



THE RIGHTS OF TRANSGENDER PERSONS BILL, 2014

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The Supreme Court of India in its landmark decision in National Legal Services Authority v. Union of India [(2014) 5 SCC 438] ordered, inter alia, that: the government must legally recognize a transgender person's right to identify as male, female or third gender; transgender persons must be granted reservations in educational institutions and public appointments; and the government must provide social welfare schemes and combat discrimination. In furtherance of these objectives, the Rajya Sabha passed the Rights of Transgender Persons Bill, 2014 on April 24, 2015. This issue of the Law & Policy Brief highlights some of the areas where the Bill falls short of the letter and spirit of the Supreme Court verdict.

The Rights of Transgender Persons Bill, 2014 [hereinafter, the Bill] represents a profound shift in the law's perception of the transgender community. Instead of regulating and punishing them – for example the Karnataka Police Act allows local authorities to keep a registry of “eunuchs” “in order to prevent or suppress or control [their] undesirable activities” – the Bill provides rights based provisions for the transgender community. It prohibits discrimination against transgender persons in education and employment, sets forth a 2% reservation in all government educational institutions and government posts, and requires the government to combat negative stereotypes and stigma [Sections 13, 16, 21, 22, 25]. It also creates National and State Commissions for Transgender Persons and specific Transgender Rights Courts [Chapters VII & VIII]. Despite these progressive measures, some of the provisions of the Bill leave much to be desired.

Sexual Orientation and Gender Identity

The Supreme Court's judgment in *National Legal Services Authority v Union of India* [hereinafter, NALSA judgment] categorically stated that, “Discrimination on the ground of sexual orientation or gender

identity, (...) impairs equality before law and equal protection of law and violates Article 14 of the Constitution of India.” However, the Bill's definition of “discrimination” provides protection only on the basis of “gender identity and expression” [Section 2 (c)]. This is a major oversight in the drafting of the Bill. The Bill should be amended to extend the discrimination protection to all persons on the grounds of not only their gender identity and expression, but also their sexual orientation. The Constitution states that no one shall be discriminated against on the grounds of sex. In the NALSA case, the Supreme Court has stated that the word “sex” includes stereotypical expectations from biological sex. Therefore, if a person is being discriminated against because they do not conform to a stereotypical expectation from their biological sex (take for example that they are gay, lesbian or bisexual), such discrimination is unconstitutional. The Bill, however, has limited the scope of this verdict. By effect of this Bill, a person can validly claim if they are being discriminated against for being transgender but no claim will lie for a person who is being discriminated against for being gay, lesbian or bisexual.

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Disproportionate Impact of the Prima Facie Equal Provisions

Section 2(c) of the Bill guarantees that no person suffers discrimination on the basis of their gender identity and expression in any field such as economic, political, civic etc. However, the Bill has not accounted for disproportionate impact of *prima facie* equal provisions. This can be explained with an example. Several states criminalize beggary through anti-vagrancy or beggary prevention laws, such as the Bombay Prevention of Beggary Act, 1959 or the Karnataka Prohibition of Beggary Act, 1975. Additionally, the Immoral Trafficking Prevention Act, 1986 [ITPA] states, among other things, that the persons who own or manage a brothel or who live off the earnings of a prostitute will be subject to criminal proceedings. Though sex work itself is not criminalized, sex workers are often harassed by the threat of this Act. None of the above laws specifically target transgender people, and yet they are disproportionately affected by these laws. A PUCL report on human rights violations of transgender persons has found that several times, the police proceed to arrest transgender persons under the ITPA without any evidence of solicitation for prostitution and merely on the suspicion that one is a sex worker. Another example can be taken from the 2014 Ondede report on the human rights violations of transgender persons, which cites the testimony of a transgender person who states that in November 2014, 47 transgender persons were arrested in Bangalore under the Karnataka Prohibition of Beggary Act, 1975. Most of them were not begging.

The fact that many transgender persons earn their livelihood through begging or sex work¹ coupled with the manner of arrests made under these laws, reveal that these facially neutral laws that criminalize beggary and brothel owners disproportionately impact the transgender population. What legal recourse will a transgender person have if they are arrested under the law? The anti-discrimination guarantee will only take them so far. In addition to the anti-discrimination guarantee noted above, there is Section 6(2) of the Bill, which states that “no person shall be deprived of his personal liberty only on the ground of being a transgender.” If transgender persons are arrested under the aforementioned laws, they may hear the legal refrain that they are being treated equally as other beggars and sex workers and are not being subject to any discrimination “only” on the ground of being transgender.

