

Fokus Menschenrechte

Living a Life of Exclusion

Being a Transgender in Modern India

Dona John

ABSTRACT

The labels placed on and experiences of a transgender in India fall into a broad spectrum. Through the prism of time, the position of transgenders has descended from deification to ostracization. Recognized recently as the 'third gender', the community continues to live on the fringes of the Indian society. Recent judicial and legislative developments are small steps towards improving their plight. The real need calls for a change in the societal mind set and inclusion of the community into mainstreams of social, political and economic life.

09/17

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Impressum

Herausgeber
Friedrich-Naumann-Stiftung für die Freiheit
Truman-Haus
Karl-Marx-Straße 2
14482 Potsdam-Babelsberg

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Redaktion
[Friedrich-Naumann-Foundation]

Gestaltung
[Friedrich-Naumann-Foundation]

Produktion
[Friedrich-Naumann-Foundation]

Druck
[Friedrich-Naumann-Foundation]

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Stand
Nov. 2017



Freiheit.org

Historical Position and Descent

Transgender is an umbrella term that is used for persons whose gender identity, gender expression or behaviour does not confirm to their gender assigned at birth. It also includes individuals who do not identify with the gender binary of masculine and feminine. Depending on the cultural and religious orientation, the assignment of names for a transgender varies. Some common names are: Hijras, Trtiyaparkriti, Napumsaka, Aravanis, Jogtas, Kothis etc.

Ancient Indian texts such as the Vedas and KamaSutra categorize them as individuals belonging to the third nature (neither masculine nor feminine).¹ Transgenders (called Khawaja Sara in Islam) played a crucial role in medieval India during the Mughal reign. Considered to be fiercely loyal and possessing strong acumen they held high positions and enjoyed a life of privilege and proximity to the royalty.

With the advent of the British era in the 18th century, there was a gradual downfall in the status and acceptance of transgenders in the public space. The transgender presence in the public sphere was seen as deviance in the 'colonial space'. Their public presence posed a threat of moral and sexual contagion to apparently deviant Indian males.² The British logic perceived the performances of transgenders as a solicitation for sexual services. By the late 19th century, through Section 377 of the Indian Penal Code, 1860, all penile-non-vaginal sexual acts between persons were criminalized. The British administration further legislated for their surveillance and control under the Criminal Tribes Act, 1871 (CTA). There was a clear move to remove transgenders as a visible social category by branding them as 'habitual criminals' and 'sexual deviants'.

Living Conditions of Transgenders under Independent India

The first Prime Minister of independent India, Nehru, in 1952 repealed the Criminal Tribes Act, 1871 calling it 'a blot on the law book of free India'. However, the same year the Government of India passed the Habitual Offenders Act which preserved most of the provisions of the CTA except for the premise that an entire community can be born criminal. The focus now shifted from criminalizing a tribe to criminalizing an individual.

The transgender community lives a life of exclusion – socially, culturally, economically and politically. The Indian government's census process which is the most authentic source of information on demography, literacy, and housing amongst other data points did not include transgenders for the first 64 years after independence in its exercise. When the community was given the option of identifying themselves as transgenders in the statistical exercise for the first time in 2011 half a million persons (amongst a 1.2 billion populace) identified themselves as transgenders. The top three states with highest concentration of self-identified transgenders in India are Uttar Pradesh, Bihar and Maharashtra.³ Only 46% of transgenders are literate as compared to 74% literacy rate amongst the general population.⁴ Those who continue to be part of the education system often report harassment, bullying, physical and sexual abuse at the hands of older classmates and peers.

Employability is low amongst transgenders and a larger part of them resort to begging, extortion, entertainment or prostitution. Indian folklore believed in the blessings of the transgender community especially after the birth of a male child and during weddings. In lieu of the blessings, a transgender would be rewarded with monetary benefit. These monetary rewards would become the main source of income

for the group. However with increased resistance from the ‘general’ public, the practice of cash reward in lieu of blessings began to be looked down upon. Low literacy rates, low skill levels and general reluctance to hire transgenders: all this pushed them further into sex work or the entertainment industry.

Globally the transgender community is 49 times more likely to be living with Human Immunodeficiency Virus (HIV) than adults in the general population.⁵ The National Aids Control Organisation in (NACO) in India estimates HIV prevalence amongst transgenders to be 7.5%.⁶ High risk behaviour such as alcohol and substance abuse amongst the group increases HIV risk for the community. Transgenders face discrimination in accessing healthcare services due to institutional and/or individual prejudices.

