

GENDER IDENTITY, CITIZENSHIP AND STATE RECOGNITION

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State recognition of gender identity claims in Karnataka has been in the form of administrative measures. Identity documents have become a crucial terrain where these identities are being contested, and citizenship claims are being made. These developments have given rise to a range of debates around the methods of identification of gender minorities and how inclusive the process of state recognition can be. This piece attempts to outline some of these contemporary concerns, both in terms of policy and the law.

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I. INTRODUCTION

The term gender minority refers to a diverse set of communities whose identity primarily hinges on their gender identity. Gender identity refers to a person's individual experience of gender that may not correspond to the sex assigned at birth including the personal sense of the body and other expressions of gender including dress, appearance and mannerisms.¹ State recognition of gender

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1 This definition is borrowed from the website of The Yogyakarta Principles, *The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, 2007, http://www.yogyakartaprinciples.org/principles_en.htm.

minorities² has evolved in India over the years, and this has happened both at the national and state levels. For instance the Ministry of External affairs, which is in charge of both passport applications³ and online visa forms⁴ provides for a transgender option in the category 'sex' the Election Commission of India and the UID enrolment forms have a similar option.⁵ At the state level the Tamil Nadu⁶ and Karnataka Government⁷ have enacted orders that provide for socio-economic benefits to transgender persons.⁸

These positive developments have gone hand in hand with violence, harassment and discrimination related to gender minorities in the country. The

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- 2 I have borrowed this term from the language of the Karnataka Government Order related to entitlements for this community that refers to a range of gender identities, which is the *Order related to Facilities for Gender Minorities (Hijras, Kothis, Jogappas, FTMs, MTFs, Mangalamukhis)*, G.O. Number 68/2010 dated 20 October 2010, Women and Child Welfare Department, Karnataka. The Karnataka Order does not define the term gender but refers to this term as a broad one to include hijras, kothis, jogappas, female to male transsexuals, male to female transsexuals and mangalamukhis.
 - 3 '*Third sex*' finds a place on Indian Passport Forms, INFOCHANGE INDIA, March 10, 2005, available at <http://infochangeindia.org/human-rights/news/third-sex-finds-a-place-on-indian-passport-forms.html>.
 - 4 The Government of India, *Online Indian Visa Form*, available at <http://passport.gov.in/visatest/>.
 - 5 Unique Identification Authority of India, Planning Commission, Government of India, <http://uidai.gov.in/download.html>.
 - 6 See Government of Tamil Nadu, Social Welfare and Nutritious Meal Department, *Social Welfare – Rehabilitation of Aravani's (eunuchs) Recommendation Sub-Committee – Orders Issued*, G.O. No. 199/2006, (21 Dec. 2006) available at http://www.tn.gov.in/gorders/social/sw_e_199_2006.htm and Government of Tamil Nadu, Social Welfare and Nutritious Meal Department, *Social Welfare and Nutritious Meal Programme Department Plan of Action to combat sexual exploitation of Women and Children- Constitution of Sub-Committee for rehabilitation of eunuchs - orders- Issued*, G.O. No. 201/2003, (21 Oct. 2003) available at <http://www.tn.gov.in/gorders/social/sw-e-201-2003.htm>. See also, Padma Govindan and Aniruddh Vasudevan, *The Razor's Edge of Oppositionality: Exploring the Politics of Rights Based Activism by Transgender Activists in Tamil Nadu*, in *LAW LIKE LOVE: QUEER PERSPECTIVES ON LAW* (Arvind Narrain and Alok Gupta eds., 2011).
 - 7 See Government of Karnataka, Department of Women and Child Development, G.O. No. 507/2010 (20 Oct. 2010) available on file with the author. See also, the DD1 footage of the announcement by ex Chief Minister B.S. Yeddyurappa related to the Transgender Government Order, available at <http://archive.org/details/KarnatakaCmB.s.YadiyurappaAnnouncingTransgendreGovtOrderCopyOnChandana>.
 - 8 A transsexual person is one who has undergone or is in the process of undergoing physical or hormonal alterations by surgery or therapy in order to assume new physical gender characteristics. In India Female to Male transsexuals, (FTMs) due to the exorbitant cost of surgery do not undergo surgery but dress as men and identify as FTMs.

