

## **TAKING TRANSGENDER RIGHTS SERIOUSLY: MAKING AUTHENTIC LIVES POSSIBLE**

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The problem of who a person really is, in terms of gender in a society, dominated by only two sexes, is something which is there since time immemorial. It is good to see that people have started talking about it pragmatically but it's a fact that they still live in an inadequate legal framework throughout the world. Some of them live in a society which tries to acknowledge the difficulties that they face and tries to provide them a route way through the bulk of the population. Others hardly even acknowledge their being. They are 'not' simply within a world that only permits two sexes, only sees gender roles, identity or expression of two types thus making them fall outside the societal 'norms' and questioning their humanity, therefore the oppression and agitation of the transgender people are legitimised.

To start with transgender, if we consider having a scientific outlook to it then we would find that the presence of transgender in our society is very natural as they do conform to the rules of genetic variation of human population. Hence, scientifically it can be inferred that their presence can't be termed as 'unnatural' or 'unusual'. Kama Sutra terms them as people of 'Tritiya Prakriti'<sup>1</sup>. The term 'transgender' is used for people who transcend the boundaries of social gender norms. These are the people who question the rigidity of the binary gender construct and generally show a dissonance to the conventional gender roles. In India, the term 'transgender' happens to be a big cover under which many subgroups according to identities, experiences and sexual orientations are present. Their presence is starkly marked by pre-operative, post-operative and non-operative transsexuals, the male and female people who generally exchange their gender person normally referred to as "cross-dressers" and people who irrespective of their sexual orientation are seen as people of different sex. The commonly

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<sup>1</sup> Danielou, A. (1994). The Complete Kama Sutra. The first unabridged modern translation of the classic Indian text by Vatsyayana. Thomson Press (India) Ltd: Mumbai.

used terms for transgender in India is Hijras, Aravanis, Kothis, Shiv-Shakthis and Jogti, Jogta and Jogappa Hijras. However each of the term has different meaning according to their sexual orientations and beliefs. Hijras are people who either reject their masculinity donning a female personality or their sexual orientations is 'somewhere between' a man and a women hence they can be seen as a male to female transgender. Aravanis are the same as Hijras however the usage of this term is mainly restricted to Tamil Nadu. Jogti, Jogta and Jogappa Hijras are those Hijras who dedicate themselves in the service of Goddess Renukha Devi, however there is a minor difference that Jogtas are heterosexuals and they may not don a female attire<sup>2</sup>. Shiv Shakthis are technically 'cross dressers' who are said to be married off to a sword which represents Lord Shiva. They are males who wear female attire. These people differentiate themselves on many bases which ironically involve explicit or otherwise ignorance of the true and original meaning of the aforementioned terms. For example, a Hijra activist doesn't like to be called as a 'transgender' as she thinks that the term 'Hijra' has a long history and a definite culture which doesn't encompass other kind of transgender subgroups and on the contrary the 'Aravanis' who are prevalent in Tamil Nadu refer to themselves as both 'Aravanis' and 'transgender', however they do use a term 'Thirunangai' to describe themselves.

India is the land of tolerance and acceptance. A very wide range of ideologies, cultures, customs and norms have been accepted in the Indian society. However there is a presence of certain lack of acceptance for people whose sexual orientation, expressions and beliefs are different to the stereotypical ones. The reason though unknown and phenomenon though unusual can be said to be a result of lack of gender education of students. The major experience of any transgender consists of only one word that is 'exclusion'. Their sense of exclusion starts from as early as their birth itself. If the transgender 'characteristics' are present and observed during birth then the parents usually try to do away with the child by either giving it to the local 'Hijra' group or by abandoning him or her in any way. Their first response is out rightly abandoning him or her. The parents then do not accept the fact if their male child is expressing feminine qualities or expression. They usually don't accept any child who doesn't behave according to the accepted stereotypical norms of their gender. They try to give several reason for it like bringing disgrace and shame to the family; inability to carry forward the family traditions due

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<sup>2</sup> Chakrapani, V., Mhaprolkar, H., Basu, J., Kavi, A.R. (2007). Dynamics of men who have sex with men (MSM) and Hijras in Maharashtra: A qualitative study on sexual networks and vulnerability. The Humsafar Trust, Mumbai, India

to inability to marriage; inability to take care of family. Therefore in future a transgender finds it difficult to get his or her share of property because of the confusion over their gender and even if he or she is accepted as a transgender, there is no provision for inheritance and succession of a transgender in any of the succession acts that is being followed in India. A transgender child leaves his or her home in order to escape either because of the discrimination or constant humiliation he faces in his home or society or he assumes that his presence would bring social disgrace to his family. Many of them find their way to several Hijra communities. Therefore a very major portion of Transgender is uneducated and illiterate. Moreover they don't have anywhere to go as there is a scarcity of people who would employ a transgender. Some societal elements also ridicule them by saying that they are "different". Even the police authorities violate their human rights by ways of physical and verbal abuse, forced sex, extortion, non-registering of complaints filed by them and even branding of false charges. Thus due to the absence of police support a transgender in a society becomes a vulnerable target for ruffians as sex objects and extortion sources.

