

(TRANS) GRESSING THE BINARY: COALITIONAL SELF-DETERMINATION FOR THE ‘THIRD GENDER’ FRAMEWORK

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In National Legal Services Authority (NALSA) v. Union of India, the Supreme Court of India legally recognized the existence of a ‘third gender’ identity to protect and promote self-determination for persons identifying as ‘transgender’. Although the judgment might seem as a breakthrough for the transgender rights movement, I believe that it has glaring contradictions with regards to the socio-political environment where the ‘third gender’ is situated. The main argument of my paper is to critique such contradictions in the existing policy approach and suggest an inclusive and self-determinative policy framework for persons identifying as transgender. To substantiate, the first chapter of the paper lays the theoretical background by dismantling the heteronormative binary of gender identity and personhood and thereby securing socio-political legitimacy for transgender identities in gender discourse. The following chapter places transgender persons in light of the dismantled gender binary by examining the political viability of a ‘third gender’ as a framework for legally recognizing an umbrella serial collective of various transgender identities. The succeeding chapter contextualizes the proposed ‘third gender’ framework by critiquing the existing legislative and judicial policy strategies in India through the lens of coalitional self-determination. In conclusion, I juxtapose Indian policy models with international jurisprudence and sociological studies to arrive at an inclusive and malleable ‘third gender’ framework for safeguarding the rights and interests of transgender persons.

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I. INTRODUCTION

In modern society, the heterosexual gender binary of 'male' or 'female' operates as a rigid normative order for generating and governing social differentiation. The gender binary maintains its relevance and universality by marginalising non-conforming gender identities, which challenge its universal functionality. This is evident from the policy-level paradigms of social ostracism and denial of legal identity and personhood, which seek to inhibit transgender persons from accessing basic core rights and participating in socio-political life. A recent report documenting the laws in numerous South Asian countries highlighted the lack of legal recognition for transgender persons' citizenship and the prohibition against accessing sexual healthcare.¹ The historic legislative approach in countries such as India, Malaysia and Bangladesh has reflected the repression of sexuality by prohibiting transgender persons' right to marriage and criminalizing non-heterosexual lifestyles.²

In the Indian context, the marginalization of subaltern genders has been sustained through consistent legislative oversight coupled with oppressive heteronormative social practices. In 2001, a study on the human rights violations against sexual minorities in India documented harrowing accounts of sexual violence, social ostracism, police atrocities and discrimination against transgender persons.³ The failure to provide legal protection for subaltern gender identities has, thus, festered a vicious cycle of abuse against these individuals in the socio-cultural and political environment.

It is against this canvas of systemic apathy that the Supreme Court delivered its judgment in *National Legal Services Authority v. Union of India*⁴. This writ petition was brought forth to seek legal recognition of a 'third gender' identity to

¹ NEHA SOOD, *TRANSSEXUAL PEOPLE'S ACCESS TO SEXUAL HEALTH AND RIGHTS: A STUDY OF LAW AND POLICY IN 12 ASIAN COUNTRIES* 30 (2009); Ilona Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L.R. 565 (2007); Even in countries such as the United States of America where there is a lesser policy bias against transgender persons, studies have documented how the widespread gender-stereotyping and consequent discrimination operates in matters of employment selection, promotions and other socio-cultural experiences to stigmatize and isolate non-conforming gender identities.

² NEHA SOOD, *TRANSSEXUAL PEOPLE'S ACCESS TO SEXUAL HEALTH AND RIGHTS: A STUDY OF LAW AND POLICY IN 12 ASIAN COUNTRIES* 26 (2009).

³ PUCL-K, BANGALORE, *HUMAN RIGHTS VIOLATIONS AGAINST SEXUAL MINORITIES IN INDIA* 29 (2001).

⁴ *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.

represent transgender persons and ensure their access to the fundamental rights guaranteed by Articles 14 and 21 of the Constitution.⁵ While the judgment might prima facie seem to be a significant victory in empowering the transgender community by ordering the legal recognition of a 'third gender' identity, we first need to understand the socio-political context in which the 'third gender' is being propositioned.

As a prerequisite to seeking structural changes in gender laws, it is critical to appraise and contextualize the existing political theory and jurisprudence surrounding gender identity and self-determination. In the Indian context, the heteronormative approach of law has shaped the universal discourse on personhood to systemically discriminate against those falling outside the cisgender binary. Accordingly, any lobby to change a subaltern identity's social situation can succeed only when the existing norms of social differentiation and exclusion are demolished and replaced by a discourse on inclusivity. Thus, before analysing the political and judicial action to empower transgender persons, this article will focus on discrediting the existing norm of heterosexuality in the socio-legal order.

In this paper, I will be narrowing my research and hypothesis to a policy strategy for the empowerment of persons identifying as 'transgender'. I use the term broadly and in consonance with the definition adopted in the 'Yogyakarta Principles on the Application of International Human Rights Law concerning Sexual Orientation and Gender Identity'.⁶ The document provides a unique libertarian understanding of gender determination and expression, which promotes choice and recognizes a wide and fluid range of gender identities that may be affected by legislative efforts on systemising persons identifying as transgender.⁷ In furtherance of this liberal understanding, this paper uses the term 'transgender' to refer to all persons whose self-recognised gender identity is different from the classification of sex/gender assigned to them at birth or from the gender identity as per which they were raised. 'Transgender', thus, includes those who identify with the opposite gender in the binary and those who do not identify with any of the existing genders at all. Thus, it would include persons who identify as transsexual (who may or may not have the urge to undergo transformative surgery or other kinds of body modifications), gender queer persons, intersexed persons, the 'hijra' community, etc. Issues relating to lesbian, gay and bisexual persons primarily deal with heteronormative sexual orientation and must be addressed differently, hence, I will not be including them in my analysis.

