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Amended Transgender Persons (Protection of Rights) Bill, 2016, contrary to Supreme Court NALSA verdict, violates right to self-identity and constitutional rights, encodes discrimination, offers no reservations while criminalizing transgender community traditional livelihood of begging

On Dec 17, 2018, the Lok Sabha passed the Government of India's Transgender Persons (Protection of Rights) Bill, 2018, with 27 amendments to its previous version, i.e., Transgender Persons (Protection of Rights), 2016. Transgender, intersex and gender nonconforming communities from across the country and allies have together opposed this amended Bill, which apart from an improved definition of the term transgender, continues to be unacceptable and needs to be redrafted or withdrawn.

These communities also opposed the Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018 which was passed on 26 July 2018 in the Lok Sabha. Both bills are pending consideration before the Rajya Sabha now.

The Government of India's Transgender persons (Protection of Rights) bill, 2018 which was passed on 17th December 2018 in the Lok Sabha should be more appropriately retitled the Transgender Persons (Violation of Rights) Bill since it violates more rights than it protects. The version of the Bill passed upholds criminalization of trans* people for organized begging while denying any opportunities in education, employment, healthcare, etc. via providing reservations. It upholds lighter consequences and penalties for discrimination and assault on trans people compared to cisgender people. It violates the constitutional rights of transgender persons to live where we please, stating that even as adults with the right to free movement and association, we must either stay with our parents or approach a court. **A detailed analysis is on the following page.**

The amended Bill is the latest in a series of Bills drafted after the landmark Supreme Court verdict in National Legal Services Authority vs. Union of India (NALSA, 2014) - please refer to the background section. It has completely ignored the critiques of the 2016 Bill and subsequent recommendations of the Parliamentary Standing Committee. It stands in stark violation of the fundamental rights of transgender persons enshrined in the Constitution as equal citizens, judgement of the Apex Court in NALSA vs UoI in 2014. **For example, the amended Bill has created a two-tier system within the transgender community, wherein persons who have not had gender affirmative care therapies, popularly known as sex reassignment surgery (SRS) can only identify as transgender and not as male or female, and the identification as transgender depends on scrutiny and certification by a District Screening Committee; those seeking to identify as male or female need to have had SRS. This is completely contrary to the NALSA verdict. We**

note here that the concept of a District Screening Committee that seeks to validate the 'authenticity' of a transgender person's identity is not only completely against the spirit of NALSA, but also provides immense scope for abuse. It has been noted in Tamil Nadu that the district screening committees result in individuals being physically groped for "evidence" that they are transgender, a clear case of human rights violations.

It may be also noted that on the same issue, in 2015, the Rajya Sabha passed the comparatively more progressive Private Member's Bill drafted by Tiruchi Siva, DMK member of the Rajya Sabha, which had been drawn up in consultation with the community, and which has since then been pending before the Lok Sabha. Tiruchi Siva's bill had several progressive positions such as reservation rights, employment and education opportunities, right to self-determination, special courts, a Transgender Rights Commission and more.

It should also be noted that in congruence with the NALSA Verdict, the Supreme Court of India recently passed two more progressive verdicts in **Justice K.S. Puttaswamy (Ret'd.) vs Union of India** and **Navtej Singh Johar vs Union of India** - having a far-reaching impacts on the rights and lives of the transgender and other gender and sexual minority communities. In the first verdict, i.e., in Puttaswamy verdict, the Apex Court declared right to privacy as a fundamental right for every citizen, including transgender individuals. And In the Navtej Johar case, the five-judge bench of the Supreme Court not only declared Section 377 of the Indian Penal Code (IPC), especially the section which was used to criminalize any "unnatural" sexual intercourse in private between two consenting adults, as unconstitutional, but they also put an emphasis on freedom to choose in the intimate sphere of transgender and other gender and sexual minority community individuals. Although the struggle for respect, dignity, acceptance is far from over for India's transgender and other gender-diverse communities, these two verdicts, along with NALSA, can pave the way for transgender and other gender-diverse community individuals in dignity and rights, which this Bill is blocking.

We wish for the Government of India to withdraw the Transgender persons (Protection of Rights) bill, 2018, from consideration in the Rajya Sabha and to instead pass the Private Member's Bill drafted by Tiruchi Siva in the Lok Sabha. The GOI Bill is in stark violation of the fundamental rights of transgender persons enshrined in the Constitution as equal citizens, judgement of the Apex Court in NALSA vs UoI in 2014 and has also disregarded most recommendations of the Parliamentary Standing Committee. It has been passed despite quite a few Parliamentarians raising serious concerns about fundamental flaws and seeking deferral of the Bill, pending broad-based community consultations.