Transgenders are often ousted by their own biological family or run away at an early age due to harassment. Being disinherited from their family property and with no means to live, transgenders live under the tutelage of gurus (mentors) in closed communities called Deras. A blinkered and exclusionary approach towards the transgender community has ensured that the daily life of exclusion and discrimination continues. Societal stigma, lack of social support, violence related stress often lead to depression and suicidal tendencies. Transgender activists assert that suicides amongst transgenders are grossly underreported.⁷ Supporting data for this assertion is that the National Crime Records Bureau (NCRB) reported 7 suicides in 2015, 0.005% of the total suicides in India during that period.⁸ Dichotomically, the national suicide rate stood at 10.6% in 2015. Without a clear national policy on transgender inclusion, any government data runs the risk of erring on capturing transgender data points as

data is usually recorded with gender attribution as either male or female.

Interaction with the Legal and Justice System

Just as the rights of every Indian citizen, transgender rights should be protected under the constitutional framework and the international human rights instruments India is bound by. However, the truth is far from the spirit of the law. Transgenders often find themselves at the mercy of the police- the ground level custodians of law and order. Cases of harassment, intimidation, violence against transgenders in the hands of the police are often reported by the media but no separate data is maintained by the NCRB on atrocities by the police of transgenders⁹. Transgenders are particularly vulnerable as many of them live a life of unrevealed identities and sexual orientation. The police use this as a tool to exploit, intimate and even sexually exploit transgenders. A study by the National Institute of Epidemiology among 60,000 transgender people across 17 states revealed that the biggest perpetrators of violence against transgender people were police and law-enforcing authorities.¹⁰

Transgenders feel intimidated to approach the police to file complaints and even if they muster courage they are often implicated in return. Transgender witnesses to a crime do not trust the police to investigate fairly and without bias. Police accountability for violations against transgenders is a rarity. One of the notable exceptions is in the case of Jayalakshmi vs. Tamil Nadu where the police was held accountable for the wrongful death and repeated rape of a transgender.¹¹

The vestigial law of Section 377, Indian Penal Code 1860 still remains in the books of law effectively criminalizing transgender lives in India. Section 377

penalises ‘carnal intercourse against the order of nature with any man, woman or animal’. Consensual anal or oral sex will be considered against the order of nature and thus can be used to penalise not just transgenders but heterosexuals as well.

Laws related to beggary, public nuisance and prostitution are often used to arrest, detain or harass persons in connection with their real or purported sexual orientation or gender identity. The vague wording of the law, prejudice and discretion of the law enforcement officials provide a lethal combination for violation of the rights of dignity, equality and privacy of transgenders across the country.

Ebb and Flow of Humanising Transgender Lives

Transgenders have been longing for a life of decency, certainty and respect in independent India for over seven decades now. Their fate like that of a pendulum swings in the hands of the Indian judiciary. A watershed moment in the history of transgender rights in India was in July 2009. The Delhi High Court in *Naz Foundation vs Government of Delhi* decriminalized homosexuality allowing consensual sex between two homosexuals as long as they are above the legal age of 18 years. The Court stated that Section 377 of the Indian Penal Code was violative of Article 14 (Right to Equality), Article 15 (Prohibition of discrimination) and Article 21 (Protection of life and personal liberty). The judges in the right constitutional spirit stated that ‘the criminal law cannot be held captive by the popular misconceptions of who the lesbian, gay, bi-sexual, transgenders (LGBTs) are’.¹²

This judgment was appealed against in the Supreme Court in 2013 in the *Suresh Koushal vs. Naz Foundation* case. Suresh Kaushal, an astrologer argued that homosexuality could even pose danger to national security as the soldiers fighting at

the borders could be tempted to take male lovers and India might lose a battle because of that¹³. In a regressive order, the Supreme Court set aside the 2009 order asserted that Section 377 affects only a ‘miniscule’ population in India and does not suffer from the constitutional infirmity and the Delhi High Court judgment is legally unsustainable.¹⁴ This was a huge blow for the transgenders who felt emboldened to assert their identities after the 2009 judgment.

In April 2014, the Supreme Court in a seminal judgment of *National Legal Services Authority (NALSA) vs. Union of India* declared that transgender persons have the right to decide their self-identified gender and the State/Central Government need to legally recognize the gender of their choice- male, female or as third gender. The Supreme Court held that the right to express one’s identity in a non-binary gender was an essential part of freedom of expression. The judgment gave directives that all kinds of reservation should be extended to transgenders in educational institutions and for public appointments. Pursuant to the judgment, the third gender category on identity documents such as passport and voter’s card has begun to make an appearance.