⁵ Justice Radhakrishnan laid down two important dictats in this landmark decision. One was for the legal recognition of a 'third gender' in India and the other was to provide affirmative action policies for safeguarding the interests of persons belonging to this 'third gender'.

⁶ Yogyakarta Principles on the Application of International Human Rights Law concerning Sexual Orientation and Gender Identity, 2009; The aim of the Committee was to develop a comprehensive framework for providing basic human rights and address the systemic marginalization suffered by the transgender community.

⁷ VENKATESAN CHAKRAPANI AND OTHERS for UNDP, LEGAL RECOGNITION OF GENDER IDENTITY OF TRANSGENDER PEOPLE IN INDIA: CURRENT SITUATION AND POTENTIAL OPTIONS, 19 (2012).

To give the reader a brief overview, this paper is divided into four chapters. The first chapter reviews literature to challenge the traditional understanding of gender identity and personhood by disproving the exclusionary sex/gender binary. The next chapter of the paper aims to situate the transgender person in light of the dismantled gender binary by examining the ‘third gender’ debate. Herein, I propose a coalitional model of self-determination as a potential framework for recognizing an umbrella serial collective of the ‘third gender’. The succeeding chapter is devoted to examining the legislative and judicial efforts taken for the adoption of coalitional self-determination in Indian policy. The concluding chapter engages in a comparative analysis and draws from international jurisprudence, case studies and reports to suggest an alternate self-determination policy model for navigating gender identity.

II. UNDERSTANDING GENDER IDENTITY

Before embarking on political and theoretical actions to re-evaluate the social situation of transgender identity, we must understand the social construction and consequences of ‘gender identity’ itself. Identity may be defined as the combined diversity of self-ascribed meanings that an individual can hold for oneself in relation to the social roles they occupy.⁸ To gauge the social relevance of identities, it is important to identify the extent to which existing notions and self-meanings influence each other.⁹ In order to appreciate the construction of ‘gender identity’ and the classifications that stem from its operation, one must uncover the connotations of norms that give it legitimacy. Scholars have argued that gender identity is distinctive because unlike other social identities such as race, language, etc. which are bound together by a commonality of culture or tradition, gender identity has no common binding traditions and is randomly disseminated across the structural hierarchies created by other cultural identities.¹⁰ The perceptions of gender identity have also undergone enormous change in recent years with the growing intersectionality and diversity in feminist legal theory.

The cultural relevance of the term ‘gender’ emerged only a few decades ago when ‘sex’ started being recognized as the biological constituent of gender identity and ‘gender’ was distinguished as the socially constructed constituent.¹¹ Scholars like Simone De Beauvoir and Merleau-Ponty focused on the unchangeable ‘naturalness’ of a sexed body, which in turn influenced and provided limited possibilities for the materialization of a corresponding gender.¹² Essentially,

⁸ Joshua Smith and Kristin Smith, *What it Means to Do Gender Differently: Understanding Identity, Perceptions and Accomplishments in a Gendered World*, 38 HUM. S.R. J. 64, 66 (2016).

⁹ GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 23 (Judith Butler ed., Routledge 2nd ed. 1999).

¹⁰ MARGARET DAVIES, *ASKING THE LAW QUESTION* 213-223 (1994).

¹¹ Judith Butler, *Sex and Gender in Simone De Beauvoir’s Second Sex*, 72 YALE F.S. 36 (1986).

¹² Judith Butler, *Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory*, 40 Theatre J. 519, 522-525 (1988).

the presumed natural occurrence of a heterosexual binary became instrumental in constructing gender identities which replicated the binary roles assigned to the respective sexes. The process of 'doing gender' was, thus, assumed to naturally flow from the biological sex assigned by the binary system and the norm of heterosexuality was maintained.¹³ This gender binary was oblivious to the entrenched incoherence in classifying individuals who did not profess the gender assumed by their assigned sex.

Iris Young's theory on oppression explains how non-dominant or 'other' identities are oppressed and expelled from meaningful socio-political participation because of the system's inability to accommodate them.¹⁴ Owing to the rigid dominance exercised by the heterosexual norm, non-conforming identities suffered structural oppression in the form of systemic marginalisation and violence. When the dominant heterosexual model appropriated a position of universal truth, all other non-binary identities were extinguished by being removed from the social system. The incoherence of the binary system became evident when incomprehensible or non-heterosexual genders, which had all the characteristics of being persons, were denied legal recognition and personhood in the existing binary system prevailing in most countries.¹⁵

