

# Chapter 8

## Time to “Act”: Guaranteeing Full Citizenship of Transgender Persons in India



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### 8.1 Introduction

Transgender people are one of the most marginalized communities in India. Historically, people from the transgender community led a decent standard of life (Michelraj 2015, 17). It was during the British era that their status deteriorated. Transgender persons lost their right to pass their land and gifts through inheritance (Biswas 2019). The situation only worsened with time as the colonizers actively took measures to erase their identity (Gannon’s Chapter 6; Biswas 2019). The administration criminalized the community through the draconian Criminal Tribes Act 1871 and took away all their civil rights and their avenues of livelihood. Transgender persons were barred from cross-dressing, performing in public, or rearing children. The infamous Sec. 377 of the Indian Penal Code (1860), which criminalized all non-penile-vaginal sexual activities, was also used as an instrument of harassment against the transgender community (Queen Empress v. Khairati 1884). Though the Criminal Tribes Act was repealed in 1949, it influences the vulnerable circumstances of transgender people in India and the society which once treated gender non-binaries as a part of the society and employed them in positions of respect (Sriraam 2020), now imbibed the colonial disgust for the community.

A transgender person in India struggles to survive starting from a very young age. They often are compelled to not embrace their gender identity out of fear of severe repercussions and backlashes from the society in general and their families in particular. Once they do “come out,” they habitually face abandonment from their families, which opens a Pandora of problems for transgender youth. Without

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familial support and financial security, they lose out on a chance at formal education. Even those who get to pursue it face bullying and discrimination, thereby limiting their job opportunities. Even with the best qualifications, institutions willing to employ persons from the transgender community are far and few. India is a transphobic society, and this reflects on issues like housing, healthcare, and access to public places. With no family backing, lacking education, employment, housing, and right about every other basic facility, the life of a transgender person is nothing short of a living hell. Battling stigma and multi-layered forms of violence, ranging from the sexual to the physical, they are often left with no livelihood options other than begging, sex work, or badhai, that is, the collecting money from families celebrating weddings or the arrival of a newborn (Pal and Sinha's Chap. 10; Singh 2019).

When people find themselves in a highly vulnerable social position, the law is expected to come to their rescue and help them secure their identity and rights. But not much has changed in the socio-legal status of transgender people in India. The year 2014 was a watershed moment in recognition of the transgender identity. The NALSA judgment (National Legal Services Authority v Union of India and Ors 2014) was viewed as a vindication of the long drawn fight for the rights of transgender persons. The Division Bench of the Apex Court consisting of K.S. Radhakrishnan and A.K. Sikri JJ acknowledged the centuries of discrimination against the community. They also acknowledged that thus far, no legal measures had been taken to afford persons from the transgender community any recognition, legal status, or provisions to cater to their needs. The Court went on to issue directions asking the State to include the third gender in documents, to provide for reservation for transgender persons, to work out welfare schemes, among others.

NALSA was followed by the decriminalization of Sec. 377 (Navtej Singh Johar v. Union of India 2018). But the rights of the transgender persons could have been truly secured only by a legislation. To effectively protect transgender people from violence and discrimination, and to promote their equality and to explicitly provide for their rights, legislative effort is mandatory. This is because, even though human rights are inherent and universal, it is only when one is legitimized through the conferral of legal status that they can begin to claim rights.

India is not without a law. The Transgender Persons (Protection of Rights) Act 2019 (2019 Act), was passed to secure transgender persons their rights. However, barring provisions pertaining to healthcare, the Act can be deemed to be a failure. It not only fails to secure the identity, social position, and rights of the transgender people but has reversed several guarantees that the NALSA put forth (Sriraam 2020).

The community deserves a comprehensive legislation that ensures that transgender persons enjoy full citizenship in India, that is, enjoy all the constitutionally guaranteed rights to the fullest extent and participate in the socio-economic, political, and cultural life as equal members of the society. To fulfil this objective, the law that is enacted must not only promote their equality and explicitly provide for their rights but must also proactively attempt to reverse centuries of marginalization.

### 8.1.1 *Methods*

While the 2019 Act has been sufficiently criticized, the literature with respect to what the Indian law ought to provide for, is lacking. The topical policy briefs by Center for Law and Policy Research (2018, 2020) are useful, but not comprehensive. *Transgender Equality: A Handbook for Activists and Policymakers* (2000) seeks to guide those involved in trans-issues to address critical areas concerning transgender persons such as defining transgender and intersex persons, hate crimes, and bathroom access, through examples of successful trans-inclusive laws. However, as the guide is entirely from the US perspective, its utility is limited to aiding in the understanding of the foundation on which laws with respect to transgender persons are to rest.

This chapter seeks to draft a progressive legislation that respects, protects, and promotes the rights of the transgender persons, by analyzing trans-inclusive laws from across the world, inter alia Malta (Gender Identity, Gender Expression and Sex Characteristics Act, 2014), Argentina (Gender Identity Law, 2012), as well as judicial precedents, especially from India. The analytical and comparative research will bring out the various rights that must be explicitly provided by law in India. While the author firmly believes in the right of transgender persons to be allowed to serve in the armed forces with the same rights, responsibilities, and privileges as other genders, without discrimination, the issue is beyond the scope of this chapter.

