These are as follows -

1. It is the first legally recognition of non-binary gender in India.
2. It upholds the following fundamental rights of transgender persons -
 - a) 'Dignity' under Article 21 of the Constitution includes diversity in self-expression, which allowed a person to lead a dignified life. It placed one's gender identity within the framework of the fundamental right to dignity under Article 21.⁵
 - b) The right to equality (Article 14 of the Constitution) and freedom of expression (Article 19(1) (a)) is framed in gender-neutral terms ("all persons"). The transgender persons are subject to "extreme discrimination in all spheres of society" which is a violation of their right to equality. Further, the right to express one's gender "through dress, words, action, or behaviour" under the ambit of freedom of expression. Therefore, the right to equality and freedom of expression would extend to transgender persons.

² "Cabinet approves transgender bill", *The BusinessLine*, July 10, 2019, <https://www.thehindubusinessline.com/news/national/cabinet-approves-transgender-bill/article28355950.ece>, Accessed 7 October 2020

³ Anuvinda P and Tiruchi Siva, "A Story of Two Bills", *The Indian Express*, October 28, 2016, <https://indianexpress.com/article/opinion/columns/transgenders-persons-bill-rajya-sabha-private-member-bill-3195872/> accessed 15 October 2020

⁴ AIR 2014 SC 1863.

⁵ *Ibid.*

- c) Articles 15 and 16, discrimination on the ground of “sex” is explicitly prohibited. “Sex” does not only refer to biological attributes (such as chromosomes, genitalia and secondary sexual characteristics) but also includes “gender” (based on one’s self-perception). Hence, the Court held that discrimination on the ground of “sex” included discrimination on the basis of gender identity.⁶
3. The Court held that public awareness programmes are required to tackle stigma against the transgender community. It also directed the Central and State Governments to take several steps to implement the following measures for the advancement of the transgender community –
- a) Making provisions for legal recognition of “third gender” in all documents.
- b) Recognising third gender persons as a “socially and educationally backward class of citizens”, entitled to reservations in educational institutions and public employment.
- c) Taking steps to frame social welfare schemes for the community.
4. The Court directed the Ministry of Social Justice and Empowerment to constitute an “Expert Committee on Issues Relating to Transgender” to conduct a detailed research to understand the needs of the trans people.⁷

In conformity of Supreme Court direction, the Ministry of Social Justice and Empowerment constituted an Expert Committee in August 2013⁸ which published its report in January, 2014.⁹ Subsequently, the government tabled the Transgender Persons (Protection of Rights) Bill, 2016 (Bill No. 210 of 2016), on 2 August 2016.¹⁰ The 2016 bill had various provisions which were reportedly regressive and inferior to those in the 2014 private bill. It had also defied many recommendations of the Expert Committee.¹¹ The Bill caused fury among the

⁶ “Comments on The Transgender Persons (Protection of Rights), Bill, 2016”, *Vidhi Centre For Legal Policy*, November, 2016, available at <<https://vartagensex.org/wp-content/uploads/2019/10/1479804443053-rights-of-tg-persons-bill-stdng-com-sbmsns-vidhi-2016.pdf>> accessed 25 October 2020

⁷ *Ibid.*

⁸ Radheshyam Jadhav, “Steps to empower transgender community”, *Times of India*, August 7, 2014, available at <<https://timesofindia.indiatimes.com/city/pune/Steps-to-empower-transgender-community/articleshow/39831957.cms>> accessed 15 November 2020

⁹ Aarti Dhar. “Expert panel wants transgender declared third gender”, *The Hindu*, March 14, 2014, available at <<https://www.thehindu.com/news/national/expert-panel-wants-transgender-declared-third-gender/article5781874.ece>> accessed 12 November 2020

¹⁰ Ministry of Social Justice and Welfare, “Transgender Persons (Protection of Rights) Bill, 2016”, available at <<https://www.prsindia.org/billtrack/transgender-persons-protection-rights-bill-2016>> accessed 16 November 2020