reason that such a contradictory situation can arise is that gender minorities, especially hijras have a history of cultural acceptance. For instance, politicians are more likely to speak up for the rights of hijras than the rights of gay and lesbian persons. This climate of a certain degree of social recognition has enabled these changes in government recognition, at least as far as service delivery and entitlements are concerned. The fact that a large majority of gender minorities are also socio-economically disadvantaged has pushed Lesbian Gay Bisexual Transgender (LGBT) groups, to demand more state benefits and recognition.

In Karnataka, changes in public perception were a direct result of efforts of sexuality rights organisations like Sangama. These organisations were acutely aware of the class dynamics of LGBT identities and have reached out to working class communities over the years. The groundbreaking Peoples Union for Civil Liberties (Karnataka) report on Human Rights Violations against the Transgender Community in Bangalore⁹ is one of the first documents of its kind in India, that laid out the broad terrain of the nature of harassment and violence faced by the transgender community in India. The report remains one the most cited document in the Indian context on rights violations by both state (including police) and non-state actors in India.

In Karnataka, government and state authorities continue to engage with the issue of rights of the transgender community. Bangalore University has announced a reservation in its postgraduate courses for transgender persons.¹⁰ The state legal services authority headed by Justice Manjula Chellur has organised workshops on the issue of transgenders and the law in Belgaum, Gulbarga, Shimoga and Bangalore. This initiative is part of a larger national programme spearheaded by the National Legal Services Authority (NALSA) to bring this issue in the judicial

9 People's Union for Civil Liberties (Karnataka), *Human Rights Violations against the Transgender Community: A Study of Kothi and Hijra Sex Workers in Bangalore, India* (2003), available at <http://ai.eecs.umich.edu/people/conway/TS/PUCL/PUCL%20Report.html>.

10 This policy has not been successful so far as there are very few transgender persons who have reached the qualification to apply for postgraduate courses. Many of them have dropped out of college or school or are unable to get admission. See Rashmi Belur, *Transgender Quota in Postgraduate Courses has not Found Takers*, DNA, September 1, 2010 available at http://www.dnaindia.com/bangalore/report_transgender-quota-in-post-graduate-courses-has-not-found-takers_1431913.

mainstream. Justice Altamas Kabir, who currently heads NALSA has publicly stated that he has proposed an amendment to a bill that is being discussed around extending adoption rights to various religious groups on the lines of the Special Marriage Act, to also include provisions that will enable transgender persons to legally adopt.¹¹ NALSA is currently considering drafting a PIL specifically related to entitlements for transgender persons.

In Karnataka, the efforts of local LGBT rights groups Sangama, Mangalamukhi and Payana has resulted in a Government Order (G.O.) that secures benefits for what it terms 'gender minorities', a term that encompasses a range of gender identities including kothi, hijra, female to male transsexuals, mangalamukhis, and jogappas.¹² The government is now grappling with the question of what systems to set in place to help identify these communities.

The impetus for these benefits in the state were a direct result of a number of developments in the state, the most important of these being the C.S. Dwarakanath Backward Classes Commission Report of 2010, which emerged through a series of testimonials before the Commission in the same year.¹³ The Commission recommended that the transgender community be included in the category of more backward communities (2-B) that would then entitle them to government benefits. The Commission held that based on evidences, witnesses and spot inspection and detailed analysis, that they are more backward, and hence under the Section 19(1) of the Karnataka State Backward Classes Commission Rules 1995, the Commission recommended to the Government of Karnataka to include the sexual minorities called Hijras, Kothis, Jogappa, F to M, Mangalamukhis, Transgenders in the Category II (B) of the Backward Classes List. The basis for this decision was their finding that none of the persons from these communities who they had spoken to got government jobs either in Government Departments or in the non-government agencies. Many of them were school dropouts and a few

11 Speech by Justice Altamas Kabir, "Transgenders and the Law Seminar", organised by Karnataka State Legal Services Authority and Karnataka High Court Legal Services Committee, Bangalore, October 2011.