## 8.2 What the New Law Should Include

The rights of transgender persons in India not only stem from the Constitution of India but also from her binding international human rights obligations. The Constitution of India, in Part III, lays down the fundamental rights of every person and citizen of India, and the same applies without discrimination (Constitution of India, 1949). On the other hand, obligations under International Human Rights Covenants like ICCPR and ICESCR are a part of domestic law. The Protection of Human Rights Act, 1993, also recognizes these international human rights instruments as a part of Indian law. This has also been held by the hon'ble Supreme Court of India in inter alia Jolly George Verghese (1980), Vishaka (1997), Apparel Export (1999), and Gita Hariharan (1999). Pertinently, the Court in NALSA held that Yogyakarta Principles (2007) must be recognized and followed. The constitutional mandate and the international human rights mandate impose on India multifold obligations to:

- Remove barriers to the enjoyment of the rights of the transgender persons.
- Prevent abuse from not just State officials but also private actors.
- Remedy and punish violations.

Most importantly, interferences imposed by law, in the recognition and enjoyment of their rights, must be proactively and urgently done away with. This would be possible only by bringing into force a progressive legislation.

### **8.2.1 Definition**

“Transgender” is an umbrella term that is used to describe a wide range of identities and experiences, inter alia transsexual people who might or might not have transitioned, and those who may choose not to transition: cross-dressers or drag queens/kings (UNDP 2010, 4). To ensure the full citizenship of transgender and intersex persons, it is imperative that the law has a clear, inclusive, comprehensive definition of transgender persons.

The 2019 Act defines a transgender person as “person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta” (The Act, sec. 2(k)). While this definition may be lauded for not using biologically deterministic terms, it is grossly insufficient. It clusters all gender non-conforming persons into one group, without accounting for key concepts such as gender identity and gender expressions. This perpetuates the colonial mindset of treating transgender persons as a homogenous group, as has been noted by Shane P. Gannon in Chap. 6. Need of the hour are definitions that are worded in clear, inclusive, and comprehensive terms, and cover as wide an array of gender minorities as possible.

A suggested definition of a “transgender person” may be “a person whose gender identity and/or gender expression is different from the sex assigned at birth or the gender they are socialized with, wherein gender identity refers to a person’s internal, self-perceived experience of gender, regardless of the sex assigned at birth and includes one’s personal sense of body, and gender expression is the external perception of a person’s gender identity. It may involve freely chosen expressions of gender such as mannerism, name, dressing, speaking, and extend to modifying one’s bodily appearance or function through surgical, medical or other means.”

The understanding of intersex persons may also be improved upon. Sec. 2(i) of the 2019 Act defines “person with intersex variation” as “a person who at birth shows variation in his or her primary sexual characteristics, external genitalia, chromosomes or hormones from normative standard of male or female body.” The reference to gender binary in the definition may be dispensed with. Instead, a person with intersex variation may be understood as “a person whose congenital sexual differentiation whether in their anatomy, reproductive organs, hormonal, and/or chromosomal pattern is atypical in whatever degree.”

## 8.2.2 *Right to Gender Identity*

The first right that law must guarantee not just to transgender persons but to all persons is the right to gender identity, bodily integrity, and personal autonomy. As is the case with Argentina (Gender Identity Law, 2012, sec. 1), everyone must have the right to recognition of their gender identity, and to be allowed to freely develop their person in accordance with their gender identity. Further, law must mandate that all persons must be treated in accordance with their gender identity, and that includes the right to alter one’s first and last name, image, and sex in one’s identity documents.

### 8.2.2.1 **Identity Documents**

As Busisiwe Deyi states, identity documents are the documentary DNA of a person in the modern world (2017, 130). It secures not just socio-economic benefits, but also basic political rights (voter ID, passport, etc.). Thus, it serves as the legal recognition of one’s full citizenship. It is the port to access public and private services, and the importance of the correct gender identity being reflected in these documents cannot be overstated.

The 2019 Act requires transgender persons to obtain a “Certificate of Identity” from a district Magistrate to be identified as the “third gender” (The Act, sec. 6). The Certificate is intended to “confer rights and be a proof of recognition” (The Act, sec. 6(3)). This is not just unfortunate but also regressive. Rights, by their very nature, are inherent. Only privileges are conferred. Gender is at the core of one’s identity and an integral part of one’s privacy, autonomy, and dignity. The right to self-determine your gender is a statement, a refusal to live one’s life on the terms set by another, or for the enjoyment of others; it is intrinsic in the freedom of speech and expression of an individual (Constitution of India, art. 19(1)(a)). One’s recognition of gender identity therefore cannot be dependent on the issuance of a certificate (Constitution of India, 1949).

