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Transgender Law in India: A Legal Conundrum

Somabha Bandopadhay

Abstract- The apathy of the transgender community in India is no exception to the general state of affairs across the world. Yet, the irony here is that India that has had a glorious history of the transgender community who commanded respect is now reduced to treatment worse than 'lower animals'. The colonial history has contributed significantly to this hatred and the historical injustices have not been done away with even today. The present day government has enacted a legislation that attempts to provide a sigh of relief. But, it has immense flaws underneath its glossy cover. The paper attempts to take a critical perspective of the law that points at missed opportunities that the law could have addressed and hence the ignorance of the government of the ground realities bothering the transgender community. It is unfortunate that the legislature failed to incorporate the demands of the community that it addresses. It also failed to acknowledge the sensitiveness of the issue and applied the same formulae that it adopts for all other laws without realizing that this will ultimately collapse the objectives of the law. Thus, the paper shall attempt to understand whether a generally wordedlaw as it is will be sufficient to protect the so- called welfare of the transgender community trying to analyze the effectiveness of the legislation!

Keywords: transgender, reservations, criminal acts, law, bill, policy.

I. Introduction

The mini constitution within the Constitution of India- Art. 21 (Right to life and personal liberty) comes in rescue for recuperating almost all the evils the Indian society comes across in the process of evolution of the society. Such is the case with the subject-matter of the transgender persons. The human rights derogations have been and are obviously covered under Art. 21. The famous *NALSA vs. Union of India*[1] judgement (hereinafter NLSA judgement) of 2014 was pronounced taking into account the tenants as enshrined through expansive interpretation of the provision as interpreted by the Court. The guidelines pronounced by the Apex Court came handy and the recognition of the transgender was a milestone achieved by the diverse country.

India has newly passed and brought into effect the 'only' *sui generis* law for the protection of the transgender community in India. This newly enacted legislation (Transgender Persons (Protection of Rights) Act 2019- hereinafter Act) and its Draft Rules 2020 (not yet in force) is in furtherance to the court decision and the international obligations on the subject- matter and apparently in consideration of the abuses faced by the community. However, the Act suffers from major irregularities and the attempt in this paper aims is to bring to light two of the glaring inconsistencies in the Act that has the possibility of undermining the utility of the Act in its entirety.

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[1] AIR 2014 SC 1863.

II. Achievements of the Law

The law while does little than expected or anticipated or is needed, the same cannot be casually let go off with criticisms because irrespective of the legal issues pertaining to the Act, there are a few interesting achievements that this law undertakes which to certain extent is trans-friendly and are quite progressive. Before delving into the missed chances of ensuring better lives to the transgender persons of the diverse nation- India, a short list is provided herewith.

First, Recognition to all the different communities, especially socio-cultural communities within the transgender communities in India like *hijra, kothi, kinne, aranvani* and *jogta.* This is very essential considering the fact that there is a social stigma and that protection henceforth would be accorded to all these communities as well.

Secondly, Self-employment has been recognized in furtherance to the job opportunities that must be made available to the community has been mandated under this Act. This is remarkable for the recognition of self-employment is empowering and gives an idea of capabilities of the transgender communities (similar to any other human being in the society) much beyond the prevalent perception that they are useless and uncouth. This is definite to bring in the adequate confidence and faith amongst the members of the community. At the same time, emphasis on the vocational training within the provision asking for empowering of the transgender community members is aimed at upliftment to the mainstream society. Section 14 in this regard is quite progressive, but, usefulness is a difficult question as shall be explained below.

Thirdly, Sex Reassignment Surgery (SRS) has been finally legally recognized in India with this law under section 15[2] asking to provide facilities and benefits for such treatments. Until this provision, the only legal attestation was the famous NLSA judgement that sought

[2] http://socialjustice.nic.in/writereaddata/UploadFile/TG%20bill%20gazette.pdf.

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to protect and ensure SRS be conducted with ease. So, with this provision in place, the fear amongst the transgender community members of atrocities by officials or citizens will hopefully be eased out. At the same time, another pathbreaking feature of Act with regard to SRS is the Insurance scheme for SRS and hormonal therapy envisaged under section 16[3]. Until recently, the process of SRS was life threatening and difficult, so an insurance coverage is very essential for the protection of the transgender persons. Furthermore, the insurance coverage will ensure lessening of unnecessary financial burden on the transgender persons who are in dire need for help.

