

THE RIGHTS OF TRANSGENDER PERSONS BILL, 2014: A CRITIQUE

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Abstract:

The organs of Indian democracy have been conferred with various duties under the Constitution of India for smooth and good governance. In any democratic setup, the endeavour is to improve the system, mitigate the anomalies and come up to the expectations of the society. This reposes faith of the people in the State as its saviour. The judiciary has been performing its duties diligently in order to protect the various rights of the people whether they relate to fundamental or other constitutional or statutory rights. In discharge of its functions the Supreme Court gave a landmark judgment on protecting the rights of the transgender persons and added a new dimension to the fundamental rights by breaking the age old barriers. The status of transgender persons was no less than a chattel or an object. With the ruling of the Supreme Court the fundamental rights of the transgender persons have been recognized. In view of the above judgment, the Council of States passed The Rights of Transgender Persons Bill, 2014 in 2015 in order to provide for the formulation and implementation of a comprehensive national policy for ensuring overall development of the transgender persons and for their welfare. The present paper deals with the repercussions of the proposed Bill and offers certain suggestions for the improvement of the Bill in larger public interest.

Key words: Bill, Judiciary, Rights, Supreme Court, Transgender

Introduction:

The three organs of Indian democracy namely; Legislature, Executive and the Judiciary have been conferred with various duties under the Constitution of India for smooth and good governance. No system in the world is perfect and can neither be but this does not mean that efforts should not be made to improve the system; change being the need of the hour. Therefore in any democratic setup, the endeavour is to improve the system, mitigate the anomalies and come up to the expectations of the society. This reposes faith of the people in the State as its saviour. The task of these organs is to bridge the gap that may occur during its course of business so as to have smooth functioning of the system thereby leading to welfare of the people. Although the three organs are considered at the same pedestal nevertheless, judiciary has been given the highest place in the Preamble of our Constitution¹ which implies that the role of the watchdog of society is being played by the judiciary.

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¹ Preamble: WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity;

and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;

The judiciary has been performing its duties diligently in order to protect the various rights of the people whether they relate to fundamental or other constitutional or statutory rights. In discharge of its functions the Supreme Court gave a landmark judgment on protecting the rights of the transgender persons and added a new dimension to the fundamental rights by breaking the age old barriers.

Transgender persons were not allowed to get a passport, ration card, voters' identity card, pan card, bank account, debit and credit card facility, making a will, inherit property etc in India. Their status was no less than a chattel or an object. They did not have the following rights²:

1. Travel legally in ladies compartments in trains, use seats meant for ladies in other public transports and access to use of ladies toilets and bathing rooms.
2. Marry a person irrespective of sexual preferences, seek adoption (even as single parent).
3. Divorce and alimony in cases of violence, abuse, fraud etc.
4. Non existence of three options for gender, namely Male/Female/Transgender.
5. Absence of Census Data in covering the transgender population and their demographic indicators.

There has been high level of stigma and physical, sexual, emotional violence, violence in terms of neglect and discrimination in educational institutions leading to most of them dropping out of their studies. Not only this they were excluded from society and family. Moreover, the low level of education either push them to other occupation like sex work or force them to take sub optimal jobs like begging etc.³ With the ruling of the Supreme Court the fundamental rights of the transgender persons have been recognized.

Supreme Court Judgment:

In the landmark judgment of National Legal Services Authority Vs Union of India and others⁴ the Supreme Court of India observed as follows:

'The Transgender are also citizens of this country. They also have equal right to achieve their full potential as human beings. For this purpose, not only they are entitled to proper education, social assimilation, access to public and other places but employment opportunities as well. By recognizing such persons as third gender, they would be able to enjoy their human rights, to which they are largely deprived of for want of this recognition. The issue of transgender is not merely a social or medical issue but there is a need to adopt human right approach towards transgender which may focus on functioning as an interaction between a person and their environment highlighting the role of society and changing the stigma attached to them. They face many disadvantages due to various reasons, particularly for gender abnormality which in certain level needs to physical and mental disability. Up till recently they were subjected to cruelty, pity or charity. Fortunately, there is a paradigm shift in thinking from the aforesaid approach to a rights based approach. Though, this may be the thinking of human rights activist, the society has not kept pace with this shift. There appears to be limited public knowledge and understanding of same-sex sexual orientation and people whose

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

² <http://www.ijssh.org/papers/551-W10007.pdf> accessed on 12-09-2015

³ Ibid

⁴ Writ Petition (Civil) No 400 of 2012 decided by the Supreme Court of India on 15 April 2014

