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Social Exclusion of Trans Persons in India: Law, Citizenship and Healthcare

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Abstract

This paper attempts to look at the social exclusion of trans persons through a social exclusion framework. It traces the history of transgender citizens as the subject of the law highlighting the politics of language and how citizenship overlooks transgender subjects with an emphasis on 'The Transgender Persons (Protection of Rights) Act, 2019.' There is also a focus on 'identity' through a psychosocial model of social exclusion, highlighting the question of liveability. It addresses the discrimination within biomedicine and healthcare by taking a brief look at the study titled "An Exploratory Study of Discriminations based on Non-Normative Genders and Sexualities", conducted and published by Advanced Centre for Women's Studies, TISS, Mumbai.

Keywords: *transgender, politics, social exclusion, rights, citizenship, identity, health, gender, discrimination, violence*

1.0 The Transgender Identity

Initially, the 'transgender subject' was constructed inhumanely by the medical establishment and clinical science (Laquer, 1990). Michel Foucault's seminal work, *'The History of Sexuality'* (1990) theorised the social construction of the binary sex system, where homosexuality was seen as deviant, in contrast to heterosexuality. This binary of sexuality (heterosexual-homosexual) led to the criminalisation and a systemic attack on the rights of trans persons and intersex people (known as hermaphrodites back then) as they did not fit within a specific form of social relations – one where the constitution of sexuality is economically helpful and politically conservative. The western discourse laid the foundations of social perceptions toward trans persons.

In India, members of the 'third gender' have played a prominent role where they were revered as 'divines' in the ancient Hindu scriptures and epics like Ramayana and Mahabharata. During the 18th century British colonial rule, the *Criminal Tribes Act, 1871*, categorised the entire transgender community as "criminals." They were subsequently arrested for dressing in women's clothing, having anal sex or dancing in public spaces. The law was repealed post-independence but the discrimination continued. The social attitudes towards trans persons have been very ostracising. They are seen as transgressing 'norms of nature' by changing their biological sex and not leading a normal life. Along with this, the rising violence against them has been pervasive, not even recognised by the media. Even within academia, celebrated authors such as Nanda (1986), have

used significantly degrading language¹ towards trans persons, which has been heavily cited by other authors as well.

India has recognised trans persons as ‘third-gender,’ neither male nor female, even though their socio-cultural identity exists in multiplicities. In *The Transgender Persons (Protection of Rights) Act, 2019*, the definition of trans persons includes ‘intersex’ people who are individuals with Disorders of Sexual Development (DSDs), socio-cultural identities like ‘kinner’, ‘aravani’ and ‘jogta’ (encompassing both trans persons and intersex people) and also ‘gender queer’ people. Social exclusion here takes place through the non-recognition of identities.

2.0 Social Exclusion of Trans Persons

2.1 Social Exclusion as a Framework

Social Exclusion Framework is increasingly used in highlighting the issues and problems faced by disadvantaged and disenfranchised groups as it provides a multidimensional and dynamic framework that focuses attention on both the causes and consequences of social disadvantage (Konduru et al., 2018). Through this, one can understand the exclusion of trans persons from social and cultural life, economy and politics, and decision-making processes (Chakrapani, 2010).

It offers a helpful framework for analysing the various axes of inequality that impact trans persons and is better suited as traditional hierarchical models of inequality could not capture the multiplicity of disadvantages. Amartya Sen theorised that social exclusion was premised on the general idea of poverty as capability deprivation (Singharoy, 2001); however, the concept is a contested one. Indian society, based on traditional occupations, operates along the lines of social exclusion and discrimination (Verma, 2011) and at times, minorities are not categorically excluded but integrated into particular ways (Jackson, 1999).

2.2 Social Exclusion of Trans Persons: The Question of Liveability

Trans persons are not allowed to die, and at the same time, they are also starved. They are allowed to live with consistent attacks on their liveability –how much does the question of life matter? The idea of a ‘liveable life’ focuses on normative conditions that need to be fulfilled for life to become ‘life’ (Butler, 2016). Judith Butler has also asked, “Whose lives do and do not matter as lives?” The lives of trans persons and their bodily integrity are exposed to a constant threat of violence. They are considered human in a limited sense because exclusionary practices that define normativity are

¹ Nanda’s discussion of *Hijras* is fixated in biology with an insensitive language.

still in place. Butler also says that lives that are excluded from the public domain are excluded from the political domain. Trans persons' lives, in general, are dispossessed and precarious, exposing how the social and economic organisation of life itself is terrible (ZAhArIJeVÍc and Milutinović Bojanić, 2017).

