
Issues for Consideration: The Transgender Persons (Protection of Rights) Bill, 2019

According to the World Health Organisation, ‘transgender’ is an umbrella term that includes persons whose sense of gender does not match with the gender assigned to them at birth.¹ For example, a person born as a man may identify with the opposite gender, as a woman.² According to the 2011 Census, the number of persons who do not identify as ‘male’ or ‘female’ but as ‘other’ stands at 4,87,803 (0.04% of the total population). This ‘other’ category applied to persons who did not identify as either male or female, and included transgender persons.³

In 2013, the government set up an Expert Committee to examine issues related to transgender persons.² The Committee stated that transgender persons faced issues of social stigma and discrimination which affected their access to education, healthcare, employment and government documents. In 2014, the Supreme Court recognised a transgender person’s right to self-identification as male, female or the third gender.⁴ Further, the Court directed central and state governments to grant legal recognition to transgender persons, address issues of social stigma and discrimination, and provide social welfare schemes for them.

A private member Bill was introduced in Rajya Sabha by Mr. Tiruchi Siva in 2014 to guarantee rights and provide welfare measures for transgender persons.⁵ This Bill was passed in Rajya Sabha in 2015, and is currently pending in Lok Sabha. In August 2016, the government introduced the Transgender Persons (Protection of Rights) Bill, 2016 in Lok Sabha. The 2016 Bill has been referred to the Standing Committee on Social Justice and Empowerment. The Committee submitted its report on July 21, 2017.⁶

The Committee gave several recommendations with regard to: (i) definition of transgender persons, (ii) process of certification as a transgender persons, (iii) inclusion of definition of discrimination against transgender persons; and (iv) requirement of complaints officer in all establishments. However, the 2016 Bill lapsed with the dissolution of the 16th Lok Sabha. The Transgender Persons (Protection of Rights) Bill, 2019 was introduced in Lok Sabha on July 19, 2019 to replace the 2016 Bill.

Key Features of the Bill

Definition of a transgender person

- The Bill defines a transgender person as one whose gender does not match the gender assigned at birth. It includes trans-men and trans-women, persons with intersex variations, gender-queers, and persons with socio-cultural identities, such as kinnar and hijra. Intersex variations is defined to mean a person who at birth shows variation in his or her primary sexual characteristics, external genitalia, chromosomes, or hormones from the normative standard of male or female body.

Certificate of identity for a transgender person

- A person recognised as transgender person under the Bill shall have a right to self-perceived gender identity.
- A transgender person has to obtain a Certificate of Identity which will confer rights and be proof of recognition of identity as a transgender person.
- An application for obtaining such a Certificate should be made to the District Magistrate (DM), in the form and manner, as may be prescribed.
- A revised certificate may be obtained only if the individual undergoes surgery to change their gender either as a male or a female.
- The gender of a transgender person will be recorded in all official documents, on the basis of this Certificate.
- An individual may apply for a revised certificate from the DM if he undergoes surgery to change their gender either as a male or a female.

Prohibition against discrimination against transgender persons

- The Bill prohibits discrimination against a transgender person, including unfair treatment or denial of service in relation to: (i) education; (ii) employment; (iii) healthcare; (iv) access to public goods and facilities; (v) right to movement; (vi) right to rent or own property; (vii) opportunity to hold public or private office; and (viii) access to a government or private establishment which has custody of a transgender person.
- All public and private establishments are prohibited from discriminating against a transgender person in employment matters, including recruitment and promotion. Every establishment is required to designate a person to be a complaint officer to deal with complaints in relation to the Bill.

Benefits related to employment, health and education

- The central or state governments shall provide welfare schemes and programmes to facilitate and support livelihood for transgender persons. This will include vocational training and self-employment.
- The central and state governments shall take steps to provide healthcare facilities to transgender persons including: (i) separate HIV surveillance centers; (ii) sex reassignment surgery and hormonal therapy counselling; (iii) review of medical curriculum; and (iv) a comprehensive insurance scheme.
- Educational institutions shall provide inclusive education and opportunities for sports, recreation and leisure activities to transgender persons.

National Council for Transgender persons

- A National Council for Transgender (NCT) persons will be set up to advise the central government on policies, and legislation related to transgender persons. It will also monitor and evaluate such policies.
- The NCT will consist of representatives from (i) ministries such as social justice and empowerment, health, minority affairs; (ii) NITI Aayog; (iii) National Human Rights Commission and National Commission for Women; (iv) state governments; (v) nominated members from the transgender community; and (vi) experts from non-governmental organisations.

