

# Limiting Gender Variance

## Critical Reflections on the Transgender Persons Bill

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The Transgender Persons (Protection of Rights) Bill, 2016 which was introduced in the Lok Sabha seems to be a watered-down version of the previous private member bill by Tiruchi Siva. It has seen much opposition from the trans community as major provisions pertaining to a rights framework have been diluted. An analysis of the weaknesses of the new bill highlights the need for further discussion.

The fight for equality for those who fall beyond the mainstream notions of gender gained momentum with the Supreme Court's judgment in *National Legal Services Authority v Union of India and Others* (2014). This decision upheld the transgender persons' right to decide their self-identified gender, and also directed the centre and state governments to grant legal recognition of their gender identity as male, female, or as third gender. It was considered "path-breaking," "a historic decision that has both strengthened and advanced fundamental rights" and that "it strikes a fine balance between philosophical, legal and practical considerations that surround the area of gender identity and recognition" (Lawyer's Collective 2016).

However, the judgment was not immune from criticism and also has had its fair share of disapproval from transgender rights activists who claimed that it was unclear in many aspects (Semmalar 2016). A clarification was requested from the Supreme Court by the Ministry of Social Justice and Empowerment (MSJE) on some of the contentious issues, like who are considered as transgender persons in the context of the judgment, the interchangeable use of the word "eunuch," the feasibility of the implementation time of six months, etc.<sup>1</sup>

Subsequently, Tiruchi Siva's private member bill, the Rights of Transgender Persons Bill, 2014 was introduced in the Rajya Sabha on 12 December 2014 and passed unanimously. The government said another bill would be brought into the Lok Sabha after it had "correct[ed] infirmities" and circulated its own revised draft among ministries (Govindarajan 2016). Thereafter, the MSJE sought comments on the draft Rights of Transgender Persons Bill, 2015. This process began in March 2016, when the draft Transgender

Rights Bill, 2016 was circulated by the MSJE for inter-ministerial consultation for two weeks (Govindarajan 2016). Although the comments were inadequately forthcoming, the bill was sent to the law ministry (prior to being sent for cabinet approval) in April (Govindarajan 2016).

Recently, Union Minister Thawar Chand Gehlot presented the Transgender Persons (Protection of Rights) Bill, 2016 in the Lok Sabha on 2 August 2016. This article tries to highlight how some of the much needed rights were removed from the bill on a comparative basis between the government and the private member's bills. This gap has created a furor amongst the affected community.

### Transgender Persons Bill, 2016

The latest bill comprises nine chapters and 24 sections. It is interesting to note that this bill, which would shape the course of history for thousands of gender variant people across India, has failed to address several major issues.

The bill defines a transgender person under Section 2(i) as one

who is—(a) neither wholly female or male; (b) a combination of female and male; or (c) neither female nor male. Such a person's gender does not match the gender assigned at birth, and includes trans-men and trans-women, persons with intersex variations and gender-queers.

The bill does not honour the rights of transgender people to self-determine their gender identity as any of, male, female or transgender. Many sociocultural identities such as Shiv Shaktis and Jogappas are also removed from the definition, which were mentioned in the previous private member's bill. The implication of the weak drafting of this major provision is that it restricts the understanding of a transgender identity to the gender binary of male and female.

Chapter 2 of the bill prohibits the discrimination against a transgender person, including denial of service or unfair treatment in relation to: (i) education; (ii) employment; (iii) healthcare; (iv) access to, or enjoyment of goods, facilities, opportunities available to the public; (v) right to movement; (vi) right to reside, rent, own or otherwise occupy property; (vii) opportunity to hold public

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or private office; and (viii) access to a government or private establishment in whose care or custody a transgender person is. It is important to note that the language of the bill is negative, unlike the positive language of the previous bill, which was affirmative and had a rights-based approach.

Chapter 3 deals with recognition of the identity of transgender persons and aggravates the ambiguity as discussed under Article 2(i). This has also been one of the most contentious chapters as it provides for application for the certificate of identity under Section 5. There is also a district screening committee for the purpose of recognition of transgender persons. Sections 6–8 provide for the detailed procedure for issuance of the certificate of identity. Such a procedure is in prima facie contradiction with the rights granted by the Supreme Court with respect to self-identification in the National Legal Services Authority (NALSA) judgment. This inconsistency is also reflected in the drafting of the legislation.

