

THE RIGHTS OF TRANSGENDER PERSONS BILL, 2014: PROVISIONS AND LACUNAS BY MR. SAIF RASUL KHAN*

Introduction

The Rajya Sabha passed the Transgender Persons Bill 2014 on April 24, 2015. The Dravida Munnetra Kazhagam MP Tiruchi Siva moved the Bill in the Rajya Sabha on December 12, 2014 and it was taken up for discussion in February and March 2015 and it came for voting on April 24, 2015.

The Supreme Court in a landmark judgment on March 15, 2014, in the case of *National Legal Services Authority (N.A.L.S.A.) Vs the Union of India*,¹ ruled that Transgender people must be granted the status of a "third gender" category, recognizing them as a socially and economically disadvantaged class.² "*Recognition of Transgenders as a third gender is not a social or medical issue but a human rights issue*," Justice KS Radhakrishnan, who headed the two-judge Supreme Court bench, said in his ruling. "*Transgenders are also citizens of India*" and they must be "*provided equal opportunity to grow*", the Court said. "*The spirit of the Constitution is to provide equal opportunity to every citizen to grow and attain their potential, irrespective of caste, religion or gender.*" "*It is the right of every human being to choose their gender*," the detailed judgment stated. The court also directed the central and state governments to take the necessary steps to allow for equal status by ensuring adequate healthcare, education and employment as well as separate public toilets and numerous other safeguards against discrimination. All identity documents such as birth certificates, passports and driver's licences must have a third gender box. The ruling laid emphasis on the gross violation of human rights and abuse that the Transgender community has suffered from ages.

The Rights of Transgender Persons Bill, 2014³, consists of 58 clauses in 10 chapters.

Rights and Entitlements

Under Rights and Entitlements⁴, the Bill makes provisions for ensuring equality of rights and guarantees non-discrimination, the right to life and personal liberty, freedom of speech etc.,. It lays emphasis on the Transgender children guaranteeing that the child must have equal opportunity to enjoy the human rights with other children and have freedom to express their views on matters affecting them. The other rights guaranteed under the said section deals with provision for accommodation and the right to live in the community, right to integrity,

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¹ National Legal Services Authority v. Union of India; Writ Petition (Civil) No 604 of 2013.

² Article, BBC News, "India court recognises transgender people as third gender", dated 15 April 2014

<http://www.bbc.com/news/world-asia-india-27031180>.

³ The Rights of Transgender Persons Bill, 2015, Bill No. XLIX of 2014, introduced in the Rajya Sabha on December 12, 2014.

⁴ The Rights of Transgender Persons Bill, 2015, Bill No. XLIX of 2014, Part II, Sections 4 to 12.

etc. A significant provision made in the Bill, relates to the protection of the community from violence and exploitation. The Sections 9 and 10 are extremely significant as it lays down intricate terms regarding the protection of the Transgender community from violence, exploitation and abuse both within and outside the home. The Bill elucidates the steps to be taken to move the criminal justice system and the response required from the police and judicial officers to such Bills of violence. It also makes the Government responsible to spread awareness and providing information on taking cognizance and the steps to be taken and legal recourse in such incidents.

The primary issue with Section 5 is the use of the term 'Transgender children'. This is so because children, until they become adolescents, are not necessarily fully aware of their identity and, therefore, it is better to use a term like 'gender non-conforming children', along with the term 'Transgender children'.

While the Bill bestows basic social rights, the sexual rights have not yet been conferred to the Transgender community. There are two draconian rules, i.e., Section 377 of IPC⁵ and the Immoral Traffic Prevention Bill of 1956. These two Bills are the instruments of harassment and exploitation of the Transgender community. A Transgender will continue to be a criminal unless these provisions are repealed.

The Expert Committee⁶, Ministry of Social Justice and Empowerment recommended that the government should rework the meaning of 'Gender' in Section 10, IPC⁷. According to the Expert Committee, the definition should be changed to *“any human being though born male, female or with intersex variations, has a right to take on any gender which will reflect in all their civil, political, social, economic and cultural identification without any ridicule, harassment, denial, rights violation, and be accepted with dignity and respect by all”*.

Education

The Bill, under Sections 13 and 14 provides for an inclusive education system, which does not discriminate against the Transgender community. The Bill states that all educational institutions funded or recognised by the appropriate government must ensure that the Transgender community has an equal access to schools and colleges so that the said community can maximize on the social and academic development. It also lays down the duty to *“monitor participation, progress in terms of attainment levels, and completion of education, in respect of every Transgender student.”* Section 21 calls for reservation of seats, two percent of the total strength of the class or course in government institutes. The Section also makes a proviso that the Transgender would not be barred from competing in the general category seats. The Bill has, however, failed to state the provision to award scholarships reserved for Transgender students in Government Educational Institutions – at all levels of education.

