

## ICJ Briefing Paper

### India: The Transgender Persons (Protection of Rights) Bill, 2016

#### Introduction

Recently, the Indian Cabinet approved a draft of the Transgender Persons (Protection of Rights) Bill, 2016. This was introduced in the Lok Sabha (the Lower House of the Indian Parliament) on 2 August 2016.

The Bill is part of a series of developments on transgender rights in India, which follow the seminal Supreme Court judgment of *National Legal Services Authority v Union of India and others (NALSA v UOI)* in 2014.<sup>1</sup> In this case, the Supreme Court affirmed transgender persons' right to their self-identified gender, and directed the government to grant legal recognition of the same, and to take specific steps to ensure equality and non-discrimination for transgender persons.

In international human rights law, discrimination on the grounds of sexual orientation and/or gender identity is prohibited. India has ratified several human rights treaties – including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights – which guarantee the rights to equality and non-discrimination.

In its reasoning and directions in the NALSA judgment, the Supreme Court relied on constitutional rights, as well as international human rights law as enshrined in the Yogyakarta Principles. More specifically it referred to a number of rights enshrined in international human rights law, including the rights to equality and non-discrimination, recognition before the law, life, privacy, humane treatment in detention, protection from medical abuses, and freedom of expression and opinion, as they apply to sexual orientation and gender identity.

The ICJ is concerned about several provisions in the current draft Bill, as approved by the Indian Cabinet, including the definition of who is “transgender person”, the process of gender recognition it outlines, as well as the lack of adequate provisions on employment, education, anti-discrimination measures, and penalties for offences committed. According to the ICJ, the above-mentioned provisions of the Bill are at odds with the

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<sup>1</sup> For more information see: International Commission of Jurists Briefing Paper, “Implementation of the NALSA Decision” available at <http://icj2.wpenline.com/wp-content/uploads/2016/04/India-QA-NALSA-Advocacy-Analysis-brief-2016-ENG.pdf>; India: support comprehensive and consultative Transgender Rights Bill, available at <http://www.icj.org/india-support-comprehensive-and-consultative-transgender-rights-bill/>.

directions of the Supreme Court in the case of *NALSA v UOI* in several important ways.

For the reasons set out in greater detail below, the ICJ considers that, while there is a need for strong and progressive legislation that fulfills the promises of the *NALSA* judgment and gives effect to India's obligations under international human rights law, the government should immediately withdraw the Bill as currently drafted, and engage in meaningful and substantial public consultation with members of the transgender community, with a view to substantially revising the above-mentioned problematic provisions of the Bill before tabling it in Parliament again.

### **1) What is the relationship between this Bill and the Rights of Transgender Persons Bill 2014?**

In April 2015, the Rajya Sabha (Upper House of India's Parliament) passed the Rights of Transgender Persons Bill 2014. This was a private member bill introduced by a member of parliament, Tiruchi Siva. This Bill was later introduced in the Lok Sabha, but has not been passed yet.

Simultaneously, the government of India began the process of developing its own draft of a transgender rights law. In December 2015, the Ministry of Social Justice and Empowerment made a draft version of this law available on its website, inviting feedback and comments from the public. However, the government was widely criticized, since the two-week public consultation period initially envisaged by the government – and which was eventually extended by another week – was extremely short and thus inadequate. Notwithstanding this criticism, however, in July 2016, it was announced that Cabinet had approved the Transgender Persons (Protection of Rights) Bill 2016, which has now been introduced in the Lok Sabha.

Despite the fact that the Rights of Transgender Persons Bill 2014 is still before the Lok Sabha for consideration, it is likely that, going forward, the 2016 Bill will form the basis of discussions in the Parliament on statutory rights and entitlements for transgender persons in India.

### **2) Who does the Transgender Persons (Protection of Rights) Bill, 2016 concern?**

The bill defines a transgender person as someone who is:

- (A) neither wholly female nor wholly male; or
- (B) a combination of female or male; or
- (C) neither female nor male; and whose sense of gender does not match the gender assigned to that person at the time of birth, and includes trans-men and trans-women, persons with intersex variations and "gender-queers".

