

## TRANSGENDER RIGHTS IN INDIAN SOCIETY: AN UNENDING FIGHT FOR EQUALITY

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### INTRODUCTION

The idea of existence of two gender; male and female which is determined since birth is so mainstream that any divergence from it either requires a deep inspection on the matter or outright ostracism. This belief often reflects the mindset that is least accepting and does not wish to diverge from the long established gender identities. The binaries of gender is so potent in literature, fiction and films that the existence of "third gender" does not cross minds of majority of society, let alone accepting its existence. Supreme Court of India in its judgment *National Legal Service Authority vs Union of India*<sup>2</sup> tried to legitimise the existence of "third gender" owning it to be transgender's right under article 14 and article 21 of the Indian Constitution. The question that arises is how effective can legal acceptance of "third gender" be in changing the perception of their social identity.

### TRANSGENDER PERSONS- MARGINALISATION AND DENIAL OF RIGHTS

It took seventy years for transgender persons to claim their right of being "third gender" under the Indian legal system but what can be considered the reasons for such delay. Some of reasons why transgenders rights remained overlooked for a long time is because of no representation of transgender persons in Parliament, social stigmatisation and inability to gain candidature as election representative that kept transgender persons away from political inclusion and therefore, no voices to raise the demands for equality before the law.

Secondly, reluctance of legislation as well as society to accept transgender persons as "normal". In Indian history the existence of transgender persons has been only prevalent through those who refer to themselves as *Hijras* or *Kinnars*. They were superstitiously feared and over the period of time assigned jobs to take part in celebrations of blessing babies and in celebration of marriages. Therefore, existence of transgenders persons outside their

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<sup>2</sup> [2014] 5 SCC 438

stereotypical cultural identities was never considered. Thirdly, refusal to see gender as a spectrum compared to its binary existence. So anything that couldn't fit in binaries of gender identity was to be marginalised or socially excluded from "normal" activities.

According to many historians and same was acknowledged in the *NALSA* judgment that transgenders played a more inclusive part in ancient pre-colonial India. They have been mentioned in Hindu mythological texts and played an important role in Mughal era. It was during the colonial rule that that illegality of various activities, discrimination towards vulnerable section of people in society as well as enactment of section 377 of the Indian Penal Code led to transgender persons going underground. Subsequently, after independence section 377 of Indian Penal Code was not repealed and even after the colonial rule ceased to exist its "injustice of material practises endured over time and framed emergent legal consciousness"<sup>3</sup> and as western "European" countries as the effect of colonisation they were positioned as "lawful", "progressive" and "civilised"<sup>4</sup>, under no condition could India have accepted the rights of transgender persons before the "civilised" west which happened after long time in early 21<sup>st</sup> century. This reflects how laws becomes a residue of colonial rule which inherently promotes the ideologies and beliefs of colonisers. Therefore, various form of regressive legal sanctions, superstitious beliefs and an identity which was considered to be unconventional propelled transgender persons towards marginalisation.

### **THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS), 2018 – AN ANALYSIS**

After the judgment give in *National Legal Service Authority vs Union of India* and acceptance of existence of "third gender", the legislation with intention to protect the rights of transgender persons drafted a bill in 2016. The bill was drafted with an intention to "define transgender persons, prohibit discrimination against them, give right to self-perceived identity, provide transgender grievance redressal mechanism and provide other such rights."<sup>5</sup> The bill was termed to be problematic on several grounds. The definition of transgender as

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<sup>3</sup> Eve Darian-Smith, 'Postcolonial Theories of Law', in Reza Banakar and Max Travers (eds.), *Law and Society theory* (Hart 2013)

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<sup>5</sup> The Transgender Persons (Protection of Rights) Lok Sabha Bill (2016) [210-C]

given in 2016 Bill was criticised by trans community for its narrow ambit and terms like transgender is someone who is not "wholly male or wholly female", a definition that tries to define transgender in terms of conventional male and female, two extremes of a spectrum. Also, the definition did not include terms like *Hijra*, *kinner* and *Jogta* which is how a section of transgender community identifies themselves in India and over the period of time this identification has become means to earn money in society. The definition was then amended in subsequent bill in 2018, which included a range of variations that exist within Indian transgender community.

Another problematic provision in the bill was to set up separate sero-surveillance centres, well in fact the idea of the bill should be to ensure the inclusion of transgender in society and that cannot be achieved by setting up separate healthcare facilities but by ensuring that existing healthcare centres see them as just like any ordinary citizen and not bombard with questions that are discriminatory and have no nexus to the illness which transgender individual has approached for.