The disproportionate impact that these laws have on this population may be lost sight of. Should such a situation arise, the court should not only look at the neutrality of the laws but also consider whether it has an unequal impact on different persons. This approach was followed in the case of *T. Sareetha vs T. Venkata Subbaiah* [AIR 1983 AP 356] by the Andhra Pradesh High Court in deciding the constitutionality of Section 9 of the Hindu Marriage Act which provides a right to both spouses to file for restitution of conjugal rights. Holding Section 9 to be unconstitutional, the court noted that although the law is facially neutral, it disproportionately impacts one section of the population, the wives. Unequal impact of the law is an important tool of substantive equality and therefore it must be built into the legislative framework addressing equality and non-discrimination.

Definition of Abuse

Abuse and violence have been defined separately in the Bill, which seems unnecessary, as one could be a sub set of the other. While the definition of abuse is not exhaustive [Section 2(a), “abuse includes ...”] giving leeway to other kinds of abuses to be included in it, the definition of violence is exhaustive and can only mean “causing physical or mental harm or injury” [Section 2(u)]. Both these definitions seem inadequate when compared to other available templates of definitions of abuse/violence, such as that in the Protection of Women from Domestic Violence Act, 2005 [hereinafter, PWDVA]. Section 3 of the PWDVA provides a fairly comprehensive definition of conduct, which shall constitute domestic violence:

“harms or injures or endangers the health, safety, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse.”

Further the PWDVA has also clarified what each of this abuses mean. For example, Section 3 of the Act defines physical abuse as:

“... any act or conduct which is of such nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force”.

Having a comprehensive definition in the Act itself ensures that less is left to the discretion of the authority to decide whether a situation constitutes abuse. Physical abuse under the Act has been mostly interpreted as danger to life or limb thus could lead to exclusion of

sexual abuse which could be problematic. Economic abuse is another important aspect of abuse which should be explicitly included in the definition. This will ensure that violence in the nature of deprivation of any economic or financial resources that the person is legally entitled to will be adequately compensated. For example, a transgender person might be entitled to claim maintenance under the Hindu Adoption and Maintenance Act, 1956 and if a person is evading his duty to maintain his child, in addition to the Hindu Adoption and Maintenance Act, 1956, the conduct could be construed as abuse under the current Bill as well. Like the PWDVA, one could also seek remedies for breach of family obligations under this Bill.

The Bill could adopt the PWDVA model for its definition of abuse and the adequate civil remedies it provides in cases of abuse and violence. These orders, which are civil in nature protect and compensate the person who has been subjected to violence/abuse. These types of orders could be included under Section 10(2) of the Bill. The provisions are detailed to include the specific acts that the court may order in order to stop the situation of abuse. For example, in a protection order or a “stop violence” order, the court may prevent any further commission of violence by preventing the respondent from entering the place of employment of the aggrieved person; similarly in a residence orders, the court may pass an order ensuring that the aggrieved person has a shelter, which is safe and could also do so by preventing the respondent from dispossessing the aggrieved from the household. Thus, including such specific orders in the Bill will also protect the transgender person from an abusive situation in a household & from being dispossessed from his/her house.

It is also pertinent to mention that Section 10 (2)(c) of the Bill states that the Executive Magistrate could pass an order “to provide for maintenance to such transgender person”. Maintenance rights are always construed as family obligations (spousal, child or parent support), therefore the word compensation/damages should be used in this provision for the sake of clarity. Moreover the criteria for assessing maintenance and compensation vary (need based approach vs. rights based approach); therefore it is important to use the term compensation.

Best Interest of the Child

Section 11(1) of the Bill states that “no child shall be separated from his or her parents on grounds of being a transgender except on an order of competent Court, if required in the best interest of the child.” This Section is unclear as to who can make an application to the court

giving it the power to make an order of separation of the transgender child from his or her parents. Could it be a third party or could it only be the parent or the next friend of the transgender child? It is also pertinent to mention that there are no factors or parameters mentioned in the Bill which would guide the court to decide what is in the best interest of the child. Discretion in the matters of deciding best interest of the child has given rise to varied interpretation and decisions in family matters. Such wide discretion could be problematic and could also be made against the wishes of the child. Many jurisdictions across the globe have now made specific guidelines for deciding the best interest of the child. According to General Comment No. 14 issued by the Committee on the Rights of the Child, some of the considerations for deciding the best interest of the child could be, the child's views, the child's sex, sexual orientation, national origin, religion and beliefs. Therefore it would be helpful to provide a set of factors in the Bill to guide the court in such matters.