Trans persons also suffer social exclusion through the lens of 'ethical loneliness'² as there is destruction, powerlessness and helplessness. Trans persons are dehumanised and face rejection of their humanity when humanity is the intrinsic condition of human existence (Stauffer, 2015). Butler also argues how sexual minorities are excluded from the state-sanctioned notions of the family, an economic unit. The Right to Citizenship and the Freedom of Speech are denied along with other fundamental human rights. This disenfranchisement of the sexual subjects operates on the sexual and gendered distribution and economic entitlements (Butler, 1997).

2.3 Psychosocial Model of Social Exclusion and Trans Persons

Trans persons are conventionally considered a subpopulation of men who have sex with men. The self-identification of sexual identity and its contradiction with biological sex is the criteria for categorising transgender women (Brahman et al., 2008; Gupta et al., 2006; & Reddy, 2005). The psychosocial model of social exclusion treats identity as a central construct. Looking at identity formation also allows us to understand the experience of trans women from a socio-behavioural perspective, which shows the wrong perception of the family as a supportive structure (Vinod, 2011; Jose et al., 2011). Multiple studies have reported that many stigmatised individuals perceived that everyone stopped loving them and felt difficulty in mingling with people in their families and neighbourhood (Berger et al., 2001; Jose, 2009).

Trans persons' appearance is situated beyond heterosexual norms and a sense of normalcy. A trans woman's body and its visibility through her public performance of sexual transgressions have been viewed as contagious, leading to their stigmatisation and marginalisation from the public domain. Scambler (1998) postulates that self-stigmatisation induces internal psychological distress and reduced mental health (Kessler et al., 1999). The critical study of identity reflects how identification provides a sense of distinctive status concerning others. It is central to one's relative position or status in any social structure, determining their inclusion or exclusion in the mainstream social structure. The very identity of transgender is heavily spoiled, discredited, devalued and induces

² Philosopher and Holocaust survivor Jean Améry coined the term, and Stauffer defined it as 'the experience of having been abandoned by humanity.'

self-perception of stigma.

3.0 Law & Citizenship

The idea of citizenship has been masculine, heteronormative and gender blind with partial inclusion of queer subjects (Richardson, 2000). Non-recognition happens in two ways – by the refusal of identification with self-identified gender and through the absence of the notion of a ‘third gender’ from other laws (Sheikh, 2014). Even after gender affirmative surgery, there are legal issues about identity recognition, same-sex marriage, child adoption, wills, immigration, employment and access to health benefits. The understanding of diverse gender identities has been done in a homogenous fashion, dominantly through *homonostalgia*, where trans identity is seen as a reflection of the hindu-ised historical influence of transgender existence (Ung Loh, 2018). Court judgements like the *NALSA Judgment*³ have focused on trans persons in Hindu culture, which excludes non-Hindu trans identities (Sharma, 2018). The state is conservative in that sense and modern due to the invocation of human rights principles recognised at an international level and upholding the same for trans persons (Sharma, 2018). Nevertheless, India is not a signatory to the United Nations (UN) Declaration on Sexual Orientation and Gender Identity.

Law has also heavily policed trans persons’ bodies. Under Section 377, the local government was required to register the names and residences of all the eunuchs who could be arrested without a warrant. Section 63A of the *Karnataka Police Act, 1963*, in the year 2013, made it mandatory to register names and activities of “eunuchs”, a form of surveillance to control “undesirable activities”. Disha Pinky Shaikh (2018) in a talk discussed the three-legged monster of caste, class and gender, marginalising trans people. The exclusion was also based upon language, as the text of the law was predominantly in English- not accessible or understandable by all. The state did not prepare any alternative and instead threatened to destroy the present structure. The earlier iterations of the Trans Bill also criminalised begging, which brings up many questions. Even the healthcare intervention on Human Immunodeficiency Virus (HIV) has protected workers and labourers and not trans persons.

The *Rights of Transgender People, 2014*, was the first private member's bill to be passed by either house of Parliament in the last 46 years. Through the subsequent bills, the prosecution of trans persons by the state continued. By not allowing for self-identification, the government aims to

³ *National Legal Services Authority (NALSA) v Union of India*, (2014) SC 1863 (India).

institutionalise the gatekeeping of trans identities. The government discards reservation in education and employment, as the bill failed to address discrimination through ghettoisation, segregation and registration. The community called it *Transgender Persons (Decimation and Violation of Rights), Bill* (Anuvinda & Siva, 2016). Trans persons called the provision of district magistrate issuing ‘identity certificate’, the lesser punishment for crimes against trans persons, and the absence of reservations violative of the 2014 NALSA Judgement, Right to Equality, among other fundamental rights. Not allowing the legal title of ‘transgender’ and only male or female highlighted moral panic around the ‘contamination’ of the binary world where the state takes up the role of crafting genders (Achuthan, 2021).

