

Training on Transgender Persons (Protection of Rights) Rules, 2020

STATE LEVEL TRAINING - GUJARAT

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Introduction

The Government had been pushing different versions of the Transgender Persons (Protection of Rights) Act, 2019 since the year 2016. Each time the Bill would be presented in the parliament protests opposing the bill would be raised across the country. The Bill was finally passed by the Rajya Sabha with bare minimum discussion on the 26th of November 2019 and on the 5th of December 2019, it received the assent of the President and the Transgender Persons (Protection of Rights) Act, 2019 came into force from the 5th of December 2019.

Since then there have been three constitutional challenges to the Transgender Persons (Protection of Rights) Act, 2019 that have been filed in the Supreme Court of India and another constitutional challenge filed in the Karnataka High Court. For each of the cases the Supreme Court issued notices to the government, but gauging the reaction from the State it hardly seems that the cases have made any difference to the state. This was evident from the response of the government to issues faced by transgender persons across the country on issues they were facing during the pandemic.

As soon as the pandemic hit all the sources of income for transgender persons dried up, as all high contact jobs such as begging, sex work, working in salons all became jobs that were restricted. During this period when various NGOs, CSOs and individuals were scrambling to procure funds in order to provide some sort

of financial assistance for working class transgender persons across the country. A number of likeminded individuals, organizations working for rights of transgender persons and collectives wrote to the government requesting for assistance of some sort for transgender persons. Since till April the central government and the state government had taken a complete hands off approach and left transgender persons in the country fending for their own lives, many who were facing abuse at their household, many who ended up killing themselves and many who were abused and harassed in public with no way to approach the gates of justice.

At such an instance the government released for forms to be filled up for financial assistance of Rs 4,500 to every transgender person, which would be done through a direct cash transfer to their bank accounts. Due the lack of access to formal financial services and lack of bank accounts this hardly reached a total of 4000 transgender persons, which barely covered 1% of the total transgender population in the country (According to the 2011 Census the total number of transgender persons in the country is about 4.98 Lakh transgender persons). Though there were multiple representations that were sent again by various organizations and collectives to both central and state governments, other than Kerala none of the state governments took any pro-active steps to alleviate issues that transgender persons faced in the country.

In such a dire state the Ministry of Social Justice and Empowerment released the draft rules of the Transgender Persons (Protection of Rights) Act, 2019 in May and opened it for suggestions till the 30th of June. This during a time when there are three constitutional challenges to the Act in the Supreme Court and notices have been issued in all of them. The rules were framed without any consultation with members from the transgender community and during a time when physical meetings would be impossible. Furthermore since very few transgender persons have access to internet online meetings and consultations would be hardly effective. Furthermore the Act itself had very few translations in languages other than English and Hindi, and the other translations were done by various collectives that pooled resources. The rules itself were extremely discriminatory and since it followed from an unconstitutional act was bound to be unconstitutional. Further hurting the lives of transgender persons and making their lives even more difficult.

On the 13th of July 2020 the Ministry of Social Justice and Empowerment through the gazette published the draft rules and opened it for comments and suggestions that would be accepted till the 12th of August 2020. This process was completed without any consultation from members of the community or transparency with regard to the suggestions either. The Transgender Persons (Protection of Rights) Rules, 2020 was published it in the gazette on the 29th September 2019. A comparison of the two reveal that there are certain

suggestions that were accepted by the government, some which were critical to providing much needed relief to transgender persons, some of which were hollow acts of performance which would make no difference and then there were a number of others critical suggestions that were completely glossed over and ignored.

Representation of the terms and identification

One of the major issues is that in the Hindi version of the rules, they have continued to use the word “उभयलिंगी”. This is a term that is considered derogatory and a complete misrepresentation of the word “transgender” in Hindi.

