



Transgenders as the 'other': The politics of Transgender community after the historic Supreme Court Verdict

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Abstract: *Transgender communities are always considered not part of the citizenship project. The recent Supreme Court verdict making them very much part of the citizenship discourse has considerably changed the situation. Even though these communities have found their presence since ancient times, yet it took such a long time to recognise their legal rights. Yet, if one closely look at the judgement, there are shortcomings and it needs further improvement. The most important drawback is that it does not address the question of their social recognition and also it does not address the unconventional transgender community in its analysis. It only recognises their legal rights.*

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The founding document on which most human rights organisations base their advocacy is the Universal Declaration on Human Rights. From this initial document has emerged a whole series of human rights declarations, conventions, treaties pertaining to the rights of various marginalised groups and communities such as children, women, rights of various marginalised groups and communities such as children, women, indigenous people, disabled people, prisoners, religious and ethnic minorities, refugees etc. However, one significant absence in international human rights law has been an express articulation of the specific interests of sexually minorities. It is only in the final decade of the 20th century that the gay/lesbian/bisexual/transgender movement brought to the fore the rights of those discriminated against because of their sexuality. In 1991, Amnesty International for the first time came out with a policy to support the rights of people imprisoned because of their sexual orientation or because of engaging in homosexual activity in private. In the mid 1990's, the Human Rights committee held that the anti sodomy law of Tasmania violated the right to privacy and

the right to non discrimination guaranteed to all persons under the International Covenant on Civil and Political Rights. In Scandinavia, the provision of equal rights for sexual minorities including marriage rights was an important breakthrough. The other major development has been the South African Constitution which for the first time expressly prohibited discriminated on grounds of sexual orientation.

While the scope of human rights has been extended to include hitherto marginalised communities at the global level, a similar movement is yet to take place in India. In fact, most human rights organisations in India have not begun to address the question of rights of gays, lesbians, bisexuals, transgender, hijras and others who are oppressed due to their sexuality. Sexuality is sometimes viewed even in liberal and radical circles as a frivolous, bourgeois issue. In such a context, homosexuality is seen implicitly as something deviant and unnatural that is at best defended as an individual freedom but not a matter of priority for the human rights movement. Generally, issues of poverty and gender, class and caste oppression are seen as more important than that of sexuality. But

this ignores the fact that sexuality is integrally linked to ideologies and structures of social oppression such as patriarchy, capitalism, the 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.

The status of sexual minorities in India

Homosexual orientation is common in almost every culture and every society. However, homophobia is chiefly the product of Judeo-Christian morality spread to various parts of the world through European colonialism, which exported its laws and its morality into other contexts. It has to be noted that homosexuality also finds a mention in the various pre-colonial laws. Homosexuality is seen as an offence in Manusmriti, which however can be expiated. Lesbianism by contrast merits more serious punishment. Islamic Shariat law treats homosexual conduct as a serious offence, though it is being argued by some recently formed gay Muslim organisations that Islamic law can be interpreted in a non-homophobic fashion. It was with the enactment of uniform criminal laws in India, in 1860 that there was a uniform proscription of homosexual behaviour.

Though sexuality minorities have always existed in India sometimes in forms, which are culturally sanctioned (such as the hijra) and at other times in invisibility and silence, their issues have never seriously been articulated. It is only recently that the rights of sexual minorities as an issue have been taken seriously in India by various civil society organisations. With the funding of India's first gay magazine Bombay Dost in the late 1980's and the starting of a lesbian collective in Delhi called Sakhi, lesbian, gay and bisexual issues were first articulated in a public forum. Since those early beginnings, the fledging sexuality minority rights movement has grown increasingly vocal and articulate.