Several civil society organisations and activists approached the Supreme Court to review its judgment in *Suresh Koushal* which recriminalized homosexuality. In February 2016 Supreme Court referred the matter to a five judge bench (a constitutional bench) as it raised significant questions of constitutional law. The bench is yet to be constituted and hear the matter. Adding to the shame is the fact that the Indian government abstained from the June 2016 voting on the creation of an independent expert on sexual orientation and gender identity in the United Nations Human Rights Council.¹⁵

Snail Paced Administrative and Legal Reforms

The Ministry of External Affairs responsible for passport control in India was the first official body in the country to recognize transgenders as a separate identity in 2005¹⁶. Transgenders were provided with the choice of identifying themselves as eunuchs (under the ‘E’ category) while applying for passport. The ‘E’ category was not just derogatory but exclusionary as the definition did not include every trans-category. Inclusion in all official documents with a certain level of sensitivity towards the transgender community will take time. In 2015 the passport authority transitioned from the ‘E’ category to the ‘transgender’ category.

The Election Commission of India in 2009 recognized transgenders having an independent identity and permitted them to register themselves as the ‘other’ category to indicate their sex. The news of India’s first transgender as presiding election officer was celebrated¹⁷ but these acts of inclusion suffer from being acts of tokenism rather than comprehensive inclusion into mainstream public transactions.

Perhaps the only known transgender currently in the political field is Ms. Madhu Bai Kinnar. She is the first transgender mayor of Raigarh, Chattisgarh (one of the eastern states in India). Two transgenders were elected in Madhya Pradesh (central state in India) but their elections were declared null and void as the seats were reserved for women.¹⁸ Considering the political clout and the enormous capital required to fight elections in India, transgenders neither have resources to enter the political mainstream nor have political parties treating them as potential vote banks.

The Indira Gandhi National Open University (IGNOU) is the largest distance

learning university in India and the world’s largest university by enrolment numbers. The University had opened its gates to transgenders with the ‘other’ category in admission forms in 2012 much before the NALSA judgment in 2014. This year it moved a step ahead by making all the courses universally free for transgenders.¹⁹ It insists on identification documentation to keep impostors at bay but this will pose a problem for transgenders who struggle to get official documents declaring them to be so.

The Indian Armed Forces is the third largest in the world yet there is no official policy on recruitment of transgenders. In August 2017, a navy sailor was discharged from military service for having undergone a sex reassignment surgery to be a woman.²⁰ It is also not known whether any of the three uniformed services of the Indian armed forces have transgenders currently serving in them.

The Kochi Metro Rail Corporation is the first government owned company to recruit staff from the transgender community, a move towards an inclusive workforce. The Corporation even set an example with all gender restrooms. However, 8 of the 23 trans-women hired quit in the first week of their job.²¹ This is because either the landlords

were not willing to let out their properties to transgenders or charged heavily for basic accommodation. The rental cost became unaffordable for trans-women who were being paid between 9000-15000 Indian Rupees a month (100-200 Euros).

The highest judicial courts in India have made it amply clear that it leaves it up to the legislature to make a law on transgender rights. The Supreme Court in NALSA judgment in April 2014 gave the Central Government six months to implement its recommendations. Even

after three years, the Central Government and the Supreme Court are still caught in administrative delay in exchanging critical information required for implementation. Several attempts have been made by two opposition members since 2016 to bring a law on transgender rights. Unfortunately, any attempt by anyone outside the ruling party to introduce a bill on transgender rights is blocked by it. However, the government introduced its own version of the bill titled, The Transgender Persons (Protection of Rights) Bill, 2016. It is currently pending with a parliamentary committee. The bill is marred with discriminatory clauses that the civil society activists have been protesting against. The mandatory pre legislative consultation has been undemocratic and non-transparent largely confining itself to English speaking web users. The Bill recognizes the right of the transgender to a ‘self-perceived gender identity’. The distressing aspect however is that it leaves the power of recognition and certification of such an identity in the hands of the administration. Even though it permits the right of residence in a household it does not grant the right to marry or adopt. The Bill also fails in defining discrimination which it forbids in spaces like educational institutions, healthcare services and employment. The Bill lacks punitive action in cases of discrimination.