Perhaps the more problematic provision is Rule 6(1) of the 2020 Rules (Transgender Persons (Protection of Rights) Rules 2020), which permits a transgender person to be identified as male or female only if they undergo the gender affirmation procedure. Such abusive conditions, known as the medical model of gender recognition, have been declared to be violative of the physical and psychological integrity of transgender persons (Special Rapporteur on Torture, 2013a, pars. 36–38, 76–79, 88; Human Rights Committee 2008, par. 8; Human Rights Committee 2013, par. 10; Committee on Economic, Social and Cultural Rights 2011, par. 26). International human rights institutions have repeatedly called on States to abolish any requirements of medical or psychological assessments, diagnostic, treatments, or surgeries (Committee on the Elimination of Discrimination against Women, 2010, par. 46–47; Committee on the Elimination of Discrimination against Women, 2014, par. 45). The ECtHR (*Goodwin v. United Kingdom*, 2002, par. 83; *Garçon & Nicot v. France*, 2017) has denounced the medical model. Even the NALSA had

precluded the right of transgender persons to identify as male or female, it had advocated for the right to self-identification. The Madras High Court had furthered the said right, and categorically held that gender identity cannot hinge on a medical certificate (*G Nagalakshmi v. Director General of Police* 2015). India recognizes the right of all to refuse medical treatments or interventions of any kind, including life-saving ones (*Aruna Ramachandra Shanbaug v. Union of India* 2011). Then how can an intrusive and invasive medical procedure be a legitimate prerequisite to carry out simple changes in documents?

The 2019 Act makes the District Magistrate the custodian of the right to identify transgender persons. It gives the medical officer the power to decide whether the transgender individual has sufficiently transitioned to their self-identified sex. The entire system put together allows the State to recognize some transgender persons, reject others, and thereby dictate or regulate access to welfare measures. In other words, it would result in the institutionalizing socio-historical marginalization faced by the persons from the transgender community.

Thus, India must thus follow the lead of countries like Malta, Denmark, Norway, Belgium, Ireland, and Luxembourg (van den Brink and Dunne 2018) and demedicalize gender recognition procedures.

Whenever the gender in identity documents does not correspond to the self-perceived gender identity of an individual, law ought to allow them to correct it, along with their first and last name, and photograph, through a simple procedure, which does not require additional certification. State must facilitate the same through a simple, quick, free, accessible, transparent, and hassle-free procedure, through a single-window system.

A suggestive process for India can begin with the aadhar, the numeric, biometric-enabled identifier system used here. An application, stating that they wish to change their first name, last name, photograph, and gender, or any of them, may be submitted to UIDAI, the body which facilitates aadhar. The application must be accompanied by a self-attested affidavit declaring themselves to be a transgender person, and that they wish to be identified as male/female/transgender. No medical or other formalities must be imposed. Upon processing the request, UIDAI must notify other bodies such as the concerned Registry of Births and Deaths, Passport Seva, Election Commission (for changes in voter ID), and Income Tax Department (for changes to PAN card). The entire process must be carried out within 30 days, and the amended documents must reach the applicant at their address of communication without requiring any further action on their part. Those transgender persons who do not possess an aadhar card must be allowed to apply for amendments directly in their other documents.

Another huge initiative that the State must undertake is the removal of the “gender” column in forms and certificates where gender is insignificant. For example, school leaving certificates, degree certificates, and bank documents need not have a gender column. As Faithful (2010) asserts, moving forward, we must reduce the impetus placed on gender as a means of legal identity, and celebrate gender

variations. As a corollary, all documents, forms, and certificates that retain a gender column must mandatorily permit three options: Male, Female, Transgender, something that public institutions have failed to do despite the NALSA mandate (*Atri Kai v. Union of India* 2017; *Mx. Alia SK v. State of West Bengal* 2019).

### 8.2.3 *Discrimination and Hate Crimes*

Abuse and maltreatment of transgender persons around the world is well documented, particularly in detention centers and healthcare settings (Committee against Torture 2002, par. 5(e); Committee against Torture 2004, par. 6(g); Human Rights Committee 2006, par. 25; Committee against Torture 2006, par. 17; Committee against Torture 2008, par. 21; Committee against Torture (Paraguay) 2011b, par. 19; Committee on the Elimination of Discrimination against Women, 2011, par. 40; Committee against Torture (Germany) 2011a, par. 20; Special Rapporteur on Violence against Women 2012, par. 98; Special Rapporteur on Violence against Women 2013b, par. 58; Committee against Torture 2014, par. 21,26; Committee on the Rights of the Child 2015, paras. 42–43; Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2016d, par. 49, 60; Committee against Torture (Honk Kong) 2016b, par. 28–29; Special Rapporteur on Torture 2016c, paras. 13, 34–46; Committee against Torture 2016a (Austria), par. 44–45). India is no exception. The Equality Code of the Indian Constitution (arts.14–18) mandates that the State eliminates all forms of discrimination against everyone, and that would include gender minorities. NALSA clarified that discrimination on the grounds of gender identity is categorically prohibited under art. 15(1) of the Constitution which prohibits discrimination, inter alia on the grounds of sex.