12 For footage from DD1 of former Chief Minister B.S. Yeddyurappa announcing this order see, *supra* note 7.

13 *Panel Recommends BC Tag for Transgenders*, THE HINDU, July 9, 2010 available at <http://www.hindu.com/2010/07/09/stories/2010070951150400.htm>.

had studied only up to X standard. Those who passed X standard were very few. None had been to colleges. The areas where they resided were even worse than slums. The rooms measuring 6x10 feet had 5 to 10 occupants. The Commission noted, “From the fact that they used to share the food they got from begging, we realized that they were backward not only economically but also socially and educationally.”¹⁴

Another important factor that led to these developments, was the fierce competition between the three main political parties in the state, with each party wooing the transgender community as even this very small constituency of voters can make a big difference in the first past the post electoral system. While the Congress, Janata Dal and the BJP have all taken a supportive stance on benefits for transgender persons, the present BJP Minister for Power, Shobha Karandlaje, has taken a personal interest in the matter, and has consciously advocated for the rights of transgender persons in the media.

State recognition of ‘gender minorities’ has been an important plank of sexuality rights groups; especially those that work with economically disadvantaged LGBT communities. State recognition, in the form of pension, health or educational benefits, is again premised on identity documents, which is now being premised on the axis of discrimination based on gender identity.

II. IDENTITY DOCUMENTS AND CITIZENSHIP CLAIMS

The identity document is an important site of contestation for those whose gender identities do not fall into conventional categories. In India, the state has already recognised these gender categories through election id cards, passport forms, and now UID (Aadhaar) forms. There is not much documentation on how or who were responsible for these changes.

One of the issues that cuts across the gender spectrum is the facilitation of identity documents, without compromising on the privacy of these individuals. For a community that has experienced harassment and surveillance by the state, processes like enumeration, creating population registers etc. need to be done in

14 C.S. Dwarakanath Backward Classes Commission Report (2010).

a manner that will include safeguards against abuse. Having said this, it is clear that for a large section of economically marginalized transgender persons, state entitlements, availability of loans, pension, health and education benefits, are an important step.

Even for transgender persons who are economically well off, the problem they face is an inability to use existing identity documents because of incompatibility of their gender identity as marked in identity documents, and their current gender identity. This mismatch in identification has huge repercussions for day-to-day transactions and can adversely impact employment, health and educational opportunities. For example, Sheetal (name changed) is a client who says that she is transitioning from male to female. Her name in her 10th Std, 12th Std and PUC marks card is Shivappa. Sheetal already looks typically female, and has obtained a certificate from her doctor that she is undergoing a sex reassignment procedure and is medically transitioning from male to female. Sheetal is potentially going to face problems if she is looking for a job, or wants to study further. While she can change her name through a name change affidavit, which is a simple enough procedure, the difficult part is to explain to her university or employers that her gender identity has also changed. Even though Sheetal has her original marks card, and a medical certificate from her doctor, not all employers or educational institutions are willing to accept this as proof of her identity. There is no standardized norms that have been laid down that prescribe that in such cases a university or place of employment will have to accept these documents as proof that Sheetal has changed her gender identity, and therefore does not need any additional documents. This is the case even when the example in question is about a person transitioning medically. The situation becomes more complicated when the person in question is not getting a surgery or medically transitioning but has transitioned as far as appearances go.

