

A critique of Transgender Persons (Protection of Rights) Bill, 2019

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.

History has, time and again, betrayed the transgender community. Erased our stories, stories of the state, majoritarian forces killing, raping and stripping us naked. Our identities and bodies mutilated to such an extent, that the word violation would be short changing the narrative. The unfairness with which history has dealt its hand would only be corrected through an active effort of the state, to recreate a discourse, the primary requirement being consultations with the community.

2014 was a watershed moment in the recognition of the community's identities. Creation of a draft of rights and a clear dismantling of the historical structures built to purely oppress and invisibilise identities, rights and as an extension, persons from entire societies. The NALSA judgement was a vindication of a centuries old movement forcing the state to recognise and uphold gender identities. The Transgender Rights Bill 2014, introduced by **Rachana Mudraboyina a Trans Activist, one of the founding members of Telangana Hijra Intersex Transgender Samiti and founder of Transvision. Sammera Jagirdar, Assistant Professor, Department of Critical Care Medicine, Mahatma Gandhi Medical College and Research Institute. Philip C. Philip, a queer activist working with Human Rights Law Network.**

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a private member Tiruchi Siva, and passed by the Rajya Sabha in 2015 gave a sense of hope that the Supreme Court verdict would be followed by legislative action.

But what followed was a crystal clear retraction of the claims made and assurances given. A series of bills beginning with the 2016 bill followed by the one in 2018 were but a death knell on the culmination of hopes of the community. We resisted, through every means available. Social media pages of transpersons saw an outpouring of personal struggles. The trans community took over public spaces by pouring out in thousands. A clearer voice opposing the law about to be foisted on the community couldn't be imagined. Nevertheless the 2018 version of the bill sailed through the Lok Sabha. The symptoms of such action were many, surveys about the community were absent, consultations were lacking, and any debate in the Lok Sabha was completely non-existent. The underlying cause though, could be pinned down to the complete apathy of the state to any of the concerns the community has raised; through multiple press releases, conferences and representation letters, issues delved into through the protests on the streets and voices of throats that had dried up screaming from rooftops.

There was a collective sigh of relief that emanated from the community when the bill lapsed. It was a brief moment of peace. The community knew it would be short lived. Since then, State sanctioned attacks against the community gained a renewed momentum. Police

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attacked transpersons, detained and arrested them unlawfully, stripped and paraded them and violations against transpersons were overlooked with a regularity that seemed to portray a complete lack of legal protections for the community.

The community didn't want to believe that the breather would be so short lived. On the 10th of July 2019 when the Cabinet passed the Transgender (Protection of Rights) Bill 2019, it was evident that the state was employing the same strategy, it employed with the earlier bills. As an added element the bill was not made available to the affected communities and the public at large, till the morning it was tabled in the Lok sabha. The community tried its best, organised press conferences across the country. But the community's best was still the state holding the whole community at gunpoint leaving the community as sitting ducks, knowing not what to expect.

The Bill has come to Parliament in this context of apathy, neglect and secrecy. A series of betrayal of assurances and a convolution of a law that would do nothing for the trans community and would rather snatch away the bare minimum that existed.

The 2019 bill fails the community on various accounts, specifically:

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- (a) Several definitions that the bill prescribes are rather redundant with regard to the issues of the community. In particular the definition of “family”. Where the present act borrows its definition blindly from earlier laws in place, without any application of mind with regard to the position or the nuances associated with the transgender community. Such a banal definition of ‘family’ is after multiple clarifications made by members of the community with regard to the need to expand the meaning of ‘family’. With most transpersons not living with their biological family because of the discrimination and violence they face from their biological family and their immediate community. Therefore a need to include chosen family within the ambit and definition of ‘family’. Since it is through the chosen family that most transpersons get support and are able to find their kith and kin.
- (b) Though there is a separate definition for ‘intersex persons’, it seems to have been done to purely appease international groups appealing for a separate definition for intersex persons. Since in the very next line it has been conflated along with the definition for ‘transgender person’. This is not just a horrifying misrepresentation but also an invisibilisation of intersex persons and their concerns. This is of extreme importance in the aspect of health as there is a range of distinct issues that intersex persons face. Ranging from forced ‘corrective’ operations on intersex infants to continuing health issues which the medical system is both unequipped to handle and is inaccessible to a large number of intersex persons.

