

TRANSGENDER BILL: A LAW THAT DEFEATS ITS PURPOSE

Relevant for: Indian Polity & Constitution | Topic: Indian Constitution – Amendments, Schedules, and Important Articles

The [Transgender Persons \(Protection of Rights\) Bill](#), 2018, passed by the Lok Sabha recently, has caused great alarm. Transgender and intersex activists have protested on the streets, campaigned with parliamentarians and spoken out against the Bill. Is it not an irony that all of this is being done to ensure that the law is not passed? Why is there such a strong resistance to this Bill? Here are the main concerns.

In the landmark *NALSA v. Union of India* judgment, the Supreme Court laid down that transgender and intersex persons have the constitutional right to self-identify their gender as male, female or transgender even without medical intervention. The court held: “Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom and no one shall be forced to undergo medical procedures, including SRS, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity”. Hence, medical procedures should not be required as a pre-condition for any identity documents for transgender and intersex persons, nor should there be any requirement of a mental health assessment. Requiring a person to submit proof of medical treatment or mental health assessment of their gender identity violates one’s right to dignity, the right to be free from unwanted medical treatment and the right to be free from discrimination.

The 2018 Bill in Section 6 establishes a District Screening Committee for the purpose of recognition of transgender persons. This Screening Committee includes a chief medical officer and a psychologist/psychiatrist, which goes to show that medical and psychological tests would be required for grant of change of gender identity. There is no provision in the Bill that gender change would be permitted without medical or psychological treatment.

Rights, revised: on the Transgender Persons Bill, 2018

The Bill also does not allow for recognition of gender identity as male or female. It only allows for an identity certificate as ‘transgender’. This goes against the decision of the Supreme Court, which recognised the right to self-identify oneself as male, female or transgender and would also be forcing intersex persons to get a gender identity as “transgender”.

The U.K.’s Gender Recognition Act 2004 was the first law in the world allowing people to change gender without surgery. Since then other countries, including Argentina, Ireland and Denmark, have passed laws that allow people to ‘self-declare’ their gender, rather than seek approval from a panel of medical experts.

Hence the District Screening Committee needs to be removed from the 2018 Bill. The Bill needs to state explicitly that no medical or mental health examination will be required and applicants will simply need to submit an affidavit attesting the request for a change of gender identity.

Debates on the Bill have always included the demand for reservations for transgender and intersex persons in educational institutions and in public employment as they are seen to be crucial for their social inclusion. This was not only mandated by the Supreme Court in *NALSA*, the Rights of Transgender Persons Bill 2014 too provided for 2% reservation.

Surprisingly the 2018 Bill does not provide for any reservation. It provides in Sections 10 and 14 that there would be no discrimination in education and employment, but these rights are meaningless if transgender persons are not able to get access in the first place. Equality would demand that in order for the trans and intersex community to get access to their basic social rights, there should be horizontal reservation in education and employment provided to them. When the new Rights of Persons with Disabilities Act 2016 was passed, it included reservations of 5% and 4% in education and government jobs, respectively. It is surprising therefore that the 2018 Bill has no mention of similar provisions.

The Bill in Section 19 makes it a criminal offence for anyone to compel a transgender person into begging. This has serious implications. A large number of people from the trans and intersex community are engaged in begging and sex work due to discrimination and not having any other opportunities. This provision would lead to members of the trans community being criminalised. When the criminalising of begging itself has been held to be unconstitutional by the Delhi High Court, there is no place for this offence in the 2018 Bill. For too long, gender minorities have been criminalised for being out in the streets and in public, and having this offence in the Bill will lead to further criminalising of transgender lives.

In all these ways the 2018 Bill is seriously flawed. It does not have a whole gamut of positive rights such as the rights of trans and intersex persons to inheritance of property, rights within the family such as adoption and to be free from domestic violence, rights of political participation such as the right to vote and hold public office, and the right to health to include free sex reassignment treatments. It also does not make sexual violence against transgender and intersex persons a criminal offence. The current law on rape is gender specific and transgender persons have no recourse under criminal law for sexual assault.

The Bill is an opportunity to ensure that the constitutional rights of transgender and intersex persons are realised. Let us not lose this opportunity by passing such a flawed legislation.

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Section 69 of the IT Act allows for disproportionate state action, and is antithetical to the right to privacy

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