Fourthly, Protection and participation in the cultural activities is yet another element looped into the Act under section 8 that legitimizes the involvement of the communities with the several rituals and ceremonies of the Indian diaspora. This will ensure lessening of the harassment they face whilst pursuing these activities which are the only sources of income and livelihood for them. Thus, atrocities by police and civilians will to a great extent be curbed through this who would not be manhandled or driven out by committing atrocities. Such acts would henceforth be liable to be penalized. But, there are nuances to this criminalizing aspect of such atrocities and it is not that encouraging as shall be detailed out later.

Finally, HIV camps have been conceptualized under section 15 to be set up by the government that will surely enable in curbing the major setback to their lives endangering them to a life of danger by restricting openly discussing about it. Thus, such a move will definitely come in aid of their life situations. At the same time will there be any mitigation of the stigma arising out of being first a transgender person and then HIV positive and will there be any effective remedy in dealing with this irrational stigma?

This draws light to the plethora of issues underlying this Act that gives an idea of the ignorance by the government of the transgender community and the unfamiliarity with the realities and grass- root issues faced by the community.

III. Unaddressed Issues in the Law

The transgender community's movement dates back to the 1970s and 1980s in the world and almost the same time in India. Of the issues flagged during the movement, the same took decades after the independence and the beginning of the movement to confer any kind of right or even legal recognition of and for the community. While some of the major concerns have been attempted to be addressed as elaborated, two major and substantive issues have remained unaddressed and as a result the completeness is compromised with. Without redress of these two aspects, in the opinion of the author, the entire Act will not be fully effective allowing for the best results in protection of the rights and preservation of their existence of the transgender community persons in India.

IV. Reservations Policy

The Bill introduced by Tiruchi Siva in 2014 and passed in Lok Sabha in 2015 provided under clause 22, 2% reservation for posts for the Transgender persons in every sector under the appropriate government[4]. The NLSA judgement also declared the community as a Socially and Educationally Backward Class and was of the view that reservation is quintessential for their protection and to finally give them the most desired-*equality of opportunity.*

Taking a holistic view of the reservation policies or determinants legitimizing reservation policies from the catena of judgements of the Supreme Court of India from *M.R. Balaji vs. State of Mysore*[5] to *K.C Vasanth Kumar vs. State of Karnataka*[6] to finally the *Indra Swahney vs. Union of India*[7] judgements, then the following determinants could be identified all of which are applicable to the transgender community.

The criterions laid down is the abovementioned groundbreaking judgements of the apex court of the country are as follows:

a. Social and not necessarily educational backwardness of the community concerned;
b. Poverty;
c. Comparable backwardness;
d. Economic backwardness identified through occupation or income;
e. Occupation related backwardness and
f. Habitation

All these determinants undoubtedly cast grave responsibility on the legislature for recognizing the transgender community as a socially and educationally backward community liable for reservations and the benefits therefrom.

Moreover, taking inspiration from the *Indra Swahney* judgement referred above- *reservation should not be reservation 'simpliciter' but other forms of special provisions like concessions, exemptions and preferences*. These are considered the lower forms of reservation as per the judgement and the policies usually followed. However, sections 8 to 10 of the Act

[3] http://socialjustice.nic.in/writereaddata/UploadFile/TG%20bill%20gazette.pdf.

[4] Clause 22 Bill of 2014.
[5] AIR 1963 SC 649.
[6] AIR 1985 SC 1495
[7] AIR 1993 SC 477.

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providing for opportunities to be conferred upon the community does not explicitly detail out the lower forms of reservations. Thus, the concern here is whether such parameters or determinants are not really met while analyzing the transgender community that the legislatures did not find it prudent to have some minimum reservation for them.

Lastly, an important consideration here is with regard to the *vertical or horizontal reservation* as per the *Indra Swahney* judgement. Though, initially analysis suggests adopting horizontal reservation in- depth research portrays that it is the vertical reservation that will do more justice for the community and the historical injustices that they have been victims of will only then be slowly faded.

