

Chapter 7
Transgenders
Transcending the
Binaries: Transgender
Exclusions in
Law and Policy



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1. Introduction

Accounts of hijras kidnapping children and changing their sex are a common folk myth in many parts of India . . . The Mumbai-based Daily News and Analysis quoted Bangalore's Deputy Commissioner of Police (South) on October 20 (2008) as calling for a 'drive against the city's eunuch menace'. 'Eunuch' is a widely used derogatory term for hijras.

On the same day, the police arrested five hijras in Bangalore and charged them with 'extortion,' beating and sexually abusing them in the process . . . Next, on November 8 and 9, five major newspapers in India, including two national dailies, carried news items about Bangalore police breaking up a 'gang' of hijras. The gang allegedly kidnapped children, performed 'sex change' operations on them, and forced them to become sex workers . . .

Immediately after these reports appeared, on November 9, the police inspector of Amrutahalli police station in Bangalore issued a notice to about 40 homeowners in the Dasarahalli neighborhood—known for having a substantial hijra population—requiring them to evict all hijras who rented apartments or rooms from them. More than 100 hijras rented rooms there, and most found themselves on the streets. Several lost their security deposits, and some lost all their belongings. One hijra told newspapers and local activists that she could not even find an autorickshaw driver to give her a ride because hijras had been labeled kidnappers.

Police claimed the hijras conducted 'immoral activities' in their houses, and the eviction notice was, according to newspaper reports, also accompanied by verbal threats to the homeowners. Some of the homeowners told newspapers that they had never had trouble with their hijra tenants, but they were afraid to disobey the arbitrary command.¹

“Transgender”² is often used as an umbrella term to signify individuals who defy rigid binary gender constructions, and who express or present a breaking and/or blurring of culturally prevalent stereotypical gender roles.³ The term ‘transgender’ has only very recently come into popular and political use, and its definition is critical to the politics that it engenders. The term, as we have used it, is in line with the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.⁴ It includes all those people whose internally felt sense of core gender identity does not correspond to their assigned sex at birth or the gender in which they were raised. This includes people who identify with a gender other than that assigned at birth as well as those who do not identify with any gender at all. It embraces those who feel no need for hormones, surgeries or other body modifications, as well as those who seek to modify their bodies. Some may identify as transgender, others as transsexual.⁵

Transpeople may live fully or partially in the gender role ‘opposite’ to their biological sex. They point out to us that gender is a continuum, rather than a construction of two ‘opposites’ that are self-contained. Transpeople are often laughed at, shunned, rejected by their families, denied jobs, ration cards and passports, and exploited by others in the professions they are allowed into (for instance, seeking alms and sex work). They repeatedly face a host of problems from institutions as diverse as family to the medical establishment, including the arms of the state, particularly the police. The social and cultural practice of discrimination, coupled with poverty, illiteracy and limited opportunities of employment have led to increased vulnerability of these communities.⁶ Society also reduces the identity of the individual to just that of being a ‘transgender’, most often choosing to ignore the multiple identities they have. Yet as Veena, a Hijra in Bangalore stated at a public meeting, ‘I am a transgender, a woman, Dalit, sex worker, socialist and poor. I am all these things and much more. And

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I fight to build up a world where I will be accepted for everything I am.⁷ As transpeople challenge our most fundamental assumptions about the relationship between bodies, desire and identity, the field is both fascinating and contentious. It has either the exotic value of being the ‘other’, or is rendered invisible, ridiculous, horrific or disgusting.

In India, transgender identities are diverse, including ‘Hijras’, ‘Kothis’, ‘Jogappas’, ‘Shivshaktis’, ‘Kinnars’, ‘Thirunambi’, ‘Kotha’, among others. Though transgender communities are spread out all over the country, there are no authentic figures on the actual number. This absence of numbers is a matter for concern. Arguably, minorities do not count until they are counted. The Karnataka Backward Classes Commission in 2010, headed by C. S. Dwarakanath, poignantly observed:

It is a tragedy that the Government does not have any data on the existence of this community. There are no studies, no records on the availability of basic needs to this community. For the Government, this community does not exist. The irony is that the Government enumerates the birds, animals, trees in the state; but it has not bothered to count the members of this community. Hence, the question of providing facilities to this community would, naturally, never arise. In the event of nil support from the Government and the Society, this community is forced to lead the life by begging and selling their body for sex.⁸

Within India, the few surveys that have been conducted have been scattered and often small-scale, have tended to focus on young and urban communities of transwomen (male-to-female transpeople), and have neglected the elderly and rural, as well as transmen (female-to-male transpeople). Some numbers derived from the National AIDS Control Organization (from their HIV-prevention targeted intervention programmes aimed at groups that are considered high risk) and UNDP studies put the transgender population at 2.5 million, but these include not just transwomen but also those who fall under the category of ‘MSM’ (men-who-have-sex-with-men).⁹

This number also excludes those who have not been reached by the targeted intervention programme, and more importantly, has no scope to include transmen. Counting also poses challenges in terms of the difficulties in standardizing instruments, and also training data collectors to acknowledge the presence of transpeople. Involving transpeople in the process of enumeration is the only way one can get an accurate estimate that reflects the reality of transgender lives.

For transpeople, to ‘come out’ as transgendered means frequently to have one’s gender identity disputed, contested, disbelieved or fully denied. Having to prove to others that you really are who you say you are is a task that might appear surreal if it were not also, for many transpeople, quotidian. Transpeople are faced with a limited range of options for living with an identity that is both felt within as problematic and continuously contested without by society. They are also caught in a bind—on the one hand, to come out and be counted may promise some space to claim their identity; however, the price that they have to pay may be steep in terms of the very real possibility of the violence and discrimination they may have to face. Anonymity, on the hand, may offer some safety. The right to speak out and be oneself is pitched against the high possibility of violence, rejection and abuse.