India has in the past, put in place stringent prohibitions on discrimination in other cases involving persons with protected characteristics such as the oppressed classes (Protection of Civil Rights Act 1955) and persons with HIV (The Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act 2017). In comparison, the 2019 Act is a feeble attempt at addressing the severe discrimination faced by the transgender people.

Chapter II of the 2019 Act enlists and prohibits the common forms of discrimination against transgender persons. These include discrimination in education, employment, housing, healthcare, custody, access to public places and facilities, and standing or holding public office. The Chapter, however, does not prescribe any punishment or remedy for violations, thus making the Chapter a mere moral code. This could be one of the factors as to why the respondents in Azhar and Vaudrey’s study felt that their complaints to abuse in public places were not being taken seriously (see the following chapter by Azhar and Vaudrey). At the outset, to make the law prohibiting discrimination against transgender persons more effective, three additional issues require focus.



### 8.2.3.1 Insurance

Exclusion of transgender persons from gaining medical or life insurance, or discrimination against them by charging higher premiums, exclusion of medical conditions such as gender dysphoria, or prescribing a more extended period of exclusion for pre-existing conditions merely on the grounds of gender identity by insurance providers must be prohibited. Similarly, law must insist that health insurances cover the cost of sex affirmative surgery, hormonal therapy, counselling, etc.

### 8.2.3.2 Restrooms Discrimination

The right to sanitation is a universal human right available to everyone (UN General Assembly 2016). The lack of safe toilets is a key issue plaguing India even today. But the concern is much worse in the case of transgender persons, as they face additional hurdles in accessing restrooms globally. In the absence of legal protection, transgender persons may be forced to use bathrooms of their sex assigned at birth. Transgender persons are often subjected to taunts, harassment, and fear violence while accessing public restrooms (UN General Assembly 2016). Taking serious note of these issues, NALSA ordered the government to provide separate public toilets to transgender persons (NALSA 2014, Para 129.6). Unfortunately, the Supreme Court in NALSA failed to guarantee the right of transgender persons to access the male and female restrooms in accordance with their self-identified gender. The 2018 case filed by Myra Grace Bandikalla highlights the need for such a guarantee. Myra Grace was not allowed by the Airport Authority of India, a State entity, to use the female restroom facility as she had not transitioned (Myra Grace Bandikalla v. Airport Authority of India 2018). It was hoped that the 2019 Act would address and prevent these discriminatory practices. Unfortunately, it neither talks about building separate toilets nor does it ensure that transgender persons have access to public toilets of their choice.

Law must mandate that the State build public restrooms for all three genders within a pre-set timeline. Institutions and establishments with more than 100 employees must be mandated to include restrooms for all three genders. Establishments with less than 100 employees may be encouraged to build gender-neutral restrooms. Additionally, law must guarantee the absolute right of everyone to use the male, female, or other gender restroom, as is appropriate to their gender identity. It must further clarify that transgender persons cannot be denied access to restrooms of their choice, in public spaces, or places of employment or education, merely on the ground that they have or have not transitioned.

### 8.2.3.3 Hate Crimes and Speech

Hate crimes are acts of violence motivated by one or more of the victim's protected characteristics. Other than injuring the victim, they also terrorize others who identify with the victim. These crimes must be met with enhanced penalties.



Transgender persons in India are very often victimized and subjected to violence. Studies in the early 2000s reported that over 50% of transgender persons in India have faced violence, that too mainly at the hands of the police (Lombardi et al. 2002, 96). The extent to which targeted violence affects members of the transgender community can also be evinced from the Jayalakshmi case, which involved the suicide of a transwoman due to protracted custodial violence. Pandian, a transwoman, was routinely interrogated over her alleged involvement in a theft case. Despite bail, the police would retain her in the police station and subject her to physical and sexual assault. Her family tried to intervene, but they were also subjected to harassment. The custodial violence and torture pushed Pandian to immolate herself (Jayalakshmi v. State of Tamil Nadu 2007).

Regrettably, not much seems to have changed despite NALSA. They continue to be subjected to physical and sexual abuse at the hands of the police. They are also subjected to financial harassment (Lalwani 2018). Further, the negative portrayal of transgender people in mass media not only perpetuates the stigma against them but also adversely affects their mental health (Thaker et al. 2016, 403–404). Therefore, except in case of bona fide academic, scientific, or critical enquiry, any publications in the form of words, either spoken or written, audio-visual representation, signs, gestures, images or any speech or expression, in any media, with the intent of promoting oppression or to offend, abuse, insult or humiliate or with the intention to cause fear, alarm or hatred toward any transgender, gender non-conforming or intersex person or persons, or the community in general, must be prohibited.