¹¹ “Report of Expert Committee on the Issues relating to Transgender Persons”, *Ministry of Social Justice and Welfare*, available at <https://www.prsindia.org/sites/default/files/bill_files/Expert_Committee_Report_%282014%29_1.pdf>

transgender community, lawyers and activists in India.¹² As a result of the protest, the Bill was sent to the Standing Committee in September, 2016. The Standing Committee submitted its report in July, 2017.¹³ A newer version of the Bill¹⁴ (the third one in this process) was again tabled in Lok Sabha and subsequently passed in December 2018 ignoring many of the recommendations made by the Standing Committee.¹⁵ With indignant protest and criticism the Bill was passed in Parliament on 26 November 2019 and has been in effect since 10 January 2020.¹⁶

The Act suffers with many loopholes. It fails to stand up with the expectation. The Act neglects various recommendations of the Standing Committee and Expert Committee. It has also defied the judgments of the *National Legal Services Authority v. Union of India*,¹⁷ *Justice K. S. Puttaswamy (Retd.) & Anr. v. Union of India & Ors.*¹⁸ and *Navtej Singh Johar v. Union of India*.¹⁹ The Act was severely criticised for being poorly researched.²⁰ The major area of concerns, of the Act, are as follows -

II. LOOSELY USED TERMINOLOGIES OF TRANSGENDER AND INTERSEX PERSONS

The Act remain ignorant to the variation exists within transgender persons. The Bill defines transgenders in two parts. In section 2(k), Part I declares that “transgender person” means a person whose gender does not align with such person’s biological gender. It comprises transman and transwoman. Part II brings, persons with intersex variations, within the ambit of the definition. The inclusion of intersex people within the ambit of “transgender persons” is problematic as an intersexual person may or may not identify as a transgender.²¹ The research

accessed 22 November 2020

¹² “Activists oppose Bill on transgender rights”, *The Hindu*, December 16, 2015, available at <<https://www.thehindu.com/news/cities/bangalore/activists-oppose-bill-on-transgender-rights/article7993938.ece>> accessed 18 November 2020

¹³ “Standing Committee on Social Justice and Empowerment”, 43rd Report, *Ministry of Social Justice and Empowerment*, available at <http://164.100.47.193/lsscommittee/Social%20Justice%20&%20Empowerment/16_Social_Justice_And_Empowerment_43.pdf> accessed 20 November 2020

¹⁴ “Transgender Persons (Protection of Rights) Act, 2019”, *Ministry of Law and Justice*, available at <<http://socialjustice.nic.in/writereaddata/UploadFile/TG%20bill%20gazette.pdf>>

¹⁵ Shalini Nair, “Lok Sabha passes Transgender Persons Bill with 27 changes”, *The Indian Express*, December 10, 2018, available at <<https://indianexpress.com/article/india/parliament-winter-session-lok-sabha-passes-transgender-bill-5497844/>> accessed 02 November 2020

¹⁶ Devika, “The Transgender Persons (Protection of Rights) Act, 2019”, *The SCC Online Blog*, January 10, 2020, available at <<https://www.sconline.com/blog/post/2020/01/10/the-transgender-persons-protection-of-rights-act-2019-comes-into-force/>> accessed 25 November 2020

¹⁷ *Supra* note 3.

¹⁸ (2017) 10 SCC 1.

¹⁹ (2018) 7 SCC 192.

²⁰ Sanjana Ghosh, “Transgender activists sore over passing the bill in RS”, *The Hindu*, November 27, 2019, available at <<https://www.thehindu.com/news/cities/Madurai/transgender-activists-sore-over-passing-of-bill-in-rs-madurai/article30099378.ece>> accessed December 08 2020

²¹ “Intersex”, LGBTQ Centre, University of North Carolina, available at

shows that unique needs of intersex people are made invisible or secondary when they become just another subcategory of "transgender."²²

The Standing Committee²³ report elucidates that it found that the 2016 Bill does not *per se* include, address and protect the interest of intersex persons as concerns of transgender persons and intersex persons continue to be different. Therefore, it was in favour of renaming the Bill as "The Transgender and Intersex Persons (Protection of Rights) Bill, 2016. But Ministry was replied that re-wording the title of the Bill would not serve any purpose as the Bill mentions "Transgender" is an umbrella term."²⁴