Given these exclusionary shortcomings in the binary system, the feminist movement tried to debunk the veracity of the sex-gender distinction. First, Judith Butler challenged the presumption of a natural continuum between sex and gender that the binary rested on. She argued that if doing gender was an organic process simulated by surrounding cultural perspectives, then there was no reason for a particular gender to be exclusive to a particular biological sex.¹⁶ In other words, if Beauvoir believed that "one is not born but becomes a woman", then there was no causative relation between sex and gender so as to restrain a body marked by male genitalia from performing the gender of a woman.¹⁷

The second level of criticism comes from Nivedita Menon who debunks the relevance placed on gender as a necessary determinant of identity. She embarks on a Foucauldian analysis to challenge the essentialist invariance accorded to 'biological' sex.¹⁸ In his *History of Sexuality*, Foucault argues that sex is not a biological, but a constructed phenomenon of an all-determinative identity created as a social regulatory mechanism by the forces of power.¹⁹ Sex then, is a mere

¹³ Kristen Schilt and Laurel Westbrook, *Doing Gender, Doing Heteronormativity: 'Gender Normals', Transgender People and the Social Maintenance of Heterosexuality*, 23 GAS 442, 445 (2009).

¹⁴ IRIS MARION YOUNG, *Five Faces of Oppression*, JUSTICE AND THE POLITICS OF DIFFERENCE 40, 45-49 (1990).

¹⁵ *Supra* note 9.

¹⁶ *Supra* note 10.

¹⁷ *Supra* note 9, at 9.

¹⁸ NIVEDITA MENON, *SEEING LIKE A FEMINIST* 32 (2012).

¹⁹ MICHAEL FOUCAULT, *THE HISTORY OF SEXUALITY: VOLUME I, AN INTRODUCTION* 4 (1978).

means to the ends of gaining power and dominance by sustaining the normative socio-legal order around the constructed importance attached to it.²⁰

A critic may appraise Foucault's claim dubiously, for he provides no authoritative evidence in history or philosophy to support his argument. However, taking his argument to a logical conclusion, Menon provides comprehensive illustrations to rebuke the assumed necessity of 'biological' labelling of sex, even for highly sexualized functions such as reproduction and chromosomal identification. Her detailed findings reflect that the apparently 'biological' characteristics of a sexed body are actually the products of a hegemonic cultural construct which, in turn, is sustained by the social relevance placed on gender identity.²¹ Menon supports this claim by describing several traditional societies which functioned in perfect political and economic harmony without relying on gender based differentiation.

By analysing the patterns of various genderless societies, Menon argues that the relevance given to sex as a natural marker of identity is a Western notion that has spread elsewhere with the advent of colonization.²² Hence, she proves that gender identity is an arbitrary cultural identity that has been given importance due to the dominance of heterosexual norms. The sex-gender distinction becomes defunct on the realization that both concepts are cultural manifestations of social hierarchy. Having debunked the claim of the gender binary as a functional differentiator, Menon seeks to establish an inclusive and intersectional understanding of identity.

III. ANALYZING POLITICAL VIABILITY OF 'THIRD GENDER'

On dismantling the exclusionist approach of the sex/gender binary, the question of setting up an appropriate inclusive framework for those excluded or mis-represented in the existing identity system arises. A dominant model in this regard has been to set up a 'third gender' for non-conformist transgender and intersexed persons. Supporters of this model emphasize its role in creating a culturally relevant gender identity for those not conforming to the cisgender norm. The creation of a third gender can also allow for the structural empowerment of such persons by providing legislative safeguards and benefit schemes.

On the contrary, the creation of a third gender may feed into the normative binary by reinforcing the stereotyped abnormality of the transgender experience. First, by limiting the understanding of a 'male' or 'female' gender identity to heterosexual persons, the label of 'third gender' sustains the phenomenon of politico-legal 'other-isation' of certain atypical genders, thus, preventing them from

²⁰ *Ibid.*

²¹ *Supra* note 18, at 30.

²² *Ibid.*

accessing personhood in the holistic sense.²³ Another criticism of the third gender approach is that it is often employed as a mechanism to fit multiple gender identities into the existing binary.²⁴

If the systemised exclusion of nonconforming identities persists, it would become incumbent to dismantle gender identity in its entirety owing to its proven non-functionality and social exclusion. However, realistically, this radical approach of dismantling gender norms in entirety would probably fail to materialise given the entrenched institutional dependence on gender identity. Thus, this paper suggests an alternative political theory which combines the merits of a nuanced, multiple identity approach with the strengths of coalitional identity politics. Referring to Judith Butler's and Iris Young's respective constructions of the 'woman' in the feminist movement, I propose an analogical inclusive framework for gender identity politics that acknowledges the differences and diversity of various transgender identities and provides for a malleable and expansive scope of navigating gender in political discourse. This inclusive framework attempts to meet the twin objectives of realizing self-determination for all gender identities as well as weakening the pillars of politico-legal other-isation of subaltern genders.

Iris Young's theory on feminist politics understands identity as a group phenomenon that precedes the individual. In contrast to atomistic ontology, she argues that identity is created only when one gains membership in a particular social group.²⁵ She favours group politics over liberal individualism as a necessary mechanism to negate the repercussions of liberal individualism. While liberal individualism has its merits, it is not cognisant of the sociological relevance of social groups. When identity is constructed as a purely individualistic phenomenon with no link to a larger commonality of traditions, the occurrence of oppression and marginalisation are also reduced to personal or natural attitudes of bias against individuals which must be remedied on a personal level without the need for political action.²⁶ Accordingly, with persistent individualisation, the reality of oppression as an institutionalised process of exerting dominance is easily dismissed, which, consequently, destabilises the demand for systemic and structural change.²⁷ Thus, Young strongly emphasises on the advantage of group politics in securing effective structural remedy against the oppression of marginalised persons.

