



ICJ Submission to the Standing Committee on Social Justice and Empowerment on the Transgender Persons (Protection of Rights) Bill, 2016

INTRODUCTION

1. The International Commission of Jurists (ICJ) welcomes the opportunity to make a submission to the Standing Committee on Social Justice and Empowerment on the Transgender Persons (Protection of Rights) Bill, 2016 (hereafter the Bill).
2. Composed of 60 eminent judges and lawyers from all regions of the world, the ICJ promotes and protects human rights through the rule of law, by using its legal expertise to strengthen national and international justice systems. Established in 1952 and active on five continents, the ICJ aims to ensure the development and effective implementation of international human rights and international humanitarian law; secure the realization of all human rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.
3. The ICJ uses international human rights law to hold States accountable for and responsive to human rights abuses and violations experienced by individuals because of discrimination against their real or imputed sexual orientation, gender identity or expression. The ICJ carries out this work through a variety of means, including through participation in domestic legal cases raising questions concerning human rights and sexual orientation and/or gender identity or expression, as has recently been the case in Australia, Belize, Hong Kong, Ireland, Romania, as well as by engaging in legal reform advocacy on behalf of lesbian, gay, bisexual, transgender and intersex individuals at the domestic and international level in countries such as Brunei, India, Malta, Myanmar, Namibia, Nigeria, Russia, and Uganda.

BACKGROUND

4. India is a party to several international 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 international human rights law, discrimination on the grounds of sexual orientation and/or gender identity or expression or intersex status or sex characteristics is prohibited.
5. In 2014, in the *National Legal Services Authority v. Union of India* (the NALSA case),¹ the Indian Supreme Court affirmed transgender persons' right to their self-identified gender, and directed the government to grant legal recognition of the same and take specific steps to ensure equality and non-discrimination for transgender persons. It also directed the state and central governments to take some concrete steps to address the marginalization of transgender persons. In April 2015, the Rajya Sabha, the Upper House of Parliament, unanimously passed a "Rights of Transgender Persons Bill". This was a private members' bill, and aimed to implement some of the core promises of the NALSA decision. This Bill was later introduced in the Lok Sabha, but has not been passed.²
6. In December 2015, the Ministry of Social Justice and Empowerment made available on its website another draft of a Union (central government) Bill on the same subject, with

¹ *National Legal Services Authority v. Union of India*, available here: <http://supremecourtindia.nic.in/outtoday/wc40012.pdf>.

² See: <http://www.icj.org/india-support-comprehensive-and-consultative-transgender-rightsbill/>.

some amendments, asking for public inputs. This initiative was widely criticized since the public consultation time initially allowed was only two weeks –and therefore inadequate; however, the consultation time was eventually extended by another week. In July 2016, a government version of the Transgender Persons (Protection of Rights) Bill 2016, was approved by the parliament, and has now been introduced in the Lok Sabha. The ICJ's comments and observations set out in the present submission to the Standing Committee on Social Justice and Empowerment arise from and address this current version of the Transgender Persons (Protection of Rights) Bill, 2016).

7. The ICJ is concerned about several provisions in the Bill, including an inadequate and problematic definition of who is a "transgender person"; a bureaucratic process of gender recognition at odds with the right of self-identification; as well as the lack of adequate provisions on employment, education, anti-discrimination measures, and penalties for relevant offences. This submission is not intended to be an exhaustive examination listing all potential concerns regarding the Bill. Rather, it provides an analysis of certain specific provisions in the Bill giving rise to serious concern, in light of India's obligations under international human rights law, relevant constitutional provisions, judgments of the Indian Supreme Court, and previous versions of the same Bill.
8. In summary, while there is a need for strong and progressive legislation that respects, protects and fulfills the full range of human rights of transgender persons, the Bill, as presently formulated, can do more harm than good if it is adopted without certain necessary amendments. **The ICJ urges the Indian government to 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 problematic provisions of the Bill, including those described in detail below, before tabling it in Parliament again.**

FLAWED DEFINITION OF 'TRANSGENDER PERSONS'

9. Section 2 (i) of 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 with 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".
10. This definition is problematic for several reasons. *First* – using language like "wholly male" or "wholly female" to define a transgender person inaccurately assumes that gender identity is the same as biological sex. *Second* – the Bill conflates the definition of an intersex person with that of a transgender person. The UN Office of the High Commissioner for Human Rights, for example, refers to intersex people as individuals who are born with sex characteristics that do not fit the typical definition of male or female, including sexual anatomy, reproductive organs and/or chromosome patterns. This is similar to the language used in the first part of the definition as set out in Section 2 of the Bill. *Third* - by using the terms "wholly male" and "wholly female", the current Bill reinforces harmful stereotypes and is at odds with transgender persons' dignity and integrity. For example, it furthers the misconception that a "wholly male" or "wholly

female” identity exists, and that such an identity does not encompass transgender persons.

IMPROPER PROCESS FOR GENDER RECOGNITION

11. Chapter III of the Bill provides for a mechanism ostensibly to facilitate legal gender recognition. Under 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 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.
12. 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 decision of the Supreme Court in the case of *NALSA v. UOI*.³ In its decision in *NALSA*, the Supreme Court guaranteed the right of transgender persons to the recognition of their self-identified gender identity, holding that, “Gender identity as already indicated forms the core of one’s personal self, based on self identification”, and directing that

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.