III. ISSUANCE OF CERTIFICATE

Medicalization of gender identity is vital for legal recognition. The mandatory requirement of psychological or medical certification rests on the notion that trans individuals suffer from psychological disorders and require medical intervention. 2016 Bill was condemned as it proposed to established "screening committees" to identify the trans people.²⁵ The 2019 Act does not make provisions for "screening committees" but it mandates for the trans people to apply for the issuance of the certificate to the District Magistrate.²⁶ The District Magistrate will do so, "*after following such procedure and in such form and manner, within such time, as may be prescribed indicating the gender.*"²⁷ The "procedure" is not described here. But it is not hard to presume that District Magistrate will rely on medical professional while granting the certificate. Moreover, the Act also states that if a transgender person undergoes a sex-change surgery then such a person will have to apply for a "revised certificate" to the District Magistrate. in order to get the revised certificate, the applicant needs to obtain a certificate attesting to the surgery from the Medical Superintendent or Chief Medical Officer of the institution where the surgery took place. The District Magistrate is to issue a revised certificate only after being satisfied with the correctness of the certificate issued by the Chief Medical Officer.²⁸ Hence, the Act does provide for an "implied and indirect" screening procedure for granting the certificate to the trans people.

<<https://lgbtq.unc.edu/resources/exploring-identities/intersex>> accessed December 03 2020

²² "Understanding Intersex and Transgender Communities", InterAct Advocates for Intersex Youth, available at <<https://interactadvocates.org/wp-content/uploads/2016/05/LavLaw-Trans-and-Intersex-Fact-Sheet.pdf>> accessed December 10 2020

²³ *Supra* note 12.

²⁴ *Ibid.*

²⁵ The Transgender Persons (Protection of Rights) Bill, 2016, available at <<https://www.prsindia.org/uploads/media/Transgender/Transgender%20Persons%20Bill,%202016.pdf>> accessed December 05 2020

²⁶ *Supra* note 13, Section 5.

²⁷ *Ibid.*, Section 6 (1).

²⁸ *Ibid.*, Section 7.

On the other hand, the recent transgender jurisprudence is thriving to remove medical and administrative barriers from legally identifying trans people. A dozen countries have taken steps to this process as a mark towards trans equality. Argentina,²⁹ Malta,³⁰ Colombia³¹ and Uruguay are among the countries who recognise a person's right to identify as their "internal and individual experience of gender" without government interference. Among European countries, Denmark³² is the first to allow self-determined gender recognition among adults without medical intervention, followed by Sweden,³³ Belgium,³⁴ Ireland,³⁵ Norway.³⁶

IV. RESERVATION IN EDUCATION INSTITUTIONS

In the *NALSA* judgment, Supreme Court asks the Centre and the State Governments to take steps to treat trans people as "socially and educationally backward classes" of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments. The Expert Committee also recommended that government should provide scholarship/ entitlement, fee-waiver, free textbooks, free hostel other facilities.³⁷ But the Act only mentions that the educational institutions shall provide inclusive education and opportunities for sports, recreation and leisure activities to transgender persons without discrimination.³⁸ It mentions "inclusive education system"³⁹ but it remains completely silent on how to accommodate trans children in the education institutes.

V. CAREER & OTHER OPPORTUNITIES

The Expert Committee in its report suggested to establish helpline for career guidance, promotion and online placement support.⁴⁰ The Standing Committee provided the similar suggestion in its report. It endorsed to make a separate provision to issue directions to

²⁹ Gender Equality Law, 2012 (Argentina), available at <<https://tgeu.org/argentina-gender-identity-law/>>

³⁰ Gender Identity, Gender Expression and Sex Characteristics Act, 2015 (Malta), available at <https://tgeu.org/wp-content/uploads/2014/02/Malta_GIGESC_2015.pdf> accessed November 26 2020

³¹ Brianna Lee, "Colombia Allows Transgender Community to Change Sex on ID Without Physical Exams", *International Business Times*, June 8, 2015, available at <<https://www.ibtimes.com/colombia-allows-transgender-community-change-sex-ids-without-physical-exams-1957412>> accessed November 23 2020