The subsequent sections of this chapter are arranged as follows: section two details the exceptionally severe marginalization of the transgender community in the Indian legal system, tracing its origins to the regressive Criminal Tribes Act of 1871 and illustrating its perpetuation in Section 377 of the Indian Penal Code (IPC), the Immoral Trafficking Prevention Act of 1986, the state level beggary laws and the civil laws in India. In section three, we highlight some of the key characteristics of discrimination and exclusion in the lives of transpeople, including the unthinkable violence that marks the body of the transperson; oppression faced within the intimate sphere of the family as well as the public sphere; and exclusion from education, health and livelihood services. Section four of the chapter examines the contours of the movement for sexual minorities in India, mapping Lesbian–Gay–Bi–Transsexual (LGBT) activism and its changing landscape in the light of the Naz Foundation and National Legal Services

Authority (NALSA) judgments. Finally, section five discusses key recommendations to bring positive changes in the lives of transpeople, including in identity documents, setting up of transgender welfare boards, recognition as a backward class, and facilitating access to health and education.

2. A History of Legal Stigmatization

The law in India is a powerful force to control transgender communities. It has criminalized the very existence of groups like Hijras and Kothis, making the police an omnipresent reality in their lives. Apart from criminal laws, which have invited the unwarranted authority of the police in their lives, the civil aspect of law has not heeded their demands for citizenship and equality. In this section, we will consider how the the Criminal Tribes Act of 1871, Section 377 of the Indian Penal Code, Immoral Trafficking Prevention Act of 1986, state level beggary laws and civil laws in India have historically disadvantaged the transgender community, and continue to deprive them of a right to live with dignity.

2.1 The Criminal Tribes Act, 1871

The roots of contemporary violence can in fact be traced back to the historical form that modern law in colonial India has taken. The Criminal Tribes Act, 1871 was an extraordinary legislation that departed from the principles upon which the IPC was based. To establish an offence under the Indian Penal Code, the accusation against the accused has to be proved beyond reasonable doubt in a court of law. However, the British seemed to feel that this system of 'civilized jurisprudence' was totally inadequate for dealing with certain tribes and communities who were 'addicted to the systematic commission of non-bailable offences'.¹⁰

These communities and tribes were perceived to be criminals by birth, with criminality being passed on from generation to generation. It fit in well with the hierarchical Indian social order, in which some communities were perceived as unclean and polluted from birth. The idea of criminal tribes was based on the notion that 'crime as a profession passed on from one generation of criminal caste to another: like a carpenter would pass on his trade to the next generation, hereditary criminal caste

members would pass on this profession to their offspring'.¹¹

Once a tribe was notified as a criminal tribe, all members of the tribe, including women and children, would have to register with the specified authority, with non-registration rendering the person liable to prosecution. Once a member of the tribe was registered, he or she was liable to be punished with imprisonment of up to three years if he or she was found in a place or in such circumstances as to satisfy the court that they were waiting for an opportunity to commit theft or robbery. Further, the registered person's movement was restricted to the limits prescribed by the authority, and any movement outside this authorized area meant that they could be arrested. Such provisions made the police an ever-present and daily threat to the very existence of these 'criminal tribes'.

The linking of criminal tribes to sexual non-conformity was entailed in the colonial administration's perception that criminalization itself was traceable to the perceived licentiousness of the itinerant communities. These itinerant communities comprised entertainers such as acrobats, singers, dancers, tightrope walkers and fortune-tellers, who were perceived as a threat to the order of sedentary societies.¹² This link between criminality and sexual non-conformity was made more explicit in the 1897 amendment to the Criminal Tribes Act of 1871, which was sub-titled 'An Act for the Registration of Criminal Tribes and Eunuchs'. Under the provisions of this statute, the sexual non-conformity of the eunuch earned severe strictures and penalties from the colonial administration. Being a eunuch was itself a criminal enterprise, with surveillance being the everyday reality. The surveillance mechanism criminalized the quotidian reality of a eunuch's existence by making its manifest sign, that is, cross-dressing, a criminal offence. Further, the ways in which eunuchs earned their livelihood, i.e., by singing and dancing, were criminalized. Thus, every aspect of the eunuch's existence was subject to surveillance, premised on the threat of criminal action, making the police an overt and overwhelming presence in their lives. Moreover, under the amended 1897 Act, a eunuch was considered incapable of acting as guardian, making a gift, drawing up a will or adopting a son. The very concept of personhood of eunuchs was done away with through disempowering them from

such basic rights. A phrase used by a British officer for criminal tribes is equally appropriate to describe the colonial perception about eunuchs: ‘they are absolutely the scum, the flotsam and the jetsam of Indian life, of no more regard than the beasts of the field.’¹³

What is important about this historical background is that the contemporary perception of Hijras as thieves, as well as the brutal violence that is inflicted against them, can be traced back to this colonial legislation that stands repealed today in theory, but continues to exist as part of the living culture of law.

2.2 Section 377 of the Indian Penal Cod

Section 377 of the IPC ‘says about ‘unnatural offences’ whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to 10 years, and shall also be liable to fine. The explanation under Section 377 is that ‘penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section’.

In *Queen Empress v. Khairati*,¹⁴ the police suspected the victim of being a eunuch who dressed in women’s clothes and on occasion was found dancing and singing with women, and arrested him under Section 377. The lower court observed that the accused was a regular sodomite, due to the medical reports which showed a distortion of his anal orifice as well as his feminine behaviour. While the Allahabad High Court acquitted the victim, the entire process of investigation and trial ended up stigmatizing Khairati through an invasive process, solely on the basis of her gender-non-conformative behaviour and identity.

2.3 Immoral Trafficking Prevention Act, 1986 (ITPA)

In modern Indian society, the state and its apparatuses—the police, judges, lawmakers—as well as social reformers have attempted with single-minded zeal to do away with sex trafficking and rehabilitate sex workers, but in ways that violate their fundamental civil, economic, social, and sexual rights, and expose them to organized

violence, public stigma and discrimination. The chief instrument of the Indian state’s regulation of prostitution is the Immoral Traffic Prevention Act of 1986 (originally the Suppression of Immoral Trafficking in Women and Girls Act, 1956), whose mandate is to prevent the trafficking of women and children into prostitution. The stated objective of the law on trafficking is not to criminalize prostitution *per se*, but to criminalize brothel keeping, trafficking, pimping and soliciting. In 1986, the act was amended to make it gender neutral and its title was modified to ‘Immoral Traffic Prevention Act’. With the 1986 amendment, both male and Hijra sex workers became criminal subjects of the ITPA, thus providing the legal basis for the arrest and intimidation of the transgender sex worker population.