Recognition of change in name and gender

One of the major issues with the Transgender Persons (Protection of Rights) Rules, 2020 has been that the hurdles that are there with legally changing the name and gender of a transgender person. These are issues that had been identified in the Act, and have continued into the Rules as well. It spends a considerable amount of time and space on how to verify the gender of a transgender person. The rules have ignored a number of major issues that were to be addressed in the rules, as per the claims made by the Minister of Social Justice and Empowerment during the Rajya Sabha debate. Issues of reservation, assistance to undergo Gender Affirmation Surgery, hormone therapy, psycho-

social counselling, reservation in public education and employment, social welfare schemes, protection from discrimination. None of these issues have been addressed in the rules published.

Fill up Form 1 which is attached along with the copy of the rules, on page number 19. There were a number of issues with the form that was released with the earlier version of the Rules but a number of them have been changed now. There are still some portions that are quite unnecessary such as one's Annual Income, which holds no relevance a decision to change one's name and gender.

Some of the changes made are hollow and barely do lip service, wherein the portion to enter the chosen gender is a blank, but when you get the certificate that is given after the form is accepted clearly has only "Transgender" written in it. So it is irrelevant that one would enter one's chosen gender, at the end you would only get transgender written in one's certificate.

One of the clauses that have changed which has had a positive impact is that the insistence of having resided in a particular district for at least a year to apply for a name and gender change with the district magistrate has now been changed. Now a transgender person can apply for a name and gender change in the district they are residing in presently without any insistence of being staying there for a particular minimum period of time. For this purpose the person applying for a name and gender change would need to fill in an affidavit on a stamp paper of Rs. 10 and get it notarized.

With the completed Form 1 and the affidavit an application is then made to the District Magistrate to legally change their name and gender. But at the first stage this can be done only to change the gender that is already in your legal documents to “Transgender”.

To change the name and gender to a binary that is different from the gender on your legal documents, one would first have to apply for a change in gender to “Transgender” obtain the transgender certificate. After which an application to the District Magistrate needs to be made again to change the gender marker from “Transgender” to “male” or “female”. Therefore to change your gender marker to a binary is a two stage process.

There is an additional portion in Form 1 that needs to be filled for obtaining gender markers which are in the binary, which begins from point number 9. These are questions which ask whether one has gone through a medical procedure for gender affirmation, what is the kind and nature of medical procedure one has undergone, a certificate by the medical superintendent or the Chief Medical Officer of the medical institution where they had got the gender affirmation surgery. So for the second time one files the application with Form 1, the affidavit declaring one’s address and the certificate of having done a medical intervention

In case of a Child

In case the person is a minor or a child, then it would be the parent or the guardian of the person who would be responsible to filling up and submitting the form.

Exception

There is an additional clause that is there which is of particular relevance to the community. Which is Section 3 (3) of the rules:

“Transgender persons who have officially recorded their change in gender, whether as male, female or transgender, prior to the coming into force of the Act shall not be required to submit an application for certificate of identity under these rules:

Provided that such persons shall enjoy all rights and entitlements conferred on transgender persons under the Act”

Therefore if there are people who have changed their name and gender before the commencement of the Act, they can use this clause to change their name and gender on all the remaining documents

Timeline

There are three things the District Magistrate is to do once receipt of the application form and the affidavit. The first is that within 30 days of applying for a name and gender change and submitting the form and the affidavit. The District

Magistrate is to provide the applicant with a Certificate of Identity. Using this certificate of identity the transgender person can change their name and gender in all legal documents. Along with the certificate the District Magistrate is also supposed to provide the applicant with a Transgender Identity Card. The respective authorities where such an application has been made for a change in name and gender would have to provide the applicant with their respective documents with a change in name and gender within a period of 15 days.

Sexual Assault

The only understanding of sexual assault is that which continues from the Act of 6 months to 2 years of punishment. The second realization that is brought in from the rules is that it is the responsibility for sexual violence and abuse against transgender persons is to come under the jurisdiction of the State Government.

Rejection of Application

If the application made is rejected, then the reason for rejection along with the rejection will be provided to you within 30 days by the District Magistrate. Within 60 days one can challenge the rejection. There is a right to appeal, but the appellate authority has not been mentioned within it. In all probability it will be the High Court which will be the appellate authority.