³² Danish Trans Law (Amendment) Act, 2014, available at <<https://tgeu.org/danish-trans-law-amendments-2014-l-182-motion-to-amend-the-act-on-the-danish-civil-registration-system/>> accessed December 01 2020

³³ Sweden Gender Recognition Act (Reformed 2012), available at <<https://tgeu.org/sweden-gender-recognition-act-reformed-2012/>> accessed November 27 2020

³⁴ Legal gender Recognition Law 2017 (Belgium), available at <<https://tgeu.org/belgium-new-gender-recognition-law-with-obstacles/>> accessed November 28 2020

³⁵ Gender Recognition Law 2015 (Ireland), available at <<https://tgeu.org/ireland-gender-recognition-act-2015/>> accessed November 30 2020

³⁶ Norway Gender Recognition Act 2018, available at <<https://www.tandfonline.com/doi/full/10.1080/008989575.2019.1542822>> accessed November 29 2020

³⁷ *Supra* note 10.

³⁸ *Supra* note 13, Section 13.

³⁹ *Ibid.*, Section 2(d).

⁴⁰ *Supra* note 10.

undertake specific measures such as counselling, career and guidance.⁴¹ Unfortunately the Act remains silent on these matters. It only mentions the “non-discriminatory provision” in recruitment, promotion and other employment related issues. But it does not impose any active responsibilities on the government to provide the trans people employment opportunities.

VI. ANTI-RAGGING CELL IN EDUCATIONAL INSTITUTES

The Standing Committee in its report mentioned that any notion of 'inclusive education' has to take into account the specific concerns regarding bullying and harassment suffered by the gender non-confirming students. without the fear of bullying, singling out and other forms of harassment and the system of teaching and learning is suitably adapted to meet the learning needs of such students. Though the Act mandates that every establishment shall designate a person to be a complaint officer⁴² but it ignores the Committee’s suggestion that the duties and responsibilities of the Complaint Officer be specified and the types of complaints he can look into and remedies offer, be also mentioned on the lines of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.⁴³

Crime & Punishment

The biggest drawback of the Act is that it reduces the term of punishment rape and assault of the members of the transgender community, as compare to IPC. There is a vast disparity between the punishment that is attracted upon the sexual assault of a transgender as opposed to a cisgender person. The Act provides that any person who is guilty of inducing or causing the sexual abuse of a transgender shall be punished with “imprisonment for a term which shall not be less than six months but which may extend to two years along with a fine”.⁴⁴ However, sexual offences upon cis-women attract stricter penalties which may even extend to life imprisonment.⁴⁵ The differential treatment between binary and non-binary people is the violation of Article 14 of the Constitution.⁴⁶

Trans-children well-being

The Standing Committee remained very sensitive to look after the needs of the trans children. The Committee in its report articulated the abuse and harassment of the trans children in the

⁴¹ *Supra* note 12.

⁴² *Supra* note 13, Section 11.

⁴³ *Supra* note 12.

⁴⁴ *Supra* note 13, Section 18.

⁴⁵ Sections 354, 354A, 354B, 376 of the Indian Penal Code, 1860.

⁴⁶ *Supra* note 18; *State of West Bengal v. Anwar Ali Sarkar* AIR 1952 SC 75.

hands of their own family members. It stated that the family that is the seat of violence, abuse and a denial of identity for young trans-person. For transgender children and minors, the family and the natal home become places where the “right to determine and express their genders and to express that gender” are severely curtailed. They, often, force to leave their homes to escape from the domestic abuse and have nowhere to go. In such circumstances, such transgender children, land up to the Hijra families, the 'Jamaats' or 'dormitories' as the places of refuge. The 'Hijra elders become their adoptive parents and the 'Hijra community' their family and friends.

The 2019 Act completely ignores this critical aspect of transgender persons' lives. It disregards the observations of the Standing Committee. It provides that transgender children cannot live separately from their family except by an order of the court.⁴⁷ Thus, a transgender child cannot on his own choose to reside with a supportive community even when the family is abusive. The Standing Committee also proposed to establish an alternative family structure. It directed the State Governments to set up specific rehabilitation centres meant only for transgender persons, which would cater to their specific needs. But it remains missing from the Act.