Having established the advantages of social group action as compared to individualism, it may be argued that multiple new gender identities must be constructed for achieving self-determination in the true sense. However, the multiple genders model in practice can be dangerously susceptible to disintegrating into

²³ Anuja Agarwal, Gendered Bodies: The Case of the 'Third Gender' in India, 31 *CONT. TO I. S.* 273, 279 (1997).

²⁴ *Ibid.*

²⁵ *Supra* note 14, at 46.

²⁶ Iris Marion Young, Gender as Seriality: Thinking about Women as a Social Collective, 19 *J. OF WOMEN IN C. & S.* 713, 718-720 (1994).

²⁷ *Ibid.*, at 722.

individualism. For instance, the multiple genders strategy could enable any number of arbitrarily formed cohesions to claim a different gender identity and make the social order vulnerable to infinite fragmentation of groups.²⁸ This would effectively fragment the idea of social groups into personal groups reflecting individual concerns, which would make it harder to engineer an integrated, far-reaching and macro-level political lobby for inclusion. A possible argument for the viability of multiple genders is to put in place some form of regulation to evaluate the credibility of various identities claimed. However, this approach would frustrate the very understanding of gender identity being self-determined and distinct from state interference and control. State interference into the veracity of gender claims would culminate in universalising the dominant social group's perspective on gender identity as the normative order.

In order to avoid the pitfalls of individualist and fragmented identity politics, Young suggests that 'women' in feminist theory be united as a unique model of social group. This social group must be mindful of the intersections and differences in identities while promoting a common ideal in a common environment. As theorised by Diana Fuss, the goal of such a social collective is to pioneer a coalitional political movement without making any generalisations as to the singularity of the womanhood experience.²⁹ Thus, it allows common lobbying while ensuring that the ends can be developed and achieved as per the nuanced experiences of the different identities.

As per Young, the subject of 'woman' as a social collective is more loosely formed than the social group envisaged by Fuss. She uses the term 'serial collective' which depicts the subject of feminist theory as a group bound together by the commonality of the material environment and institutional structures that affect them.³⁰ Thus, the serial collective of 'woman' comprises of nuanced identities that have a common commitment to political action against structural oppression.

An analogy can be drawn to Judith Butler's construction of the 'woman'. She observes that the obsession with seeking a generic, uniform definition of the subject of feminist theory has led to the 'invisibilisation' of many socio-cultural intersectional concepts that create unique identities for women.³¹ She urges for a "coalitional" form of politics which understands the flexibilities of gender identities and restrains from forming pre-conceived and generalized notions of what 'womanhood' constitutes.³² Her argument is to place separate identities under one

²⁸ Iris Marion Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship* 99 *ETHICS* 250, 253-254 (1989).

²⁹ *Supra* note 26, at 724.

³⁰ *Supra* note 26, at 722.

³¹ *Supra* note 9; Butler highlights the marginalization of important intersectional identities of race, ethnicity, class, etc. in the bid for a universal definition of 'woman'.

³² *Supra* note 9, at 22.

united political umbrella group that respects the differences in experience yet works unitedly to achieve social integration of the ever-transforming identities of gender.

Applying these coalitional models to the third gender debate, I argue that it is favourable to lobby for the rights of excluded transgender identities under the ambit of one 'third gender' so long as the nuances of each emerging and existing gender identity are equally represented. The proposed model is unlike the existing framework which envisages the third gender as the *de facto* identity for persons not conforming to the heterosexual binary genders. I propose that the coalitional model must construct the 'third gender' not as a distinctive social identity in itself but as a serial collective to achieve varied individual ends without making any appropriative claims on the subject of 'third gender'. To put it simply, the 'third gender' must serve as a political union of various nonconforming identities for the limited purpose of lobbying against the dominant heterosexual social order that excludes and discriminates against all nonconforming gender identities. Thus, the diverse categories covered by the 'third gender' would associate together only for dismantling structures that have common repercussions for the progress of their different agendas. Like the diverse identities of 'woman' in Young's analysis, the diverse identities contained in the serial collective of the 'third gender' should be free to realize their own socio-cultural objectives once the common structural oppression has been confronted.

For instance, the heteronormative exclusivity of marriage and inheritance laws in India is a common concern for transgender persons. The 'third gender' identity allows for the creation of a strong, united lobby against the systemic exclusion of these family laws. However, while there exists a common goal of dismantling the extant laws, different transgender identities might demand different types of modifications in the law to facilitate their holistic inclusion in the social system. The lobby of pro-surgery transsexual individuals may be more concerned with the expansion of the traditional understanding of heterosexual marriage to include medically reassigned genders as part of the binary, whereas the intersexed lobby may demand the recognition and protection of non-heterosexual or atypical marriages within the family law framework. Thus, a coalitional form of 'third gender' politics would ensure a strong movement against the heteronormative order and the other-isation of non-binary experiences and would also provide opportunities for the nuanced realisation of differing social inclusion agendas.