Issues that remain

A critical concern with this is that of continuing protection for a trans man, after they have changed their gender marker. Since when their gender marker was “female” they would be provided with protection under various gender specific laws. There are a number of other welfare schemes aimed at women, in addition there are seats in public employment and public education that reserve seats for women. The question then remains as to whether trans men who would change their gender marker would still be able to obtain the same protection as that which cis women get and continue to avail the benefits of the schemes.

There are a number of other issues that a transman would face. Since for cis-women there are laws that protect them from sexual violence and abuse and once a person who is AFAB (Ascribed Female at Birth) changes their gender marker to male or transgender, in all probability they would then lose the protection provided by law under IPC and be considered only the minimal protection under Transgender Persons (Protection of Rights) Act, 2019.

Though there would be a difficulty if the gender marker has male in it, since there are no laws which protect men from sexual and gender based violence. The only protection that is offered is from Section 377, which would not fall under rape or sexual abuse but fall under an unnatural act of sex.

The very same issues also pertain to trans women who have changed their gender marker, would they get protection that cis women receive under law is a question that is still unanswered clearly here.

Interestingly under Chapter IX the punishment a person would have to face for sexually and physically abusing and assaulting a transgender person, the punishment has to be in the range of 6 months to 2 years. With the maximum punishment a culprit can be given under the Act is 2 years.

Psychiatric Evaluation and Conversion Therapy

A very critical issue that has not been dealt with in the Act and the rules has been the issue of conversion therapy. An issue raised here was by a trans man who wanted to start taking hormones. As and when he did approach the government psychiatric institute, he was asked to bring his family along with him even though he was not a minor.

Furthermore he was told that after a discussion with his parents and family he would be tested on various psychological tests, to ascertain if he could go through the surgery. Furthermore, the psychiatrist had said that he would have to go through Electro Convulsive Therapy (ECT) and only after going through such torture would he finally get a letter from the government psychiatrist that he could undergo surgery.

Physical and Psychological Examination

Within the rules it has been clearly stated that the District Magistrate under no circumstance can do a physical or a psychological examination. Rather there is no examination of any kind that the District Magistrate can do. The only task of the District Magistrate is to look at the veracity of the documents submitted to them.

So any kind of examination done by the District Magistrate is plain illegal.

Welfare Schemes

One of the main issues with the Act and the Rules themselves is that, neither spends a considerable amount of time on welfare schemes for Transgender Persons. There is a section which does indeed look at suggested welfare schemes and rather wide overarching claims, which say that existing policies, laws and acts should be inclusive of concerns of transgender persons, there should be new laws, acts and policies that aim at making laws and society more considerate to issues faced by transgender persons.

Welfare Boards

The establishment of welfare boards has been mentioned in the rules, wherein it has asked for establishment of welfare boards across the country. Though there

is clearly a lack of description of the role of welfare boards, the powers of the welfare boards, the constitution, election and people who are a part of the welfare boards, the timeline in which welfare boards are to be established or even the jurisdiction of the welfare boards. None of these concerns are dealt with in the Act. This is a legitimate concern as Kerala has welfare boards in each District, whereas a number of states have state-wise welfare boards. There needs to be much more clarity with regard to what the consequence on welfare boards that are to be established across the country are to be.

Definitions of discrimination are also kept vague and undefined, furthermore meanings with regard to inclusion in schemes seem to be done out of mere lip service rather than with any intention of greater inclusion or for the welfare of transgender persons.

The nature and kind of Rehabilitation Centers, as mentioned in the Act, which we expected to be done in the rules is also absent. The community at large is completely against the establishment of such “Rehabilitation Centers” particularly in the context of where Transgender Sex Workers have been detained by a number of Anti-Trafficking NGOs in their “Rehabilitation Homes”.

There are infrastructure developments that have been suggested of building separate sero-surveillance surveillance centers, public institutions to have separate washrooms and wards, including hospitals and educational institutions. The rules also specify that transgender persons shouldn't be discriminated against

whether in access to public spaces or in institutions. In addition the state is supposed to carry out awareness campaigns for public at large, personnel heading and part of institutions and government authorities.

Institutions such as schools and colleges are to have gender sensitization programmes for teachers, in hospitals for doctors, the places where we go to work either private or government institutions. Transgender Persons face sexual harassment, verbal harassment and physical harassment. For which government has to establish sensitization programmes.