Another important discussion related to transgender persons specifically took place in 2011 around whether the UID scheme and their acknowledgment of transgender persons was a positive development. The majority of persons who spoke felt that the UID scheme, because of its potential to enable surveillance and

centralization of personal information was a double-edged sword for transgender persons. Many of those who spoke felt that what the UID would do, in the guise of opening up citizenship rights for transgender persons would be to allow for the invasion of privacy rights, greater surveillance and police tracking of a community that has historically faced the threat of criminalization. This point was reinforced by recent developments in Karnataka where the legislature unwittingly passed an omnibus legislation which was aimed at getting rid of archaic laws, but also retained a few of these laws, one of these being the Hyderabad Eunuchs Act, a law based on the dreaded Criminal Tribes Act, a colonial law that branded communities as criminals.¹⁵

Government officials have recognised the lack of identity documents as one of the main reasons for the underutilization of existing schemes aimed at transgender persons. The Karnataka Government has specifically allotted resources for the transgender community in its 2012-2013 Budget.¹⁶ The Karnataka Government has instituted a specific scheme titled Lingathwara Alpasankhyathara Yojana (Gender Minorities Programme) proposing to implement trainings, loans and subsidies through NGOs working in the area since transgenders do not have permanent addresses and there are issues related to identification of transgenders.¹⁷ Recently, the spokesperson of the Karnataka Women and Child Welfare Department Sarojini Bharadwaj said that the state government had allocated Rs 57 lakhs for schemes related to the transgender community. However, she explained that this money was not being utilized enough, as many in the transgender community did not have identification documents including a proof of residence.¹⁸

15 Siddharth Narrain, *Karnataka's Warped Law-gic: Targeting Hijras Through the Police Act*, THE ALTERNATIVE, July 26, 2011 available at <http://thealternative.in/articles/karnataka%E2%80%99s-warped-law-gic-targeting-hijras-through-the-police-act>.

16 Government of Karnataka, *Annual Budget-Part II (2012-2013)*, available at <http://www.finance.kar.nic.in/bud2012/budsp-gen2012-e.pdf>, at 32 (hereafter 2012 Budget).

17 *Id.* at 80.

18 Speech by Sarojini Bharadwaj, Gender Minorities Festival, organised by Center for Advocacy and Research (CFAR), National Institute for Mental Health and Allied Neurosciences (NIMHANS), Sangama and the Karnataka State Women's Development Corporation, 17 May 2012, Bangalore. See also, 2012 Budget, *supra* note 16.

III. INTERNATIONAL DEVELOPMENTS

International developments point to countries moving towards legislation that will enable change in gender identity and enable gender minorities to obtain identity documents. For instance, in Japan the Gender Change Bill, 2003, allowed people with “Gender Identity Disorder” to ask a family court for a change of gender on the family registry but only if they were (1) diagnosed by at least two medical experts as having “Gender Identity Disorder” (2) older than 20 years of age (3) single and childless (4) have already completed sex reassignment surgery.¹⁹ In 2008, the Philippines Supreme Court permitted an intersex individual to alter his birth certificate and change his gender from female to male, as well as his name.²⁰ In Indonesia Change of gender after reassignment surgery can be legally effected by a district court, based on jurisprudence after the case of Iwan Rubianto/ Vivian Rubianto at the South Jakarta District Court in 1973.²¹

One of the most important legislative changes of recent times is the enactment of the Argentinian Gender Identity Law 2011, a comprehensive law that allows for persons to change their gender identity in all documents including the national identity document. While the law applies to adults (persons above eighteen), minors can also use the provisions of the law provided that here is explicit consent from the minor and through the minor’s legal representatives.²² This law also allows persons above eighteen to access surgical interventions and hormonal treatment to match their self-perceived gender identity.²³

19 Makiko Matsumoto, *What has been achieved with the Bill of Gender Change for People with Gender Identity Disorder?*, 11 WOMEN’S ASIA 21: VOICES FROM JAPAN 51, 52 (2003) available at <http://www.ajwrc.org/english/sub/voice/11-2-9.pdf>.

20 Republic of the Philippines v. Jennifer B. Cagandahan, G.R. No. 166676 (September 12, 2008) available at www.intersexualite.org/Philippines-vs-Cagandahan.html.

21 Asia Pacific Forum, *Asian Commission of Jurists Report: Human Rights, Sexual Orientation and Gender Identity* (Aug. 2010), available at http://www.asiapacificforum.net/support/issues/acj/references/sexual-orientation/downloads/Human_Rights_Sexual_Orientation_and_Gender_Identity_Final_Report.doc.pdf, at 40.

