

The Transgender Persons (Protection of Rights) Bill, 2018

I. Introduction

In order to comprehensively understand the challenges faced by the transgender community in India, an Expert Committee was established by the government in 2013. The subsequent report argued that transgender people are victims of discrimination and stigma, which is why they are a marginalised group in society.¹ As a result, transgender people have limited access to education, employment, and healthcare services.

The report was followed by a landmark judgment of the Supreme Court in 2014. In the case of National Legal Services Authority v. Union of India (NALSA v. UoI), the Supreme Court most notably recognised the constitutional right of transgender people to identify themselves as outside the male-female binary.² Moreover, it recommended a renewed focus on the provision of health and welfare schemes, suggesting the need for affirmative action in government jobs and educational institutions.³

The Transgender Persons (Protection of Rights) Bill, 2016 was finally introduced by the government in August 2016 following a Private Member Bill (PMB) by Hon'ble MP Mr. Tiruchi Siva, which became the first PMB to be passed by either of the Houses in 36 years and by Rajya Sabha in 45 years.⁴ The Bill was referred to the Standing Committee on Social Justice and Empowerment in September, 2016, and the ensuing report was presented to the Parliament in July, 2017.

II. The Transgender Persons (Protection of Rights) Bill, 2018

The Transgender Persons (Protection of Rights) Bill, 2018 aims to empower transgendered people by protecting their rights and providing for their welfare. First introduced in Lok Sabha on August 2, 2016, the Bill was eventually passed by the House on December 17, 2018 following 27 amendments. The Bill is currently pending in the Rajya Sabha.

¹ <http://socialjustice.nic.in/writereaddata/UploadFile/Binder2.pdf> accessed as on January 14, 2019.

² <https://www.theguardian.com/world/2014/apr/15/india-recognises-transgender-people-third-gender> accessed as on January 14, 2019.

³ Ibid.

⁴ <http://currentnews.in/rs-passes-private-members-bill-transgender-rights-first-45-years/> accessed as on January 14, 2019.

Salient Features of the Bill

- **Defining “Transgender Persons”:** A transgender person is one whose self-identified gender does not match with the gender assigned to that person at birth, including trans-man or trans-woman, people with intersex variations, gender-queer, and others who are socially and culturally identified as kinner, hijra, aravani and jogta.⁵
 - **Certification of identity as transgender:** Under this Bill, a transgender person can receive a certificate of identity as a transgender person through an application to the District Magistrate (DM). An individual’s application will be evaluated by a District Screening Committee (DSC) that is composed of: a) the Chief Medical Officer; (b) District Social Welfare Officer; (c) a Psychologist or Psychiatrist; (d) a representative of transgender community; and (e) a government officer. If accepted, the applicant’s identity as a transgender person can be displayed on all of their official documents.
 - **Change in Gender:** If a transgender person undergoes surgery to change their gender to either male or female, they would have to file an application for a second time to the DM — along with a certificate issued by relevant medical official — in order to be certified as male or female. If accepted, the transgender person will be allowed to change their first name in all official documents.
 - **Provision of Welfare:** The Bill underlines the government’s obligation to enable the provision of social welfare schemes and programmes for transgender people in a sensitive, non-discriminatory, and non-stigmatising manner. Moreover, the Bill highlights the need for protection and rehabilitation of any transgender persons in need.
 - **Prohibition of Discrimination:** The Bill prohibits discrimination against the transgender community through the discontinuation or denial of services pertaining to: education, public goods and services, employment, healthcare, right to movement, opportunity to hold public or private office, and the right to own or rent property.
 - **Setting up National Council for Transgender persons:** Section 17 provides for setting up a National Council for Transgender persons tasked with advising the government with formulating of policies, programmes, legislation and projects with respect to transgender persons as well as addressing grievances of transgender persons.
 - **Setting Punishments for Offences:** Offences such as enticing a transgender person to beg, preventing their access to public places and harming their life, safety, health etc. would be punishable with imprisonment from six months up to two years.
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Shortcomings of the Bill