The GOI Transgender Persons (Protection of Rights) 2018 bill, instead of protecting rights, criminalizes traditional hijra livelihoods and family structures. It encodes discrimination with lower penalties for sexual and physical violence against transgender people.

The Trafficking bill passed in July 2018 compounds the criminalisation of the transgender community, by providing a staggering 10 years of punishment for organised begging, which it calls a form of aggravated trafficking that goes beyond punishments for trafficking for

forms of forced labour. It criminalizes the administration of hormones and other medicines while again not distinguishing between coercion and assistance in accessing gender affirming hormone therapy. It also does not distinguish between voluntary sex work and delineates it apart from trafficking. Above all, it violates the agency of people in sex work or begging to decide if they are trafficked or choosing these forms of work.

Both these flawed Bills are likely to adversely impact thousands of trans persons, sex workers and persons in already vulnerable situations, across the country. **We ask the GOI's bills be completely overhauled, made compliant with the NALSA verdict, and incorporate the community feedback given via Parliamentary Standing Committee process before being presented again.**

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REFERENCES

FULL TEXT OF 2018 BILL, 27 AMENDMENTS, UPDATES

<http://orinam.net/resources-for/law-and-enforcement/trans-persons-protection-rights-bill-2018/>

FULL TEXT OF 2016 BILL

http://orinam.net/content/wp-content/uploads/2016/08/TGBill_LS_Eng-1.pdf

OVERVIEW of 2016 INCLUDING CRITIQUES GIVEN TO STANDING COMMITTEE

<http://orinam.net/resources-for/law-and-enforcement/trans-persons-protection-rights-bill-2016/>

TIRUCHI SIVA BILL 2014 - passed RS in 2015

<http://orinam.net/resources-for/law-and-enforcement/rights-of-transgender-persons-bill-2014/>

MSJE 2015 BILL (AFTER SIVA BEFORE 2016 BILL)

<http://orinam.net/resources-for/law-and-enforcement/msje-rights-of-transgender-persons-bill-2015/>

RECOMMENDATIONS

Problematic features of the bill	Recommended change by the community
<p>III.5, 6. Screening committee: “5. A transgender person may make an application to the District Magistrate for issuing a certificate of identity as a transgender person 6. District Magistrate shall refer such application to the District Screening Committee to be constituted by the appropriate Government for the purpose of recognition of transgender persons”</p>	<p>Self-identification in any gender should be upheld and extended to all forms of ID and educational documents, especially for runaway children; remove the provision of district screening committees. Uphold NALSA vs. UOI Supreme Court Judgement direction that it is “immoral and illegal for governments to insist” on surgery or hormones for declaring gender, and the Standing Committee recommendation “that any procedure for 'identification of transgender persons' which goes beyond self-identification, and is likely to involve an element of medical, biological or mental assessment, would violate transgender persons' rights under Article 19 and 21 of the Constitution”</p>
<p>VIII. 19. (a) Criminalization of enticement to beg: “Whoever compels or entices a transgender person to indulge in the act of begging.. shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years and with fine.”</p>	<p>As the Committee states “The clause is likely to be misused against the other transgender persons, in the garb of protecting them. It is an open fact that most transgender persons are harassed or booked under the begging prohibition laws, even when they are not begging or merely present at public places”. This draconian clause should be removed as it criminalizes hijras or kinnars who do traditional badhai toli and mangti given that, as the committee says, the “transgender community does not enjoy parity with other genders when it comes to alternative modes of employment”. We recommend a gender-based internal reservation for trans people and a strong anti-discrimination provision with penalties, for educational and employment access.</p>
<p>VIII. 19 (d) Low punishments for violence against trans people: “Whoever harms or injures or endangers the life, safety, health, or well-being, whether mental or physical, of a transgender person or tends to do acts including causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years and with fine.”</p>	<p>Penalties for sexual violence upon all transgender persons should be equivalent to existing penalties for sexual violence against women, while penalties for physical, verbal, emotional and economic abuse should be similarly commensurate with the punishments for such acts under existing laws. Specific atrocities that transgender and intersex people face must be defined and strictly penalized, including forced gender conformism, hormonal treatment and/or surgeries, aversion based pseudo-psychotherapies, forced marriages, stripping, etc., as well as custodial violence, dereliction of duty by state and medical authorities, and violence in educational, residential, medical and employment. All trans people should have the right to be handled by women police as per their choice and</p>