In actuality, the enforcement of the ITPA invariably targets the visible figure of the sex worker (who is also the weakest link in the chain), and generally spares the hidden and powerful system that supports the institution of sex work. Thus, the operational parts of the ITPA are sections 7 and 8, which deal with prostitution in public places and soliciting, respectively. Under ITPA, all sex workers, male and female, face state violence and public stigma and discrimination. On the grounds of preventing immoral trafficking and protecting public order and decency, the police exclusively target people in prostitution, instead of the institution of prostitution, including brothel keepers and clients. Often the police proceed against the sex workers without any evidence of solicitation (as is required under the act) and merely on the suspicion that they are prostitutes. This produces an underclass of permanently targeted people who, at any time, are liable to be assaulted in public, merely because they happen to be there, taken away to the police station, wrongfully confined and restrained there, subjected to humiliating treatment and have their earnings taken away. Sometimes, false cases are lodged against them, which serve the double purpose of ‘solving’ an existing case and keeping the sex workers off the street.

2.4 State-level Beggary Acts

State-level beggary laws, in existence in 20 states and two Union Territories of India, criminalize begging, including seeking alms by singing songs,

dancing and other similar activities. Offences under these laws are generally punishable with imprisonment.

In the absence of a dignified basis of earning a livelihood, many members of the transgender community often have no option but to beg for a livelihood, inevitably running afoul of such laws. It is shocking that when they take to this profession out of a lack of options, what they face from the law is the question of the criminalization of their conduct. This makes a mockery of Article 21 of the Constitution, the right to live with dignity guaranteed to all persons.

2.5 Accessing Rights Under Civil Laws

In a cruel paradox, while the transgender identity poses no problems to the operation of criminal law and its role in criminalizing Hijra existence itself, it becomes a stumbling block as far as accessing rights under civil law are concerned. Nowhere is this more apparent than in the treatment of marginalized categories such as transgender sex workers. If one takes the position of Hijras and Kothis, it is clear that gender non-conformity does make a difference to one's ability to access basic civil rights otherwise available to all other citizens.

Official identity papers provide civil personhood. Among the instruments by which the Indian state defines civil personhood, sexual (gender) identity is a crucial and unavoidable category. Sex and gender are conflated to become one immutable category. Identification documents like birth certificates, passports or ration cards are a predicate for the ability to enter into a variety of relationships in civil and official society—to obtain a driver's license, to access legal services, for university admissions and employment, and to get essential benefits like healthcare. The Indian state's policy of recognizing only two sexes and refusing to recognize Hijras as women, or as a third sex (if a Hijra wants it), has deprived them, at a stroke, of several rights that Indian citizens take for granted. These rights include the right to vote, the right to own property, the right to marry, the right to claim a formal identity through a passport and a ration card, the right to education, employment, health and so on. Such deprivation excludes Hijras from the very fabric of Indian society.

In north India, there are instances of Hijras contesting and winning elections as Members of Legislative Assembly (MLAs), mayors and councillors. These elections, however, become vulnerable to legal challenge precisely because of the difference between the sex at birth (male) and the assumed gender identity (woman). Thus, in February 2003, the Madhya Pradesh High Court upheld the order of an election tribunal which nullified the election of a Hijra, Kamala Jaan, to the post of mayor of Katni on the grounds that it was a seat reserved for women and that Kamala, being a 'male', was hence not entitled to contest the seat.¹⁵ Similarly, a local court, on the grounds that she was not biologically female, annulled the election of Asha Rani, the mayor of Gorakhpur.¹⁶ These decisions essentially imply that one cannot choose one's gender and that one should remain within the sex into which one is born.

What is noteworthy is that it is not only gender that is regulated by law, but also sex. A person, once born into one sex, is legally obligated to live within the gender ascribed to that sex. Sex changes are not yet legally recognized in India. Therefore, the binary classification of sex/gender into male/man and female/woman, which does not recognize the third-gender category, makes the transgender status of Hijras a legal non-entity. The rigidity of the law is further exemplified in the fixing of sex at birth as the sex for all subsequent legal transactions. A Hijra then, who wishes to claim her legal gender as a woman while being born a male, is unable to do so.

Although gradual, there have been some breakthroughs and transpeople are beginning to access voter identity cards in the 'other' category. In fact over 28,000 have registered themselves as 'others' in the election rolls,¹⁷ with the maximum number registered in Karnataka.¹⁸

3. Experiencing Violence, Discrimination and Exclusion

3.1 Narratives of Violence that Mark the Body of the Transperson

Homophobic and transphobic violence has been recorded in all regions of the world. Such violence may be physical (including murder,

beating, kidnapping, rape and sexual assault) or psychological (including threats, coercion and arbitrary deprivations of liberty). These attacks constitute a form of gender-based violence, driven by a desire to punish those seen as defying gender norms.¹⁹ Violence against LGBT persons tends to be especially vicious compared to other bias-motivated crimes.

What is common to this diverse range of transpeople is that their gender identity is visible, and the very visibility of their gender identity, 'as already evidenced evidenced, means that they become vulnerable to sexual assault. While this is an aspect of the reality of the daily interface of the transgender community with the law enforcement machinery, these experiences have been shrouded in silence. As the Peoples' Union for Civil Liberties, Karnataka (PUCL-K) notes, 'Disturbing as these narratives are, they have yet to be picked up by mainstream human rights community in India. It is important that these narratives become part of our understanding of human suffering.'²⁰

The PUCL-K Report documents what Upendra Baxi calls 'unthinkable violence' on the bodies of transpeople. The transgender community in particular has been subject to brutal assault by thugs, policemen and other vigilante elements. The following is just one of the many egregious instances of such assaults documented by the PUCL-K:

Then he [the police officer] asked me to leave in a naked condition, refusing to return my clothes. But as I turned I could sense that he was getting sexually aroused. He wanted to fuck me. I didn't have a condom. I didn't even like taking it in the backside. Then he hit me very hard. He covered my mouth with his hand and started fucking me. He was very big, and without a condom, it was all so painful. My ass was bleeding. I could feel blood going down on my thighs. The policeman shouted at me, saying, 'Hey, stop crying. I will hit you again if you cried.' Then he lifted me, asked me to bend and fucked me more. Finally he was done and he left, thankfully leaving my clothes with me.²¹

Based on shocking narratives like the one just cited, the PUCL-K report concludes:

Sexual violence is a constant, pervasive theme in all these narratives. Along with subjection to physical violence such as beatings and threats of disfigurement with acid bulbs, the sexuality of the hijra also becomes a target of prurient curiosity, at the very least and brutal violence as its most extreme manifestation. As the narratives indicate, the police constantly degrade hijras by asking them sexual questions, feeling up their breasts, stripping them, and in some cases raping them. With or without the element of physical violence, such actions constitute a violation of the integrity and privacy of the very sexual being of the person. The police attitude seems to be that since kothis and hijras engage in sex work, they are not entitled to any rights of sexual citizenship.²²

3.2. Rejection by the Family

The tragedy of the transgender community is that as well as marginalization in the legal and public sphere, the experience of marginalization is no less acute in the intimate sphere of family relations. While other marginalized groups, be it on the basis of caste, religion, ethnicity or tribe, often have the family system to fall back upon, that is not always the case for the transgender community. The relationship with the family, with the father and brother often functioning as the upholders of the normativity of gender, is especially fraught in the transgender context.

In a study on advocacy needs among sexual minorities, most respondents spoke of deep pain, disempowerment, loneliness and guilt, which sexual minorities experience because of the rejection and violence that they face at home.²³ In fact, a respondent said that there is a tendency towards talking mostly of police or the state as the source of violence, but it is forgotten that family and others are equal participants. The family is often a patriarchal institution that finds it difficult to deal with the blurring' of the lines along gender, which it has imposed and seeks to reinforce.

At a public hearing in Tamil Nadu about human rights violations faced by the transgender community, the accounts shared demonstrated that while gender non-conformity may be tolerated in children, when changes in the gender expression

of a child become obvious—and that happens usually with the onset of puberty—parents resort to policing the child’s sexuality and adopt cruel measures to ensure gender conformity. There was a case shared of a young boy whose parents administered electric shock to his genitals in an attempt to ‘fix’ his fondness for girls’ clothes. They hoped it would ‘rouse’ the man in him. In another case, a young transwoman’s parents forced her to take male hormone tablets.²⁴

Families are often ill-equipped to deal with family members who are ‘different’. They may feel confused, inadequate, guilty and angry. Lack of information and ways to understand the issues and being ill-equipped to strengthen themselves against the pressures from other relatives, neighbours and society are some of the issues that families deal with. Families are sometimes unaware of the possible impact their reactions could have on their children. They may be well intentioned, and yet cause damage.

Sometimes transpeople ‘buy’ their acceptance back into the families in many complex ways—by making significant financial contributions; by undertaking more work at home; by muting their identity in various ways; by not reacting to the abuse that is hurled at them. The desire to somehow keep links with their family is strong among many transpeople, and is manifested often in the silent compliance with the imposition of marriage.

The compulsion to marry to save the ‘honour’ of the family, to ‘cure’ the person, to produce heirs for the family or due to practical considerations (such as increased income, help at home) are major factors pushing transpeople towards marriage. For many, especially the female born, it is at what is deemed the ‘marriageable age that they face the maximum pressure and find it more difficult to escape or negotiate their way out. The pressure includes physical and emotional violence, and withdrawal (or threat of withdrawal) of economic and social support. The fact that marriage is considered universal in India also leads to Kothis marrying women and leading what some of them called ‘a double life’. They live in fear of being ‘found out’ and also under pressure to be what they are not—heterosexual men. The women who are married to them also face a difficult life.

There is no social institution equivalent to that

of marriage that might enable public recognition of transpeople’s intimate relationships with members of the same sex (but different gender); as a consequence, transpeople are unable to access the social and economic benefits conferred by marital status. Lack of familial support and other risk factors—unemployment, educational failure, mental ill health or alcohol dependency—can feed off one another, compounding their effects and leading to outcomes that can be very damaging for those affected.

3.3 Homelessness and Difficulties in Securing Housing

In a series of Focus Group Discussions (FGDs) conducted with transpeople in south India, as part of a study on transgender lives,²⁵ respondents spoke of how the lack of understanding, the violence and anger, and the pressure to marry or adhere to a gender role that is different from their identity often resulted in their forced migration away from home. Unfamiliarity with a new place, language and food, and a sense of loneliness make migration difficult, even if it does sometimes offer a chance to be freer and more ‘themselves’, and in some cases find a means to earn a livelihood.

Transpeople are also faced with a wide range of challenges due their gender identity, from the difficulty of finding a home to the constant threat of being driven out of those homes, and having to shift residences often. A few transpeople spoke of the fact that they have to pay higher rents. Homelessness is an issue that affects young LGBT people; when they ‘come out’, they risk rejection by their family—they are asked to leave or they run away from the family home. Research has found that when young LGBT people leave home, they are more likely than their heterosexual peers to live on the streets than in public care, where such care is available.²⁶ In India, access to government support shelters, houses at subsidized rents and other such support systems are more difficult to come by than in other parts of the world, particularly the West.

3.4 Difficulty in Negotiating ‘Gendered’ Public Spaces

Rapid urbanization and an economic system that is uniquely tied to the social system have made the politics of space and territory central to the lives

of India's poor. The poor are largely marginalized in a geography that is inscribed with relations of power and control, expressed in ways that sustain 'oppressive forms of cultural and political domination'.²⁷ This spatial marginalization must be understood as an expression of the broader disempowerment of the poor. For transpeople, the fact that public spaces are gendered as well as 'classed' means that they have great difficulty in negotiating these spaces. What compounds the agony of the violence is the continuous contestation of their identity by the wider society.²⁸

Some members of transgender communities, like Hijras, Shivshaktis and Jogappas, do find some traditional space and social status. For example, women often consult Jogappas both for physical and mental health issues; and there are sections of people who believe that Hijras have special powers to grant blessings. However, these are still peripheral spaces.

As a consequence of society's lack of acceptance of and deep stigma against these communities, a profound sense of alienation often parallels concrete material effects. For example, they have greater difficulty in accessing public services like transport, public toilets, public taps and so forth, often being subjected to unwanted attention, harassment and discrimination in such spaces.

In a public meeting in Bangalore, Christie Raj, a transman, recounted his experience of travelling in a public bus.

Once I was in a bus sitting in the seats where men sit as I am a female-to-male transgender person. On hearing my voice people around me starting shoving me around asking me to 'show them' that I am a man. They attempted to strip me. Nobody came to my rescue and in fear I jumped off the moving bus.