Offences and Penalties

- The Bill specifies the following offences: (i) compelling transgender persons to do forced or bonded labour (excluding compulsory government service for public purposes); (ii) denial of use of a public place; (iii) removal from household, village or other place of residence; and (iv) physical, sexual, verbal, emotional or economic abuse.
- These offences will attract imprisonment between six months and two years, and a fine.

Issues to consider

Recognition of transgender identity

Self-determination of identity vs. verification of eligibility for entitlements

The Supreme Court has held that the self determination of one's gender is part of the fundamental right to dignity, freedom and personal autonomy guaranteed under Article 21 of the Constitution.⁴ Further, the Court upheld the right of transgender persons to determine their self-identified gender as a man, woman or as third gender. This would protect their right to live with dignity and respect.

In addition, the Court directed the central and state governments to provide reservations in educational institutions and public offices, and social welfare schemes for transgender persons. In this regard, it could be argued that there must be objective criteria to verify the eligibility of applicants to receive benefits targeted for transgender persons. If self-determination of one's gender identity were to be the sole criterion to receive benefits, it could be misused by others to claim such benefits.

The Bill creates provisions to protect transgender persons from discrimination, and provide welfare schemes in relation to health, education and employment. In doing so, the Bill provides for both – self-perceived gender identity, and a screening process – to recognise the identity of transgender persons. This leads to the issue discussed below.

The meaning and implication of the term ‘self-perceived gender identity’ is unclear

Clauses
4-6

The Bill states that a person will be recognised as ‘transgender’ on the basis of a Certificate of Identity issued by a District Magistrate. Such a Certificate will be proof of identity as ‘transgender’ and confer rights under the Bill. However, the Bill also states that a person who is recognised as ‘transgender’ shall have the right to ‘self-perceived’ gender identity. Given that there is a requirement of a Certificate of Identity under the Bill, it is unclear what the term ‘self-perceived’ gender identity entails and how it will be enforced.

Note that, if a transgender person is denied a Certificate of Identity, the Bill does not provide a mechanism for appeal or review of such decision of the District Magistrate.

The Bill does not follow the Standing Committee’s recommendation on a Screening Committee

Clause
6

The Bill states that a person will be recognised as ‘transgender’ on the basis of a Certificate of Identity issued by a District Magistrate. Note that the Transgender Persons (Protection of Rights) Bill, 2016 provided that a person will be issued a Certificate of Identity as a ‘transgender’ by the District Magistrate based on the recommendations of a District Screening Committee. The District Screening Committee consisted of a: (i) Chief Medical Officer; (ii) District Social Welfare Officer; (iii) psychologist or psychiatrist; (iv) representative of the transgender community; and (v) government officer. The 2019 Bill removes this provision.

The Standing Committee, which examined the 2016 Bill, noted that the role of Screening Committee is critical in declaring a person as transgender.⁶ It further emphasised on the importance of the role of the Chief Medical Officer to check any potential misuse of the certificate, and recommended that the role of the Chief Medical Officer should be clearly defined in the Bill. However, the 2019 Bill removes the provisions for a District Screening Committee and leaves the power to issue the Certificate with the District Magistrate, based on procedure notified through rules.

Transgender persons and their status under existing laws

Clauses
18, 20

Currently several criminal and civil laws recognise two categories of gender i.e. man and woman. These include laws such as Indian Penal Code (IPC), 1860, National Rural Employment Guarantee Act, 2005 and Hindu Succession Act, 1956 which contain some gender specific provisions. The Bill recognises a third gender i.e. ‘transgender’. However, the Bill does not clarify how the above mentioned laws will apply to transgender persons. Table 2 below lists some legal provisions that are gender specific in their application.

Note that the penalties for similar offences may vary because of the application of different laws, based on gender identity. For example, under the IPC, sexual offences related to women attract a higher penalty (up to life imprisonment) than that specified for sexual abuse under the Bill (up to two years).⁷

