

Transgender Persons and the Criminal Law System: Social Narratives Affecting Legal Systems

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Abstract

“All of us inhabit a normative world. The world of law exists within a normative universe which grants meaning to its various forms of social regulation and control². To inhabit a legal world is to then understand the narratives that shape and grant meaning to the institution. The institution of law then is closely connected to the social and political narratives that are created. Perhaps it would be worth extrapolating these narratives vis-à-vis the substantive laws and legal practices that they perpetuate. In this paper we will briefly explore the relation of the transgender community with the criminal law system”.

1. Introduction and Brief Overview

The dominant narratives of heterosexuality rooted in a patriarchal system have resulted in unspeakable violence against the transgender community. There is a history of invisibilisation of transgender people from the criminal law system unless they are to be treated as criminals. Violence against the transgender community is often under-reported. Activism and Supreme Court judgements in the last decade have led to the creation a rights based narrative. Transgender people have been accorded fundamental rights granted to every citizen in India³. They have also been granted the status of third gender⁴. While the courts have been at the forefront of protecting transgender person rights, the criminal law system continues to exclude, invisibilise and victimise transgender people. In fact, documentation efforts by civil society organizations throw light upon instances of police brutalities and illegal detention.

The question that we need to keep coming to back to is can the narratives that obstruct transgender people from accessing criminal systems be looked into? There is a need to reframe the relationship of the transgender community with the criminal system and ultimately create pathways to access of justice.

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² Robert Cover, *The Nomos and the Narrative* 97 Harv. L. Rev 4 (1983-1984), retrieved: https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3690&context=fss_papers

³ National Legal Services Authority vs Union of India (2014) 5 SCC 438

⁴ *Id* at 3

The first part will look at Prosecution of Transgenders, often on fabricated charges and, instances of illegal detention. A few incidents where the police brutalities have been documented or their apathy towards the community to file complaint has been noted will be explored. Some provisions of the Transgender Persons (Protection of Rights) Act, 2019 which brings transgender person at the periphery of the criminal law will be looked into. Finally, the proposed Criminal Law (Amendment), 2019 with its proposal for gender neutral laws for sexual assault and violence will be looked into and the ways it could further harm and invisibilise the transgender community.

2. Criminal Law System and Transgender People

The dominant social narrative always has the family, created within the norm of heterosexuality, as the bedrock for sustaining patriarchy, communities and the nation⁵. The dominant social narrative of heterosexual family as the acceptable form of expressing sexuality and desire creates a process of “othering”. The individuals who fail to comply with this framework of heterosexuality become the “others”. The cornerstone of Queer activism has been to contest this idea of Gender as a mutually exclusive category. It challenges the idea of “normal” and “abnormal”, not as naturals but rather as social constructs⁶ which can be subverted. In the domain of substantive laws, it is the NALSA judgement which granted the status of “Third Gender” to the transgender communities and the right to self-identify to gender non-confirming and gender fluid individuals⁷. This is in alignment with a rights based approach framework of demanding rights from the State. The citizens are no longer passive recipients of their rights but rather take an active role in demanding the ones the State has failed to provide for. It is in this new sense of entitlement that we need to view the advocacy around LGBTQiA+ rights. Post NALSA, the advocacy for the LGBTQiA+ community has shifted to the Rights Based approach and the State is made accountable to the extent they deliver within the Right approach framework

However, the narrative of rights and entitlements shifts as the conversation enters into the criminal law system. The fact finding and incident reports by People’s Union of Civil Liberties, Alternative Law Forum, Sangama and other organizations working in the sphere of Transgender rights show us a picture of antagonistic relations between police and

⁵ Nivedita Menon, *Seeing Like a Feminist*, Penguin, 2012, 39.