A coalitional self-determination model of gender identification whereby persons are given the freedom to choose one's gender identity can be instrumental in capsizing heteronormative social institutions and structures. This model must not restrict excluded persons to choosing only the 'third gender', but also empower them to determine if their gender identity falls within either end of the binary. Self-determination takes away the state's power to assign gender and compulsively categorise the nonconforming genders in a distinct social group. It

ensures greater integration of non-binary gender identities in socio-political participation by according greater autonomy to marginalised persons to represent and develop their identities rather than making them subject to systemically or socially oppressive state structures. Extending the illustration on marriage laws, it is evident that a common lobby to dismantle the normalized heterosexual marriage framework would have greater success in combating political exclusion and other-isation as compared to fragmented efforts by different groups in pursuit of individual ends.

IV. CRITIQUING THE EXISTING INDIAN FRAMEWORK

Traditionally, Indian society has followed a practice of structural marginalisation in its treatment of persons and communities who do not identify as cis-gender. For instance, patterns of oppression and invisibilisation are evident in the colonial and post-colonial social ostracism suffered by the hijra community, whose members predominantly identify as male-to-female transgender persons, who often undergo haphazard methods of castration to regain some form of socio-religious legitimacy.³³ Once identified as hijra, such persons have to stay removed from society and are often forced into prostitution and beggary which are the only acceptable employment that society allows for this community.³⁴

Historically, Indian state policy consistently refused to acknowledge gender identities apart from heterosexual genders which indirectly resulted in the classification of transgender individuals as legal non-persons. As an automatic consequence of not fitting in, transgender persons were denied basic rights such as the right to vote, the right to marry, the right to seek education, employment, healthcare, etc.³⁵ Additionally, transgender persons were unable to prove legal identity and citizenship due to the confusion in gender selection on identity documents.³⁶ To summarise, for many years, the country's policy on gender identity or lack thereof resulted in the state-sanctioned enforcement of socio-political ostracism of transgender persons from any social, legal and civic participation.

In recent years, there has been an emergence of unregulated and unsafe “corrective” surgeries carried out by Indian surgeons in a bid to “cure” non-conformity.³⁷ This approach is influenced by Western models such as the one endorsed by the American Psychiatric Association manual which continue to “diagnose”

³³ Gayatri Reddy, *Men Who Would Be Kings: Celibacy, Emasculation and the Reproduction of “Hijras” in Contemporary Indian Politics*, 70 *SR QUARTERLY* 165, 171-174 (2003).

³⁴ *Ibid.*

³⁵ HARSH MANDER AND OTHERS, *INDIA EXCLUSION REPORT 2013-2014*, 187 (1st ed, Books for Change, 2014).

³⁶ MINISTRY OF SOCIAL JUSTICE AND EMPOWERMENT, *REPORT OF THE EXPERT COMMITTEE ON THE ISSUES RELATING TO TRANSGENDER PERSONS*, 97 (2014).

³⁷ ZAYAHARY ORTIZ for ISP COLLECTION, *THE TRANSGENDER COMMUNITY IN BANGALORE: HEALTH ISSUES AND FACTORS NEGATIVELY AFFECTING OUTCOMES*, 14 (2016).

transgender identity as a Gender Identity Disorder (GID).³⁸ By promoting such “corrective” procedures, the GID approach feeds into the notion that third gender identities are unnatural and require fixing through Sex Reassignment Surgeries (SRS). This approach enforces heteronormativity and generalizes the needs of an entire identity by reinforcing cisgender conformity against atypical gender identities. The GID model proliferates in India due to the politics of ignorance practiced by Indian policymakers which has reduced transgender issues to an unregulated and unprotected space. In light of this, it is important to critically appraise the reality of the coalitional model of self-determination against the recent policy developments aiming to uplift the transgender community.

The lobby of the United Nations Development Program and various Indian non-profit organizations for transgender rights has resulted in two institutional landmark initiatives which provided for the creation and legal recognition of a third gender identity. The following sections analyse the impact of these landmark initiatives on the socio-political status of transgender persons.

A. NALSA judgment

The first landmark was the Supreme Court decision in *National Legal Services Authority v. Union of India*³⁹. The judgment was the first judicial effort in formally recognizing the existence of a third gender and advocating the self-determination model for navigating gender identity and expression. While the judgment was a welcome initiative in recognising nonconforming gender identities, it is pertinent to question whether it achieved the goals of the coalitional, inclusive framework of self-determination described in the previous chapter. I argue that the judgment suffers from two theoretical contradictions that preclude it from devising a coalitional model of self-determination.

The first contradiction in the decision arises from the meaning ascribed to the subject of ‘transgender persons’. The operative part of the judgment provides that transgender persons have the right to self-identify their gender by choosing ‘male’, ‘female’ or ‘third gender’ and that it is the duty of the state to grant legal recognition of this choice.⁴⁰ Justice Radhakrishnan first employs a wide, umbrella definition of ‘transgender persons’ which covers a range of non-conforming gender identities, but the later references to ‘transgender persons’ limit the definition to only male-to-female transsexual persons and the hijra community.⁴¹

Framing a restrictive definition that is based on pre-conceived notions of what constitutes the third gender leads to the sustenance of an exclusive gender system

³⁸ Amber Ault, Removing Gender Identity Disorder from the ‘Diagnostic and Statistical Manual of Mental Health Disorders’: A Call for Action, 54 Soc. WORK 188 (2009).