- **Right to “Self-Perceived Identity”:** Section 4(1) of the Bill guarantees each transgender person the right to self-perceived identity. However, it is unclear what this signifies. Since each transgender person’s identity is only legitimised by the issuance of a certificate from an external entity (DSC), an individual’s self-perception is clearly not a sufficient condition to prove their own identity.
- **Absence of appeal mechanism:** As previously mentioned, the DSC has the authority to approve or decline an individual’s application for a certificate that validates their transgender identity. However, the Bill does not provide an individual the option to protest and appeal the committee’s decision in case their application is rejected. Since a transgender person’s identity often concerns their psychological sense of gender more so than their biological traits, there exists considerable room for subjectivity. Hence, the absence of an appeal mechanism is a serious drawback that needs to be addressed.
- **Requirement of surgery:** As per section 8(1), a mandatory surgery is required if a transgender person wishes to identify with the male-female gender binary. This clause is tricky because it presupposes that an individual has the necessary resources to undergo this surgery. Moreover, section 8(1) also violates the NALSA v. UoI judgement that allows self-identification of gender without medical procedures.⁶
- **Definition of “guardian”:** Section 5 of the Bill provides that a minor child’s application to the DM is to be made by their parents or their guardian. In the absence of parents, the Bill fails to define who the official guardian of a transgender child would be.
- **Scrutiny by the DSC:** The NALSA v. UoI verdict established that an individual’s word will be enough to acknowledge their gender.⁷ Hence, the Bill’s requirement of a screening committee for the same violates the Supreme Court’s judgment. While some kind of screening may seem necessary to avoid fraudulent claim over certain benefits from the government, the current process is inadequate. Moreover, subjecting an individual’s personal gender identity to scrutiny by an external entity is complicated in and of itself.
- **Separation of child from family:** In the “interest of a child” and/or when a child’s immediate family is unable to provide for the transgender, the Bill mandates that a competent court can place them in the care of a rehabilitation centre. However, it is unclear how a court could objectively ascertain what the ideal conditions for a child should be. Moreover, the enforcement of this clause is likely to be difficult. Who

⁶ <https://www.icj.org/india-parliament-must-revise-problematic-transgender-persons-protection-of-rights-bill-2018/> accessed as on January 15, 2019.

⁷ <https://thewire.in/lgbtqia/why-the-transgender-community-is-angry-over-a-bill-meant-to-protect-their-rights> accessed as on January 15, 2019.

appeals on behalf of a kid that is being subject to discrimination and abuse within their family? What is a “competent court”? The Bill fails to address these questions.

- **Medical care facilities:** Section 16(b) instructs the government to “provide for medical care facility including sex reassignment surgery and hormonal therapy”. In this case, it is ambiguous what the Bill means by the word “provide” — it could either mean that the medical facilities could be made accessible, or that they could be paid for by the government. Also, section 16(g) mentions that a “comprehensive insurance scheme” would cover medical expenses for the transgender community. Again, it is unclear what this specific insurance scheme is trying to achieve and what it would entail.
- **Offences and penalties:** For a plethora of offences committed, the Bill mandates the same punishment of imprisonment for a minimum of six and a maximum of two years, along with a fine. This clause effectively places physical, mental, and sexual abuse — amongst other offences — in the same bracket of punishment. Activists have argued for the need to have similar punishments for sexual abuse of both women and transgenders.⁸ Furthermore, punishments for other kinds of abuse should be in accordance with relevant existing laws. The Standing Committee recommended graded punishment, with physical and sexual offences attracting higher punishment.

III. Conclusion

The intentionality behind The Transgender Persons (Protection of Rights) Bill, 2016 is commendable. However, the Bill appears to be hastily drafted, and lacks clear definitions, objectives, and the mechanisms to achieve these objectives. Although this Bill has successfully passed in the Lok Sabha due to majority of the ruling party, it is critical that the Rajya Sabha parliamentarians either introduce necessary amendments and/or refer it back to the Lok Sabha for the incorporation of requisite changes.

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⁸ Ibid.