Today, there are organisations, helplines, publications/newsletters, health resources, social spaces and drop-in-centers in most of the major cities in India like Delhi, Mumbai,

Calcutta, Bangalore, Hyderabad, Pune, Chennai, Patna and Lucknow. There has also been a branching out into smaller cities and towns like Akola, Trichi, Gulbarga. In spite of this, the support structures provided are painfully inadequate with few or no such organisations for lesbians, bisexuals and hijras. What is more, many of the newly emerging organisations die out silently while even the more established ones have been able to reach out in concrete terms only to a small section of the sexuality minority population due to lack of resources, personnel, government support and extreme societal/state discrimination. It is in these twin contexts of the global movement for recognition of sexuality minority rights and the increasing assertiveness of sexuality minority voices at the local level that the present argument is located. The paper has two broad arguments. First, the judgement of Supreme Court with regard to legal recognition of third gender is historic. Second, there are problems and areas of improvement in the Supreme Court judgement.

Supreme Court Verdict on Third Gender

The supreme court, in the National legal Service Authority (NALSA) judgment has recognized the legal and constitutional rights of transgender persons, including the rights of the hijra community as a 'third gender'. In judgment of immense breadth and vision, Justice K.S.Radhakrishnan and A.K Sikri have brought hope and a promise of citizenship to a community that has largely been outside the legal framework.

NALSA filed this petition in 2012. In 2013, this matter was tagged together with a petition filed in the Supreme Court by the Poojaya Mata Nasib Kaur Ji Women's Welfare Society, an organization working for kinnars, a transgender community. Laxmi Narayan Tripathi, a well-known transgender rights activist from Mumbai also intervened in this case.

Irony of this judgment is that/ it was delivered just a few months after Koushal, in which the Supreme Court recriminalized LGBT persons and upheld the constitutionality of section 377 of the IPC.

The court acknowledges this, but make it clear while it recognizes that section 377 is used to harass and discriminate against transgender persons, this judgment leaves Koushal undisturbed, and instead focused specifically on the legal recognition of the transgender community.

The court relied on the definition in the Yogyakarta Principles and clarified the distinction between gender identity and sexual orientation. The court engages with both these categories, but focusing only on the transgender subject. Transgender is seen as an umbrella category that includes those whose identify as male to female, female to male, intersexed, and transsexual persons as well as those identify as hijras, kothis, kinnars, aravanis/thirunangis, jogappas/jogta, shivshakthis and eunuchs. Significantly, the court says the term transgender includes 'pre-operative, posts-operative, and non-operative transsexuals who stringly identify with persons of the opposite sex. Thus the court's judgment is not limited to post operative transsexuals, and the court emphasizes that to limit itself to such a view is unacceptable.

There are two central questions that the Court addresses. The first is the recognition of a third gender category for hijaras or equivalent culture identities in order to facilitate legal rights. The second is that transgender persons, for the purpose of the law, should be able to identify in the gender of their choice, which could be male, female or a third gender category. In the operative part of the judgment, the court held that hijras and eunuchs be treated as "third gender" to safeguard their fundamental rights. The Court also held that and transgender persons have right to decide their self identified gender.

The Court builds on a recent history of central and state government recognition of the third gender category in state social welfare benefits, national election identification cards, passport forms and the UID form. In making it legal blinding on central and state governments to begin moving away from a legal system based purely on a binary system, this judgment has revolutionary implications for the current

laws related to marriage, adoption, inheritance, succession, welfare legislations like the NREGA labour law, etc, all of which are based on a binary classification of gender.

Specifically dealing with the issue of Sex Reassignment Surgery (SRS), the Court relies on judgments from jurisdiction across the world to direct the government to move away from the now discredited Corbett test i.e. to move away from a biological to psychological evaluation of gender for purpose of the law. In fact the court has held that insistence on SRS as a precondition for legal recognition is immoral and illegal. This will facilitate the legal recognition of all those who undergo an SRS, and clarify any existing area in the law.

From the point of view of constitutional developments, the NALSA judgment is path breaking. The Courts rely on Article 14 (right to equality), 15 (right to non discrimination), 19 (right to freedom of speech and expression), 21 (right to live with dignity and right to autonomy), Article 51(Directive Principle of State Policy) (fostering respect for international law and treaty obligation) and the words Justice – social, economical and political in the preamble to the Constitution.