³⁹ *Supra* note 4.

⁴⁰ *Supra* note 4.

⁴¹ Aniruddha Dutta, Contradictory Tendencies: The Supreme Court’s NALSA Judgment on Transgender Recognition and Rights, 5 J. OF I. L. S. 230 (2014).

that Butler warned the feminist struggle against. The implications of using a fore-closing definition of ‘transgender’ are evident from the subsequent Madras High Court decision of *Jackuline Mary v. Supt. of Police*.⁴² The Tamil Nadu police department was sued for identifying Jackuline as a ‘female-to-male transgender’ and denying her employment for the position of ‘woman’ police constable based on a medical examination of her sexual organs and chromosomal patterns. Relying on the NALSA judgment’s chaotic and periphrastic discussion on the composition of ‘transgender persons’, the Madras High Court interpreted the definition of ‘transgender’ to be restricted to male-to-female transsexual persons alone. As a necessary corollary to this restrictive interpretation, the judge found it incumbent that other transgender categories such as female-to-male transsexuals would have to be legally recognized only as either male or female in order to lay claim to any fundamental rights and access gainful socio-political participation within the system.⁴³

The second contradiction arises from the judgment’s inconsistent construction of the self-determination model of choosing one’s gender. The operative part constructs the self-determination model as reflective of free will without any interference from the state. However, scholars have noted that both Justice Radhakrishnan and Justice Sikri later gravitate towards a biological essentialist model regulated by the power strategies of the state.⁴⁴ For instance, the judgment generically classifies all members of the hijra community as belonging to a third gender, thus, establishing that its ambitious notions of self-determination and choice are to be selectively implemented in keeping with social prejudices.⁴⁵

Furthermore, after providing this inconsistent construction, the judgment further references the Expert Committee Report of the Ministry of Social Justice and Empowerment⁴⁶ for elaborating the self-determination model. In contrast to the principles of self-determination, the said Report advocates a highly invasive and diagnosis – based procedure to gender identification by requiring psychological tests and screening committee approvals to decide favourably for applications

⁴² *Jackuline Mary v. Supt. of Police*, 2014 SCC OnLine Mad 987.

⁴³ The decision ordered the concerned police department to reinstate the appellant as a woman police constable because she self-identified as a woman and was also assigned the ‘sex’ of female at birth. However, the decision has far-reaching consequences for the nascent evolution of ‘transgender’ identity in law and jurisprudence. By categorically stating that female to male transsexual persons are not envisaged under the NALSA definition of ‘transgender’, the judgment continues to interpret transgender identity through the politics of exclusion and state control which restrict such identities to the binary model.

⁴⁴ G.I. Semmalar, Gender Outlawed: The SC Judgment on Third Gender and its Implications, ROUND TABLE INDIA (Apr. 19, 2014), https://roundtableindia.co.in/index.php?option=com_content&view=article&id=7377:because-we-have-a-voice-too-the-supreme-court-judgment-on-third-gender-and-its-implications&catid=120:gender&Itemid=133.

⁴⁵ *Supra* note 4.

⁴⁶ MINISTRY OF SOCIAL JUSTICE AND EMPOWERMENT, REPORT OF THE EXPERT COMMITTEE ON THE ISSUES RELATING TO TRANSGENDER PERSONS 34 (2014).

by transgender persons.⁴⁷ Thus, although the judgment makes ambitious attempts to promote a self-determination model, its heavy stereotyping and reliance on state agencies to understand gender identity denigrate the principles it champions.

B. Bill for Transgender Persons' Rights

The second major institutional development in the third gender discourse was the introduction of the Rights of Transgender Persons Bill, 2014 and its many subsequent revisions. This legislative effort for legal recognition of basic rights of transgender persons was prompted by the NALSA judgment's directions for affirmative action. While the journey of the Transgender Persons Bill has been riddled with much criticism, this paper will be limited to critiquing the implications of the 2016 draft⁴⁸ on the goal of achieving a coalitional and inclusive model of self-determination.

The Transgender Persons (Protection of Rights) Bill, 2016 suffers from several limitations which have rendered it unfeasible in providing any real relief to the socio-political exclusion of transgender persons. The Bill consists of many grossly whittled down versions of the measures envisaged by the Supreme Court.

For instance, the definition of 'transgender persons' itself is reflective of the legislative pre-occupation with transformative surgery and medical categorisation of gender. The definition focuses on the physical characteristics and sex/gender deviations in identifying transgender persons and fails to effectuate the self-determination approach of gender identification. The definition seems to proceed on the assumption that transformative surgery is a natural requirement for transgender persons and, thus, leaves the inclusion of non-SRS supportive identities ambiguous. It is also ambiguous in explaining the identities covered by 'inter-sexed persons'.

Furthermore, the Bill altogether regresses towards a diagnosis-based invasive approach of gender identification by incorporating the Expert Committee's recommendation of a Screening Committee for analysing and granting the third gender identity as per the preferences of the state.⁴⁹ Essentially, the Bill requires a panel of psychiatrists, affirmed transgender persons and government employees to rule on the veracity of the transgender identity claimed by an applicant seeking the protection of the Bill. It also requires a court application for changing one's gender, which grossly violates the right to privacy enjoyed by transgender persons.⁵⁰ A public procedure of changing one's identity also contributes in making transgender persons easy targets of stigmatisation and discrimination.