Educational Institutions

Educational Institutions are to have a committee that is accessible to all transgender persons and students in the educational institution. Furthermore if there are cases of harassment or discrimination the committee has the power to ensure that transgender students don't have to be affected by the presence of those persons who were bullying them, and these are to include teachers as well.

A number of issues with this part of the rules is that there are hardly directives of as to how the committee is to be formed, the members of the committee, the tenure, policies that govern the committee, under what circumstances can the committee can be disbanded, how the proceedings is to conducted.

This is a space that needs to be explore and that needs to be explored much further, since the number of transgender, gender non-binary and gender queer

persons, persons across the spectrum face an extensive amount of violence in college, they face discrimination before entering college and even after entering college. This will be a critical institution to mainstream transgender persons within mainstream education systems. The extremely poor mechanism and the marginal effort that has been put into drafting such a critical piece of legislation makes it evident how poorly the Rules have been drafted.

Lack of enforcement mechanisms or punitive action

There is a complete lack of punitive action that can be taken against people that are discriminating against transgender persons. There is a complete lack of clarity with regard to what the enforcement mechanisms are to be employed against discrimination or the action that is to be taken when a public institution or a public authority discriminates against transgender persons.

Complaint Officer

Every single institution is to have a complaint officer under the rules where transgender persons can file complaints about issues they have with the institution or discrimination that they have faced. Every institution is to have a complaint officer that has been elected within a period of 30 days from the date that rules were notified. The complaint officer then is supposed to do an investigation and prepare a report of the complaint received within 15 days. Within the next 15 days

the complaint officer is to take action. Therefore within 30 days of the complaint filed, the complaint officer of the institution is to prepare a report of the investigation, the discrimination faced by the transgender person and subsequent action is to be taken.

In case the complaint officer is unable to take action with the prescribed time period. Then the head of the institution should take action therein and complete the investigation and take action as soon as possible.

Provisions for non-discrimination

Government is to take steps to prohibit discrimination in government, private organizations and various establishments. Particularly in areas of education, employment, healthcare, public transportation, participation in Public Life (such as participating in festivals, going to a mall, entering public spaces), sports, leisure and recreation and opportunity to hold public or private offices.

Furthermore within a period of two years the government is supposed to formulate a comprehensive policy on measures and procedures necessary to protect transgender transgender persons. The policy that is formulated is to have preventative administrative and police measures to protect vulnerable transgender communities. It is highly odd that this specific rule restricts the ambit of policies to mere preventative measures, the wording is highly unclear and transgender

persons are left wondering as to what are their rights and laws and policies that protect them.

Since mere preventative measures are insufficient to protect us, there have to be punitive mechanisms in place so that action should be taken against those persons who are discriminating against transgender persons.

Redundant sections such as section (4) which says that the appropriate Government will be responsible for the supervision of timely prosecution of individuals charged under Section 18, is something that is obvious and redundant and a complete waste of space.

Transgender Protection Cell

Even though the reading of the law says that every state government is to set up a Transgender Protection Cell. According to the reading of the section it is clear that every district is supposed to have a Transgender Protection Cell, since the Cell is to be under the charge of the District Magistrate and the Director General of Police.

Oddly enough the only role the cell performs is to monitor cases of offences against transgender persons and ensure timely registration, investigation and prosecution of offences against transgender persons.

There is no further description of the Cell that is given in the rules which is also highly problematic. The most concerning of these is that there is no transgender

persons in a Transgender Protection Cell. Furthermore it is people who are working with the state, which has been blatantly trans-phobic over the past years that are a part of Cell.

Similar to the issues of the committee to protect transgender persons they remain with this cell as well. There are no rules that guide the cell, there are no policies on as to how many persons are there on the cell, the period of which people are a part of a cell, rules and guidelines that detail out how long the members are a part of the cell. It is just a single section and one line given to describing what the Transgender Protection Cell is, which is highly inadequate to move ahead with it or have it being implemented on any level.

Action to be taken by places of employment

Every single establishment is to implement all measures to provide transgender persons with a safe working environment and that transgender persons are not discriminated in any sector.