Being different also imposes an economic burden. Transpeople are forced to pay a higher price to service providers like the tailor and the *dhobi*, and for services at restaurants, hotels and so on. Similar to the way in which they sometimes 'buy' acceptance into their families (as just discussed above), they 'buy' their way into communities that

they are part of by making generous donations to local festivals, etc.

The hostile attitude of society is due to notions that anything other than heterosexuality is 'deviant' and 'self-indulgent' behaviour. People commonly complain that they are uncomfortable with the behaviour of the community—especially Hijras; that Hijras are noisy and their language harsh and 'uncivil'. Such dominant perceptions and prejudices fail to take into account the multi-faceted violence that the transgender community faces on a daily basis—as nobodies, as easy targets, as scapegoats. The violence, therefore, is often for no reason but 'entertainment'—as part of a macho culture that encourages violence as a way to show superiority. These attitudes create an overall environment that allows for various violations to be perpetrated on the community with impunity. They also make it much more difficult to raise the issue of sexual minorities as people 'worthy' of rights among the general public.

As Dinesh, a Kothi activist from Belgaum explains:

We remember an instance when a Jogappa died. Her family who had abandoned her came and dressed her in a man's attire. It was heart-wrenching. While she couldn't really get accepted as a woman when she was alive as she desired, she couldn't even die as one.²⁹

3.5 Exclusion and Discrimination in Education, Health and Employment

For many transpeople, the high school years and beyond are terrifying. They are teased because their behaviour does not conform to that expected of their sex. The experiences of adolescent transpeople (at a time when it becomes evident that they are 'different') include being segregated, harassed, bullied, and even sexually abused by both teachers and students. The trauma of this causes self-loathing and low self-esteem that often results in them dropping out of school or college. Apart from this, there are also financial concerns because of which they are unable to go to school or complete their education. They often leave home due to violence directed against them in the family, or

fear of the consequences of disclosure at home. In such a scenario, they are forced to discontinue their studies. The possible fallout, besides educational under-attainment, includes depression, attempted suicide and difficulty in forming relationships.³⁰ Reservation of seats at the tertiary level—for instance, the Bangalore University has reserved one seat at the post-graduate level for transgenders—while symbolically important, fails to take cognisance of the fact that the crisis for transpeople vis-à-vis education is fundamentally at the level of secondary education, when most of them drop out.

Healthcare professionals are often insensitive to the needs of transpeople, and lack the necessary professional training. Transpeople approaching health services commonly report that providers are unco-operative or hostile, with staff addressing or responding to them in a gender-inappropriate way, often adopting a mocking or ridiculing attitude, withholding or refusing healthcare. Transpeople are sometimes treated as ‘objects’ of study, with students and others coming to gawk at them and inspect these ‘strange being’. The stigma and prejudice put large numbers of transpeople on to a ‘stigma–sickness slope’.³¹ Those who are HIV positive face double discrimination at hospitals. They are often denied treatment either actively or through non-co-operation. Many of them also face discrimination in sexual minority organizations and sexual health interventions.

The medical establishment’s attitude affects the community in many other ways. For instance, when attacked by goons or the police, they need a medical certificate for legal purposes. But government hospitals do not co-operate, and this presents problems for the case. In addition, intersex children, who are born with atypical sex characteristics, are often subjected to discrimination and medically unnecessary surgery, performed without their informed consent, or that of their parents, in an attempt to ‘fix’ their sex. Costs, especially with regard to transition healthcare, like gender affirming surgeries, hormone therapy and implants, serve to push transpeople towards sex work. In the absence of reasonable, accessible healthcare, transpeople who cannot afford these costs often have to rely on unsafe or unsupervised health services, for instance traditional or backyard castration, non-medical industrial quality silicone ‘fillers’ and ‘pumpers’ or taking hormones with

little or no medical supervision.³² The need for psychiatric evaluation before provision of hormones or surgery adds to the expense and layers of difficulty, besides having implications in terms of access and availability. Besides, some health professionals (including, but not only, psychiatrists) suggest and even offer ‘reparative’ treatments intended to ‘cure’ individuals, which is unscientific, potentially harmful and contributes to the stigma.

Given that the educational system is inimical to their needs and interests, transpeople are compelled to quit education, resulting in fewer employment opportunities. Lack of employment opportunities and discrimination at the workplace are major issue for all transpeople. There are very few options that are available for Hijras other than begging and sex work, both of which are criminalized. In a few cases, they also work as masseurs. Similar to female sex workers, transgender sex workers have to confront the police, local thugs (*goondas*) and the public. They are harassed physically, sexually and mentally. They too have to pay bribes and extortion money to carry on even day-to-day activities. Most transpeople are *a priori* considered criminals and treated as guilty until proven innocent. Therefore, they grapple with constant fear and insecurity in sex work, since the chances of getting caught and being charged with false cases and tortured are high. Jogappas and Shivshaktis are involved in some traditional occupations, but this is proving to be less and less sustainable, with an increased wave of ‘modernity’ sweeping even small towns and villages. In some states, like Tamil Nadu for instance, a few of them are involved in other occupations such as cooking or fruit vending, but these are also at the lower end of the employment spectrum in the unorganized labour sector.

Transpeople who are able to secure employment are often discriminated against at the workplace and, worse, face harassment (including sexual harassment). Insecurity about the risk of being ‘found out’, and subsequently losing employment, is always high. Those who are HIV positive are even more anxious. In informal conversations with the author, a transperson with HIV talked about how he stayed on in his old job even when he had a chance to move to a better one because there was a pre-employment medical test that he was afraid of. Another decided not to avail himself of the

health facilities offered by the company because of his HIV status. A well-meaning social worker, ignorant of the importance of a transperson's sense of gendered self, once asked, 'Why can't they just adjust if they want the job so badly?'

For some, a new possibility has opened up with respect to employment opportunities in Non-Governmental Organizations (NGOs), though this too is largely restricted to those involved in HIV-related work. HIV-related work has provided opportunity and exposure for many community members who have learnt new skills and have grown in confidence. However, the flip side is that there is also widely prevalent exploitation of the staff members. The concept of 'peer-educators', for example, is a powerful one, to allow for teaching and learning within the community. But this is also used to underpay staff, using the logic that the money given to them is just an honorarium. Many of them are stuck in low-paying jobs and feel that the scope for growth, professionally and personally, is restricted and 'discouraging'.