The *National Legal Service Authority*<sup>6</sup> case mentions a Allahabad high Court judgment referred as *Empress Queen vs. Khairati* where the case involved *Khairati*, described to be an eunuch who was regularly called by police officials and was under their supervision. The medical examination of *Khairati* revealed that they showed signs of catamite and that *Khairati* was habitually involved in unnatural sexual acts that were prohibited by section 377 of Indian Penal Code, 1860. A conclusion was drawn that *Khairati* could have been sexually assaulted over a course of time and it was in fact a form of physical abuse considered prevalent among the Hijras and transgender persons. The bill acknowledges the presence of sexually transmitted disease within the transgender community but remains silent on any form of criminalization of sexual abuse inflicted on transgender persons.

This is a major loophole given, that neither Indian Penal Code nor any other law explicitly or implicitly criminalizes such acts. Prostitution is one of the forms of profession that most transgender persons resort to and according to UNAIDS report in India around 90 per cent of transgender sell sex to earn livelihood<sup>7</sup>. The idea of "bad sex" is so political<sup>8</sup> that inherently

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<sup>6</sup> [2014] 5 SCC 438

<sup>7</sup> 'The Gap Report' (2014) UNAIDS <[https://issuu.com/unaid/docs/20140716\\_unaids\\_gap\\_report](https://issuu.com/unaid/docs/20140716_unaids_gap_report)> accessed on 24<sup>th</sup> August 2020

despising the idea of it, we could only acknowledge the existence "bad sex" by repealing section 377 but couldn't go a step forward by acknowledging the abuse and power struggle that exists within its framework. Therefore, the bill overlooked the existence of sexual abuse that is present amongst transgender persons making it clear how uncomfortable are the legislators in discussing the divergent form of sexuality that exists and violence that exist within it.

Two forms of activities that economically vulnerable transgender persons are dependent on for livelihood is begging and prostitution. The sexuality in itself has hierarchy and the probability of conviction for any sexual abuse varies with the status of the victim within such hierarchy. Therefore, it becomes important that explicit provisions are made to deal with such matters. Secondly, the act of begging is prohibited in the transgender rights bill. The prohibition snatches the only form of livelihood available to many transgender persons. The bill does not try to rehabilitate, provide reservations or guarantee job security to transgender persons which is the most important instrument for their inclusion into the society. Both the bill, one passed in 2016 and other in 2018 do not take into account reservations for transgender persons who are most vulnerable to marginalization in society.

The bill in itself shows the effect of law in which legal rules and their application give effect to existing social relations<sup>9</sup> by giving power to the competent court to send the transgender person to rehabilitation centre, an idea of them being in some form incapable of taking care of themselves and in need of constant assistance by their family members. A major opposition that the bill faced is that the definition of family within the bill involves those related by birth, marriage and adoption in accordance with law which ignores the bonding and solidarity that exists within the members of transgender persons, indirectly trying to weaken the bonds between under privileged class, so that they are stuck within traditional structure of family, which might or might not accept them. Similarly, a bill that is meant to safeguard transgender clearly protects the government from any legal proceedings for act done under good faith or within the provision of act. The bill gives legitimacy to the acts of government that seem least informed to make decisions for transgender persons and then be

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<sup>8</sup> Gayle S. Rubin, 'Thinking Sex: Notes Towards a Radical Theory of Politics of Sexuality' in Richard Parker and Peter Aggleton (eds.), *Culture, Society and Sexuality: A Reader* (Routledge 1999)

<sup>9</sup> A. Hunt, 'Law, State and Class Struggle', *Marxism Today* (1970)

protected from any repercussion of it by hiding behind the garb of "good faith" and "decisions taken to promote purposes of the Act".

The bill also reflects traces of "ideological domination"<sup>10</sup> as bill gives definition of transgender but when it comes to registration with district office for issuance of certificate it defines the identity to be "self-perceived gender identity" reflecting stereotypical mindset of understanding gender variations. Moreover, the bill talks about setting up different health care centres which reinforces the existing position of transgender in social order. The bill does in fact conveys the complex attitudes and values that legitimizes the social order.<sup>11</sup> The bill essentially manages to cover all the stereotypical problems that transgender persons can face whether it is educational, healthcare, acceptance from family and societal inclusion but does not attempt to deal with deep-rooted issues that perpetuate the exclusion of transgender from society and resorts to giving preventive measures. Law can only be instrument for changes in society provided, it is effectively implemented in a way to break the social order and stereotypical outlook that certain section of people have towards other section of people. Therefore, law cannot be shaped on social beliefs and forces that it ultimately wishes to transform.