For the prohibition to be truly effective, law must impose a penalty of imprisonment of 1 month to 6 months or a fine or both for discrimination against transgender persons. Hate speech must be punished with a prison sentence of 3 months to 2 years or fine or both. In case of hate crimes or violence against the person or property of a member of the transgender community, minimum imprisonment of 2 years, which may be extended to 7 years must be imposed. Sexual offences against transgender persons must carry the same punishment as those imposed in the Indian Penal Code (1860) for sexual offences against women. Enhanced penalties must be prescribed where these acts are committed by persons in authorities. Due compensation to the victim transgender person must also be given.

### **8.2.4 Intersex Persons**

Despite the distinction between intersex persons and other gender minorities, there is a lack of recognition of the same. Even the much-lauded NALSA judgment grouped intersex persons with other transgender persons. This is particularly disappointing because the High Court of Gujarat in the Mulla Faizal case recognized the difference between transgender persons and intersex persons over a decade before NALSA (Mulla Faizal v. State of Gujarat 2000).

While the 2019 Act provides for a separate definition for persons with intersex variations, (The 2019 Act, sec. 2(i)), the substantial provisions group intersex

persons with transgender persons. This leads to their invisibilization. While it is well known that intersex persons are stigmatized and encounter prejudice regularly, empirical data regarding the lives of intersex persons' and the kind of discrimination they face is lacking (Human Rights Watch 2017). Though intersex persons face discrimination in ways that may sometimes be similar to that faced by transgender persons, they have certain unique concerns that differ from the concerns of other gender minorities. For example, while several trans-persons may wish to undertake elective surgeries to attain the body they are comfortable in, intersex persons often lament the body they had and was lost due to the unnecessary "normalization" surgeries they were subjected (Butler 2004, 4–7). Intersex persons' right against forced surgery is one that is rooted not just in human rights but also in child rights, and needs specific recognition in law, which is missing in the 2019 Act.

### 8.2.4.1 Intersex Genital Mutilation

Intersex genital mutilation (IGM) is a surgery often performed on infants or young children with the aim of normalizing intersex variations, and thereby makes the child fit into the gender binary. Intersex infants may be deemed to require multiple surgeries involving clitoral reduction, removing sensitive erectile tissues to reduce the clitoral size, gonadectomies, and sterilization. In addition to social stigma, the compulsion to register the infant's sex as either male or female in the birth certificate, pressurizes the parents and doctors to resort to IGM. But IGMs are invasive, risky, harmful, immensely painful, traumatizing surgeries that are rarely medically necessary, based on nothing but prejudice toward gender binary (Human Rights Watch 2017).

As the intersex child grows up, they might identify with a gender other than their surgically assigned sex. Intersex persons, who have undergone IGM, have reported to have a troubled relationship with their bodies. They may have trouble relating to their body or feel inadequate and violated. IGM also reiterates the notion that sexual ambiguity is shameful and must be perceived as a medical disorder (Human Rights Watch 2017).

There is a clarion call to put an end to IGM (International Commission of Jurists (2017). IGMs on minors have been prohibited in Malta (Identity, Gender Expression and Sex Characteristics Act, 2014, sec. 14). In India, the state of Tamil Nadu (GO No. 355 (TN) 2019) has banned it. Taking a cue from the same, the Indian law protecting the rights of transgender persons must stringently prohibit IGM, sex assignment surgeries, and treatments on persons below the age of 18 except when medically necessary. Any sex affirmation surgeries must be deferred until the intersex person can decide for themselves (World Health Organization 2015). It is equally important that law permits parents to register as an infant's gender as "intersex" in the birth certificate.

### 8.2.5 *Conjugal Rights*

The right to marry, found a family, inherit property, etc., are not rights expressly guaranteed in NALSA, but rights that flow from the right to gender identification. Further, Puttaswamy (2017) recognizes these rights to be a composite part of the right to privacy, and rightly so. Unfortunately, Indian law on marriage, adoption, inheritance, succession, even taxation laws continue to operate within the paradigm of gender binary, and the 2019 Act did nothing to rectify it. Consequently, transgender persons do not enjoy any rights which flow from marriage, inter alia, making health decisions for their partners, even in life-death situations, adopting as a couple, accessing assisted reproductive technologies, opening joint bank accounts, taking family health insurances, claiming accident benefits under Motor Vehicles Act or other labor laws, in case of accident of the partner, tax benefits, and joint ownership of assets.

The Madras High Court, in Arunkumar’s case (2019), held a marriage between a male and a transwoman to be valid under the applicable personal law despite the gender binary groom-bride requirement. The Court achieved this by reading the phrase bride in the Hindu Marriage Act to include transwoman. As laudable as this may be, piecemeal approaches will not work for long. A consolidated legislative effort to recognize the conjugal rights of transgender persons, along with other allied rights must be undertaken. Moving forward, law must at the earliest:

1. Recognize equal marriage rights for all. This would include within its ambit recognition of the rights to divorce, maintenance, inheritance, and domestic violence.
2. Ensure that the rights of transgender persons as parents of their children are not affected in any manner by virtue of them disclosing their gender identity or by opting to correct their gender in legal documents.
3. The Juvenile Justice Act, which is the principal legislation dealing with adoption in India, talks about the rights of men and women to adopt. In order to be inclusive of gender minorities, the Act must be made gender-neutral except where necessary.
4. At a time when US states like Texas are going back to the “fetal heartbeat” rule for abortion, India’s abortion laws deserve appreciation. Albeit its imperfections and limitations, the Medical Termination of Pregnancy Act, 1971, permits abortions till the 24th week of gestation. However, the law is intended toward women, thus excluding gender minorities. Same is the case with maternity leave laws in India. India grants maternity leave from 24 weeks to a year, depending on the applicable law, and also grants substantial leave in cases of miscarriages. It is well known that menstruation, pregnancy, maternity, and child-rearing are not limited to women and that transgender persons also need reproductive rights. Therefore, the term “woman” in the Medical Termination of Pregnancy Act,

1971, and Code on Social Security, 2020, and other maternity rights laws, should be amended to cover any person who is/has been pregnant irrespective of their gender identity or gender expression.

### 8.2.6 *Kinship*

Kinship or chosen families are a significant part of the lives of transgender persons. Purayil brings out the nature and importance of these kinship bonds excellently in Chap. 12, titled “‘Families We Choose’: Kinship Patterns among Migrant Transmen in Bangalore, India.” As transgender persons are often abandoned by their biological families, they get together and form their own “chosen family.” Unlike traditional families which are formed within a procreative framework, these kinship bonds among transgender persons are a practical necessity and also a cultural reality of queer individuals. These “alternative families” are a robust support system that enables transgender individuals to survive in our transphobic society.

Some forms of kinship are much more formalized than others. Hijra kinship is based on the traditional guru-chela relationship. Hijras sever ties with their biological families and become bound to their guru who is the head of the family. The guru commands respect and the hijras under the guru, known as chelas, must serve the guru and by extension, their household. The chelas do household work and give a part of their income to the guru. Disobedience could lead to expulsion. In return, the guru provides shelter and protection, look after the chelas, and also gives them a sense of community (Purayil, Chap. 12).

The 2019 Act does not acknowledge the kinship bonds that prevails among the transgender community. In fact, the 2019 Act implicitly denies them any legitimacy. The Act allows transgender individuals two broad options: staying with their family or moving into a rehabilitation center. A transgender child can leave its family, as defined in Sec. 2(c), only on the orders of a competent court. In other words, the child must either be with their biological, adopted family or family through marriage or in a rehabilitation center. This is yet another attempt at invisibilizing the ways and means of the transgender community. The State seems bent on fitting the peg into the hole which forced them to choose such alternative families in the first place. There is no right way to live. There is no limit to who or what can constitute a family. There is absolutely no reason for the State to deny the transgender community recognition of their kinship bonds. Law must award legal recognition to these chosen/alternative families.

The guru-chelas structure has extensive customs (Purayil, Chap. 12). These customs include inheritance rules wherein, on the death of a chela, their property is inherited by the guru. This traditional customary inheritance is recognized by Indian courts (*Ilyas v. Badshah aka Kamla* 1990; *Sweety v. General Public* 2016). Legislation must also recognize this customary inheritance under the guru-chela structure.

## ***8.2.7 Education and Employment***

### **8.2.7.1 Educational Institutions**

Transgender people are not only one of the most socially marginalized groups socially, but they are also marginalized educationally and economically. As a consequence of abandonment and bullying in schools, formal education of transgender children is most often disrupted. This emerges as the first stage of marginalization.

The 2019 Act prohibits discrimination in education. In particular, it prohibits discrimination in admissions, expulsion, equal access to institutional amenities, scholarships, awards, other benefits and opportunities. Nonetheless, a few more specificities need to be incorporated. Law must mandate that the gender identity of candidates not be revealed without their consent. Educational institutions must be encouraged to put in place mechanisms that would make persons from the transgender community feel safe to report bullying. Most importantly, the anti-ragging affidavit/undertaking, which is mandatorily collected from graduate students, must include a clause wherein students and their parents affirm to not indulge in ragging, bullying, or teasing transgender students and staff.

### **8.2.7.2 Employment**

Marginalization in economic opportunities is yet another major area of concern. Pal and Sinha in Chap. 10 shed light on the different jobs and professions that transgender persons, in particular hijras, engaged in through time. Traditionally, hijras relied on the social belief that transgender persons had the ability to bless or curse others. This is known as *badhai*. Consequently, they were invited to important occasions such as the birth of a child and wedding, to endow their blessings. Thus, their livelihood stemmed directly from their identity as a transgender person, rather than from their skill or labor.

With the criminalization of their identity under the Criminal Tribes Act during the British era, *badhai* was no more viable. This led to socio-economic marginalization. Left with no choice, transgender persons have been forced into begging and prostitution. Today, despite the scrapping of the Criminal Tribes Act, the marginalized transgender communities continue to engage in begging and prostitution.

Economic opportunities in India stem either from formal education or by being a part of a family enterprise such as agriculture. An abandoned transgender youth is unlikely to have either. Efforts by the State at providing employment have not always been successful (Saria, Chap. 7). Further, caste barriers and financial and social taboos make it very difficult for transgender persons to gain lucrative or steady employment as has been expounded by Azhar and Vaudrey in Chap. 9.