3.6 Limited Political Participation and Policy Responses

Denied basic citizenship rights due to their gender identity, transpeople are often unable to even exercise their franchise. They do not find mention in the manifesto of any party. Contesting elections poses a challenge for them on many grounds, such as asserting their gender identity, gaining acceptance in society, understanding the electoral process and finding the resources to contest elections. The inability to participate in the political process limits the voice and agency of transpeople, and their access to political and other decision-making fora. Besides this, transwomen are subjected to stereotypical perceptions and are depicted by the media as engaged exclusively in 'feminine' (read apolitical) activities, like brushing their hair or fluttering their eyelashes.

However, major strides have been made in the recent past. The Lok Sabha elections of 2014 saw many transpeople in the fray. Bharathi Kannamma, a transgender candidate, contested as an independent candidate from Madurai, as did Kalki Subramaniam from Polachi (both in Tamil Nadu). In the prestigious seat of Varanasi, where

Narendra Modi of the Bhartiya Janata Party and Arvind Kejriwal of the Aam Aadmi Party were at loggerheads, Kamla, a Kinnar, decided to contest. As mentioned earlier, over 28,000 people have registered themselves in the column of 'other' in electoral voter lists. This upsurge has come after the slow start in 2009 in Bangalore when a transwoman contested in the Bangalore Municipality elections. Several transpeople also received their voter identity cards, making them eligible to vote, as they began to engage with political parties to make their issues 'political'.

In terms of policy responses, the criminalization of same-sex relationships and the non-recognition of transpeople have meant that with the exception of HIV-prevention work there are almost no state interventions that address the deprivations of this community. The HIV pandemic has forced the government to start dealing with issues of gender and sexuality, and resulted in some limited space for mobilization and policy outreach of sex workers and sexual minorities. The HIV-intervention programme has had greater community participation than most other health-related interventions, and has also put into place technical, physical and procedural infrastructure to deal with the HIV health issue. In most other policies, however, there is an almost complete effacing of sexual minorities. The development agenda has scarcely addressed issues of sexuality, except somewhat negatively as linked to population control, disease and violence. However, emerging studies by researchers, activists and organizations shows that in many cases poor people are more vulnerable to oppression on account of their sexuality and that denial of sexual rights entrenches poverty.³³ Economic systems and policies assume certain kinds of relationships, desires and consumptions—both sexual and material—and these rigid assumptions result in social exclusion and inequality. These issues have still not gained sufficient recognition in policy making, and apart from the few exceptions—for instance, the Gender Minorities Programme for transpeople instituted by the Karnataka Government in its 2012–13 budget, and the establishment of the Transgender Welfare Board in Tamil Nadu³⁴—transpeople remain absent from policy and programme interventions.

Transmen, Transmasculine Community or Female-to-Male (FtoM): A Minority Within a Minority

A transman is someone who may be born female (or intersex), is brought up as a girl (based on conventionally assigned gender roles or at least the external genitalia) but identifies as a man (and maybe earlier as a boy).^a In interactions, many transmen narrate how their behaviour (of not conforming to the role of a girl) was tolerated or even accepted till they reached adolescence.

In interviews, transmen have narrated as follows: ‘My father would tease me and say I am strong like a boy’, or ‘I was called a tomboy—and it was used affectionately.’ It is around puberty that the issues become more acute. The family starts to discipline the young ‘girl’ and views *his* behaviour as willful disobedience.^b The fact that gender norms are strictly imposed on girls, especially as they reach a certain age, means that the pressures (psychological, emotional, even physical) are enormous. They experience greater pressure to marry, stricter restrictions on mobility and more strongly imposed ideas of ‘honour’—all of which make it difficult for them to exercise their choice.

Transmen, therefore, negotiate their lives through the many restrictions that society places on them—avoiding certain places, often experiencing fear and feeling very vulnerable. Some of them have reported being sexually assaulted, and in one study, the respondents affirmed certain traditional masculine values such as protection of women as ‘heroic’ behaviour, and they simultaneously expressed an inability to protect a partner in the event of a man ‘misbehaving’ with them in public. This adds to their burden of ‘failed’ masculinity.^c

One of the biggest issues faced by transmen is their invisibility in society and culture, partly due to the high degree of intolerance in society, reinforced by patriarchal strictures on how a woman should behave. They are also overlooked in the formulation of government policies and programmes for transpeople, a case in point being the Aravani Welfare Board in Tamil Nadu, which provides services only to Aravanis (transwomen) and not transmen. While Hijras, Jogappas, Shivshaktis and some other male-to-female transgenders have formed communities occupying certain social and cultural spaces, there are no known spaces for female-to-male transpeople.

Efforts are under way to recover or forge an indigenous identity such as ‘Thirunambi’. Here, the primary struggle is for recognition, since people are unfamiliar with and often times presume that they have not encountered transmen. Transmen have also started to articulate their position on a range of issues. For example, Satya Rai Nagpal has founded Sampoorana, a successful Indian transpeople network that works for advocacy on issues of transpeople with families, friends, political parties, and particularly with legal and healthcare service providers. Christy, a young filmmaker, and Kiran, a full time activist working with people with disabilities and sexual minorities in Chikballapur district in Karnataka (among others), are engaged in building their community and supporting a range of other disenfranchised and marginalized communities. It is through their depositions, their struggles and steady work (along with supporters and friends) that the idea of transgender in Karnataka, as articulated in official documents, has taken some account of female-to-male transpeople as well.

Sources: a. The authors are conscious that there is a diversity of individuals who are assigned ‘woman’ as their gender identity but may not see themselves as women, and that not all of them regard themselves as transmen. However, to facilitate understanding and to allow for engagement, we have used the term transmen or FtoM as a descriptor for a broad diversity of persons.

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c. Cath Slugget (2011), ‘Is S/he More of a Man? Constructing Masculinity as a Female-to-Male Transsexual in India’ in Jerker Edström and Alan Greig (eds), *Men and Development: Politicising Masculinities*, London: Zed Books Ltd.

