

The Prohibition of Unlawful Assembly (Interference with Freedom of Matrimonial Alliances) Bill 2011 - Suggestions and Recommendations

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Introduction

It is in the milieu of concerns over growing unlawful interferences by caste panchayats that the Law Commission of India has initiated measures to deliberate and propose a draft Bill. Supreme Court of India has also highlighted the need to take actions to curtail such unlawful activities and bring in a culture of accountability. The effort of the Law Commission in this direction is creditable. The proposed draft by the Commission is a significant effort to retain continued attention on an evil which otherwise will retract from public memory till the next incident occurs.

The draft Bill aims to criminalise acts of groups against the freedom to consort vested in every individual. Additionally, it seeks to affirm the right to family of an individual, which can be read within the penumbra of rights within right to life under Art.21 of the Indian Constitution. The Bill is perceived to be a social legislation. It is therefore imperative to understand its repercussions on the target demographic, that is, family units. The family ethos should not be breached at the same time individual's right shall not also be sacrificed. Creation of substantive offences and criminalisation as its necessary corollary will result in several oddities including less reporting of offences as individuals will be unwilling to report against their family members or persons in the neighbourhood, more so, when adversaries possess political clout.

General Observations and Suggestions

The Bill is a reaction to a despicable phenomenon and the legislative response is to criminalise the action. The experience of Dowry Prohibition Act, 1961 and the abysmal level of its performance should teach us a lesson or two in the making of this enactment. The law should be capable of achieving the objectives it intends to. It should be verified to see whether it is capable of realising the proposed objectives. The second question to be asked is, what is the mischief the law intends to deal with and what are the remedies designed to deal with it? There could be multiple mischief or malaise that may affect the right. A legislation that partially addresses the issues will remain fragmented.

If the intention of the lawmakers is to secure freedom of choice and right to family of the individual, the Bill fall short of attaining it. It begins and ends at criminalising certain actions, which could affect the rights. Therefore, the Bill needs to be reoriented in its width. The second analytical vantage point is of dealing with mischief. The objective if is to eliminate the mischief that stands in the way of freedom of choice to matrimony, the Bill fails to address it in complete. Potential acts that can have negative impact beyond that by *Khap* type of institutions is left unaddressed. Such actions could be from within family (*Lata Singh v. Sate of U.P, Writ Petition (crl.) 208 of 2004*). And the solutions offered in the Bill, criminalisation, as experiences have shown, might be unsuccessful to bring remedies.

The third general observation is that the Bill fails to take into consideration the aspects of prevention and protection, instead, is focusing on punishment of actions post facto. The Bill if incorporates provisions for prevention and protection will go a long way to achieve the objectives that ought to be. It is therefore suggested that the Bill need to have the following flow; (1) declaration of certain acts or omissions as prohibited, (2) provisions to issue orders of protection/ prohibition in case of apprehension of or event of violation and (3) punish the violation of the prohibition/protection orders and violation of actions declared prohibited.

Specific Suggestions

Proposed changes to the provisions of the Act

Section 2(1)- use the words marriages '*not prohibited by law*'. These words create grey area because law does not prohibit marriages even by minors, though it is punishable under the law. Therefore, this loophole must be remedied and the Act must apply to *marriages and the like* between consenting adults. Delete the expression '*not prohibited by law*'.

The ambit of the word '*marriage*' should also be enlarged to include *live in relationships* and the like.

The prohibited action in section 2 is "*gather assemble or congregate at any time with a view or intention ...*". This seems to suggest only gathering/assembly/congregation in the physical space. The section should also take into consideration the technological advancement and include virtual participation through social networks and the like. It should cover both direct and indirect participation.

The action intended in section 2 may not always be collective action. As mentioned in the general observation above, if intimidation, threat or coercion can occur from within family/or one of the member of the family. Such act need not always be to break marriages but could also be to coerce someone into marriage. Therefore, under the prohibited action in section 2, such acts should also figure in.

Section 3- suffers from ambiguity where it uses the phrases '*creates an environment of hostility*' and '*brings pressure*'. These phrases need to be guided, as they are very general.

Section 4(1)- not only must the Act prohibit *criminal intimidation* but also *extortion*. This is in light of various cases which have occurred where the family of the couple has been made to pay huge fines to the *Khap Panchayat*.