This is not to state that no member of the transgender community has had any opportunity at mainstream employment. Dr. Trinetra Haldar Gummaraju is a transwoman doctor (Indian Express 2021). Laxmi Narayan Tripathi is a popular

Bharatanatyam dancer and actress. She has authored three books, one of which, *Me Hijra, Me Laxmi*, has been analyzed by Shalini Jayaprakash in Chap. 2. Sathyasri Sharmila is a practicing advocate (India Today 2018), Padmini Prakash was the first news anchor from the transgender community, and Rose Venkatesan was a talk show host and radio jockey (Thomas 2016). Dr. Manobi Bandyopadhyay holds a doctorate and is India's first college principal from the community (Roy 2015). Shabnam Mausani Bano, Madhu Kinnar, Devika, etc., also hold public offices (O'Connor 2015; Trivedi 2018; Times of India 2020). While these are incredible examples of exceptional people, the fact remains that none of them had it easy. But as Pal and Sinha note in Chap. 10, there are undeniable class distinctions within the transgender community in India. While some transgender persons coming from better-off economic classes manage to achieve a certain degree of economic agency, certain communities—especially the hijras—lack opportunities. Even those who are qualified face discrimination and prejudice.

Transgender persons encounter bias in hiring policies, compensation, terms of service, promotion, privileges, etc. The illustrative cases of Nangai I (2014), Nangai II (2014), Nangai III (2014), Faizan Siddiqui (2011), and Prithika Yashini (2015) stand testimony to the fact that despite NALSA, employment discrimination continues. The three Nangai cases deal with police constable recruitment in the state of Tamil Nadu. Candidates who identified as females were denied opportunities on the ground that they were transgender/transsexual. The Faizan Siddiqui case concerned a female candidate who was born male, with congenital anomalies and a Disorder of Sexual Differentiation (DSD). She underwent medical treatment and was medically certified to be akin to any other female barring natural pregnancy. She applied for the post of a female constable of the Sa shastra Seema Bal but was rejected on the ground that as she cannot become naturally pregnant, she does not qualify as a female. Prithika Yashini is a celebrated transgender woman who became the first police officer from the community. But at every stage, right from the application to the final appointment, she had to knock on the doors of the judiciary to counter the discrimination she faced as a transgender person.

In all these cases, courts have had intervened and ensured that justice was done to these candidates. But will this piecemeal approach suffice? Presumably not. Government initiatives like hiring transgender persons by Kochi Metro and Chennai Metro Rail are widely published (Sekar 2021). But in reality, highly qualified persons, including those with postgraduate and engineering degrees, are employed in ticketing jobs on contract for limited wages and benefits (Nidheesh 2017). This leads Pal and Sinha to conclude in Chap. 10 that these initiatives are mere tokenism. The unwillingness of house owners to lend houses to transgender people only makes it worse (Varghese 2020). Further, bullying faced by transgender persons at work is not only underreported, but also an issue without any redressal mechanism. This makes it very difficult for these employees to sustain themselves in the job.

Bullying and workplace harassment are not faced by transgender persons alone. The harassment of women employees, especially sexual harassment at work has led to the passing of the Sexual Harassment of Women in the Workplace (Prevention, Prohibition and Redressal) Act 2013. Under the said Act, a grievance redressal

procedure has been put in place by constituting a forum called the Internal Complaints Committee. The Committee receives complaints relating to sexual harassment, conducts enquiries, and makes appropriate recommendations. An easily implementable solution to harassment faced by transgender employees at workplace would be to expand the mandate of the existing Internal Complaints Committee to receive complaints by transgender employees as well.

But addressing bullying and harassment would only improve the situation of transgender employees. It does not in any manner increase the entry-level opportunities for transgender persons. That would require targeted affirmative action.

### 8.2.7.3 Reservation

One of the legal mechanisms used in India to overcome centuries of socio-economic oppression faced by persons from scheduled classes (SC), scheduled tribes (ST), socially and educationally backward classes (SEBC) is affirmative action in the form of reservation of seats in higher education and public employment. NALSA recognized the systemic subjugation of the transgender community and furthered reservation for them under the SEBC category. While the intention behind the approach is laudable, the approach itself is not in the best interest of the transgender community.

India addresses caste-based discrimination through vertical reservations for SCs, STs, and SEBCs, and reservation for women, disabled, displaced persons, and others who might suffer disadvantages on grounds other than caste, through horizontal reservation that cuts through vertical reservation. By treating the transgender community under the SEBC category, the Hon’ble Court has treated the discrimination faced by the transgender persons as being similar to the discrimination due to caste. This would amount to treating their transgender identity as a caste. This approach is similar to the one adopted by the British during the colonial census (Gannon, Chap. 6). In consecutive censuses, the British listed hijras as a caste and not as a gender identity. Shane P. Gannon argues in Chap. 6 that the colonizers’ association of hijra identity with caste helped them identify their status in the society and account for their social degradation. This also helped the British shift the onus of their social degradation on the indigenous caste system instead of admitting that the acts of the British such as the enactment of the Criminal Tribes Act, contributed to it. While the hon’ble Court’s approach seeks to improve the condition of the transgender community in India, it unfortunately, fails to appreciate the intersectional discrimination that transgender and intersex persons may face.