4. Contours of the Sexual Minorities Movement¹

The rights of sexual minorities were not part of the discourse of human rights for many years. Since its founding in 1945, the United Nations General Assembly had not discussed LGBT rights (for equality regardless of sexual orientation or gender identity) until December 2008, when a Dutch/French-initiated, European Union-backed statement was presented to the United Nations General Assembly. However, this was not officially adopted by the United Nations General Assembly.

In a major breakthrough for sexual minorities, the Human Rights Council in Geneva adopted, by a narrow margin, resolution 17/19 in June 2011— the first United Nations resolution on human rights, sexual orientation and gender identity.³⁵

The PUCL-K report on Human Rights Violations against Sexuality Minorities in India³⁶ discusses how most human rights organizations in the country are yet to address the question of the rights of gays, lesbians, bisexuals, transpersons and others who are oppressed due to their sexuality. The question of gender identity and sexual orientation is most often seen as a ‘private matter’. Generally, issues of

poverty and gender, and class and caste oppression are seen as more important than that of sexuality.

More often than not, the abuse suffered by these subaltern sexual cultures has been made invisible even by the activist community using a convoluted logic that arrogates to itself the ability to calibrate pain. First comes class, then comes caste, gender, ecology and so on. If there is any space left on this ark of suffering, then sexuality is included as a humble cabin boy. There is no hope of the last being the first in this inheritance of the meek.³⁷

But this ignores the fact that sexuality is integrally linked to ideologies and structures of social oppression such as patriarchy, capitalism, caste system, and religious fundamentalism. Hence, the struggle for sexuality rights cannot be separated from the broader human rights struggle for economic, political and social liberation.³⁸

Other issues also frustrate attempts for a more proactive push to secure the rights of sexual minorities. Activists defending rights related to sexual orientation and gender identity are targeted in a number of ways: offices are raided, there is harassment of staff and volunteers, legal registration of organizations is denied, and defenders risk suffering violations and harassment. This is especially true when activists do not come from the more privileged sections of society. Most NGOs working on issues of HIV prevention use status-quoist approaches and are reluctant to use some of the more effective and time-tested approaches that challenge the state and established social institutions. Interventions are often unduly oriented towards the fulfilling of numerical targets, with strong managerial components; currently there are added challenges such as the slashing of budgets and a push towards what is deemed as greater efficiency with a narrow focus on implementing the given project. Advocacy that is linked to a set of planned activities, which are related to larger political processes for social change in favour of the marginalized (in this case sexual minorities), finds little support in existing programmes. Within large NGOs, leadership is often in the hands of the privileged sections of sexual minorities (men from economically well-off backgrounds), who tend to

monopolize the space. The others are rarely heard and any discourse that does not toe the official line is actively discouraged. Given the lack of income-generating avenues, grassroots activists and change makers in the transgender communities are often at a disadvantage. They are forced to continue in their current employment even though it may not give them the freedom to pursue their ideas and ideals.

It might not be correct to paint an unchanging picture of transgender lives in the Indian context. Transpeople face an overwhelming sense of discrimination across multiple realms—housing, public sphere, education, livelihood, health and political participation. However, the communities have fought back against this animosity and prejudice. The movement gained to some extent from the feminist thinking that foregrounded what was perceived as a private matter as a matter of politics. And while some of the initial coming together of sexual minorities was either in small, secluded groups (mostly middle-class, English-speaking urban men), the next wave was prompted as responses to HIV and violence. There has been greater public action, articulation and organization of the sexual minority communities and sex workers, as well as deeper engagement with the state and other institutions. This has resulted in real changes on the ground, one of the clearest indicators of which is that attitudes towards sexual minorities, including transpeople, are becoming more liberal and accepting. Also noteworthy are policy spaces that are now being carved out for transpeople, particularly the Tamil Nadu Aravani Welfare Board and the Karnataka State Backward Classes Commission's inclusion of transgenders as a class of peoples who are eligible for benefits. These efforts, in combination with changes at the international level, with more countries moving towards de-criminalizing sexual minorities and a supportive media, have resulted in a less repressed atmosphere for sexual minorities across several parts of the country. While these changes portend well for sexual minorities, they are still confined to small pockets and largely focussed on the more privileged among the communities.

Due to the brave and courageous efforts of transgender activists, there have been significant advances with respect to the rights of transpeople. Two recent events deserve special mention.

4.1 Victory in Naz Foundation and Setback in Suresh Kumar Koushal

The single most significant advance has to be the landmark decision of the Delhi High Court de-criminalizing consensual adult sexual acts in private, better known as the *Naz Foundation* judgment.³⁹ While this decision is often seen as a charter for the rights of gays and lesbians, what is often not noticed is the extent of sensitivity and a deep historical appreciation shown by the judges for the plight of transpeople. The judges astutely traced the victimization of the Hijras to the Criminal Tribes Act, 1871. While appreciating the specific context of the Hijra community, the judgment was also clear in including the Hijra community within the fold of the fundamental rights, the right to dignity, privacy, equality and non-discrimination. What remains at the heart of the *Naz Foundation* judgment and its plea for inclusivity was its invocation of the two founding fathers of the Indian republic: B. R. Ambedkar's notion of 'constitutional morality' superseding majoritarian sentiments, which will remain a sheet anchor for the rights of any despised minority, and Jawaharlal Nehru's idea of 'inclusiveness' as being at the heart of the Indian constitutional order. It is really within this framework that brings together the philosophies of inclusiveness and constitutional morality that the struggle for LGBT rights can be taken forward.

It should be noted that this dramatic victory for LGBT rights was reversed through the ruling of the Supreme Court in *Suresh Kumar Koushal v. Naz Foundation*.⁴⁰ However, the broad and expansive language of the *Naz Foundation* judgment has set a benchmark for LGBT rights, which one hopes will be a signifier of things to come. The date 2 July 2009 continues to be a significant day for the LGBT community, and the revolution unleashed by this decision will continue to unfold in many ways that will undercut the basis of the judgment in *Suresh Kumar Koushal*.