The right to equality in Article 14 has been read to apply to transgender persons including those whose identify as a third gender. The Court says that non-recognition of identity denies transgender persons equal protection of the law. In a move reminiscent of the Delhi High Court's ruling in the NazFoundation case, the Court reads the term 'sex' in the non-discrimination clauses of Article 15 and 16 include 'gender identity' (In Naz, the High Court had read sex include sexual orientation). The Court's does this by stating that the intent behind the framing of the term 'sex' in these sections was to prevent the direct or indirect attitude to treat people differently, for nor being in conformity with stereotypical generalizations of binary genders. The court held that the expression 'sex' in Article 15 and 16 is not limited to male or female but includes people who consider themselves neither male nor

female. The Court's ruling prohibits discrimination against transgender persons in public spaces like hotel, public restaurants, roads, shops and places of public entertainment.

Building on this analysis, the Court directed the central and State governments to take steps to treat transgender person as a socially and educationally backward class entitled to reservation in educational institutions and public appointments. It also directed the Central and State governments to provide access to healthcare for transgender persons is based on the prevalent juridical assumption that law should target discrimination based on sex (i.e. whether a person is anatomically male or female) rather than gender (whether a person has qualities that are masculine or feminine).

One of the most innovative parts of the judgment is the court's reading of Article 19 (1) a, the right to freedom of speech and expression to include the right to expression of one's self identified gender. No person can be told how to dress subject to restrictions in Article 19(2) (which include 'public order, decency and morality'). This is a bold move and identifies the link between gender identity and dress, words, action and behaviour. This is especially important in the context of discrimination against transgender persons who challenge accepted binary forms dressing, and behaviour.

In this judgment, the court builds on a long line of cases where the right to life has been recognized in claims from marginalized communities. The Court stressed that the right to life includes the right to live with dignity and the right to human development. Article 21, the court says, not only provides a negative right, but also places a positive obligation on the state to ensure that the transgender community is able to live with dignity. This can be Court observes that by giving force to the right to dignity guaranteed by the Constitution, the court is bridging the gap between law and life, which is the primary purpose of the constitution.

A recurring theme that runs through the judgment is that of the idea of justice. Justice Sikri explains the idea of justice that

animates the Indian Constitution as being influenced by Kantian categorical imperative, the Rawlsian notion of Justice as Fairness and Amartya Sen's idea of Distributive Justice.

Another thread running through the judgment is that the Constitution has to keep up with the move from the colonial to post colonial dispensation. Transgender persons were criminalized by the British by section 377 IPC, (1861) and an amendment to Criminal Tribes Act (1871). Section 377 remains on the statute book and the court this act that remains in force in the country even today. The court highlights the indigenous root of hijras culture and the rich Indian tradition of mythology and history with references to persons of the third gender.

In stark contrast to the judges in Koushal, the Bench in this case relies extensively on international human rights principles and comparative law. They quote extensively from the Yogyakarta principle on the application of International Human Right Law in relation to Sexual Orientation and Gender Identity (2006), the Universal Declaration of Human Right (1950), the International Covenant on Civil and Political Rights (ICCPR), 1976, and comparative law from the United Kingdom, the EU, Germany, Argentina, South Africa, the United State, Hungary, Australia, Malaysia and New Zealand.

The most interesting use of comparative law is the court's reference to recent Supreme Court decisions in Pakistan (Dr. Mohammad Aslam Khaki v Sr Superintendent of police, Rawalpindi, 2011) and Nepal (Sunil Babu Pant & Ors v Nepal Government, 2007) where these courts in these countries have recognized a third gender category in law. The judges in this case refer to the historical presence of a third gender in the subcontinent. This reference holds out the possibility of developing a unique South Asian jurisprudence on transgender rights that can contribute to the existing international human rights framework.