Transgender people encounter unique difficulties in terms of healthcare services, lack of knowledge being one of them. Most of the time, the healthcare providers are ignorant of sexual diversities and they don't have enough knowledge about the kind of health issues and the treatment of sexual minorities. The problems faced by transgender people during tests related to sexual health issues have been well documented. The other difficulty faced by transgender people in the sphere of healthcare services is discrimination. They include: deliberate verbal reference of them as 'males'; humiliating them by telling them to stand in the queues of 'male'; humiliating them by shifting them to 'male' wards; verbal assaults and harassment by the healthcare providing staff and the patients who are sharing the ward with them; a serious scarcity of healthcare providers who are sensitive to the health issues and social hardships that transgender people face; deliberative inadequacy of attention by the healthcare providing staff towards the transgender people and even denial of services to them.

Transgender people face a variety of social security issues. Since most of the transgender people are either abandoned from their home or have fled their home themselves, let alone education even literacy is not something that they have the privilege of. Moreover, lack of support from their original family aggravates their problem of unemployment. Most people don't want to employ a transgender even if he is educated and skilled. A recent survey showed

that there are only 103 institutions and networks that work with Transgender people.<sup>3</sup> Even among these 46 are community owned. There are many success stories like transgender opening their own shops or self help groups or any cottage industry but they are only exceptions and we cannot count them as examples. Therefore these lack of options for livelihood leads them to follow the path of a sex worker. However, recently some initiatives have been taken up by institutions like Life Insurance Corporation of India for the job of ‘agents’.<sup>4</sup>

Government has ‘social welfare departments’ to provide relief to those people who are marginalised in a social, economical or both of the above means. However by far very few states like Telangana, Andhra Pradesh, and Tamil Nadu. Recently Andhra Pradesh has ordered its state minority welfare board to accept transgender people as minority however the process is very stringent and cumbersome<sup>5</sup>. Tamil Nadu has made a ‘Aravanigal/Transgender Women Welfare Board’ to redress the problems of Transgender People. In addition to these very few programmes related to literacy and social awareness is carried out for transgender people so even if welfare programmes are carried out by the Government, the transgender people are not aware of it.

Apart from social exclusion, the transgender people have faced exclusion from their social, civil and political rights since the time when India was colonised. The British came up with the Criminal Tribes Act, 1871 in which there were provisions which considered certain tribes and communities as '*addicted to the systematic commission of non-bailable offences*' which made them criminal by birth! The ridiculousness of this provision extended to the successive generation as it also criminalised them! The respective act was amended in 1897 and it was said that “a eunuch [was] deemed to include all members of the male sex who admit themselves or on medical inspection clearly appear, to be impotent”. The government of the respective locale was asked to keep a record of all the “eunuchs” in that area who are “reasonably suspected of kidnapping or castrating children or of committing offences under Section 377 of the Indian Penal Code” and any “eunuch” who is registered if appears to be dressed and

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<sup>3</sup> Asia Pacific Coalition on Male Sexual Health (APCOM). (2008). Mapping Transgender groups, organizations, and networks in South Asia.

<sup>4</sup> <http://economictimes.indiatimes.com/personal-finance/insurance/insurance-news/LIC-set-to-hiretransgenders-as-agents/articleshow/6756549.cms>

<sup>5</sup> <http://www.siasat.com/english/news/transgenders-included-minorities>

ornamented like a woman can be arrested without warrant. Hijras have also been harassed by the police in the name of conviction under the aforementioned section.

Legal issues can be very difficult for transgender people. The term 'legal issues' incorporates legal recognition of gender identity, same sex marriage, adoption, inheritance, trusts, immigration status and access to the health benefits bestowed upon the citizens. Legal recognition of gender as a woman or transgender is a very complicated process and generally hinders the procurement of ration cards, passports and opening up of bank accounts. Transgender people have the option to vote as a woman or 'other'<sup>6</sup> and transgender people have contested election in past but there has been an incident when a transgender won an election but the election was overturned as she registered herself as 'female' which was considered to be illegal therefore the right to contest election is something which is disputed and needs further attention. In legal terms many legislations which allows a group to form associations (Societies Registration Act, Indian trusts Act etc.) does not help the transgender people because their identity proof is disputed as most of them have a 'male' identity proof therefore making joint banking options difficult. Irrespective of the above legal challenges that they face, a few community based organisation of transgender people reported issues with the government officials who were in-charge of their gender registration to be unsupportive as they asked irrelevant questions called for irrelevant queries and caused unnecessary delay.

However, it should be noted that that there has been some important legislations regarding the sexual rights of the Transgender people. Till the decision of Naz Foundation vs. NCT Delhi in 2009, all types of "non-penovaginal" sexual relationship among consensual adults was a criminal offence<sup>7</sup>. Though the provision violated the Article 17 and 2(1) of the International Covenant on Civil and Political Rights<sup>8</sup>, there was no such decision or legislation which happened to be sensitive towards the rights of the Transgender people. The Naz Foundation actually applied the provision of the Constitution to the sexual minorities which were never thought worthy of judicial consideration. The Delhi High Court observed that, "If there is one constitutional tenet that can be said to be underlying theme of the Indian Constitution, it is that

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<sup>6</sup> <http://timesofindia.indiatimes.com/india/Undertrials-must-get-right-to-vote-Election-Commission/articleshow/5259200.cms>

<sup>7</sup> *Naz Foundation vs. NCT Delhi* (2009) 160 DLT 277.