A plain reading of Section 4(2) stands in contradiction to Sections 6(1) and 8(2). The question that arises is as to whether the right to self-identification is provided under Section 4, and as to why there should be an involvement of unnecessary bureaucracy in order to determine the gender identity. The presence of the chief medical officer in the district screening committee also suggests some medical checks. It is pertinent to note that if there is any medical assessment as a requirement for transgender identification, then such a procedure shall stand in contradiction to the NALSA judgment, which limits itself to psychological assessment. The inclusion of only one transgender person from the community might lead to internal conflicts as the more influential or politically connected would secure this coveted position. This can also result in power politics within the community and arguably lead to unwanted politicisation in the community.

Chapter 4 provides for “Welfare Measures by the Government” such as social inclusion, facilitating access to transgender sensitive welfare schemes, rescuing and protecting transgender people to address needs of such persons, and

promoting their right to participate in cultural and recreational activities. Many recommendations sent to the earlier bill by transgender groups demanded for a change from the language of rehabilitation to a language of rights (Semmalar 2016), and, as stated earlier, this is not the case in the current bill.

Chapter 5 provides for “Obligation of Establishments and Other Person.” Section 12 further states that if an establishment has more than 100 persons, then it is required to designate a person to be a complaint officer to deal with complaints in relation to the act. If one applies these criteria with the definition of establishment as provided for in Section 2(b) of the bill, it is observed that it leaves out scores of unorganised sector workers and transgender persons in organisations with less than 100 employees without any recourse. It is important to note that the issue of reservation in employment and in education has been clearly avoided. The question of reservation could arguably have been dropped because of protests by Other Backward Class (OBC) groups who feared this would shrink their share of the pie (Nair 2016).

Section 13(1) states that “No transgender person shall be separated from parents or immediate family on the ground of being a transgender except on an order of a competent court, in the interest of such person.” This also leaves us with a question as to what would be the consequences in the cases where a transgender child suffers violence at home.

Chapter 6 deals with the education, social security and health of transgender persons. Educational institutions funded or recognised by the government shall provide inclusive education, sports and recreational facilities for transgender persons, without discrimination (*National Legal Services Authority v Union of India* 2014). Under Section 17, the government is obliged to take steps that can provide healthcare services to transgender people, which include separate HIV surveillance centres and sex reassignment surgeries. A clarification is indeed necessary with respect to understanding whether the surgeries are covered within an insurance scheme as promised under Section 16(d). It is to be

noted that separate wards for transgender persons have been dropped from this bill even though they were mentioned in Siva’s bill.

It is also criticised that this bill confuses intersex variations and they are pushed under the umbrella of transgender persons. People with intersex variations will need access to medical care in the event they chose to seek it, and employment and non-discriminatory treatment (Mogli 2016), which seems to be negated in this bill.

Chapter 7 provides for a National Council for Transgender Persons. The council would not have powers similar to a civil court, as compared to the previous bill, and it can arguably end up becoming a toothless body. Chapter 8 provides for “Offences and Penalties.” The bill states that begging, forced or bonded labour (excluding compulsory government service for public purposes), denial of use of a public place, denial of residence in household, village, and physical, sexual, verbal, emotional and economic abuse attract punishment by imprisonment between six months and two years, and a fine. Yet, the chapter is silent on the atrocities committed specifically by the police against the community, which is one of the major issues faced by the transgender community.

This important legislation would require much wider consultation and debate in the assembly. It should not ignore the voices of those who would be affected by it the most, and, if passed, I wonder if we would be “successful” in limiting gender variance and proclaiming victory of a pseudo-accommodative heteronormative society.

### Postscript

The Lok Sabha speaker has referred the Transgender Persons (Protection of Rights) Bill, 2016 to the Parliamentary Standing Committee on Social Justice. Subsequently, the parliamentary panel which was examining the bill had also invited suggestions from the public seeking wider consultations. It is hoped that better sense prevails, and that the “infirmities” are adequately corrected and the right to self-identify one’s gender is legally implemented.

## NOTE

1 “Application for Clarification/Modification of Judgment and Order Dated 15 April 2014 Passed by This Hon’ble Court and to Pass Appropriate Directions on Behalf of Union of India,” in *National Legal Services Authority v Union of India* (2014), [http://orinam.net/content/wp-content/uploads/2014/09/NALSA\\_UOI.pdf](http://orinam.net/content/wp-content/uploads/2014/09/NALSA_UOI.pdf).

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