Contradictions in the judgement and areas for improvement

While the ruling is in line with the tune of Indian constitution, the verdict does not apply to sexuality, leaving India's lesbian, gay and bisexual communities in a state of flux. In fact, it contradicts a judgment made in December, by a different bench of the Supreme Court, which upheld the controversial section 377 of the Indian penal code the criminalised "sex against the order of nature "which is interpreted as gay sex. Only the ruling Congress party was quick off the mark to question the court ruling.

The transgender judgment quotes from several testimonies, illustrating the suffering of transgender persons and rightly acknowledging the role that section 377 played in discriminating against them. It is well accepted in the west that just as gender identity is integral to a person's self, dignity and freedom, so is a person's sexuality . The result is a constitutional dilemma –a colonial –era law is being interpreted in a contradictory manner by highest court in India. Yet uniquely, both ruling fit in India's super conservative extended family-structured value system which is adhered to throughout the nation as well as the Hindu majority's religious beliefs. Psyche stems back to the essential Hindu epic text, the Mahabharata, where the male Shikhandi (but born the female Shikhandini) was vital in securing the Pandavas's necessary victory over Kaurava in the great war of Kurukshetra.

While the Hijra are part of Indian society, they are still considered outsiders, being poor and generally working class. This makes it more acceptable for them to be ignored, thus preventing the judgment from being truly progressive. However, lesbian, gay, and bisexual Indians also stem from middle-and upper-class society, and are therefore more threatening to the conservative structure and value system of society not only in India but where Indians have settled worldwide. Only last week a British-Asian man was imprisoned for murdering his Indian –born wife whom he married with the wish to unite his homosexuality and the value system of his community. There are two specific criticisms used against NALSA judgement.

First, in the 130-page judgment of Justices K.S. Radhakrishnan and A.K. Sikri, not a single page carried any of the following words: FTM (Female to Male), Transman, Intergender, Bhैया, Babu, Kotha, FTK (Female to Kotha), Thirunambi, Genderqueer, Gandabasaka—some common terms used by members of the trans masculine, intersex and inter-gender communities for their identities and/or expressions. Nor did the judgement have one example of the extremely difficult and invisible lives of persons from these non-traditional trans communities.

Second, there is no exploring NALSA without going into NAZ. What needs to be realized is that NAZ and NALSA deal with two different things, that is, sexual orientation and gender identity, respectively. Thus NALSA does not by any means overrule NAZ. First, in the context of NALSA confusion arises especially given that Para 77 of the judgement stipulates – "Discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution, and hence we are inclined to give various directions to safeguard the constitutional rights of the members of the TG community." However, there is a need to read this statement in context of NALSA judgement, that is, extension of citizenship rights to members of the trans-community. This can be illustrated using an example. A transman who does not undergo sexual reassignment surgery (SRS) and continues to retain the biological body of a woman cannot be criminalized for engaging in sexual activity with a cisgender (or trans) woman because by the virtue of his gender identity such an act would be viewed as being heterosexual sex. However a conflict may arise in the following case: Could a transman who does not undergo SRS and continues to retain the biological body of a woman be criminalized under Section 377 of the Indian Penal Code if he has consensual sex with a cisgender man, because in such event

because of his gender identity such an act would be viewed as homosexual sex. Thus in spite of dealing with a different issue as compared from NAZ, the shadow of NAZ continues to extend over NALSA. As argued by Danish Sheikh, one cannot overlook historical reality wherein the transgender community has always been identified with sexual acts committed under Section 377.1 He goes on to argue – “The full moral citizenship that NALSA grants can only be rendered such when it is accompanied by the sexual citizenship that the Koushal Court has taken away.”² Second, though the right to gender identity is recognized in law, the issue

that arises is how far will a society, including legal authorities, which continues to remain in the dark as far as issues of gender and sexuality are concerned, view what in law is legitimate (Illustration #1) as normative and thus acceptable sexual expression? The underlying conflict between the two judgements in terms of the intrinsic nexus between gender identity and sexual orientation and society's ignorance and hetero-normative outlook leaves the members of the trans-community in a flummoxed state when it comes to determining which sexual expressions are legitimate or illegitimate.

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