⁴⁷ *Supra* note 1.

⁴⁸ The Transgender Persons (Protection of Rights) Bill, 2016.

⁴⁹ *Ibid.*

⁵⁰ Shreya Ila Anasuya, Over Two Years after Landmark Judgment, Transgender People are Still Struggling, *THE WIRE* (May 15, 2016), <https://thewire.in/35978/over-two-years-after-landmark->

In July, 2017, the Standing Committee on Social Justice and Empowerment which was constituted to analyse the Bill submitted its report enlisting many of these concerns and shortcomings in the final draft of the Bill.⁵¹ In particular, the Committee noted that the Bill had failed to incorporate the self-determination model and provide for basic civil rights for transgender persons. Although the NALSA judgment specifically directed that affirmative action measures and policy changes be planned to bring the third gender identities at par with the binary genders, the Bill failed to ameliorate transgender accessibility to basic civil rights. For instance, the final draft of the Bill removed the provisions for reservations in educational institutions and public employment. It also made no attempt to dismantle or modify the heterosexual structure of family laws, adoptions laws and property law to facilitate the inclusion of third gender identities in the social sphere.

Despite the many criticisms levelled in the Standing Committee Report, the Bill has been introduced in Parliament without incorporating any of the changes and recommendations suggested by the Committee.⁵² Thus, it is evident that the Transgender Bill has adopted a highly stereotypical approach of denying the capacity to self-identify and reinforcing a model of state control over the private sphere choices of non-heterosexual genders. Although the Bill was to be advanced to further the ideals of inclusion and self-determination envisaged by the operative rationale of the NALSA judgment, the draft floated presently only enforces scrutiny and regulation by taking advantage of the inconsistencies in the obiter of the decision.

V. CONCLUSION: ALTERNATE POLICY STRATEGY FOR SELF-DETERMINATION

In order to achieve an inclusive and coalitional model of self-identification for non-cisgender persons, it is important to acknowledge the misguided policymaking in the era of the NALSA judgment. The NALSA judgment and the legislation it conceived have approached transgender identity without dismantling the sex/gender binary and the social relevance placed on it. Thus, their attempts to grant legal recognition have created institutionalised 'other-isation' of these identities within a Foucauldian structure of state interference that blurs the public-private divide. Drafting a bill for protecting transgender rights without reforming the legal system that denies access to such rights is a futile exercise in policymaking. Thus, in order to move towards a truly coalitional model, we must rework the existing socio-legal framework on an all-pervasive level to weed out various

judgment-transgender-people-are-still-struggling/.

⁵¹ STANDING COMMITTEE ON SOCIAL JUSTICE AND EMPOWERMENT, REPORT ON THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) BILL, 2016, 8 (2017).

⁵² Anon, Government set to re-introduce Transgender Persons' Rights Bill, Ignoring Key Recommendations, THE WIRE (Nov. 20, 2017), <https://thewire.in/198486/transgender-persons-rights-bill/>.

criminal legislations, family laws, citizenship regulations, etc. that sustain the systemic oppression of the nonconforming gender identities.

I have identified three stages to achieve the goal of an inclusive coalitional model. The first stage, as mentioned above, is to identify and neuter laws that discriminate against nonconforming gender identities. For instance, several broadly worded criminal laws are implemented to target, extort and imprison entire communities of transgender persons such as the hijra community. Historically, the Criminal Tribes Act, 1871 was one of the first such vague, colonial legislations that allowed police officials to imprison hijras on charges of recidivist criminal offences without supplying any proof or investigation of the same. Today, the various state laws prohibiting beggary and sex work⁵³ are often abused by law enforcement officials to incarcerate and sexually harass transgender persons.⁵⁴ Furthermore, the Indian Penal Code continues to criminalize the very identity and freedom of sexual orientation that the legislative policy is seeking to protect.⁵⁵ The heteronormativity of personal and civil laws also serves to enforce strong exclusion of non-binary genders which cannot be remedied by merely bestowing formal recognition on transgender persons. For instance, all Indian marriage laws are framed from an exclusive heterosexual perspective and do not envisage a transgender marriage.

In order to achieve a true cohesion of transgender identities within the socio-political system, it is incumbent to re-structure the existing binary normative order to provide for inclusion at all levels of policy and implementation. Unless the third gender is given equal protection and equal opportunity in every sphere of policy where they face discrimination, any transgender-specific legislation will prove to be an exercise in superficiality.

Indian laws must ensure formal legal recognition of a third gender and its encompassing identities in all fields of social and political policy. Necessary steps must be taken in accordance with international norms to affirmatively remedy the historical discrimination and subversion of the subaltern gender identities. In this regard, reliance can be placed on the Yogyakarta principles⁵⁶ to customize the policy changes required in the Indian context. The Yogyakarta Principles, drafted by a committee of international law experts, prescribe certain basic standards and measures for addressing the human rights issues and legislative marginalisation

⁵³ Sex work is indirectly criminalized through the Immoral Trafficking Prevention Act, 1956 which inter alia prohibits any form of solicitation for prostitution and engaging in prostitution in public places.