gender identity and expression are incongruent with their biological sex. As a result of this approach, such persons are socially excluded from the mainstream of the society and they are denied equal access to those fundamental rights and freedoms that the other people enjoy freely. Therefore, gender identification becomes very essential component which is required for enjoying civil rights by this community. It is only with this recognition that many rights attached to the sexual recognition as 'third gender' would be available to this community more meaningfully viz, the right to vote, the right to own property, the right to marry, the right to claim a formal identity through a passport and a ration card, a driver's license, the right to education, employment, health so on. Further, there seems to be no reason why a transgender must be denied of basic human rights which includes Right to life and liberty with dignity, Right to Privacy and freedom of expression, Right to Education and Empowerment, Right against violence, Right against Exploitation and Right against Discrimination. Constitution has fulfilled its duty of providing rights to the transgender. Now it is time for us to recognize this and to extend and interpret the Constitution in such a manner to ensure a dignified life of transgender people. All this can be achieved if the beginning is made with the recognition that TG as third gender. In order to translate the aforesaid rights of TGs into reality, it becomes imperative to first assign them their proper 'sex'. At the time of birth of a child itself, sex is assigned. However, it is either male or female. In the process, the society as well as law, has completely ignored the basic human right of TGs to give them their appropriate sex categorization. Up to now, they have either been treated as male or female. This is not only improper as it is far from truth, but indignified to these TGs and violates their human rights. Though there may not be any statutory regime recognizing 'third gender' for these TGs. However, we find enough justification to recognize this right of theirs in natural law sphere. Further, such a justification can be traced to the various provisions contained in Part III of the Constitution relating to 'Fundamental Rights'. The rule of law is not merely public order. The rule of law is social justice based on public order. The law exists to ensure proper social life. Social life, however, is not a goal in itself but a means to allow the individual to life in dignity and development. The human being and human rights underlie this substantive perception of the rule of law, with a proper balance among the different rights and between human rights and the proper needs of society. The substantive rule of law "is the rule of proper law, which balances the needs of society and the individual." This is the rule of law that strikes a balance between society's need for political independence, social equality, economic development, and internal order, on the one hand, and the needs of the individual, his personal liberty, and his human dignity on the other. It is the duty of the Court to protect this rich concept of the rule of law. By recognizing TGs as third gender, this Court is not only upholding the rule of law but also advancing justice to the class, so far deprived of their legitimate natural and constitutional rights. It is, therefore, the only just solution which ensures justice not only to TGs but also justice to the society as well. Social justice does not mean equality before law in papers but to translate the spirit of the Constitution, enshrined in the Preamble, the Fundamental Rights and the Directive Principles of State Policy into action, whose arms are long enough to bring within its reach and embrace this right of recognition to the TGs which legitimately belongs to them.'

Following directions were issued to the State by the apex court in the above case:

- i. Hijras, Eunuchs, apart from binary gender, be treated as "third gender" for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by the Parliament and the State Legislature.
- ii. Transgender persons' right to decide their self-identified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender.

- iii. We direct the Centre and the State Governments to take steps to treat them as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.
- iv. Centre and State Governments are directed to operate separate HIV Sero-surveillance Centres since Hijras/ Transgender face several sexual health issues.
- v. Centre and State Governments should seriously address the problems being faced by Hijras/Transgender such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma, etc. and any insistence for SRS for declaring one's gender is immoral and illegal.
- vi. Centre and State Governments should take proper measures to provide medical care to TGs in the hospitals and also provide them separate public toilets and other facilities.
- vii. Centre and State Governments should also take steps for framing various social welfare schemes for their betterment.
- viii. Centre and State Governments should take steps to create public awareness so that TGs will feel that they are also part and parcel of the social life and be not treated as untouchables.
- ix. Centre and the State Governments should also take measures to regain their respect and place in the society which once they enjoyed in our cultural and social life.

In view of the above judgment, the Council of States passed The Rights of Transgender Persons Bill, 2014 on 24th April 2015⁵ in order to provide for the formulation and implementation of a comprehensive national policy for ensuring overall development of the transgender persons and for their welfare.⁶ With the passage of this Bill the Constitutional guarantee provided under Article 15⁷ has been recognized and given effect thereto. The Bill has dealt with various rights of the transgender persons in order to ensure their overall development and growth in an egalitarian manner.

⁵ <http://164.100.47.4/BillsTexts/RSBillTexts/PassedRajyaSabha/transgndr-RS%20pas-E.pdf> accessed on 05-08-2015

⁶ *ibid*

⁷ Article – 15: (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to-

(a) Access to shops, public restaurants, hotels and places of public entertainment; or

(b) The use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.

Repercussions and Suggestions:

Despite the efforts put in by the legislature, the Bill so passed contains certain anomalies and may have future repercussions as well, if not amended. The repercussions that may occur are as follows:

1. Under Section-9⁸ the appropriate Government and local authorities have been empowered to take all appropriate administrative and other measures to protect persons from being subjected to torture, or cruel, inhuman or degrading treatment or punishment. However, it could have been better if some broad guidelines had been given to the administrative authorities as to the direction in which they need to work. Since police agency already exists to work in this direction, additional guidelines can be given. For example, setting up of specific centres in the State dealing with providing medical, psychological as well as monetary help to the victims of above stated cruelty. Moreover, a great majority of the hijras (87.5 per cent) have experienced problems caused by the police whether policemen from respective police stations (50.87 per cent), railway police (26.31 per cent), or traffic policemen (8.77 per cent).⁹ This implies that approaching the police by the transgender victim is not a very feasible option and demands separate centres exclusively meant for the purpose.
2. Section 11 of the Bill¹⁰ puts two restrictions providing that a child cannot be separated from his/her parents and in case the family is unable to take care of the child then the court shall make efforts to place the child within his community in the family setting. The provision is not clear as to what would happen to the child if parents despite their ability to bring up the child are not willing to keep him/her? Also, this provision does not cast any liability on the parents in case if despite the ability of the parents to bring up the child, the parents try to escape from their responsibility. In the absence of such a provision, such parents will easily be able to escape from their liability of failure to bring up their transgender child due to the fear of embarrassment in the society or pressure from the relatives or society.
3. Section 17¹¹ only deals with the requirement of framing necessary schemes by the state government. However, no time limit has been set within which the schemes need to be

⁸ Section 9 - The appropriate Government and local authorities shall take all appropriate administrative and other measures to protect persons from being subjected to torture, or cruel, inhuman or degrading treatment or punishment.