V. Criminal Acts - Section 18

The greatest disadvantage of the Transgender Persons (Protection of Rights) Act 2019[8] amongst others fails to identify, recognize, criminalize and prosecute for varied kinds of acts committed against the community and restricts itself to four kinds. As a result of this, there is blatant disregard of human rights violations that underlie their existence. Chapter V (Sections 9 and 10) definitely casts obligations on establishments and persons to act in adherence to Arts. 14 to 16 of the Constitution[9] and administrative law principles of internal complaint officers. But, the Act fails to protect the Right to life and liberty of the members of the transgender community despite its apparent outlook on extending protection to them because it is disproportionate to the harm that is caused.

Furthermore, there has been utter dilution of the reality whereby offences and penalties, with varying degrees of severity grouped together for all the acts of derogations under one category (section 18). The dilution makes all such awful actions, seem mere injuries endangering the life, safety, health or well-being of transgender persons and accordingly suggest meagre penalties. So, whether rape of transgender persons or denial of basic amenities to them, the penalty envisaged is same- maximum being 2 years! Also, the verbal abuse is peculiar and of a much higher threshold for the transgender community as compared to verbal abuse a woman faces. In this context, the 2014 Bill[10] gave recognition to the sensitive age- old issue of verbal abuse against the community and accordingly provided for punishment in the form of imprisonment (clause 50). But, the same goes unpunished in the present legislation.

Another glaring issue in this section is the fact that the maximum punishment available being 2 years of imprisonment makes the offence a non-cognizable offence as a result of which a warrant from the Magistrate is needed. In other words, police is not mandated to take a First Information Report (FIR). So, no matter how gruesome the atrocities be there can be no FIR! Thus, instead of making the law a 'special law' which in every sense of the term it should have been and was thought and expected to be the intention of the legislature, all such expectations have failed and what we now see is an ineffective law giving no scope for welfare or benefit of the transgender community.

With this kind of a straight-jacket formula[11], the special character of the law is lost and the law even though is not in derogation with any other laws (section 20), the same will prevail in the normal course of interpretation owing to the principle of *generalia specialibus non derogant* with an implied repeal effect which then undermines the utility and efficacy of the Act. Similarly, unlike the effect of a *non- abstante clause* that would have asserted Since, it does not have such a clause, there is doubt as to whether the interpretation with the greater or lesser punishment prevail like Section 42 of another special law- Protection Of Children against Sexual Offences 2012 specifically lays down that the greater punishments out of all the similar legislations providing for such offences (mainly Indian Penal Code) will prevail, but such is missing in the present legislation.

Additionally, the law grossly ignores incorporation of other criminal special statutes that have relevance to every stage of lives of the transgender persons like the Domestic Violence Act 2005[12] at their household from the childhood days and the Sexual Harassment at Workplace Act 2013[13] when they manage to find a job. Even though sections 5 and 12 make reference to the atrocities of transgender children, strict punishments are not prescribed. So, a robust comprehensive mechanism sensitive to the causes of the transgender community is missing.

Thus, unless, safety is assured to the transgender community in India primarily from protection against criminal acts like sexual assault, outraging modesty, rape and *others* the realization of civil rights granted in furtherance to human rights obligations, from international agreements as well cannot be realized and effectuated adequately!

[8] http://socialjustice.nic.in/writereaddata/UploadFile/TG%20bill%20gazette.pdf.

[9] https://www.india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf.

[10] http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/210_2016_LS_Eng.pdf.

[11] Somabha Bandopadhay, *The Trans Discrimination: Expanding the Legal Horizon of Gender*, 7(11) Journal of Critical Reviews (2020).

[12] http://legislative.gov.in/sites/default/files/A2005- 43.pdf.

[13] http://legislative.gov.in/sites/default/files/A2013- 14.pdf.

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VI. Conclusion

Unless, safety is assured which primarily comes down from the protection against acts criminal in nature, the realization of the civil rights being granted in furtherance to human rights obligations (from international agreements) as envisaged in the law cannot be realized and effectuated adequately. The Act has failed to take note of the moral failure of the society in respecting these fellow human beings that the earlier Bill could have attempted to dissuade. This has been an exercise in futility that has done very little to redress the grievances of the most vulnerable and mostly forgotten community existing amongst the civil society. While certain provisions can be considered as wonderful achievements- the same is overshadowed by the vagaries inherent in them. Thus, the only law of the land, as it stands now has in totality demeaned the cries of the community as well as the Supreme Court and the same is required to be rethought of a better future for the community and humanity at large.

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