⁵⁴ INTERNATIONAL COMMISSION OF JURISTS, UNNATURAL OFFENCES: OBSTACLES TO JUSTICE IN INDIA BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY, 13 (2017).

⁵⁵ Indian Penal Code, 1860, §§ 377, 294. The provisions criminalizing homosexual intercourse and obscenity are abused enthusiastically to target and harass transgender persons by both state authorities and members of the public.

⁵⁶ *Supra* note 6.

faced by transgender persons.⁵⁷ The document, although not binding, is comprehensive and persuasive as it affirms and contextualizes the binding international obligations of states with respect to all humans. Incorporating these principles in different spheres of legislative framework would ensure the development and practice of core human rights and principles on anti-discrimination such as the right to equal treatment, right to work, right to healthcare, right to form a family for the betterment of transgender persons.⁵⁸ Thus, the Indian legislative effort to protect transgender persons could aim to include these human rights principles and basic freedoms in various fields of policy and regulation before we can progress towards an inclusive model of gender identity. It is important to identify and rectify the statutory contradictions and stereotypes that feed into the paradigms of socio-cultural exclusion and look deeper than the superficial recognition offered by whittled down legislations.

The second stage is to rebuild the social and legal understanding of gender identity by advancing the self-determination model of choosing one's gender. Coalitional politics can succeed only when policy provides for the development of nuanced identities without generalising the experience of various, intersecting genders. Thus, the third gender identity must be constructed as an umbrella framework that does not hinder the individual commitment of the various groups that it comprises. It is relevant to look at the Argentinian and Australian legislative frameworks in this regard.

The Argentinian model provides for a choice-based model of 'doing gender' that does not require psychiatric evaluations, screening, evidentiary proof of transgender-ism or court-based petitions for determining gender expression.⁵⁹ The legislation allows individuals to opt for free transformative surgeries and medical assistance if they wish to change their assigned gender. It also makes the necessary changes to legally recognise the changed names and self-determined gender of individuals in all state documents. Although this legislation made great progress to provide measures to accommodate gender dysphoria, it did not recognize a distinct gender or genders for persons who do not associate within the binary. The Argentinian model thus, excludes the needs of transgender persons who do not subscribe or transition to either side of the binary.⁶⁰ This limitation is overcome in the Australian legislative model which also follows self-determination and does not require any state interference in gender identification. Additionally, the Australian Government Guidelines on Sex and Gender allow

⁵⁷ *Supra* note 7.

⁵⁸ In 2017, the Second International Panel of Experts in International Human Rights Law, Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics adopted a supplementing document called the 'Yogyakarta Principles Plus 10' to list certain additional principles and obligations of states for the application of international human rights law to transgender persons. Notably, the document demanded that transgender persons must enjoy the rights to state protection, legal recognition and freedom from criminalization.

⁵⁹ *Supra* note 4.

⁶⁰ *Supra* note 37, at 105.

individuals choose a gender of 'male', 'female' or 'X'; here, 'X' is understood as an indeterminate gender which accommodates a wide range of flexible gender identities.⁶¹ The Australian model also addresses the privacy concerns of the 'X' gender by keeping all records of gender identity and change of gender confidential and protected.⁶² Thus, given these precedents, it is possible for India to practice a more inclusive and respectful approach to gender identity.

The third stage is to create a framework that provides for special safeguards and measures for persons identifying as the third gender in order to dismantle the systemic discriminatory practices and attain social equality. This stage is the culmination of the collective efforts of the umbrella social group of third gender identities. The present draft of the Transgender Rights Bill does not provide any measures for affirmative action as mandated in the NALSA judgment. It is incumbent for India to focus on policy that positively undertakes the responsibility of employing affirmative action measures for reservations, protection and overall social development of the marginalized identities.

A report on gender inclusiveness in India has observed that a high percentage of transgender persons are in favour of transgender reservation.⁶³ However, the reservation policy, if any, must be drafted to benefit all transgender identities and take into account the complex intersections of caste, class and other social disadvantages. It must also allow for suitable modifications depending on the needs of particular identities within the 'third gender' framework such as transsexuals, gender queers, etc. Furthermore, unlike the scheme suggested in the 2014 draft of the Transgender Rights Bill, reservation must be made available in all interlinked stages and sectors of social life ranging from education to employment to promotions. Only then would a reservation policy stand a chance at overcoming the systemic marginalisation of the transgender community. It would also be beneficial to learn from domestic examples such as the welfare board and welfare fund initiatives of the Tamil Nadu Government.⁶⁴

Thus, there are several entrenched systemic norms in the existing framework that need to be reformed and overcome before we can address questions of the scope and nature of measures for empowering the transgender community." The starting point for empowering the transgender community is to include them in the fold of identity and personhood by according them the right to self-determination on par with the treatment accorded to cisgender persons.

⁶¹ Guidelines on the Recognition of Sex and Gender, 2014 (Australia).

⁶² *Ibid.*

⁶³ SUNIL MOHAN AND OTHERS, TOWARDS GENDER INCLUSIVITY: A STUDY ON CONTEMPORARY CONCERNS AROUND GENDER 69 (2013).

⁶⁴ *Supra* note 7, at 14.