Under Section 10(2) of the Bill, the Executive Magistrate has the power to authorize the police to rescue and provide safe custody or rehabilitation to a transgender person in cases of abuse. If the victim here is a child, it should be the duty of the Executive Magistrate to see if it is in the best interest of the child whether the child should be rehabilitated or the abuser should be instead removed from the setting. As a general note under the abovementioned Section, the first option should be to remove the abuser and only if that is not possible, then to provide rehabilitation or safe custody to the victim.

Transgender Rights Courts

Section 47 requires state governments to set up an exclusive Transgender Rights Court in each city with a population of 10 lakh or more and gives the option of setting up such courts in each district. These courts will hear only cases involving the rights of transgender persons. While this system could have potential benefits, such as creating a cadre of judges familiar with the unique challenges facing the transgender community, this court may also reinforce the idea that the rights of transgender persons are somehow different from the right of others. In addition, it is not certain that such courts would be particularly effective, since other specialized courts, such as Delhi's fast-track courts for trying sexual offences, have been criticized as slow, underfunded, and ineffective at securing convictions.²

Section 46 allows the states to set up Special Transgender Rights Courts in each sub-division that, in addition to their regular dockets, can hear claims by transgender persons. It is unclear, however, how these

courts would differ from existing courts – the existing court system can already hear claims by transgender community, presumably including claims involving violations of the Bill (nothing in the Bill restricts jurisdiction for offenses under the Bill to the newly created courts). Moreover, Section 46 appears to contradict itself. It states that the purpose of the Special Transgender Rights Courts is for “speedy disposal of suits of a *civil* nature” but also that these courts are “for the hearing and disposal of *such suits and criminal cases*.” It is unclear whether the jurisdiction of this transgender court extends to only civil cases or criminal cases or both. The role and jurisdiction of the Special Transgender Rights Courts needs to be clarified in the Bill.

Miscellaneous

Sections 49-51 provide that anyone who commits an offense under the Bill may be punished by a fine or imprisonment up to one year. However, the Bill does not define what constitutes an “offense.” Presumably, this term would apply to discrimination against transgender persons in employment and education, which are prohibited by Sections 16(1) and 13. However, it is less clear what else constitutes an offense. Numerous provisions require the government to take necessary action (e.g., to ensure that transgender persons enjoy the right to equality and the right to life with dignity). If the government fails to take this action, would this constitute an offense? The Bill should clearly explain what constitutes an “offense” triggering the above provisions.

Section 2(t) states that the term “transgender person” includes trans-men and trans-women “whether or not they have undergone sex reassignment surgery or hormone therapy or laser therapy etc.”. The Bill's refusal to require medical intervention is welcome step; however, the Bill does not rule out requiring a psychological test or examination. The NALSA decision on the other hand clearly states that gender identity is based only on self-identification. The Bill should state that a psychological test or examination is not required to qualify as a “transgender person.”

Finally, Section 16(1) prohibits any “establishment” from discriminating against transgender persons in matters relating to employment. However, the definition of “establishment” in Section 2(d) is unclear as to whether it covers only state authorities or also includes private companies. To be sure, the definition of establishment as per the Bill includes any company that provides any professional service, including health, education and financial services. These services could be provided by

either a member of a trade or by a state authority [Section 2(r) read with Section 2 (d)]. Therefore, the definition of the word establishment covers both private and State authorities. The Bill should clearly state that the term “establishment” includes any *public or private* company, firm, cooperative, etc..

Conclusion

The Bill contains important protections and represents an important step towards acceptance and equality. However, there are several key weaknesses and ambiguities that should be remedied before it is made into law. Most importantly, the Bill should: follow the NALSA judgment by including sexual orientation in its anti-discrimination provisions, protect against discrimination on grounds that have a disproportionate impact on the transgender community, expand the definition of “abuse,” clarify the provisions relating to transgender children, and, if specialized courts are found to be expedient, clarify their jurisdiction and ensure that they are more effective than existing specialized courts.

¹ ONDEDE, “A Report on the Human Rights Violations Against Transgenders in Karnataka, 2014” page 5 (Compiled by Prerna Kodur and Gowthaman Ranganathan and edited by V. Elizabeth). Available at: <http://www.scribd.com/doc/277108005/Final-Report-on-Human-Rights-Violations-of-Transgender-Persons> (last visited 23rd October, 2015). See also, PUCL Karnataka, “Human Rights Violations Against Sexual Minorities in India” page 32. Available at: <http://www.pucl.org/Topics/Gender/2003/sexual-minorities.pdf> (last visited 23rd October, 2015).

² See, e.g., Lhendup G Bhutia, *The Case against Fast Track Courts*, OPEN THE MAGAZINE (Oct. 12, 2013), <http://www.openthemagazine.com/article/nation/the-case-against-fast-track-courts>

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