13. Furthermore, 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”.⁴ The two-tiered bureaucratic process envisaged by Chapter III of the Bill is inconsistent with this.
14. The inconsistency is made worse by the fact that the recognition process set out in the Bill does not explicitly prescribe the requirements for recognition of gender change. This vagueness increases the discretion of the bureaucratic authorities responsible for issuing

³ *NALSA v. UOI*, (2014) 5 SCC 438, available at: <http://supremecourtfindia.nic.in/outtoday/wc40012.pdf>

⁴ The International Commission of Jurists and the International Service for Human Rights, on behalf of a coalition of human rights organizations, undertook a project to develop a set of international legal principles on the application of international law to human rights violations based on sexual orientation and gender identity to bring greater clarity and coherence to States’ human rights obligations. In 2006, in response to well-documented patterns of abuse, a distinguished group of international human rights experts met in Yogyakarta, in Indonesia, to outline a set of international principles relating to sexual orientation and gender identity. The result was The Yogyakarta Principles on the Application of International Human Rights law in relation to Sexual Orientation and Gender Identity: a universal guide to human rights which affirm binding international legal standards with which all States must comply. The principles are available online at: http://www.yogyakartaprinciples.org/principles_en.htm.

the certificate of identity. The draft recognition process does not clarify on what grounds the Screening Committee should issue its recommendation; it does not clarify the grounds on which the Magistrate's decision is to be made; it does not give a timeframe within which the Magistrate must make this decision; and it does not specify how the applicant can challenge this decision.

15. These hurdles will only add to the existing challenges facing transgender persons, even before the procedure under the Bill is introduced. In interviews with the ICJ on their experiences accessing the legal and justice system, transgender persons have described the obstacles they already face, on a daily basis, in obtaining documents that reflect their self-identified gender. These include lengthy delays in getting these documents; the fact that officials demand additional documents that are in fact not legally required, including medical certificates and residence certificates; as well the judgmental attitudes of officials and authorities during this process, which made many transgender persons feel uncomfortable and intimidated.

INADEQUATE DEFINITION OF DISCRIMINATION

16. Two separate provisions in the current Bill deal with the duty not to discriminate: section 3 in Chapter II and Section 10 in Chapter V. Neither of these provisions of the Bill provides a definition of what constitutes discrimination. Furthermore, there is no enforcement mechanism provided in case of a violation of the anti-discrimination duty under Section 3 in Chapter II. The ICJ recommends that the Bill define discrimination to make clear what acts are unacceptable, and also put in place remedies for when these duties are violated.
17. The *NALSA* decision clearly directed the government to take specific steps to ensure equality and non-discrimination for transgender persons. The *Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity* define discrimination as including "any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms".⁵ The *Yogyakarta Principles* call on States to "adopt appropriate legislative and other measures to prohibit and eliminate discrimination in the public and private spheres on the basis of sexual orientation and gender identity".
18. The earlier iteration of the Bill contained a definition of what would constitute "discrimination", similar to the one featured in the *Yogyakarta Principles*. 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". However, this language is absent in the current draft of the Bill.

⁵ Principle 2.

WELFARE, EDUCATION, SOCIAL SECURITY AND HEALTH

19. Chapter IV of the Bill requires the government to formulate welfare schemes that are sensitive to the needs of transgender people, non-stigmatizing and non-discriminatory. Chapter VI makes provision for education opportunities, vocational training and livelihood support programs, and access to certain health services. However, in several respects, certain provisions of these chapters are inconsistent with the *NALSA* decision, and in fact represent a step back from better-drafted corresponding provisions in previous drafts of the same Bill.
20. Previous drafts of this Bill – both the one released in early 2016 as well as the version approved by the Rajya Sabha in 2014 – put in place affirmative action programs (reservations) in employment. However, the current draft has been widely criticized by human rights activists and the transgender community for omitting this provision. In its *NALSA* decision, the Supreme Court directed that the government should “extend all kinds of reservation in cases of admission in educational institutions and for public appointments” for transgender persons. 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 the UN Human Rights Committee’s General Comment 18 on non-discrimination, “take affirmative action in order to diminish or eliminate conditions” which perpetuate discrimination.⁶
21. Furthermore, there is no mention about making provisions in Chapters IV and VI economically and otherwise accessible to people who would not be able to afford them. For example, the 2014 Bill had specifically stated that state governments must provide “sex reassignment surgery, free of cost”.

OFFENCES AND PENALTIES

22. Chapter VIII of the Bill introduces 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.
23. Specifically, the identification of compelling or enticing a transgender persons to indulge in the act of begging as a separate offence is problematic since for many transgender

⁶ UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989.

persons in the country, begging remains one of the limited livelihood opportunities. The new criminal offence, if enacted, would put the transgender community at risk of criminalization under the law. This concern is heightened by the fact that the general criminal law on beggary has already been significantly misused against the transgender community, and has become a tool for their harassment. An egregious example of this was the detention of about 167 transgender persons in October 2014 under the Karnataka Prohibition of Beggary Act.⁷ The misuse of so-called “beggary” laws to harass transgender persons has also come up in interviews that the ICJ has conducted with members of the transgender community. The ordinary criminal law provisions on beggary must be amended to prevent the potential for abuse. In this context, the ICJ urges the authorities not to introduce further provisions on begging that directly target transgender individuals; it is a sad irony that their introduction is being considered through a Bill whose adoption is meant to protect the rights of transgender persons.

⁷ “Arbitrary detention of Hijras in Bangalore (Nov 2014): communities demand justice” available at <http://orinam.net/hijras-detained-bangalore-nov-2014/>.