⁵ The Indian Penal Code, Section 377, “Unnatural Offences”.

⁶ Government of India, Ministry of Social Justice and Empowerment, Expert Committee on the issues relating to 'Transgender', constituted on October 22, 2013, under the Order of the T.R. Meena, Joint Secretary to the Government of India.

⁷ The Indian Penal Code, Section 10, “‘Man’, ‘Woman’”.

Education is indispensable for the growth and advancement of any community. The Expert Committee report highlighted a very critical aspect pertaining to the education system. *“Many Transgender persons fall out of the educational system because the teaching-learning environments are geared only for those who clearly identify as either male or female. This results further, in severe social exclusion of those students whose sense of self does not neatly fit into these two gender categories and they will more often than not drop out of school.”*

The society discriminates and ostracizes the Transgender community, which in turn results in lack of basic education and academic life. These two Sections will make sure that there is equality in admittance of every Transgender and thus provide an opportunity for the overall educational development. The basic challenge faced by Transgender children and students is harassment, discrimination and bullying and thus, apart from Anti-Ragging provisions, there is a need to sensitize the student to refrain from harassing them. Sex education is another aspect that needs to be introduced in the Bill. There should be counseling, not only for the Transgender students but also for all students, on how to treat them. The reservation under Section 21 is in additional advantage for the community as they can compete not only as a reserved category but also as a general category student.

Skill Development and Employment

Sections 15 and 16, highlights the necessary provisions for the employment and training of Transgender community in the society. It states that necessary schemes and programmes must be provided for the employment of the Transgender, specifically focusing on self-employment and vocational training. It also provides that the Government authorities must set up mechanisms, which will extend loans to the Transgender at concessional rates for the initiatives and ventures taken up the community to forward self-employment. Section 16 reiterates that there shall be no discrimination against the Transgender in matters of employment and the community must have an equal chance of filling up any post in case of vacancy. Section 22 which provides incentives to private employers, is laid down with the hope that private sector would open up its doors for the community.

Employment is the first step towards financial independence and stability. The Bill emphasizes on self-employment and vocational training and makes provisions for loans and other facilities that would help the community in being self-sufficient. The provision for incentives to the private employers will assure that the employment is not limited to the public sector industries. The Transgender community lives on the fringes of the society and most make a living by singing and dancing or by begging and prostitution. These provisions will ensure their economic emancipation and liberation from the shackles of poverty.

Social Security, Health, Rehabilitation and Recreation

The social security and necessities of live have been expounded in Section 17. The section makes elaborate provisions for the following:

- “(a) safe and hygienic community centres with decent living conditions in terms of nutritious food, sanitation, health care and counselling;*
- (b) facilities for persons including Transgender children who have no families or have been abandoned, or are without shelter or livelihood;*

(c) access to safe drinking water and appropriate and accessible sanitation facilities especially in urban slums and rural areas.

(d) pension to Transgender persons subject to such income ceiling as may be prescribed;

(e) unemployment allowance to unemployed Transgender persons registered with special employment exchange for more than two years and who could not be placed in any gainful occupation.”

Section 18 brings to light the health issues faced by the Transgender community. It elucidates on topics like separate HIV Sero-surveillance Centers, sex reassignment surgery and barrier free access to hospitals. The community often faces huge discrimination and at times, the hospitals refuse to admit them. They are compelled to choose either male or female as their gender in most public spheres. The Bill has no express stipulation to provide subsidized Trans Healthcare Services, meeting International Standards of Care procedures at at-least one major Government Hospital in each state, which been recommended by the Expert Committee. Further, in hospitals, there are only two wards: the Male Ward and the Female Ward. There is no Transgender Ward. The doctors in the hospital are not ready to treat them in the Female Ward. They are not ready to admit them in the Male Ward either. *De facto*, the hospital administration denies the treatment to the Transgender community. This is not only a violation of Fundamental Rights, but a very serious violation of human rights too. The Bill must make it mandatory for every hospital to have dedicated Transgender wards for their treatment. A further provision that needs to review is subsidy for the sex reassignment surgery.

Section 19 discussed rehabilitation process for the Transgender people in areas of education, health and employment. It envisages schemes and development mechanisms to ensure that the Transgender persons reap benefits of the Bill at the earliest.