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(c) The Chapter that prohibits discrimination does cover discrimination against transgender persons on range of fronts. It is not even a toothless tiger, it is just a number of teeth scattered about with no power, reason or authority to take action on their own. The chapter prohibiting discrimination is plagued with three major concerns:

- (i) Lack of an enforcing authority
- (ii) Lack of remedial measures, be it in terms of compensation or any other means, for the survivor
- (iii) Lack of punitive measures to be taken against the violator

(d) The process of recognition of identity of transpersons is affected by the same issues with the earlier bill. Though the District Screening committee has been dismantled, recognition of a transgender person's identity is then to be decided by the District Magistrate, who will then issue the certificate based on a certain set of documents that would be prescribed. The elemental question that arises is then as to what are the documents that would allow transgender persons to be recognised with regard to their identity as a transgender person. These follow on with another set of issues that muddle how gender identity is to be decided:

- (i) If a person is to then change their preferred gender to male or female, the bill

harks back to the archaic understanding, enforcing the need for a Sex

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Reassignment Surgery (SRS) in order to change their gender identity to their preferred gender of either male or female. Moreover the validity of the SRS would be decided by the District Magistrate.

(ii) Post the change in gender identity, the person is then allowed to only change their first name, which raises the question as to the sacrosanct position that the last name holds such that under no circumstance then can the person be aided in changing their last name. The sole reason for such an obstruction of changing one's last name, is the impervious nature of caste in Indian society. Thereby preventing one from changing one's last name is the primary manner through which caste system and the hierarchy retains its ossified state.

(e) 'Obligations by the appropriate government' suffers from the same issues as the chapter on prevention of discrimination. The lack of any kind of punitive action against the state, or funds apportioned for such schemes, significantly raises questions on the efficacy of such provisions.

(f) The clause of 'rescue, protection and rehabilitation' has to read in context of the experience of transpersons in rescue/shelter homes. The amount of abuse, of various forms - mental, physical, emotional and sexual, faced by transpersons has had the community being extremely apprehensive about the manner in which shelter homes are established and run. Secondly, from earlier experiences shelter homes have

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displayed an evident insensitivity to concerns of transgender persons. For years we have stayed and lived independently with support from the community, amidst the discrimination and violence. We don't need an unnecessary policing of our existence by the state. Do not restrict our lives, we need protection mechanisms from those who bent on violating our identities, bodies and lives.

(g) The bill stipulates a complaint officer designated to deal with complaints under this law. The process of having a complaint officer is completely unclear, it could be through nomination, election or any other process, but as of now, the process of having the complaint officer is non-existent. The procedure finalized will establish the independence and the efficacy of the complaint officer and its absence, the clause is a cause for concern.

(h) The restriction of movement with regard to transpersons in separating from their parents and allowing a person to move out only through an order of 'a competent court'. Dividing the community on class lines with only those being able to access court even having a chance at separating from their family. Moving out of the family has been the need of a large number of transpersons, primarily due to the discrimination and violence they would face from their immediate family and the immediate surrounding community. The freedom to move and have a chosen family has been effectively restricted and dismantled through this clause. Furthermore, the only alternative made available to the community other than the family is a

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rehabilitation centre. The errors and fears of which have been reiterated multiple times.