4.0 Biomedicine and Healthcare

Trans persons have also died because doctors did not know whether to admit them to the male or female ward (Soumya, 2015). Until recently, trans women were included under the epidemiological term MSM (Men who have Sex with Men) even though they identified as women. The term ‘transgender’ itself fails to cover the diversity of gender identities, impacting HIV prevention and care interventions. Multiple studies showed very high HIV seroprevalence among *hijras* and *aravanis* (Chakrapani, 2010). Recently, trans activist, Ananya, suffered death by suicide due to the failure of gender affirmative surgery (Udayavani, 2021). Trans persons have also been marginally vaccinated compared to their cis-gender counterparts (Choudhary, 2021).

4.1 An Exploratory Study of Discriminations based on Non-Normative Genders and Sexualities

The study discusses the medicalisation-pathologisation nexus where there is a shift of responsibility towards the individual. It highlights how ‘difficulty to access’ is often termed unavailability while it can also be a denial of treatment, which is a common experience for trans persons. The politics of identifying ‘high-risk groups’ can also be examined through Gayle Rubin’s articulation of the charmed circle. The study critiques the medico-legal language and the shift towards medicalisation of the experience of queer persons accessing healthcare. There is also much erasure of transmasculine persons in LBT activism and academic literature and *hijras* in the clinic. Achutan further theoretically explains discrimination as ‘institutional functioning,’ highlighting how even the vocabularies of sexual and reproductive rights of trans persons are structured around notions of culture and tradition; and gender affirmative surgeries and their procedures are mediated by the

normative, binary understanding of gender.

The attitude within the healthcare sector is still of homophobia, transphobia, misogynist patriarchal systems, and beliefs in gender binaries. There is an unhealthy obsession with establishing ‘normal’ bodies. Even conversion therapies are still in practice in many places which cause severe violence. The theme of ‘infantilisation’ comes up as community members are considered not mature enough to make decisions about their own gender identity. When this is played with the existing power hierarchy between doctors and healthcare workers, and patients with the social axes of caste, class, gender and religion, one can imagine the extent of discrimination. The healthcare system appeases the patriarchal family structure as during the removal of reproductive organs through gender-affirmative surgeries, the agency over the body, gender and sexuality is always given to families.

The double stigma of HIV and sexuality is still strong too. There is a rampant violation of privacy where trans persons receive much hostility. They are not touched, physically hurt, harassed during medical assistance, or abused verbally over their life choices. For instance, an LGBTQIA+ activist once expressed that a doctor told a transman: *“I will not perform a hysterectomy for someone who has not enjoyed motherhood.”* Within the context of gender-affirmative surgeries, the treatments have been unsafe until recently. However, still, inexperienced doctors performing on a trans person can lead to fatal side effects. Even doctors who perform surgeries with an asocial response commit violence as they care with no care reception.

5.0 Conclusion

Our society refuses to develop social relationships with trans persons and prevents access to social institutions, resources and services. Families remain as the perpetrators of stigma against trans persons. Trans persons have critically restricted agency in participating in socio-cultural, economic and political activities, are abused by the members of the mainstream society, and are unable to exercise power or establish citizenship rights at home or in society. In addition to this, there has been continuous discrimination against trans persons in healthcare as discussed.

Furthermore, the government’s recent decision to include reservations for trans people within the category of Other Backward Classes (OBC) also points towards further exclusion. The Trans Rights Now Collective has urged the Union government to institute a mechanism for providing ‘horizontal

reservations' as trans persons are not a homogenised group. Many of them belong to different castes and face further exclusion within the community due to which incorporating all trans persons as a single identity group within the OBC category to provide for reservations would amount to further exclusion for trans persons (Mantakali, 2021).

Trans persons are also the target of extreme violence even if they try to live a dignified life. In October 2020, at the height of the COVID-19 pandemic, transgender activist Sangeetha was brutally murdered. Her crime was employing trans persons by opening the eatery *Covai Trans Kitchen* run solely by trans persons in Coimbatore (Chauhan, 2020). Due to social exclusions, trans persons' access to social, cultural, educational and legal and health services is minimal (Jose et al., 2012).

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