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The Transgender Persons (Protection of Rights) Bill, 2019: An epitome of legislative apathy.

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1. Abstract

This paper analyses the recently passed The Transgender Persons (Protection of Rights) Bill, 2019. The paper primarily focuses on various short falls of the transgender bill along with the journey of the various transgender bills in the parliament. The authors solicit the idea that the transgender bill at the very outset alludes to the lackadaisical manner that the central government has followed while approaching an issue of such an immense significance, which will bear some very profound and far reaching consequences for the transgender community.

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2. Introduction.

The 17th Lok Sabha's first session after the Lok Sabha elections has been hailed as the most productive one in the last 67 years with 135 % productivity in Lok Sabha and 103% productivity in Rajya Sabha.¹ However, this most productive session may also be seen as a session in which several bills that required a lot more deliberation and debate were passed hastily. Around 28 bills were passed in this budget, and a distinguished bill among these was The Transgender Persons (Protection of Rights) Bill, 2019("The bill").² This bill was further passed in the Rajya Sabha on 26th November.³ The bill was regarding serious concern but a casual approach has been followed in drafting and passing them. The transgender bill fails to address the concerns of the LGBTQ community. The lackadaisical approach of the legislature is evident in the fact that the LGBTQ community was not even consulted.⁴

3. Legislative history of attempts of enacting a transgender bill.

From time immemorial, the LGBTQ community has been subjected to discrimination. During the British India, they were considered a different caste or tribe and were denied civil rights⁵ and were continued to be disregarded until 2014. In 2013 the then UPA government constituted an expert committee to study the harsh living conditions being faced by the transgender community and come up with reasonable solutions to improve upon the same. The committee published its report in January 2014 in which it made several recommendations such as recognition of third gender for the people belonging to the trans community.⁶ In the same year, the Supreme Court of India too,

¹PRS Legislative Research, The Transgender Persons (Protection of Rights) Bill, 2019 available at <http://www.prsindia.org/sessiontrack/productivity/842097> (Last visited on December 21, 2019).

² *Id.*

³ PRS Legislative Research, The Transgender Persons (Protection of Rights) Bill, 2019 available at <http://prsindia.org/billtrack/transgender-persons-protection-rights-bill-2019> (Last visited on December 21, 2019).

⁴ Aarushi Aggarwal, *Govt. making rules for us without us: transgenders*, The Hindu, <https://www.thehindu.com/news/cities/Delhi/govt-making-rules-for-us-without-us-transgenders/article29104679.ece> (Last updated Aug. 16, 2019).

⁵ Sawant NS. *Transgender: Status in India*, Ann Indian Psychiatry 2017;1:59-61

⁶ Ramya Kannan, *Why are there objections to the Transgender Persons Bill?*, The Hindu

, <https://www.thehindu.com/news/national/why-are-there-objections-to-the-transgender-persons-bill/article30125894.ece> (Last Updated on 01/12/2019)

in its judgement in the case *NALSA v Union Of India* recognized the transgenders as the third gender.⁷ Since then, there has been a series of bills introduced in the parliament regarding transgender people almost every two years, with the first one being introduced by Tiruchi Siva a DMK parliamentarian in Rajya Sabha⁸. The 2014 bill according to many transgender activists is considered the most ideal bill.⁹ Though despite being passed in Rajya Sabha the bill was rejected in the Lok Sabha. In 2016 however, the NDA government tabled its own version of the bill before the Lok Sabha which had very significant and conspicuous deviations from its predecessors and since this whole bill had constantly been fraught with controversies. The latest bill with respect to the same was tabled in the parliament this year only. The bill was brought with an aim to empower the transgender community which includes around 4.88 lakh people according to 2011 census.¹⁰

4. Exploring the concerns apropos the Transgender bill

Protection of the rights of the marginalized section of the society should be the purpose of social welfare legislation. Transgender bill tries this, but it fails to do so and fails the transgender community on several accounts, especially on the following.

4.1 Identification

Clause 5 of the bill provides that a person to be identified as transgender has to move to a district magistrate, who would go through the prescribed documents and only then issue a transgender identity certificate.¹¹ It's not clear what happens to those cases in which the person is unable to produce such 'prescribed documents' to prove that the person is transgender. The bill also doesn't mention provisions or redressal mechanism for an appeal or review of the decision of the DM. Furthermore, although the bill states that a person who is transgender shall have a right to self-perceived gender identity, it doesn't appear to be true from clause 7

⁷ *NALSA vs Union of India*, (2014) 5 SCC 438.

⁸ *Supra* note 6.

⁹ Chaitanya Mallapur, *Why New Bill Meant To Benefit Transgender People Is Termed Regressive*, IndiaSpend.com, <https://www.indiaspend.com/why-new-bill-meant-to-benefit-transgender-people-is-termed-regressive/> (Last Updated on 22/08/2019)

¹⁰ India, 2011 Census Data, Transgender, available at <https://www.census2011.co.in/transgender.php> (Last visited on August 22, 2019).