⁶ Ruth Benedict, *Anthropology and the Abnormal*, *The Journal of General Psychology*, Vol 10(1) (1934)

⁷ *Supra* at 3

Transgenders⁸. There are a few incidents which have brought to attention the violation faced by the community in the hands of the legal system, especially the local police officers. In 2002, four Kothi sex workers Seetam Sheela, Vimla and Malathi were taken to Sampangiramanagara Police Station in Bangalore, where they were illegally detained and physically harassed and beaten up. No charges were pressed against them and they were let go with a warning that they should not be seen on streets⁹. In 2002, Chandini, a member of the Hijra community residing in Bangalore was burnt to death by her husband. The police denied registering the complaint of her unnatural death on grounds of the marriage being invalid or being faked. This claim was made despite evidence that the husband was a regular visitor at the hamam (the place where the Hijras live) and there was photographic evidence of the marriage which was also attended by many members of the Hijra community. Banaswadi Police Station denied filing the complaint or acknowledging any kind of foul play. They claimed that they would file a complaint only if Chandni's biological parents were the complainants¹⁰. In 2004 a transgender named Kokila was raped and subjected to brutal physical assault at the hands of the police. Kokila was being gang raped when the police walked into the site. While the goons ran away, Kokila was arrested and illegally detained. During detention she was subjected to rape and physical assault by the police officers¹¹.

Alternative Law Forum, a collective of human rights lawyers provides legal representation to Transgenders. To get a sense of the number of Transgenders who are kept in prison cells or police custody they filed RTIs. In the RTIs, the information received was that there have been no Transgenders who have been illegally detained or kept in the police custody¹². The official version as it stands; do not acknowledge the atrocities that take place behind the bars or the police officers who are responsible for carrying out these acts. While it is a widely known fact that Transgenders are prosecuted without legal evidence or following due process, it is not a well-documented fact.

⁸ People's Union of Civil Liberties. *A study of Kothi and Hijra sex workers in Bangalore*. PUCL-K (2003)

⁹ *Ibid* at 8

¹⁰ Sangama, *Justice for Chandni* [http://ai.eecs.umich.edu/people/conway/TS/PUCL/PUCL_Report.html#Kokila\(2002\)](http://ai.eecs.umich.edu/people/conway/TS/PUCL/PUCL_Report.html#Kokila(2002))

¹¹ Sangama (2004). *Rape and Police Abuse of Hijra in Bangalore, India: Call for Action by Sangama* <http://ai.eecs.umich.edu/people/conway/TS/PUCL/PUCL%20Report.html#Kokila>

¹² As told by Deeptha Rao, lawyer, Alternative Law Forum. Personal communication

In all the instances where Transgenders have been imprisoned or illegally detained and abuse that has been carried out in the prisons, there is a larger social narrative which sanctions this behaviour which may not be acceptable within a legal framework. It is worth thinking about that prosecution of Transgenders is a well-known and acknowledged fact and so are the “clean up drives” that are often carried out by the police in public places. There is a certain moral high handedness with which the “clean up drives” and illegal detention are conducted. The narrative that the presence of Transgenders, Kothis and the members of the LGBTQiA+ community causes public nuisance and disrupts public life is well articulated and socially sanction such behaviour¹³.

3. Operation Anandi: Social Narratives leading to Prosecution of Transgenders

There is a narrative that adversely impacts transgender people that children are kidnapped and forcefully castrated by the community¹⁴. This view also finds representation in the latest law created for the protection of the transgender community. In *Transgender Persons (Protection of Rights) Act, 2019* (hereinafter, the Act) section 12(1) states that, “No child shall be separated from parents or immediate family on the ground of being a transgender, except on an order of a competent court in the interest of such child”¹⁵. The larger social narrative solidifies itself into law when children are brought within the ambit of the criminal law system for defying the norms of heterosexuality. The section states the “interest of the child” but the questions that continues to remain is who determines the interest of the child? This narrative strips a gender fluid individual of their autonomy and paints a picture that being a transgender person was forced upon them, that is unnatural to want to change their biological sex and one would do it only if this were forced upon them. This is the narrative on which the unethical and inhumane sting operation called *Operation Anandi* was based.

On 27th September 2016, transgender persons Shreyan Anandi and Aishu were arrested on charges of kidnapping and gender mutilation of an 18 year old boy. The question that comes up is how did the police find out about the case of alleged kidnapping and genital mutilation? A local news channel called TV9 conducted a sting operation called *Operation Anandi*. They had hidden cameras to document the daily lives of Transgenders and captured the process of Nirvan or castration which is a private ceremony within the community and outsiders are not

¹³ *Supra* at 7

¹⁴ Zia Jaffery. *The invisibles: A tale of the eunuchs of India*. New York, NY: Pantheon Books, 1996.