4.2 Petition by the National Legal Services Authority (NALSA)

The Supreme Court, in a far-reaching ruling in *National Legal Services Authority v. Union of India*,⁴¹ held that transgenders can identify as a 'third gender'. It also called for reservations

for transpeople in educational institutions, job opportunities and government welfare programs. The judgment took a broad view of transgender as including persons whose gender identity, gender expression or behaviour did not conform to their biological sex and, more importantly, those who did not identify with the sex assigned to them at birth. It also made medical intervention to determine gender identity unnecessary. Self-identification as man, woman or third gender, irrespective of sexual reassignment surgery, is now protected by law. While recognizing the rights of transpeople, the judgment pointed out that non-recognition of gender identity violates the rights to equality and life, and that transpeople should not be compelled to declare themselves as either male or female. As Justice Sikri stated:

*It is only with this recognition that many rights attached to the sexual recognition as 'third gender' would be available to this community more meaningfully viz. the right to vote, the right to own property, the right to marry, the right to claim a formal identity through a passport and a ration card, a driver's license, the right to education, employment, health so on.*⁴²

5. Key Initiatives for the Greater Inclusion of Transpeople

Amartya Sen, quoting Hilary Silver, says that the list of 'a few of the things the literature says people may not be excluded from' must include the following:

*A livelihood; secure, permanent employment; earnings; property, credit, or land; housing; minimal or prevailing consumption levels; education, skills, and cultural capital; the welfare state; citizenship and legal equality; democratic participation; public goods; the nation or the dominant race; family and sociability; humanity, respect, fulfillment and understanding.*⁴³

Given the extreme nature of the exclusion of transpeople, the ongoing battle for inclusion, equality and recognition of diversity must occur in

a range of forums—politics, the courts, the media, government policies, the broader society, and even the intimate space of the family. Some of the key areas of reform are now discussed.

5.1 Changes in Identity Documents

Only two sexes—male and female—are recognized in Indian civil law. Furthermore, India does not recognize sex changes on, which makes it impossible for an intersex or Hijra to choose a legal female identity in most states. Lack of legal recognition has important consequences in getting a ration card, passport and bank account. There have been some major inroads into this rigid gender classification; for the purposes of securing an voter identity card, persons can now state their gender as ‘other’.⁴⁴ A separate ‘transgender’ category is now a reality in new identity documents such as the Unique Identification Number (UID) card. These designations are noteworthy because they allow individuals to self-identify outside of the male–female binary. The Indian government—in all of these processes—requires no proof, medical or otherwise, of third-gender status. It is a self-declared, identity-based category.

Yet, even in these instances, there is no standard way to record a transperson’s status. While the Census has a category as ‘other’, the UID allows people to register themselves as ‘transgender’. Bureaucratic regulations and general establishment rules cannot fathom and deal with the rich and diverse gender identities that exist. It is important that transpeople are recognized in other important identity documents, but also that such steps are taken in consultation with the transgender community. Among transpeople too, there are differences with respect to how they would like to be identified. Some assert that they are not men and women and should be seen as the third gender, others argue that the category ‘other’ is broad and less problematic. For some, both are undesirable and they would rather be recognized as transmen or transwomen.

5.2 Setting up of Transgender Welfare Boards

The Tamil Nadu government constituted a Transgender Welfare Board in April 2008, with a yearly budget of ₹5 million. The social welfare

minister is the president of the board, and other appointees include the secretaries of law and finance, and senior officials heading various agencies like the women’s commission, police, and state human rights and social justice commissions. In addition, a number of transpeople have been included as advisors to the board.⁴⁵ This effort is the first of its kind in India and perhaps even in the world. The mandate of the board is to look into the various problems faced by transpeople and to formulate and execute welfare schemes for their betterment.⁴⁶ Importantly, government and NGO partnership has been a key factor in the progress of transgender rights in Tamil Nadu, and NGOs play a vital role in the activities of the Transgender Welfare Boards. Setting up similar welfare boards in other states will be a critical step towards better addressing the needs and concerns of the transgender community.

5.3 Support in Accessing Education

Acting on the recommendations of a sub-committee for the rehabilitation of transpeople, the Tamil Nadu state government issued orders in December 2006 directing school and higher education departments to ensure that they are not denied admission to schools and colleges. It also recommends counselling for children with behaviour changes in schools, for which teachers need to be specially trained. The government order is clear: no discrimination should be shown against transpeople on account of their gender identity or expression. In an additional effort to improve the educational status of transpeople, the Tamil Nadu government issued an order in May 2008 to create a third-gender category for admissions to government colleges, and stated that they can share 30 per cent of seats reserved for women in government-owned and government-aided arts and science colleges. While this is a welcome step in ensuring access to education for transpeople, it takes away from provisions for an already marginalized population—women. It would be more appropriate to make separate reservations for transpeople.

5.4 Assistance in Sex Reassignment Operations

There is a pressing need for the government to provide financial assistance to transpeople who

undertake sex reassignment operations. At present, the Tamil Nadu government fully reimburses the cost of sex change operations in government healthcare institutions, and a few people have utilized this provision already. Yet, there are problems with this programme. To begin with, this process requires the person to be able to raise the amount for this costly operation, pay for it, process the reimbursement and wait to recover the money; this is practically impossible for most transpeople as they are people of modest means or are poor. Additionally, transpeople are reluctant to use these services as they fear becoming ‘guinea pigs’ for inadequately trained or inexperienced doctors.

5.5 Recognition as a Backward Class

Another key area of support for the transgender community would be its recognition as a backward class, which would allow it access to a range of benefits guaranteed to Backward Classes, under the provisions of the Constitution. This has already occurred in Karnataka where the state’s Backward Classes Commission concluded that it was amply clear that the sexual minorities, including Hijras, Kothis and Mangalamukhis, were socially and educationally backward and therefore eligible to be included in the list of Backward Classes.⁴⁷

5.6 Greater Inclusion in Government Planning and Policies

The 12th Five Year Plan (2012–17) marks the first time that the Planning Commission has specifically provided recommendations for the transgender community.⁴⁸ Among other areas, the 12th Plan proposes empowerment of transpeople by advocating that the relevant ministries should support their education, housing, access to healthcare, skill development and employment, and also provide financial assistance. It also proposes their recognition as a third gender in all government and non-government records, and calls for the Ministry of Social Justice and Empowerment and the Ministry of Statistics and Programme Implementation to determine the number of transpeople in India and map their socio-economic status, with the intention of creating a law relevant to their needs.⁴⁹ While these are certainly very progressive measures, there is an urgent need to ensure their actual implementation by the relevant ministries.

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49. Planning Commission, Government of India (2013), *Twelfth Five Year Plan (2012–2017): Social Sectors*, vol. 3, New Delhi: Sage.