There seems to be no section 4 (2), therefore the numbering of the section as 4 (1) is unnecessary.

Section 2 and 4- lays emphasis on *collective action only*. However, *individual acts* are also important in this situation. Therefore, to plug the mischief that is prevalent, the Act must also take into consideration individual acts in addition to collective acts.

Section 6- uses the word '*participation*'. Participation should be defined to mean not only physical presence but also political, financial and other influences. Also, it should include virtual participation in light of the increase in use of technology and the internet in form of Facebook, Twitter and the like. (Please also see the last suggestion for section 2)

Section 6 – the Bill as it stand attaches presumption about acts under sections 3 and 4. The presumption shall be extended to all acts prohibited/penalised.

Section 7 - the intent of section 7 though commendable cannot be achieved if framed in the present manner. The amendment shall be made in the concerned enactment.

Section 8- does not include punishments for *omission on part of the authority*, which receives information about the said offenses but fails to take appropriate action. The Protection of Women from Domestic Violence Act, 2005 has a provision of accountability. Also, the Supreme Court in *Bhagwan Das v State of Delhi* (decided on 9 May, 2011) has suggested to ensure accountability on the part of responsible office/officers. Addition of accountability element in the section may be considered.

Section 8– in addition to *Collector or District Magistrate*, the *Judicial Magistrates* should also be given powers under the Act.

The ambit should be enlarged to include *prohibitory and protective orders*. Punitive measures should be resorted to when there has been a breach of such orders.

Therefore section 8 need to undergo a major overhaul, in the line of general comment made above.

Section 9 (1) - Though the provision for *Special Courts* is attractive, the strength of the cadre of judges to manage these Courts should be kept in mind before creation of such Courts. The Special Courts shall not be drawn from the existing cadre which itself is short of optimal human resources. Till the Special Courts are established the Sessions Courts may try the offences.

The phrase '*unlawful assembly*' present throughout the Bill, creates vagueness as it is already defined in Section 141 of the IPC with its own requirements. Therefore, this phrase needs to be swapped with a neutral expression. Even the word '*association*' may not be appropriate as an association has a feature of permanence, organization and administrative nucleus, which is missing in a *Khap Panchayat* or a motley crowd. Therefore, the most viable option is to amend Section 141 IPC to incorporate the assembly indicated in this Bill.

Additional proposals

The Bill needs to focus more on prohibiting acts rather than punishing them. As this is a piece of social legislation, it will be very difficult to implement it if its emphasis is on criminalisation. Social legislations which have been proved to be effective focused on prohibition rather than criminalising. The colonial experience in Bengal by which *satis* and female infanticide could be considerably reduced offer models for emulation. (see, P. Ishwara Bhat, Law and Social Transformation, Eastern Book Company, 2009, pp 102-106) It was through a concerted action of the administration supported by law that success could be achieved. The method was intense, whenever there was a death of a male member, appropriate authorities cause to send officials both police and administrative to make sure that *sati* is not performed by overseeing the funeral. These were measures taken at the grass root level and were so effective that the number of incidents of *sati* reduced drastically. Female infanticides were controlled by periodical visits by the local authorities to assess the

well being of the girl child born when information is passed on by designated authorities. This model can offer some guidelines.

District authorities on receipt of information or *suo motu* may initiate actions to prevent prohibited activities declared by law. On intervention by court, prohibitory orders and wherever necessary protection orders should be issued. However, there should be strict secrecy over names and identity of the persons giving such information.

Special cells should be created for spreading awareness about the procedure. Also, these cells would act as more approachable bodies for the victims to discuss the problems and avail assistance to lodge complaints. Cooption of non-governmental sector could be adopted.

In light of the ostracism faced by such couples and their families, there could be economic schemes devised to help the victims to rebuild their lives. This will incorporate curative aspect in the Bill.

Institutional support systems in the line of the Protection of Women from Domestic Violence Act, 2005 and the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 could be incorporated.

The Bill does not provide for witness protection, which is very important due to societal pressure that exists with regard to these offenses. Protection to whistleblowers also should be considered.

The Bill must not only prohibit breaking of marriages but also address forced alliances. Foreign legislations on the same aspect, of Scotland and UK may be looked into for a more comprehensive and inclusive legislation.