One of the small victories for the transgender community in Karnataka was the removal of the word ‘eunuch’ from Section 36A of the Karnataka Police Act 1963. The discriminatory law gave the power to the police to regulate eunuchs and required them to maintain a register of names and residence details of eunuchs suspected of kidnapping or emasculating boys. The transgender community contended that the law was discriminatory and further marginalised them. Eventually, the government agreed to remove the word ‘eunuch’ from the Act.

While this paper was being written, the Indian Supreme Court pronounced a seminal judgment on August 25, 2017 declaring that the right to privacy constitutes an essential part of the fundamental rights enshrined in the Indian Constitution. In its 547 paged judgment, the apex court criticized the *Koushal* judgment by stating that “*a miniscule fraction of the country’s population constitutes lesbians, gays, bisexuals or transgenders*” is not a sustainable basis to deny the right to privacy. *Sexual orientation is an essential component of identity. Equal protection demands protection of the identity of every individual without discrimination.*²² The landmark judgment will now be considered closely when the Constitutional bench on the legality of homosexuality is formed.

Societal and Individual Efforts

The harsh truth remains that the inclusionary mechanisms for transgender community have been sparse in time. The battle for rights is either taken up individually by members from the community or by a handful of civil society organisations working for the cause. One of the instances to be highlighted is the attempt to place a matrimonial advertisement for a transgender. Arranged matrimonial alliances are still a common practice in India mostly placed through newspaper advertisements. Interestingly, a mother of a well-known gay activist had to run up against the wall with the news agencies refusing to put a matrimonial advertisement for a transgender. The advertisement was finally placed but caught the eye of the public for being an anomaly.²³ In December 2016 a learning centre came up in Cochin exclusively for transgender school drop outs to enable them to finish schooling.²⁴ As the literacy rate amongst transgenders is low as compared to the national rate, efforts such as these need to be replicated in other

Indian states. There are efforts to provide counselling and educational material to young school students battling their idea of gender identities but these efforts are few and far between. For those who manage to complete their education, their educational degrees still hold their gender identity as of birth. It is an arduous task to get the gender (or even names) in changed through the bureaucracy. Recently, the Department of Publications, Central Board of Secondary Education and Delhi University were sued because they refused to issue certificates with the adopted gender identity of a transgender.²⁵

There are a handful of NGOs working with corporates to hire members from the transgender community and train them with required skill sets to be part of the workforce. A spokesperson from IBM India said it will cover the costs for gender affirmation surgery under the corporate health plan this year onwards. This is a phenomenal move by IBM named as the world's most LGBT inclusive community by Amsterdam based Workplace Pride Foundation.²⁶ The Indian LGBT Workplace Climate Survey assesses the workplace environment vis-à-vis LGBT employees in corporate India. The second survey in 2016 revealed that more than half LGBT Indians could be legally fired from their jobs for being LGBT. Only a small minority 4% are covered under the same sex partnership benefits.²⁷ Some corporates are now willing to include transgenders in their workforce and slowly adapting by providing counselling, unisex bathrooms and keeping their identities discreet on request.

Centre for Law and Policy Research (CLPR), a partner of the Friedrich Naumann Foundation has developed India's first course on transgender rights and the first lecture was held at the prestigious National Law School of India University, Bangalore in late August 2017.

CLPR has recently started a legal aid clinic for transgenders in Bangalore. It is held on a weekly basis every Wednesday.

A Delhi homemaker and her husband have put their life's savings into organising India's first ever national level beauty pageant for transgenders in late August 2017. The homemaker wanted the society to recognize the talent and beauty coming from the community.²⁸ The winner will now represent India at the Miss International TransQueen in Thailand in March 2018.

Efforts of individuals, corporate inclusion of transgenders and civil society activism is slowly changing the environment that transgenders often find painful to traverse.

What is the Way Forward?

Living on the fringes of society, their right to identity, livelihood and entitlement to universal services is based on the whims of an apathetic state administration. Implementation gap in law is most often the cause for deprivation of individual rights in India. The judiciary and the administration have made visible efforts to demarginalize the transgender community. The biggest challenge is the parochial attitude and societal resistance to include transgenders as a normal part of daily lives. Large scale sensitization needs to happen starting from the school level to see transgenders not as an aberration, but an integral component of societal life. Once sensitization occurs the need to battle for the most basic human rights for the transgender community will no longer be a tough one.

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