¹⁵ Transgender Persons (Protection of Rights) Act, 2019, Sec 12(1), retrived from: <http://socialjustice.nic.in/writereaddata/UploadFile/TG%20bill%20gazette.pdf>

allowed to attend it. By showing the process, they have orchestrated the video and use parts where they can prove their agenda of portraying the Transgenders in an insensitive and derogatory manner¹⁶. Following this portrayal the arrest had taken place. The only evidence against the community is the video of the sting operation which had been captured by violating ethical protocols and invading a minority groups' right to privacy. In prisons, transgender people do not have separate cells. On physical inspection if it is found that they are biologically males or females and are assigned to the respective cells. If a transgender person has not gone through the sexual reassignment surgery they are placed in solitary confinement because he did not want to be in the cell assigned for men¹⁷. It is at these junctures do we understand how the criminal law system denies to implement or even acknowledge the mandates of the NALSA judgement, of which self-identification of one's gender has been a cornerstone. The judgement states that a gender fluid individual can self-identify without undergoing the gender affirmation surgery. Furthermore, there shall be separate detention facilities which will take into account the gender identity of an individual¹⁸. Both the mandates of NALSA were violated in these arrests. Aishu, a 19 year old Transgender had undergone SRS and developed an infection while in prison. She had been given painkillers by the prison authorities. The prison in charge was unaware of the hormone replacement therapy and failed to provide for adequate medical facilities¹⁹.

While this may be the first time TV9 is targeting the Transgender community, this is not the first time they are being accused of unethical reporting. Since 2004 that they have started broadcasting with a particular inclination towards sensational stories with questionable facts and ethical standards including a story called *Gay Culture rampant in Hyderabad* in 2011²⁰.

¹⁶Prajwala Hegde, *Shocking case of Irresponsible Reporting: TV Channel Targets Transgender Community*. Youth Ki Awaaz <https://www.youthkiawaaz.com/2017/02/operation-anandi-tv9-karnataka/> (2017)

¹⁷Mritika Roy, *Transgender Prison Inmate in Bengaluru Face Abuse, Harassment and Neglect*. Huffington Post https://www.huffingtonpost.in/2017/01/25/transgender-prison-inmates-in-bengaluru-face-abuse-harassment-a_a_21662329/ (2017)

¹⁸ *Supra* at 3, Justice J Radhakrishnan, para 22.

¹⁹ *Supra* at 17

²⁰Nayantara Narayanan, *Controversial Telegu News Channel is TV9 is always at the centre of story itself*. Scroll (2014) <https://scroll.in/article/678482/controversial-telugu-news-channel-tv9-is-always-at-the-centre-of-story-itself>

4. Body as a Site of Intervention

The violence by the police and response of the courts on issues concerning Transgender identities, though contradictory in the end result, one is violence and the other emancipatory, have their roots in biology and body as the site of intervention. The idea that gender determination is deeply rooted in biological essentialism finds its mention in the Act of 2019. Section 5 of the Act states that transgender person has to make an application to the district magistrate to obtain a certificate which certifies their identity²¹. Section 5 of the Act strips transgender person of their right to self-determine and sharply contradicts the NALSA judgement's right to self-identify²². What happens when the right to gender identity is subjected to voyeuristic tendencies like that of the State, specifically the criminal law system²³. It is described by trans-feminine person Sayantan Datta as, "*My body here becomes the space where my identities shall never be constrained, but my body shall also become the object for voyeuristic annihilation of the unlimited potential it holds in its limited existence. I am dead, genocided into a performance I have long been trying to rid myself of*"²⁴

Why does the State want to make biology and body as the site for intervention? What does conflating gender identity with biology do for the State and its mechanisms? Maybe the idea of regulation of its subjects by the State is worth exploring. The idea of surveillance of non-confirming bodies is deeply arises from the idea that bodies or the social and construction of bodies is deeply informed by ideas of culture, gender and sexuality²⁵. The emphasis on biological essentialism then creates a binary within the State narrative of gender non confirming individuals who have undergone surgery versus the ones who self-identity without surgery²⁶. One of the reasons of emphasising on the biological aspect could be bring