Section 20 states that the Government must take all suitable measures to promote and protect the right of all Transgender persons to have a cultural life and to participate in leisure and recreational activities on an equal basis with others. It focuses on sponsorship of Transgender film, theatre, music and dance festivals. It also calls for the establishment of a Transgender history museum, which chronicles and interprets the historical experiences of Transgender persons. This sub-section seems to be futile, in the sense that a history of the community would reap not benefits in the development of the community.

Duties and Responsibilities of the Appropriate Government

Section 25 is an extremely pertinent section in the struggle of the Transgender community. It lays down the duties of the government in the sphere of public awareness. It stipulates that the Government must do all possible tasks to reduce the discrimination and bring the Transgender to the mainstream. It also specifies areas where there is an urgent need to sensitize and make people aware of the Transgender people viz., workforce, labour market and professional fee, school, college, university and professional training level and also to employers, administrators and co-workers.

This section is fundamental, there is a need to change the attitude and outlook of the society and develop an understanding to the cause of Transgender community. The society must

bring about the change in their attitudinal behavior and be accommodating to their development and empowerment.

The National and State Commissions

The Bill, in Sections 26 to 45 envisages the establishment of National and State Commissions for Transgender people to exercise the powers conferred upon, and to perform the functions assigned to it. It lays down detailed provisions on term of office of Chairperson and members, their resignation and removal, situations when the Member to Bill as Chairperson or to discharge his functions in certain circumstances. It also lays down the terms and conditions of service of Chairperson and Members, Vacancies, etc, procedure to be regulated by the Commission, functions of the Commission and their Annual and Special Reports of the Commission etc. The Bill has overlooked the proposal of the Expert Committee, to have a dedicated cell for documentation of Human Rights violation against the Queer community in every State Human Rights Commissions and the National Human Rights Commission.

Transgender Right Courts

Chapter VIII, Section 48 makes provision for the commission of Transgender Courts to ensure speedy disposal of civil and criminal cases. It states that the “*State Government, with the concurrence of the Chief Justice of the High Court, by notification in the Official Gazette:—*

- (i) may establish for each district, and*
- (ii) shall establish for each city with a population of 10 lakh or more as per the last Census, a court as an exclusive Transgender Rights Court, and such court shall hear and dispose of only suits of the type mentioned in Section 46.”*

The provisions of legal implementation are not as detailed as required. In light of the recommendation of the Expert Committee, the Bill must make provision for a comprehensive anti-atrocities Bill that spells out the rights of Transgender people to gender expression of any kinds and punishes discrimination and atrocities against people based on gender identity or expression. The atrocities perpetrated against Transgender persons range from rape, rape by insertion of objects, stripping, mutilating the genitals, confinement etc. In addition, verbal abuse should be punishable as an offence. An anti-discrimination Bill must enable Transgender people to take legal action against any form of discrimination encountered in pursuing their education, employment, getting access to housing, access to healthcare, access to bathroom space, access to public transport, etc.

Further, sexual assault, sexual harassment and domestic violence laws should become inclusive: The gender of the survivor of sexual assault and harassment cases should include all people regardless of gender. Under the current laws, only women can file cases of sexual assault.

Section 375 of the IPC⁸ requires an amended in order to make it gender neutral with respect to the victim. This will ensure that even if the assaulter is male, the victim of any gender should fall under the purview of this Bill. It must also include marital rape as a punishable

⁸ The Indian Penal Code, Section 375, “Rape”.

offence. The punishment for rape should be the same irrespective of whether the perpetrator is married to the victim or not.

Offences and Penalties

Sections 49 to 51 states the penalties and offences committed by the Establishments and their punishments. It makes a vital provision for hate speeches and the same is punishable with imprisonment, which may extend to one year and with fine.

Miscellaneous

These are the miscellaneous provisions regarding the funds, removal of difficulties and the power to frame rules and regulations for the effective implementation of the said Bill in the truest sense.

Conclusion

It is notable that 'The Rights of Transgender Persons Bill -2014' is the first 'Private Member's bill passed in the Rajya Sabha in the past 45 years. The Union Government of India, accepting the spirit and the sentiment of the bill, has promised to bring an updated bill of "The Rights of Transgender Persons Bill-2014", after removing the infirmities in the present bill passed in the Rajya Sabha. The Union Government of India must also relook at the recommendations made by the Expert Committee of the Ministry of Social Justice and Empowerment, and the ruling of the Supreme Court in the case of *N.A.L.S.A. vs Union of India* to iron out the creases and issues in the said Bill, which has been passed by the Rajya Sabha.