- (i) With regard to health though there are certain issues that are covered it is pertinent to note that there isn't a single organised protocol guiding the medical community on healthcare for the transgender community. Without such a concerted effort to build health systems working for transgender persons. An array of individual clauses and provisions becomes a mere juggling of health rights that play with our lives. Other than the need for a separate protocol concerning the health of the transgender person, there also needs to be a subsequent inclusion in each of the health care policies that would be drafted further on and also applied retrospectively. For a greater implementation throughout the indian health system, there needs to be an addition to Primary Health Centres, which would be an implementing agency for all the healthcare policies at the grass root level. Rights of a Transperson with regard to their fertility is critical, and inclusion in both artificial fertilisation and surrogacy. These areas still follow critically heteronormative understandings of the ability of a person to be a parent. Furthermore with regard to mental health issues faced by the trans community, by virtue of discrimination and ostracization faced by transpersons, other than the involvement of mental health professionals in verifying gender dysphoria there is no further support that is provided. Whereas there needs to be continued support for mental health to be provided to a transperson.

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(j) The National Council for Transgender Persons lacks any kind of independence to carry out functions. The National Council which is composed of at least 30 persons, has a mere representation of 5 persons from the transgender community. Further the persons would be nominated by the Central Government, compromising significantly the autonomy of the persons on board. Every member who is not an employee of the central government is to be appointed by the Central Government, placing significant questions on the independence of The National Council for Transgender Persons, its separation from the government and therefore its ability to then question the government on various concerns.

(k) The offences and penalties enumerated though have seen changes from previous drafts, but similar sections have been employed through a mere contortion of the law. There are still issues that come across glaring errors:

(i) Though the Bill has removed provisions criminalising begging and sex-work, it has introduced a new section that criminalizes ‘compelling or enticing’ a transgender person to indulge in forced labour. The need for the section should be under scrutiny, for when there is a pre-existing Bonded Labour System (Abolition) Act which criminalises those employing bonded labour, and is applied across persons with no discrimination on gender, the need for this provision is redundant. The only reason that can be foreseen for the presence of this section is to criminalise begging and sex work. The twisting

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of words doesn't absolve the law makers of the repercussions it would translate in during implementation.

- (ii) The section criminalizing violence against transgender persons, has been reproduced without any changes from previous drafts. In fact any kind of violence, as much as that which would endanger a transperson's life is punished by a term of a maximum of 2 years. Sexual abuse rampant against transpersons is included within the same section. Such acts which ought to be criminalized over and above the existing sections in the IPC, are now a watered down version of what is present in existing criminal law, which punishes a person with a minimum of 7 years in cases of rape. This section thus is a travesty to the rights of bodily integrity of transpersons.

The stark reality that transpersons are facing post-NALSA, is a continued dialogue with central and state governments to implement the judgement. The attempts to have an open dialogue have been met with brutal resistance and a continued onslaught of violations wrecked on us by law enforcement agencies and law drafters.

In a conflict between the court judgement and legislations, such as this, it is the legislation that will take precedence. Till its constitutionality is challenged in courts and such a challenge is accepted and the absurd law is struck down. It is not a novel concern that the **Rachana Mudraboyina a Trans Activist, one of the founding members of Telangana Hijra Intersex Transgender Samiti and founder of Transvision. Sammera Jagirdar, Assistant Professor, Department of Critical Care Medicine, Mahatma Gandhi Medical College and Research Institute. Philip C. Philip, a queer activist working with Human Rights Law Network.**

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law has been opposed to us, and has continued to ignore our existence. What is surprising in this case is the law being used as an effective mechanism to validate our existence, but place us at a plane lower than that which the rest of the society rests on, thus legitimizing the violence that we are put through. We will continue to oppose this. Our throats cracked ages ago, hands bled and bodies tired. None of it has put a halt to our demand for what is rightfully ours. Through the fight we spent moments mourning our losses, these weren't losses in courts or in legislation, these were losses of our kith and kin. These were losses when our partners in the fight were stripped naked and paraded, their bodies examined, their bodies raped and violated, bodies stared at till they were bloodied in shame, minds torn apart and pushed to them taking their own lives. The absurdity of the whole fight has been that as much as we would have wanted to, we didn't have time to stop and mourn these losses. Each incursion against an individual was then followed by structural violence to massacre the movement. Now it isn't just an apology that we want, for an apology will not wash away the incursions carried out against us. We have spoken in voices clear, through throats that bled with our demands. It seems now as this was to no avail.

All that is for certain is that we will continue to exist and we will resist any subjugation.

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