⁹ <http://www.ijssh.org/papers/551-W10007.pdf> accessed on 13-09-2015

¹⁰ Section 11 (1) - No child who is a transgender 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.

(2) Where the immediate family is unable to care for a transgender child, the competent Court shall make every effort to place such child within his or her extended family or within the community in a family setting.

¹¹ Section 17 (1) - The appropriate Government shall promulgate necessary schemes and programmes to safeguard and promote right of transgender persons to adequate standard of living and living conditions to enable them to live independently and in the community.

(2) The schemes under sub-section (1) of section 17 shall inter-alia provide:

(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;

framed. Non fixation of any time limit gives a wide discretionary power to the States to exercise or not to exercise this power as no liability has been cast upon for non compliance of the same. Similar problem occurred when the Criminal Law Amendment Act of 2009 was incorporated directing the States to frame schemes to provide compensation to the victims. In the absence of any time limit many States had not formulated the schemes due to which numerous petitions had to be filed in the court for giving directions to the State for the same.

4. Though there cannot be any mandatory legal duty that can be cast upon the parents to send their children to school, however, it should be so made in the interests of the transgender children, who remain deprived of this right due to fear of societal embarrassment. At least some incentives should be given to such parents who send their transgender children to school thereby breaking the long set societal barriers. This will help in setting examples and thereby motivate other such parents to send their transgender children to schools. It is the parents' initial bold initiative due to which the child is able to begin the path of his future that makes his/her career.
5. Children should be brought up and inculcated with these thoughts and values that being a transgender is not a curse but just a situation and circumstance which one may have to face in life because of the sex he is born with. Most of the maladies in our society are prevailing because of our mind set and our false beliefs. Hence efforts should be made by the state and central governments to incorporate topics pertaining to the recognition of equal rights to the transgender persons in the school curriculum so that the tender minds of the children can be kept at bay from the misconceptions about transgender persons. Parents should also be encouraged to inculcate such values among their children so that the very concept of inequality can be mitigated to a great extent. A moral obligation on parents is self imposed.
6. The way parents rearing female children are given various incentives, similarly parents who are in government service should be given certain incentives if transgender children are born to them. A provision in this regard will certainly prove fruitful in reducing the pains of transgender persons.
7. Though under Section-10(4)¹² police officer has been conferred with the duty to inform the transgender person as to his rights but many a times a transgender may feel reluctant in

(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.

¹² Section 10 (4) - Any police officer who receives a complaint or otherwise comes to know of abuse, violence or exploitation towards any transgender person shall inform the aggrieved person of:

(a) The right to apply for protection under sub-section (2) of Section 10;

(b) The particulars of the nearest organization or institution working for the rehabilitation of transgender person who have been subject to abuse, violence or exploitation;

(c) The particulars of the Executive Magistrate having jurisdiction to provide assistance to aggrieved persons;

approaching the police. To avoid such a situation the State government as well as the central government should upload a list of such organizations along with their complete address which the transgender person can contact to seek instant remedy instead of first approaching the police. This list should be updated from time to time. The setting up of all women Police Station in Karnal, Chandigarh etc is a welcome step and a well thought initiative of the government to help the victims of abuse in case of transgender persons.

Conclusion:

"Sex is what you are born with, gender is what you recognize and sexuality is what you discover."¹³ All transgender persons are human beings and therefore all human rights are available to them irrespective of their sex. As all human beings have the right to live with dignity, regardless of their legal, social or political status so do the transgender persons. Lot needs to be done for the welfare of transgender persons. By working together progress is possible. A step in this regard has already been taken in the form the judgment and the proposed Bill endeavours to bridge the remaining gaps. The Bill is yet to be passed by the House of People. The above stated repercussions need to be considered by the Lower House and suggestions if incorporated will certainly benefit the transgender persons to whom the legislature wants to provide benefits.

(d) The right of the transgender person to free legal services under the Legal Services Authorities Act, 1987 and any other services offered by the National Legal Services Authority or the State Legal Services Authority for the benefit of transgender persons; and

(e) The right to file a complaint under the relevant provisions of the Indian Penal Code, 1860 or any other law dealing with such crimes:

Provided that nothing in this section shall be construed to free such Police Officer of his obligation to proceed in accordance with law upon receipt of information as to the commission of a cognizable offence.

¹³ <http://www.ijssh.org/papers/551-W10007.pdf> accessed on 14-09-2015