	should be held in separate cells with access to gender-affirming healthcare, legal aid and education.
V. 13 Family and residence:(3) “Where any parent or a member of his immediate family is unable to take care of a transgender, the competent court shall by an order direct such person to be placed in a rehabilitation centre”.	This provision violates the Constitutional Rights of trans persons to freedom of residence. This provision does not understand violence in familial homes and rehabilitation centres. The definition of family should also be expanded to legally recognize families of choice, partnership, marriage, friendship and, as per the Committee’s recommendation, “Hijra or Aravani community elders, who adopt young transgender children” who provide shelter, medical care, and gender-affirming inheritance and burial norms.
VI. 16. Medical care	Free access to gender-affirming medical procedures, full insurance coverage, choice of m/f/separate wards for trans people in hospitals
VII. 17. National Council for Transgender Persons	National and State Trans Rights Commissions with appropriate powers, with a majority of trans members from a variety of gender and other identities, to tackle atrocities, grievances and welfare/benefits.

BACKGROUND OF 2018 BILL

The landmark Supreme Court NALSA (2014) verdict accorded transgender individuals the right to self-identify as the third gender or within the binary, as male or female; and ruled that insistence on sex reassignment surgery, hormone therapy, or other procedures to legally declare gender was illegal and immoral. The verdict directed the Centre and State Governments to provide the community with various social welfare schemes and to treat the community as socially and economically backward classes. It asked for the transgender community to be extended reservation in educational institutions and for public appointments, proper medical care and separate public toilets. It also asked for the recommendations of the Expert Committee Report on Transgender persons (released February 2014) to be reviewed in light of the verdict and be implemented within six months, i.e. by October 2014.

In 2015, the “Rights of Transgender Persons Bill 2014” was passed by the Rajya Sabha on 24th April 2015 unanimously, with cross-party support. A private member’s bill introduced by the MP from Tamilnadu, Tiruchi Siva, the Bill had been drawn up in consultation with the community and has since then been pending before the Lok Sabha. Tiruchi Siva's bill was largely reflective of the NALSA verdict and had several progressive positions such as reservation rights, employment and education opportunities, right to self-determination, special courts, a Transgender Rights Commission and more.

Later in 2015, the Ministry of Social Justice and Empowerment drafted a Rights of Transgender Persons Bill (2015), and sought public input, with comments to be submitted by 14th January 2016. The MSJE Bill had borrowed several concepts such as ‘inclusive education’, ‘reasonable accommodation’, and ‘barriers’ etc. from the Rights of Persons with Disabilities Bill 2013; harboured problematic notions of rehabilitation, lacked clarity on sexual offences committed against transgender persons, etc. The draft bill received substantial input from transgender and intersex led groups, as well as from LGBTIQ and ally groups.

The Transgender Persons (Protection of Rights) Bill 2016 was then introduced in the Lok Sabha on August 2, 2016. However, it did not incorporate any of the community feedback given to previous versions of the Bill. In October 2016, the Lok Sabha Standing Committee sought, through a newspaper ad, feedback on the bill, with the last date that was eventually extended to November 5, 2016. Subsequently, community feedback was given to the Parliamentary Standing Committee, which submitted its report in July 2017. Except for the revised definition of ‘transgender’, progressive amendments made by the Standing Committee have been largely ignored in the amendments resulting in the 2018 bill.

WHO ARE WE?

1. Transgender persons have a strong physical and/or cognitive discomfort with the gender which is socially, legally and medically unambiguously assigned to our bodies at birth. Persons who don’t identify as transgender are cisgender.

2. Intersex: Persons with intersex variations have bodies that do not conform to medical, legal and social categories of male and female, in various ways [anatomical, chromosomal, hormonal etc]. Some intersex persons are uncomfortable with the gender they were assigned, in which case they may be transgender and intersex; but if not, they can be cisgender and intersex.
3. Hijra: The Hijra community is a sociocultural group whereby some members of the transgender and intersex communities formally enter a traditional system of living together and mutual support. They may take on different identities and names in various local languages: kinnar in Hindi, tirunangai in Tamil, aravani in Tamil, mangalamukhi in Kannada. Some kinnars may identify as Triteeya prakriti or third gender while others do not.
4. Transgender woman: Transgender women are transgender persons who identify as women, regardless of how they look, or dress. Some transgender women are also hijra identified while others are not.
5. Transgender man: Transgender men are transgender persons who identify as men, regardless of how they look, or dress. In Tamil Nadu, some transmen may also identify as thirunambi.
6. Shivashaktis and Jogtas/Jogappas: These are culturally specific groups who are socially permitted a feminine gender expression in the context of specific religious roles.
7. Genderqueer/Gender non-binary/Gender fluid/Agender/Intergender: Persons who do not identify within the gender binary may have a variety of gender identities including but not limited to these categories above.