22 ENGLISH TRANSLATION OF ARGENTINA’S GENDER IDENTITY LAW AS APPROVED BY THE SENATE OF ARGENTINA (Alejandra-Sarda Chnadiramani and Radhika Chandiramani trans., 2012), available at <http://globaltransaction.files.wordpress.com/2012/05/argentina-gender-identity-law.pdf>.

23 *Id.*

IV. METHODS OF IDENTIFICATION

An important debate in the move towards more state recognition of gender minorities has been the methods that are used to identify ‘gender minorities’. Sexuality rights activists Sumathy Murthy and Sunil Mohan, who work with Lesbit, a group that works on the rights of lesbians and female born transsexuals have argued that the best practice in this area will be to evolve a system of self identification. Currently the state government is in consultation with sexuality rights groups and psychiatrists in NIMHANS to evolve methods of identifying persons who will be eligible for state benefits. There are serious concerns about involving psychiatrists in certifying persons as affected with “gender identity disorder”, since this would in effect be a trade off between state entitlements and being categorized as medically abnormal.

The Argentinean model, and current debates within the gender minority community shows that best practices involve self-certification, where the state need not vet a person’s gender claims. However, when these gender claims are linked to state entitlements, there is a demand from the government that these entitlements reach those they are targeting and that there be a state approved mechanism of identifying gender minorities. In Karnataka, these negotiations have led to a situation where the National Institute of Neurosciences and Mental Health (NIMHANS), (a state funded body), in collaboration with NGOs is currently evolving mechanisms to identify persons who will be eligible for entitlements under the Karnataka G.O.

V. CONCLUSION

Increasing state recognition of rights claims based on gender identity in Karnataka and other parts of the country have provided an opportune moment for making claims for positive entitlements for gender minorities in the country. The concerns related to the process of identification, privacy rights, and the role of psychiatry in these developments, need to translate into constructive suggestions towards evolving mechanisms to allow for state entitlements for gender minorities. One method of enabling this is through more public and community consultation

on these issues. We are faced with an opportune moment to bring in changes in legal norms, and government policy around gender minorities. Beginning from identity documents, to state entitlements in education, health, and inheritance laws, and adoption laws, state authorities in India are beginning to react to civil society demands, and in some cases pushing civil society to act. Through more participative voices, we need to ensure that these changes are as flexible and farsighted as possible to encompass a diverse range of gender identity concerns.

While some of these concerns will be take care of through government measures, the judiciary will probably have to play an important role in these ongoing developments. The PIL that NALSA is contemplating is an important initiative in this area. In cases relating to identity documents and discrimination related issues, it is likely that it is the courts that will be the forum where individuals seek relief. The Delhi High Court has already laid the ground for gains on this from through its expansive interpretation of Article 15(1), allowing for an expansion of the enlisted grounds of non-discrimination in the Constitution.²⁴ The mood in the judiciary seems to be empathetic to this issue. The Karnataka High Court recently appointed C. Anu, a transgender persons, to an administrative job in the Group D category.²⁵ If this is anything to go by, the time is ripe for crucial claims to legal rights and social entitlements that transgender persons are seeking.

The challenge, however is to tackle the contradictory impulses of the state, the attempt of governments to address the problem of socio-economic rights for gender minorities while at the same time guarding against increasing criminalization of these communities through a range of legislation and unofficial drives that the police conduct from time to time.

24 Naz Foundation and Ors. v Govt. of NCT and Ors, 2009 (160) DLT 277. The judgment has been appealed by fifteen different parties in the Supreme Court (Suresh Kumar Kaushal and Ors v. Naz Foundation and Ors). The Supreme Court has reserved its verdict in this case.

25 Krishnaprasad, *High Court Strikes a Blow for Transgenders*, THE HINDU, February 5, 2012 available at <http://www.thehindu.com/news/states/karnataka/article2860948.ece>.