

Rehabilitation or Torture: The Plight of Indian Prisons, a Third Gender Perspective

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Abstract

With history as living witness, the Transgender have been a significant part of the Indian subcontinent and are the proof of the sexual diversity that existed in Indian culture. Historical significance has been deteriorating, and today the Transgender community is not only castaway in the outside world but also behind the bars.

Before a person is brought to prison, she/he is sent for medical examination, followed by which classification is done on basis of their genitals. The biological sex of the inmate is generally used as the basis for the initial decision making of which prison she/he will be housed in. What if one doesn't fall under the general canopy of she/he? It is crucial to examine the conditions of placing *such* individuals in prisons with respect to the gender assigned at birth as it directly threatens the management and security of the institution and poses risk to life and to is against the principle of *Self-identity* as laid by the Supreme Court in *NALSA v. Union of India*.²

Police investigations and Prisons can often be nightmares for interactions especially for the transgender. In a country like India, transgender people are most likely to be stopped and interrogated by the officials as they are victims of *society generated suspicion* for having involvement in sex work and other crimes. The final result is often bad, they are become victims of bullying and assault.

Moreover, being a transgender in jail often is synonymous to daily discomfort, sexual and physical abuse and lack of proper medical treatment. In recent times, these issues gained the attention of authorities and a few steps have been implemented in a few states. An important question to ask 'Is this all we can do?' The rates of abuse of transgenders are a black-mark on the entire criminal justice system. Is it rehabilitation the prisons are trying to provide, or is it state funded torture? It thus becomes crucial to re-evaluate a few fundamentals of the Indian prison system and update them to the needs to the present day. In light of these circumstances, it is important to reenergise the principles of safeguarding the marginalised community's rights with a new policy and a scholarly analysis of the prevailing conditions of

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the transgender community from a contemporary legal perspective would represent an overdue addition to the literature. For just as they have so far received far less than their due share of attention whether from commentators or lawmakers in India .The primary objective of this study is to ascertain the factors responsible for worsening condition of the transgenders. The main purpose of this paper is to raise issues for affirmative action by way of developing law and policy framework for improving upon the worsening political, socio-economic and living conditions of the third gender of India.

Introduction

The failure of the society to accept different gender identities and its reluctant mindset to embrace the same has traumatised the transgender community. A Transgender is a person whose gender identity does not confirm with the gender assigned to that person at birth. In common parlance, often called as Hijras, aravanis, jogtas and kinnars, the transgender community which includes trans-men and trans-women have faced a multitude of problems to seek just to seek legal declaration of their identity which came, but after 67 years of Indian Independence. Often humiliated and ridiculed in public places like schools, parks, bus stops, railway stations, police stations and hospitals by members of the society, we as a Democracy have failed to listen to the voices of this sexual minority group.

Literature reflects the historical significance of the trans community by valuing their presence in Hindu Mythology and other important religious texts. The 'tritiyapakritis' have been a part of the Vedic culture, the Mughal rein and various notable parts of Indian History. Such acceptance can also be traced to Ancient India, where myths have pointed to instances of Gods who were at once Male and Female. Their significance deteriorated in the British rule after the enactment of *Criminal Tribes Act, 1871* and the same behavioural attitude was prevalent until a few years ago. Relief came in form of the Supreme Court's verdict in *NALSA v. UOI*³ where relief came in not in one, but in various forms, one of the most important being recognition in documental identity as the 'third gender.'

Despite progressive measures by the Government, today the transgender community is not only castaway in the outside world but also behind the bars. The denial of social justice leads to denial of economic and political justice, and acceptance of transgender identity has to cut across the entire society and cannot be confined to transgender friendly sections of a city.

Identifying Oneself as a Transgender

When asked whether they identify themselves as men or women, transgenders invariably respond that they are not one or the other, but that they are '*transgenders*'. They take pride in identifying themselves as '**transgenders**' rather than being called or classified under male or female, and the same was upheld by the Supreme Court as 'right to self identity.' In light of the same it is essential recognition comes in all aspects. Ironically, acceptance of the transgenders as a third gender appears is facilitated by a sharp division of sex roles and the

³*Ibid.*

prevalence of gender equity. Transgenders themselves and members of the community at large believe that rather than being a voluntary choice one is born a transgender.

Being a Transgender Prisoner

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State Funded Torture or Rehabilitation?

Prisons are always difficult environments, and the State has a duty to ensure that prisoners are safe and live a life with basic dignity. Yet, Transgender prisoners are among the most vulnerable inmates. Firstly, Prisons are gender segregated, and are binary in nature: male and female and such segregation is done to maintain security and enforce rules. But are there only 2 genders? The answer is simple, 'No'. Sexuality is fluid and thus, it becomes important that the State initiates important steps to protect individuals with vulnerabilities for which law is unequivocal. Prisoners are ordinarily to be housed according to their legally-recognised gender, the basis of it being derived from documental identity. A lot of the documents are still un-updated and only options of male and female are available. This is an important issue and immediate steps need to be taken to bring in reform. Moreover, before a person is brought to prison after formal arrest, she/he is sent for medical examination, followed by which classification is done on basis of their genitals. The biological sex of the inmate is generally used as the basis for the initial decision making of which prison she/he will be housed in and not the self identity. What if one doesn't fall under the general canopy of she/he? It is crucial to examine the conditions of placing *such* individuals in prisons with respect to the gender assigned at birth as it directly threatens the management and security of the institution and

poses risk to life and to is against the principle of *Self-identity* as laid by the Supreme Court in *NALSA v. Union of India*.⁴

The result is of the same is that often trans-women end up being housed in male prisons and are victims to in-house crimes and other forms of abuse. The result of such activity directly affects their safety and well being. Bulling, physical and sexual abuse and harassment soon become a part and parcel of everyday life.