The ICJ is concerned that this definition is inconsistent with the *NALSA* judgment. That decision allowed a person whose sense of gender did not

match with the gender assigned to them at birth to opt for an identity as male, female or transgender.<sup>2</sup> The ICJ notes that, in this critical respect, the prior version of the Bill did in fact comply with Supreme Court's decision in NALSA, as its definition provided that a transgender person should have the option to choose either man, woman, or transgender when it came to their legal gender identity. That definition also clearly mentioned that the right to choose any of these options was one that stood independent of gender reassignment (or gender-affirming) surgery or hormone treatment.

Instead, the definition provided in the current version of the Bill takes away the option of identifying as either male or female, and the question of whether medical intervention is required is open to ambiguity. Further, by using language like "wholly male" and "wholly female" the definition of a transgender person in the current draft reinforces harmful stereotypes and is at odds with the right to dignity and integrity and self-definition.

### **3) What are the Rights guaranteed under the Bill?**

#### **a) Gender Recognition**

Chapter III of the Bill provides for a mechanism to facilitate legal gender recognition. As per the Bill, a transgender person may make an application to the District Magistrate for a certificate of identity as a transgender person. On receiving this application, the District Magistrate will refer the application to a District Screening Committee. The committee will be constituted of a medical officer, a social welfare officer, a psychologist or psychiatrist, a transgender community representative and a government officer. The Committee makes its recommendations on the application following which the Magistrate will issue the certificate of identity to the applicant. The identity certificate then serves as official proof of the individual's gender identity, entitling people to change their details in other official identity documents, as well as serving as a tool through which to access rights and entitlements that might accrue to them as transgender individuals.

The NALSA judgment was celebrated for its self-identification principle vis-à-vis legal gender recognition. The principle underlying that notion would be a barrier-free process to accessing gender change. The ICJ is concerned that the proposed bureaucratic process described above - which puts the decision for gender change before two different sets of authorities - is inconsistent with the self-identification principled championed by the NALSA decision. Furthermore, the organization is concerned that the recognition process set out above does not explicitly prescribe the requirements for recognition of gender change.

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<sup>2</sup> See, for example, para 70 of the Supreme Court's decision in the case of NALSA v UOI, which said "Self-identified gender can be either male or female or a third gender"

Principle 3 (b) of the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity requires states to “Take all necessary legislative, administrative and other measures to fully respect and legally recognize each person’s self-defined gender identity”. Chapter III of the Bill is inconsistent with this.

## **b) Protection from Discrimination**

Two separate provisions in the current Bill deal with the duty not to discriminate. The first, in section 3 of chapter II, lays down a general duty against discrimination, under which no person shall discriminate, on a number of defined grounds, against a transgender person. The grounds correspond to the nature of certain relevant sectors – the provision effectively prohibits discrimination in educational establishments, employment settings, healthcare services, and in the housing context, among others. However, there is no enforcement mechanism provided in case of a violation of the anti-discrimination duty under this provision.

Second, in an entirely different chapter – section 10 in chapter V - the Bill specifically prohibits “establishments” from discriminating against transgender persons in any matter relating to employment. “An establishment” is defined under the Bill as including a range of bodies, such as companies, firms, etc. that provide certain services. In terms of enforcement of this provision, the Bill mandates the designation of complaint officers in establishments consisting of a hundred or more persons, without providing any guidance or sanctions in case of violation.

In neither of these provisions does the Bill provide an actual definition of what constitutes discrimination. The earlier iteration of the Bill did in fact provide such a definition: it included “any distinction, exclusion or restriction on the basis of gender identity and expression which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field and includes all forms of discrimination, including denial of reasonable accommodation”.

## **c) Welfare**

Chapter IV of the Bill as currently drafted requires the government to take steps to secure the participation and inclusion of transgender persons in society, including by “formulating” relevant welfare schemes; facilitating transgender persons’ access to these schemes; and taking steps towards the “rescue, protection and rehabilitation” of transgender persons.