For this very express purpose of providing with a nondiscriminatory space, every establishment should make infrastructural adjustments (this would include gender neutral bathrooms, sanitary napkins, pads, etc should be put in all bathrooms, among a range of other infrastructural adjustments that can be made. The establishment has to ensure that there is no discrimination in recruitment,

transgender persons should be provided with employment benefits, ensure aid during promotion.

Every establishment is to publish an equal opportunities policy for transgender persons. This policy will have all details about the actions taken by the government for protecting rights of transgender persons, the mechanisms that they have built in, details of the complaint officer are to be a part of this equal opportunities policy. This is then to be published on the website of the organization, or in case the organization doesn't have a website, the equal opportunities policy is to be published in all public locations which is easily accessible to persons who are coming to the office.

The elements of the equal opportunity policy of an establishment are to have at least the following details:

1. Infrastructure Facilities, details of unisex toilets
2. Measures for safety and security (by ensuring transportation that would provide them with protection, guards who would be sensitized to gender issues and issues of transgender persons)
3. Amenities in terms of hygiene products (such as sanitary napkins in men's bathrooms, gender neutral bathrooms, availability of pStyles (or other such devices which provide them with the ability to use the urinal standing up), among a number of other facilities)

4. All the rules and regulations that are applicable to employees for safe service conditions. That are to be maintained and expanded to be inclusive of transgender persons as well.
5. The gender identity and other details such as deadname are to be kept confidential if they are taken by the office.
6. Details of complaint officer(s) are to be published within this Equal Opportunities Policy for Transgender Persons.

Grievance Redressal

Government is supposed to set up a mechanism for grievance redressal within one year of the rules coming into place. There are multiple ways that a grievance redressal mechanism is to be set up:

1. A helpline number is to be established where transgender persons can call up and register complaints
2. Outreach centres are to be established so that there are physical safe spaces that enable transgender persons to go to the location and access services from the government and gain protection.

The grievance redressal mechanisms established are to ensure that the rules are followed through, to register complaints that transgender persons have filed, more specifically with regard to the rules to ensure that every establishment has a complaint officer and an Equal Opportunities Policy for Transgender Persons.

The system of grievance redressal that is established has to ensure that the grievances or complaints filed are to be resolved within a period of thirty days from the day the grievance is brought to the helpline. Furthermore the penalties that are described in Section 18 of the Transgender Persons (Protection of Rights) Act, 2019.

Furthermore the government is to put in place a monitoring system for tracking the kind and number of complaints filed, enquire that has been conducted and report prepared, action that has been taken by all the establishments that is under their jurisdiction.

National Council

The National Institute of Social Defence will provide the National Council and assist them in conducting meetings and facilitate discharge of functions of the National Council.

List of suggested welfare schemes that is to be implemented through the rules

1. Access to health

- a. At least 1 government hospital in every State shall be equipped to offer safe and free gender affirming surgery, counseling and hormone replacement therapy to the transgender community, including all Male to Female (MTF) and Female to Male (FTM) procedures.
- b. State medical insurance shall cover procedures of SRS, hormonal therapy, laser therapy, counselling and other health issues of transgender persons at private hospitals
- c. medical insurance/arogyashri cards,
- d. All healthcare facilities should ensure that that there are separate wards for transgender persons

2. Access to education

- a. Scholarship for transgender students
- b. Inclusive and equitable quality education in schools that fosters respect for equality and gender diversity
- c. Protection against ragging in the educational institutions with provisions for grievance redressal

- d. Facilitation of accommodation and schooling for transgender, gender non-conforming and intersex children in residential government schools and universities

3. Access to housing:

- a. Affordable housing
- b. Shelters and community centres for at risk transgender youth that provide nutritious food and counselling.
- c. Access to sanitation facilities and safe drinking water

4. Welfare measures

- a. Universal access to Food security schemes and provision of ration cards,
- b. Pension for aged, disabled or other vulnerable transgender persons
- c. Old age and retirement homes for transgender persons facing housing exclusion
- d. Public transport to have harassment-free zones for transgender persons