The most important fact is that the bill faces opposition from transgender community itself and it was them who suggested various amendment due to which the amended version of bill was again introduced in 2018. The judgment given in *National Legal Service Authority vs Union of India* was accepted in fact applauded by the transgender community but the bill does not essentially cover all the duties and the obligations of the state as pointed out in the judgment. This shows the contradiction that exists between law and state and how judgment given by courts does not necessarily "please the holders of the state"<sup>12</sup> and therefore, gets tailored according to what legislators deem fit. Therefore, Separation of Power becomes as instrument through which the state can modify its laws differently from that defined by legal system and courts can use it to refuse adjudicating matters by defining them to be "legislative duties". This back and forth affects the implementation as well as enactment of rights of individuals, especially the one most vulnerably placed in social order. In a democracy the consent of the person who will eventually be governed by the law matters

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<sup>10</sup> Ibid

<sup>11</sup> Ibid

<sup>12</sup> Ibid

to an extent, especially when the law is enacted to safeguard their rights. Therefore, it is vital that before enacting any bill the demands and the grievances of transgender persons are taken into consideration.

The bill also does not take an "intersectional approach" in understanding the transgender and problems faced by them in society. In context of criminalization of unnatural sexual acts under section 377 and recognition of transgender as "others" there was an existent legal contradiction<sup>13</sup> until section 377 of Indian Penal Code was not repealed. This is one of the illustrations which reflects how intersectional understanding of transgender rights can broaden the understanding of real social situation of transgender. The elitist part of transgender community manages to become part of social movements but it is in fact less educated, economically backward and those belonging to backward caste whose voice remain unheard. The amalgamation of backward caste with identity of being "other" gender, makes a section of transgender person "invisible others"<sup>14</sup> and the transgender rights bill does not even mention any provision relating to caste which is clearly one of the vices of Indian society.

The bill also mentions how certification of transgender persons requires an examination of "District Screening Committee" which shall first determine whether the person is in fact, transgender or not and for such examination the committee shall comprise of psychiatrist, medical officer, social welfare officer and a representative of transgender community. The problematic part of this committee that it deprives an individual the agency to choose their gender and expect acceptance from other members of society without a set of individuals consistently judging them on stereotypical standards to determine their gender. The psychological terminologies that can define the person to be mentally ill as well as absence of stereotypical characteristics can deprive a transgender of their rights. Additionally, the transgender persons who strongly identifies with their self- perceived gender identity but refuse to undergo sex-reassignment surgery then in such a case what parameters will determine the status of an individual being transgender. The autonomy, agency and right to choose gender is questioned by such provisions which in a sense demands verification from transgender persons. These screenings and examination of transgender persons and documentation of such observation can be a way investigating those who are not "normal".

<sup>13</sup> Sumit Baudh, 'Invisibility of "other" Dalits and Silence in Law', biography (University of Hawai'i 2017)

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Therefore, it can be an attempt to determine the identities of transgender and characteristics that differentiate them, to define genders in concrete parts thereby, reflecting the less informed perception of state, society and legislators towards the concept of gender.

## **TRANSGENDER RIGHTS AND FUTURE RECOURSE TOWARDS EQUALITY**

The introduction of transgender rights bill reflects a major development in human rights and a legal framework that can guarantee transgenders right before equality. The transgender rights can be further implemented if law recognizes the distinction between sexual orientations and gender. Words like sex and gender are used interchangeably which need to be legally be defined separately as both entail different meaning. Discrimination on grounds of sex is considered a breach of fundamental right of an individual under the Indian Constitution, inclusion of terms gender will further safeguard the transgender from discrimination based on grounds of gender.

Moreover, it is important that the state before enacting any law takes into account the demands of those the law eventually seeks to protect. It is important that in democracy the consent of those been governed by law is respected and law does not only reflect the interest of those at authoritative position in state. The legal terms and languages construct any given law<sup>15</sup>. Therefore, it is important that the internal logic behind the terms can be explicitly be understood through the terminologies used. The bill seeks to define transgender and in same instance gives a right to "self-perceived gender identity" which points towards contradiction and confusion when interpreting law.

The "ideological domination" that shapes the law in its itself reinforce the social order, exclusion and marginalization that transgender persons are already subjected to. The law should aim towards inclusion of transgender persons, not stigmatise them further. It is important that the law does not reflect the regressive viewpoint that is least tolerable of anyone divergent from existing gender binary but should be accepting of different variations of gender that exists within our society.

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<sup>15</sup> J. Derrids, 'Force of Law: The 'Mystical Foundation of Authority' in D. Cornell, M. Rosenfeld and D.G. Carlson (eds.), *Deconstruction and the Possibility of Justice* (Routledge 1992)