Table 1: Gender specific laws and procedures in India

Legislation	Gender specific provision
Criminal laws	
Indian Penal Code, 1860	<ul style="list-style-type: none"> ▪ Punishment for assault on a woman with intent to outrage her modesty; ▪ Punishment for selling female minors for purposes of prostitution; ▪ Rape as an act committed by a man on a woman; ▪ Word, gesture or act intended to insult the modesty of a woman; ▪ Husband or relative of husband of a woman subjecting her to cruelty; ▪ Dowry death, where death of a woman caused due to cruelty by husband or his relatives.
Code of Criminal Procedure, 1973	<ul style="list-style-type: none"> ▪ A female under arrest can be searched only by another female with strict regard to decency; ▪ Grants the power to compel restoration of the liberty of unlawfully detained females; ▪ Requires the medical examination of a victim of rape, who should be a woman.
Indecent Representation of Women (Prohibition) Act, 1986	<ul style="list-style-type: none"> ▪ Prohibits the indecent representation of women in various forms of publications.
Protection of Women from Domestic Violence Act, 2005	<ul style="list-style-type: none"> ▪ Grants protection to a woman in a domestic relationship and who alleges domestic violence.
Civil laws	
The Sexual Harassment of Women At Workplace (Prevention, Prohibition, Redressal) Act, 2013	<ul style="list-style-type: none"> ▪ Provides protection against the sexual harassment of women at the workplace.
Hindu Marriage Act, 1955	<ul style="list-style-type: none"> ▪ Recognises marriage between a man and a woman.
The Special Marriage Act, 1954	<ul style="list-style-type: none"> ▪ Recognises marriage between a man and a woman.

Legislation	Gender specific provision
Hindu Adoptions and Maintenance Act, 1956	<ul style="list-style-type: none"> Provides different criteria for a man and a woman in relation to adoption of a child.
Hindu Succession Act, 1956	<ul style="list-style-type: none"> 'Heir' refers to either a male or a female for the purpose of succession, in the absence of a will.
The Muslim Personal Law (Shariat) Application Act, 1937	<ul style="list-style-type: none"> Specifies 'special property' of females which includes personal property inherited or obtained by contract, gift, etc.
Other laws	
The Mines Act, 1952	<ul style="list-style-type: none"> Prohibits the employment of a woman in areas of a mine below ground level; Permits the employment of a woman in a mine above ground level between the hours of 6 am and 7 pm.
Factories Act, 1948	<ul style="list-style-type: none"> Permits a woman from working in any factory only between the hours of 6 am and 7 pm.
National Food Security Act, 2013	<ul style="list-style-type: none"> States that the eldest woman in every eligible household will be head of the household for the purpose of issue of ration cards.
National Rural Employment Guarantee Act, 2005	<ul style="list-style-type: none"> States that priority will be given to women workers (at least one-third of the beneficiaries are to be women) if they have registered and requested for work under this Act.
The Companies Act, 2013	<ul style="list-style-type: none"> Requires the Board of Directors of every company to have at least one woman director.

Sources: Various central laws;⁸ PRS

¹. "Transgender persons", World Health Organisation, <http://www.who.int/hiv/topics/transgender/en/>.

². Report of the Expert Committee on the Issues relating to Transgender Persons, Ministry of Social Justice and Empowerment, January 27, 2014, <http://socialjustice.nic.in/writereaddata/UploadFile/Binder2.pdf>.

³. Primary Census Abstract Data for Others (India & States/UTs), Census 2011.

⁴. National Legal Services Authority vs. Union of India [(2014) 5 SCC 438].

⁵. The Rights of Transgender Persons Bill, 2014, Private Member Bill, August 24, 2015, http://164.100.47.4/BillsTexts/LBillTexts/Asintroduced/210_2016_LS_Eng.pdf.

⁶. "Report No. 43: The Transgender Persons (Protection of Rights) Bill, 2016", Standing Committee on Social Justice and Empowerment, July 21, 2017, https://www.prsindia.org/sites/default/files/bill_files/SCR-%20Transgender%20Bill.pdf.

⁷. Sections 354, 354A, 354B, 375, Indian Penal Code, 1860.

⁸. Sections 354, 372, 375, 509, 498A, 304B, Indian Penal Code, 1860; Sections 51, 98, 164A, Code of Criminal Procedure, 1973; Indecent Representation of Women (Prohibition) Act, 1986; Protection of Women from Domestic Violence Act, 2005; Sexual Harassment of Women At Workplace (Prevention, Prohibition, Redressal) Act, 2013; Section 7, Hindu Marriage Act, 1955; Section 4, Special Marriage Act, 1954; Sections 7,8, Hindu Adoptions and Maintenance Act, 1956; Section 3, Hindu Succession Act, 1956; Section 2, Muslim Personal Law (Shariat) Application Act, 1937; Section 46, The Mines Act, 1952; Section 66, Factories Act, 1948; Section 13, National Food Security Act, 2013; Section 5, National Rural Employment Guarantee Act, 2005; Section 149, The Companies Act, 2013.

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