Health Care Scheme

The Act mostly accommodates the health-related recommendations of the Expert Committee and Standing Committee.⁴⁸ But it limits counselling only to Sex Reassignment Surgery, and hormonal therapy.⁴⁹ There is no provision for psychological counselling or counselling related to mental health. It also does not mention insurance coverage which the Standing Committee suggested.

Welfare Schemes

The Expert Committee recommended a list of welfare measures to fulfil the purpose of the Act. These were as follows –

1. An Umbrella Scheme for transgender persons may be formulated for empowerment of this community.
2. A Crisis Counselling Services on the model of Rape and Crisis Intervention Centres, to cope up with trauma and violence.

⁴⁷ *Supra* note 13, Section 12.

⁴⁸ *Supra* note 13, Section 15.

⁴⁹ *Ibid.*, Section 15(3)

3. Ensure housing and rehabilitation through the housing assistance schemes with the help Ministry of Rural Development and Ministry of Housing and Urban Poverty Alleviation.
4. Widening the mandate of one of the Corporations for providing the economic support to transgender community.
5. Establishment of effective linkages with vocational training centres run by private and Government agencies for providing vocational training to this community.
6. A National Council for Transgender persons may be considered on similar lines as that of the National Councils for Senior Citizens.

But the Act has severally disappointed. Under Chapter IV, titled as “Welfare Measures by Government” it only mentions that the government should initiate welfare schemes and measures to include the transgender persons in the mainstream of the society.⁵⁰ Except the provision for setting up the National Council for Transgender Persons, the Act neither provides any guideline on what are the measures should be adopted by the government, nor it alludes the areas where the welfare activities should be carried on. Moreover, the Act diverged from the *NALSA* judgement by removing the clauses for the setting up of National and State Transgender Welfare Commissions and replaced it by the National Council for Transgender Persons. The Council is apprehended to be a massive bureaucratic structure without enforcement abilities.⁵¹

School Curriculum

It is necessary to include contents on trans gender in the adolescent school curriculum. It is also essential to inform the students and school staffs by following various methods.

Public Awareness

The Centre and State Governments should adopt an “inclusive approach” towards the trans genders so that they feel that they are also part and parcel of the social life and be not treated as untouchables. For this purpose, the Committees mentioned several processes to sensitize people on transgender issue, such as –

1. to utilize the existing forums like the Anganwadi Centres and Self-Help Groups and involved them to providing information the parents of gender non-conforming youths and public, in general.

⁵⁰ *Ibid.*, Section 8.

⁵¹ *Supra* note 2.

2. to adopt measures for generating awareness at various levels such as schools/colleges, Government and private offices, police stations, etc. regarding concerns of transgender persons.

But the Act does not contain any such provision.

VII. CONCLUSION

The law alone cannot ensure trans-equality. The government has to take some measure to include trans people in the mainstream community. Canada has provided \$ 6.7 million to create the Centre for Gender, Diversity and Inclusion Statistics⁵² to identify the issues faces by the trans community. For this purpose, it has decided to add a third gender option to its census in 2021 which will help it to serve better the needs of the trans community.⁵³ In India, it is the high time that the government needs to run radical visibility programme to include help the trans and nonbinary populations rise above the pain caused by centuries of systematic discrimination.

The sole purpose of a social welfare legislation should be to protect the rights of the marginalised. In instances where discourse by the marginalised is not allowed, purely because of a very real threat to their lives and systemic obstructions in place to not just dissuade, but to disallow members from the community from occupying and participating in political spaces, it is incumbent then on the state to actively engage with such communities to create such a discourse. But, at the same time, we must remember that law cannot bring changes unless the society is ready to accept trans people as part of the mainstream community.

⁵² “Government of Canada launches Centre for Gender, Diversity and Inclusion Statistics”, *Cision Canada*, May 31, 2019, available at <<https://www.newswire.ca/news-releases/government-of-canada-launches-centre-for-gender-diversity-and-inclusion-statistics-822009003.html>> accessed December 10 2020

⁵³ John Garry, “What we can learn from countries with progressive transgender rights”, *Matador Network*, May 7, 2020, available at <<https://matadornetwork.com/read/countries-progressive-transgender-rights/>> accessed December 07 2020