Thus, in institutions like prisons, it is important to raise fundamental questions about treatment and safety of transgender prisoners. In light of the same, it becomes essential to examine role of prisons. Indian prisons are becoming integral centres which focus upon rehabilitation and resettlement. Generally, debates regarding prisons only concern broad ideas of restructuring them and bringing in rehabilitation, making them human friendly and bringing in realisation for offenders. Prisons are often seen as institutions to become learning organisations and a number of other possibilities. While the rest of the world in prison reform at least, is undergoing dynamic changes as they develop, the lives of transgenders is still with little scope of hope. But, is this the lesson to learn? Where we explore opportunities for internal and external growth of a male/ female prisoners, why do we discriminate transgender prisoners? Isn't this against our fundamental constitutional guarantees? The right to equality? What is the future of this? If we wish to transform these places, what are our policies: policing, prisons and corrections?

Exploring Issues

The concern today is that the transgender inmates have presented new questions for authorities, as one's gender at birth is based on the genitals, and a change in this aspect is often considered inappropriate because the traditional view still remains 'genitals at birth'. It is of fundamental importance to understand, that in the contemporary world, classification on basis binary gender identity is insufficient. Transgenders do not identify themselves to the gender they were assigned at birth, and it is important to recogniseself identified gender identity.

Moreover, with increased number of individuals recognising themselves and coming out as transgenders, the legal system has realised that the binary classification of gender is inadequate. By adding to the classification, law not only adds to identification of gender, but

⁴*Ibid.*

also adds to legal status and protections. Reform stands for awarding protections and this is a major issue for consideration.

The logic here is simple, the lack of legal protection for transgender citizens in public which includes workplaces, the prison is no different. The hardships faced are difficult to justify with the existing laws and safety concerns. Also, there is little awareness about the issues faced by the transgender communities, much like the outside world, the prison system is not prepared to accommodate the needs of such individuals.

All these problems, lead to the victimization of transgenders by other inmates and sometimes by authorities also. Additionally the prison environment is a major contributing factor, the hierarchal power structure increases the risk of vulnerability. Transgenders with more feminine identifiers are at a larger risk when compared to the individuals with male identifiers. The individuals with feminine appearance often are in greater risk of being raped, assaulted and tortured. This is the direct consequence of not taking their gender expression into account while attesting them cells.

Exploring Possible Solutions

The way 'transgenders' are defined in the legal language has laid foundation for welcoming change. In the past, their needs and status received less recognition and attention from the state due to the lack of understanding of the problems they encounter. The criminal system has to re-examine the legal rights of people belonging to the third gender.

One way to address these concerns is acknowledgment of the legal right to be housed according to their self identified gender identity, to allow transgender inmates to express their gender identity regardless of their documental identity or classification based on genitals. This will ensure that transgender inmates are housed based on their self-identified gender, not the gender assigned to them by their documental identity.

The next step is to establish separate prison facilities exclusively for transgender inmates. This case highlights the plight of transgender inmates, who are a particularly vulnerable group in our society. Recognising the same, Kerala has an exclusive third gender block for housing transgenders. This is definitely scope for hope and will have huge inferences on treatment of transgender prisoners not only in the state of Kerala but in prison systems across the country. Plus, this change leaves a significant mark in the evolution of trans rights in India. It has established a precedent that every individual has a constitutional right to access gender affirming treatment.

The next important concern is medical care, which has been a difficult issue for prison administrators. The need to recognise and provide for decent facilities for transgender inmates is essential as they are vulnerable to both physical and psychological problems.

Conclusion

The extreme rates of physical and sexual violence faced by transgender people in our nation's prisons is a stain on the entire criminal justice system. A proactive approach is the need of the hour where individual needs and circumstances of inmates is taken into consideration to live safely in the self identified gender.

It is understood that the issues which transgenders face is complex and with courts having interfered with its guidance recently, and the inherent inability to target all specific issues regarding transgenders and their constitutional rights, that the legislature comes out with a legislation which sees the light of the day. The two bills presented in the Parliament, one by Hon'ble member of the Parliament, Mr. Tiruchy Shiva and the other by the Central Government, both remain scope for just little hope. These Bills also lack the provisions of separate prisons and thus they remain abstract. Unless, laws are specific justice is only half done, and without proper legislation separate prisons for housing transgenders is just a dream. Separate prisons for housing transgenders raise the importance of several constitutional provisions. As society becomes more sensitive to the needs of transgenders, prisons should also acknowledge their existence and update to their unique needs and vulnerabilities as well. This review of the current status of the rights of transgender inmates reveals that Indian prison system has a long way to go.

It is yet, essential to understand that it is going to require more than a policy to bring in changes in the system.