Chapter V provides for non-discrimination in matters relating to employment, including in the private sector. This chapter also states that transgender

persons have the right to reside in and use the facilities of the house where their immediate family resides without discrimination.

#### **d) Education, social security and health**

Chapter VI focuses on education, social security and health. It states that government-funded or recognized educational institutions must provide inclusive education and recreational activities to transgender persons; and that the government will develop schemes to support vocational training and self-employment opportunities for transgender persons.

While the previous draft of the 2016 Bill, as well as the 2014 Bill, both, contained provisions for reservations in employment, the current draft has been widely criticized by activists and the transgender community for omitting the same. Under international human rights law, States have a duty to adopt special measures, policies and affirmative actions needed to ensure that persons or groups that are subject to discrimination or intolerance enjoy equal treatment and exercise their human rights on the basis of equality and non-discrimination. For example, in the context of the implementation of the ICCPR, in instances where conditions prevent or impair individuals or groups from enjoying and exercising their human rights as provided for under the Covenant, States parties should, in accordance with General Comment 18 on non-discrimination, “take affirmative action in order to diminish or eliminate conditions” which perpetuate discrimination.<sup>3</sup>

Chapter VI also provides for health-related measures, including pre and post-sex reassignment surgery and hormonal therapy counseling, a comprehensive medical insurance scheme for transgender persons to cover medical expenses, and a review of medical curriculum. However, there is no mention about making these measures economically and otherwise accessible to people who would not be able to afford them. The 2014 Bill, on the other hand, specifically states that state governments must provide “sex reassignment surgery, free of cost”.

#### **4) What administrative bodies does the Bill set up?**

The Bill sets up a “National Council for Transgender Persons”. It provides details about the composition of this Council, saying that it will consist of representatives from certain governmental ministries, the National Human Rights Commission and National Commission for Women, state governments, the transgender community and non-governmental organizations, all to be appointed by the Central Government.

However, while the Council’s functions are detailed in the Bill as including advising the government on laws and policies regarding transgender persons; monitoring and evaluating the impact of governmental measures for transgender persons; and coordinating activities of governmental and non-

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<sup>3</sup> UN Human Rights Committee (HRC), CCPR General Comment No. 18 ¶10, HRI/GEN/1/Rev.9 (Vol. I): Non-discrimination (10 Nov. 1989).

governmental organizations that deal with transgender persons, the Bill fails to provide the Council with any clear powers.

The Bill also requires that certain private establishments set up a complaints officer to deal with any violations of the Bill.

### **5) What are the established offences under the Bill?**

As mentioned previously, Chapter II of the Bill entitled "Prohibition of Certain Acts", prohibits discrimination against transgender persons on specific grounds. However, the violation of this duty to not discriminate is not correlated with any clear sanction.

In a different chapter on "Offences and Penalties", the Bill provides for four specific criminal offences: 1) compelling or enticing a transgender persons to indulge in the act of begging; 2) denying a transgender person right of passage or access to public place; 3) forcing a transgender person to leave their place of residence, or, finally, 4) endangering the life, safety and well-being of a transgender person. These four distinct offences are all given the same punishment, which is to vary between six months' and two years' imprisonment.

The specific nature of offences covered under the current draft of the Bill gives rise to serious concern. Some, such as "endangering the life of a transgender person" or the criminalization of beggary, are already covered within the general criminal law. In addition, the identification of beggary as a separate offence under the draft is at the very least questionable since for many transgender persons in the country, it remains one of the limited livelihood opportunities. The general criminal law on beggary has further been significantly misused against the transgender community – one of the more egregious instances of which was a police drive against community members in Bangalore in October 2014 where dozens of individuals were arbitrarily detained in a Beggars' Colony.<sup>4</sup>

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<sup>4</sup> "Arbitrary detention of Hijras in Bangalore (Nov 2014): communities demand justice" available at <http://orinam.net/hijras-detained-bangalore-nov-2014/>.