²¹ *Supra* note 15, Section 5 & 6

²² Nimisha PS & Priyanka Chakraborty, *Free Will, Self Determination and Transgender Persons Act, 2019*, Centre for Legal Theory, vol 2(1) (2020)

²³ Sayantan Datta *We Refuse to be Subjects of Experiment for Those Who Do Not Understand us*. Vol. 52, Issue No. 49, 09 Dec, 2017. Economic and Political Weekly Engage. http://www.epw.in/engage/article/transgender-persons-bill-we-refuse-be-subjects-experiment-those-who-do-not-understand?0=ip_login_no_cache%3D9e4bf83bcf1f6cc22226c5b99f494d1 (2017)

²⁴ *Ibid* at 23

²⁵ Christine Quinan, *Gender (in) securities: surveillance and transgender bodies in a post-9/11 era of neoliberalism* (2017), p 153.

²⁶ Lane, Riki. *Trans as bodily becoming: Rethinking the biological as diversity, not dichotomy*, *Hypatia* 24.3 (2009) p 136-157.

the community under closer scrutiny and maintain surveillance on them by having documents and details of their surgeries, transition and identities.

5. Criminal Law (Amendment) Bill, 2019 and the Myth of Gender Neutral Laws

The Criminal Law (Amendment) Bill, 2019 (hereinafter, the Bill) which is currently pending in Rajya Sabha seeks to amend the Indian Penal Code, especially provisions regarding sexual offences. The Bill leans towards making sexual offences gender neutral and also include transgender persons within the ambit of Indian Penal Code. While on paper this sounds like a great move because it is seemingly inclusionary, it stands to harm women and transgender person because even sexual offences law that heavily favour women time and again fail to deliver justice.

It is not the absence of strict laws or penalties but social narratives that intervene in adjudication which obstructs justice. In earlier sections we have seen the ways in which transgender people have been subjected to violence by state machinery, specifically the criminal system. The violence is a result of transphobia that exists in a heterosexual world. It does not favour women either because of persisting gender biases which erode criminal justice systems. Hence, increasing punishment and introducing death penalty remain plastic move that does not change or impact sexual offences law that often fail to deliver justice because of patriarchal notions.

If increased punishment within sexual offences law was a deterrent then there would not be a rise in the sexual crimes against women. According to the National Crime Records Bureau latest data in crime²⁷ for 2019 crimes against women has increased by 7.3%. The data further shows that it is in deeply personal and intimate spaces of the household that women are most susceptible to violence. 30.9% of the cases filed were under the category of cruelty faced by husband and relatives²⁸, 21.8% under the category of intent to outrage her modesty²⁹ and 7.9% under the category of rape³⁰. Hence, strict punishment is not a deterrent of crime because a lot of cases get dismissed or led to acquittal because of social narrative that interferes with legal processes.

²⁷ Crime in India-2019, National Crime Records Bureau, retrieved from <https://ncrb.gov.in/sites/default/files/CII%202019%20SNAPSHOTS%20STATES.pdf>

²⁸ *Ibid* at 27

²⁹ *Supra* note at 27

³⁰ *Supra* note at 27

5a. Compromise in Rape Trials

Section 320 of Code of Criminal Procedure, 1973 (hereinafter, CrPC) states the offences that are compoundable³¹. Section 320(9) states that no other offences shall be treated as a compoundable apart from the said section³². Compromise or out of court settlements can be carried between parties for compoundable offences that are mentioned in Section 320 of CrPC. Rape and any other sexual offences mentioned in CrPC do not come under compoundable offences. Hence, they are non-compoundable offences and the parties are not allowed to reach a compromise or go for out of court settlements. While this is the law in book, the law in action shows that parties in rape cases are pressurised to settle by the accused.

Pratiksha Baxi in *Public Secrets of Law*³³ lays bare the socio-legal category of compromise in rape trials. The book is an ethnographic study of trial courts and the ways in which compromise and out court settlements work for rape trials. The pressure to compromise on the victim and their families is create through networks of social power which includes lawyers, police and local politicians who act as middlemen forcing the parties to settle³⁴. While the court is supposed to the sole arbitrator, rape trials are often treated as a social dispute that can be settled by the community. Unwillingness to compromise often leads to tragic consequences for the victim and their families³⁵. A settlement outside the court often leads to acquittal inside the courtroom because the witnesses turn hostile and due to the lack of reliable evidence, the perpetrator is granted acquittal³⁶.