If transgender persons are granted reservation under vertical categories, it would force them to choose between their caste and gender identity. Further, such a scheme would also assume social homogeneity among transgender persons, which is not the reality. The class distinctions among transgender persons have been excellently elaborated on by Pal and Sinha in Chap. 10.

The 2019 Act completely ignores the need for affirmative action for transgender persons and does not provide any measures to improve the educational and economic opportunities of the transgender community. Therefore, it is suggested that



law must grant transgender persons horizontal reservation of 2–2.5% in public higher education as well as in State employment.

### **8.2.8 Healthcare**

The stigma and discrimination against transgender persons are not limited to social and economic settings alone. It has also penetrated deep into the medical field (Feinberg 2001, 898). The fact that the World Health Organization had listed “gender incongruence” as a psychological disorder right until 2019 reflects on the level of callousness that possibly prevails in the healthcare sector toward transgender persons (BBC 2019).

Surveys of LGBT and intersex people indicate disproportionately high levels of stigma, discrimination, and even violence when accessing health services, less access to health insurance, and lower health outcomes (United Nations 2016, 72). Income instability, lack of reliable and accessible information, systemic social service barriers, and lack of accessible trans-inclusive healthcare services are among the many barriers to accessing quality healthcare. In the following chapter, Azhars and Vaudrey highlight the need for greater attention to mental health support and medical care for transgender persons. More importantly, attention must be paid to the identification and elimination of all those social conditions and contexts that exacerbated diseases.

The need for greater focus on understanding gender variations, particularly in the context of HIV interventions cannot be overstated. Transgender persons are undoubtedly at greater risk of contracting the virus owing to the nature of work, they are forced to engage in. Further, the insensitivity of medical professionals when they treat transgender persons who are living with HIV, as evinced from Azhar and Vaudrey’s study, is a major hurdle to quality healthcare. Thus, in addition to the creation of alternative employment, it is imperative that the State focuses on research on medical issues concerning transgender persons. Efforts to sensitize healthcare professionals on the physiological and psychological needs of transgender persons, the need to employ the correct pronouns, etc., must also be given urgent focus by the State (Azhur and Vaudrey, Chap. 9).

The 2019 Act prescribes that the State take measures to set up separate Sero-surveillance centers for transgender persons and to provide for the medical facility including sex “reassignment” surgery, hormonal therapy, pre-operative and post-operative counselling, to improve the curriculum for doctors, and to come up with a comprehensive insurance policy to cover the expense of surgeries. These are however suggestive and are not time-bound. Under such circumstances, there is absolutely no reason to believe that the fate of transgender persons dealing with the healthcare industry would improve. In fact, the recorded instances of discrimination against transgender persons trying to get their COVID19 vaccine (Choudhary 2021; Jahan 2021; Rajaram 2021), the lack of data at the hands of the government on the number of transgender persons who have taken their vaccine (Murali 2021), etc.,

show that the callousness, stigma, and discrimination in the healthcare sector continue even after passing of the 2019 Act and the 2020 Rules. Thus, a stricter and unambiguous guarantee of rights of transgender persons vis-a-viz is an urgent requisite.

Right to health is viewed as an integral part of art. 21 of the Indian Constitution (Municipal Council, Ratlam v. Vardhichand, and Ors. 1980; Mahendra Pratap Singh v. State of Orissa 1997). Law must recognize that the constitutional right to health would include the right of transgender persons to be in a body that they are comfortable in. Thus, in line with the Argentinean law (Gender Identity Law, 2012, art.11), India must guarantee the right of all to transition and provide free access to total or partial surgical intervention and/or comprehensive hormonal treatment. Further, these treatments must be provided to them without requiring any judicial or administrative authorization and solely on the basis of informed consent. Moreover, revision of the medical curriculum and sensitization of healthcare professionals on trans-health-related issues must be done in a time-bound manner, preferably within 3 years of coming into force of the new law (Constitution of India, 1949).

### 8.3 Conclusion

The Indian society has ill-treated transgender persons for centuries and law has done little to nothing to correct it. The law that was finally brought in is also full of potholes that run the risk of worsening the status of transgender persons. What is needed is a legislation that would explicitly guarantee a host of rights and put in place mechanisms to dismantle historical structures built purely oppress, invisibilize the identities and rights of transgender persons. Arguably, law cannot resolve every problem plaguing the transgender community. But a legislation, as envisaged in this chapter, would bring about a sea change in the system and in the way in which the society perceives transgender persons. We must, as a State, realize that no amount of discourse and debate is going to be enough unless they fructify into effective laws that help transgender persons lead their lives as full citizens of India.

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