¹¹ The Transgender Persons (Protection of Rights) Bill, 2019, 169 of 2019, Cl. 5.

of the bill. Clause 7 provides that the transgender identity certificate may be further used by the person to change his legal gender identity as male or female but again by applying to DM after securing a medical certificate from a chief medical officer or medical superintendent confirming that they have gone through medical surgery.¹²

This is in direct violation of NALSA judgement, which held the right to self-determination of one as male, female or as the third gender as the fundamental right of a person.¹³

4.2 No Reservation.

The bill prohibits discrimination against a transgender person on grounds including denial, discontinuation or unfair treatment in educational establishments¹⁴ and employment.¹⁵ However, it does not talk of providing reservation to the transgender community in government institutions. Though all transgenders are categorized as Other Backward Classes (OBC) it must be noted that this blanket classification of all transgenders as OBC totally disregards the disability that they suffer by virtue of them belonging to a scheduled caste or scheduled tribe thereby denying them their constitutionally mandated rights.¹⁶ The honorable Supreme court in the historic NALSA judgement had directed the Centre and the State Governments to provide reservations to transgenders in cases of admission in educational institutions and for public appointments, as they belonged to socially and educationally backward classes of citizens.¹⁷ Thus, the provision pertaining to the reservation of the transgender community should have been provided in the bill for their upliftment in the society.

4.3 Inadequate penal provisions

Clause 18 of the bill containing offences and penalties provides a minimum of 6 months and a maximum of 2 years of punishment for “*causing physical abuse, sexual abuse, verbal and*

¹² The Transgender Persons (Protection of Rights) Bill, 2019, 169 of 2019, Cl. 7.

¹³ See *supra* note 7.

¹⁴ The Transgender Persons (Protection of Rights) Bill, 2019, 169 of 2019, Cl. 13.

¹⁵ The Transgender Persons (Protection of Rights) Bill, 2019, 169 of 2019, Cl. 9.

¹⁶ *Supra* note 9.

¹⁷ See *supra* note 7.

emotional abuse and economic abuse”¹⁸ The term sexual abuse has nowhere defined in the bill and neither the term rape has been mentioned. This may provide loopholes to sex offenders and undermine the sexual violence that is rampant against the transgender community, making sexual abuses like rape *ejusdem generis* to the other abuses.

Thus, it's possible that penal provision for sexual assault against a transgender is imprisonment for a maximum of two years. While in the case of women, sexual assault such as rape is punishable by imprisonment of not less than ten years and a maximum of life imprisonment as provided in IPC¹⁹. The Transgender community in India has suffered immensely because of this horrendous lacuna present in the Indian legal system. There have been numerous cases in our where transgender men and women who have faced very brutal have not been able seek justice because of the absence of laws that cater to sexual crimes committed against them due to which their perpetrators were either let off on bail or received very little punishment.²⁰ Rather than hiding behind the obscurity present in the laws and inflict such gross injustice on the transgenders our criminal justice system should be sensitive enough to furnish the trans people with the opportunity to identify themselves with the gender they prefer and their perpetrators should be brought to books accordingly. In many countries when it comes to sexual violence against transgenders, they are treated on equal footings just like a normal individual. Thus, in India too and they should be treated equally and be given equal protection under the law as held in NALSA judgement.²¹

4.4 No Provision for Inheritance Rights and for Marriage.

The bill does not provide provisions for the inheritance of property. Pakistan's The Transgender Persons (Protection of Rights) Act 2018 has provided the transgender community

¹⁸ The Transgender Persons (Protection of Rights) Bill, 2019, 169 of 2019, Cl. 18.

¹⁹ The Indian Penal Code, 1860, §376

²⁰ Anupriya Chatterjee, “Loopholes in third gender law aid 4 rapists to get bail”, Pune Mirror, <https://punemirror.indiatimes.com/pune/civic/loopholes-in-third-gender-law-aid-4-rapists-to-get-bail/articleshow/59960595.cms> (Last Updated on 08/08/2017); Puja Changoiwala, “India: no country for transgender women”, South China Morning Post, <https://www.scmp.com/week-asia/society/article/2154077/india-no-country-transgender-women>. (Last Updated on 08/07/2018).

²¹ See *supra* note 7.

with right of inheritance²². Also, in various succession acts like The Hindu succession act²³, the process of inheritance for male and female are clearly mentioned. Thus, this provision should have been included in the bill.

Madras high court in one of the recent judgements held that transgender marriages are valid and ordered registration of the marriage²⁴. But the bill does not contain any provision regarding the marriage of transgender people. It should had included this provision as the precedents of Madras High Court have only persuasive value in other courts.



5. Conclusion

On perusal of the bill, what emerges is a picture of a society moving backward, holding onto the regressive ideas where the right to freedom and equality are getting dissolved. The bill should had been referred to a select committee for review, but it was not. Apart from the major fallouts in the Transgender Bill, the Surrogacy (Regulation) Bill, 2019 also manages to stricture the rights of the transgender group in a pronounced manner by not allowing homosexual couple to have a surrogate child.²⁵

The legislature should had been more thoughtful while discussing the transgender bill along with the surrogacy bill and the effect of these bills on the transgender community. The modern notions of equality and inclusion for becoming a collective society hang meaningless if the legislature passes laws without deliberation and in disregard to progressive Supreme Court judgements.

²²Mahwish Gul, *Recognising a minority's human rights*, D+C, <https://www.dandc.eu/en/article/new-law-confirms-transgender-persons-enjoy-same-rights-other-citizens-do-pakistan> (Last updated on Oct. 14, 2018).

²³ The Hindu Succession Act, 1956

²⁴Shamani Joshi, *A Trans Woman Can Now Be Recognised as a 'Bride' Under the Hindu Marriage Act*, Vice, https://www.vice.com/en_in/article/wjv5xn/a-trans-woman-can-now-be-recognised-as-a-bride-under-the-hindu-marriage-act (Last updated on Apr. 24, 2019).

²⁵Aniruddha Ghosal, *The New Surrogacy Bill Won't Let Live-in and LGBTQ Couples Become Parents*, News18, <https://www.news18.com/news/india/the-new-surrogacy-bill-wont-let-live-in-and-lgbtq-couples-become-parents-1979055.html> (Last updated on Dec. 20, 2018).



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