Compromise in rape trials takes place despite their being strong laws in statue books which protect women. Minimum punishment for rape under Section 376 of Indian Penal Code is seven years and extends up to death penalty in cases of heinous offences. Despite the presence of strong laws, we have the socio-legal phenomenon of compromise which obstructs the course of due process.

³¹ Code of Criminal Procedure, 1973, Section 320, retrieved from https://www.indiacode.nic.in/handle/123456789/1611?sam_handle=123456789/1362

³² *Ibid* at 31

³³ Pratiksha Baxi, *Public Secrets of Law*, Oxford University Press, 2013.

³⁴ *Ibid* at 33 p 182

³⁵ *Supra note* at 33 p 183

³⁶ *Supra note* at 33 p 180

5b. Myth of Gender Neutral Laws

As we have already seen the incidence of crime against women and the ways the criminal justice system often fails its victim. The question that begs to be asked is, who does the gender neutral laws then benefit? In 2018 homosexuality in India had been decriminalised and Section 377 of Indian Penal Code was read down³⁷. This judgement decriminalised the entire LGBTQIA+ community who were under the radar of the criminal justice system since colonial era. Since then buzzwords of *equality* and *inclusion* have been entered the parlance of activism and law. Does a brief look into the criminal justice system which has time and again failed to protect women and subjected transgender people to violence really pave the way for gender neutral laws? Can laws relating to sexual crimes ever be neutral? And, who and how is neutrality being defined?

While the specific provisions of the Bill won't be analysed here the premise of neutrality has to be subjected to examination. The idea that all genders are susceptible to violence equally is aimed at erasure of power dynamics that exists between the genders. Since every gender is not susceptible to violence it erases women and transgender people's narratives of being more vulnerable than other groups. The idea of neutrality in social sciences has always been premised as a problematic idea. The idea of neutrality stripped of dominant value systems being projected upon it does not exist³⁸. Neutrality always carries the mark of the social and ethical commitments of the dominant. It is in the light of this that the aspect of gender neutral laws needs to be looked into.

The idea that gender neutral laws includes transgender people within the ambit of the Indian Penal Code must also be looked into with healthy scepticism because the criminal justice system while protects and punishes, it also prosecutes. The question then stands is, a community that has been largely invisibilised by the criminal justice system, even in the violence that has been perpetrated and till 2018 treated as criminals, will the gender neutral laws continue the trend? Because the same laws that promise protection and punishment to "any person" can also prosecute "any person".

³⁷ Navtej Singh Johar v Union of India AIR 2018 SC 4321

³⁸ Gutting, Gary and Johanna Oksala, "Michel Foucault", *The Stanford Encyclopedia of Philosophy* (Spring 2019 Edition), Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/spr2019/entries/foucault/>>.

6. Conclusion

In this paper, an attempt has been made to trace the relationship of transgender person vis-à-vis the criminal justice system. We have seen how the transgender community has been at the fringes of the criminal law system. State apparatuses have often inflicted violence on transgender person for simply existing and being visible in public spaces. The transgender community has always shared an antagonistic relationship with the criminal justice system because this system has only treated them as criminals. The model victim of the state, a woman, is treated no better by the criminal justice system as we have seen in the case of rape trials.

Laws are an extension of the normative universe we inhabit. Laws shape and are shaped by the norms that are prevalent. The actors of the legal system and state apparatuses inhabit the normative universe and the biases which seep into the process of law and law making. Hence, it is in the light of this prevalent normativity we need to look at the aspect of neutrality of gender neutral laws. In light of the brief history of the ways sexual crimes have been adjudicated we really need to ask, why is there such a dire need to invisibilise gender? NCRB data 2019 clearly proves that crime against women is on the rise. Transgender person's murder is also an unfortunate phenomenon though not a well-documented one. In light of the well-established fact that individuals are targeted merely because of their gender and, gender as a category is a social construct through which power is exercised, why is there such a push to erase this category?