5. Economic support

- a. Universal coverage of Life Insurance
- b. Access to banking and financial services including loans
- c. Explicit inclusion of transgender persons in employment guarantee schemes such as Mahatma Gandhi National Rural Employment Guarantee Act (MNREGA) and all social security schemes,

- d. Formation into self help groups for livelihood activities
- e. Provisions of zero-interest and other micro-finance scheme

Documents in which the name and gender is changed if
name and gender change is done through the rules:

- | | |
|---|---|
| 1. Birth certificate | 9. Post Office bank/ Bank Pass |
| 2. Caste/ Tribe certificate | book with photo |
| 3. Any education certificate
issued by a school, board,
college, university or any such
academic institution | 10.Pass port |
| 4. Election Photo Identity Card | 11.Kisan Pass book |
| 5. Aadhaar Card | 12.Marriage certificate |
| 6. Permanent Account Number
(PAN) | 13.Electricity / water/ gas
connection paper |
| 7. Driving Licence | 14.Property papers, |
| 8. BPL ration card | 15.vehicle registration |
| | 16.Service book, employment
papers |
| | 17.Identity card related to bar, |
| | 18.Policy papers |

Question and Answer Session

Q. If I have changed my gender and I am male then will I fall for welfare schemes? There is no clarity on this front within the act or the rules. There are a number of other issues also such that if cis women faced sexual violence and abuse then would be able to file a criminal case under Section 376 of the IPC. Other than that if there is, so criminal law understanding this space of rape and sexual violence against women is a complicated space.

Ans. A number of people are contract workers who have their name changed but not their gender. We are dealing with a similar case in Delhi, but they are not interested in filing a case, but if there are people do tell. We would like to file a clarification for the same. Wherein the Social Justice and Empowerment Ministry would have to clarify.

So therefore this can go either way, if a transman has applied for male gender markers then they might be refused the protection and welfare schemes offered to women. Therefore there needs to be a clarification from court. Therefore if there are people willing to file a case we can definitely go ahead with the case. Especially people whoa are in police would face difficulties, the second problem is that they are contract workers, the third issue is that the name has been changed through an affidavit, newspaper ad and government gazette but they didn't change the gender. They want a collector's certificate to change gender.

In a lot of cases newspapers and not allowing for a change in gender. If it has been published in the gazette then one should be able to change it, but a lot of this depends on what the officials at the desk talk about.

So one thing is if you are going through the act then you would be recognized for all certificates, such as property, school certificate etc. If name change has been done through a gazette notification then the same thing is to be done

Q. If one has done the whole operation, also bottom operation would one still not be able to get male or female in their certificate?

Ans. Transgender Certificate then Binary Certificate

Q. Pallav – if we give our documents for male and female gender markers, but can they do any examination.

Ans. No they can't do any medical or physical examination. This has been expressly mentioned in the rules that such an examination cannot be done. If you encounter such a case please take details of the DM and file a complaint against them.

Q. is there any role of a psychologist or a psychiatrist

Ans. there is no role per se according to a psychologist or a psychiatrist according to the law here.

Q. Chris here and my question is that after I do a surgery and before that we need to get a certificate from the Psychiatrist. My experience with a psychiatrist has

been extremely poor, wherein the psychiatrist said that I would need to bring my family member along with me. After that we will take their permission and after that only we would put you through ECT. After that if we feel like giving you a certificate we will. This was what was told me in a government mental health hospital.

Ans. Absolutely, this is called conversion therapy. Against which there is a case filed in Kerala. Because a person lost their life due to forced conversion therapy because, people across the spectrum are forced through conversion therapy and ECT itself is illegal. Since you are an adult there is no need for a family member to be there either. Therefore if you went to a government hospital then you can file a complaint and file a petition or a PIL as well. There are a number of Queer Affirmative psychotherapists and psychologists who would be willing to provide you with a Gender Dysphoria Certificate

Q. Pallav – I had done my surgery about 10 years ago and have all the certificates. I did an operation in a private hospital. Can I get a male gender marker?

Ans. Absolutely, if you do have the certificates then along with the form and affidavit