<sup>8</sup> See *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994). Para 8.6 and para 8.7 for the interpretation of the ICCPR that anti-sodomy laws violated both the right to privacy clause and the non discrimination clause. <http://hrlibrary.ngo.ru/undocs/html/vws488.htm> accessed on 26 April 2010.



of 'inclusiveness'. This Court believes that Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as "deviants" or "different" are not on that score excluded or ostracised"<sup>9</sup>. Legal think tanks of the country believe that the judgement will have a desired effect as in order to question the sexual orientation of the Transgender people, the provisions of the non-discrimination clause of the ruling has to be read.<sup>10</sup> In brief the Naz Foundation case gave a legal basis to the Transgender People to fight against the discrimination meted out to them. This case removed the downside of criminal justice from the back of Transgender people. Apart from the Naz Foundation there are several other instances in which a considerable amount of promise has been shown in the sphere of Transgender justice in social or political aspects. For election Transgender people do have the option as 'Other' if they want to vote.<sup>11</sup> In ID documents like 'aadhar' the inclusion of the term 'transgender' has helped the situation. It is estimated that over 19,000 transgender have identified themselves with Aadhar.<sup>12</sup> With respect to property rights Madhya Pradesh High Court in a certain case allowed a Transgender person to receive property from her 'leader' as they can't be transferred to anyone other than their community. The court noted that a certain 'eunuch' class exists and its customs and rituals should be respected.<sup>13</sup>

After all is being said and done it can be inferred that the condition of Transgender people in Indian, though progressive, yet is not yet up to the mark. The basic need of the hour is to have a model which gives a legal recognition of identity. An identity which neither is as ambiguous and demeaning as 'other' nor as unspecific as 'transgender' is required. In this light there should be a 'self identification of gender' principle. This model respects the right of one's gender determination. This acknowledges the fact that the aspect of gender of a life form is not limited to physical structure which requires only medical attention but rather is a belief on oneself and a form of expression. The Yogyakarta principles are the best way to approach this. These were formed at a meeting of the International Commission of Jurists at Gadja Mada

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<sup>9</sup> *Naz Foundation v. NCT Delhi, op. cit.*, See Para 130.

<sup>10</sup> Tarunabh Khaitan, *Reading Swaraj into Article 15: A New Deal for all Minorities*, 2 NUJS L. Rev. (2009) 419.

<sup>11</sup> [http://lgbtqnews.com/gaynews/eunuchs-transsexuals-given-third-gender-option-india-election-forms\\_BYN.aspx](http://lgbtqnews.com/gaynews/eunuchs-transsexuals-given-third-gender-option-india-election-forms_BYN.aspx) accessed on 28 April 2010.

<sup>12</sup> [49http://www.deccanherald.com/content/249637/over-19000-transgenders-issued-aadhaar.html](http://www.deccanherald.com/content/249637/over-19000-transgenders-issued-aadhaar.html)

<sup>13</sup> *Illyas and Others v. Badshah, alias Kamla*. AIR 1990MP 334.

University in Java in November 2006. It has 29 principles unanimously adopted by the United Nations, different countries' government and various other regional intergovernmental institutions. The preamble to the principles says that gender identity should be used to," The preamble to the Yogyakarta Principles usefully notes that gender identity is used: "to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms."<sup>14</sup>In relation to this, The International Bill of Gender Rights says that any person should be given three basic rights for the legal establishment of their gender identity.<sup>15</sup>

- Right to free expression of gender identity.
- Right to control and change one's body.
- Right to competent and professional medical care.

To legally recognise the transgender people we will not only have to make sure that there are certain rights available to transgender people, we will also have to see that the rights vested are in accordance to the system of laws followed in different countries. This will make India as a nation with progressive thoughts that ensures equal legal rights for its citizens. Like Argentina, India can follow the Yogyakarta principles for the right of gender or can cancel the requirement of surgery like that of South Korea and Japan. There should be flexibility in the procedures like that of Portugal where the decision regarding gender change has to be given in 8 days and the number of times a person changes his or her gender shouldn't be limited. These matters being sensitive to some people, there should be a confidentiality clause like the provisions of England and Jersey under which it may not be mandatory to have public records of people undergoing sex change. Following UK, there shouldn't be any effect to any rights of a person if he or she undergoes sex change and last but not the least there must be an Anti Discrimination Law for the security of the Transgender People like the Equality Act 2010 of United Kingdom which addresses it.

The situation of transgender in India speaks for them. There is no denying that they still live in a world made obsolete by the bi-gender construct. To actually improve them, we need to change

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<sup>14</sup> *Yogyakarta Principles*, princ. 3.

<sup>15</sup> <http://inquirer.gn.apc.org/GDRights.html>

our attitude and mindset towards them. We should understand that they are like us. Only then can we make their life as authentic as that of us.

