

IS A TRANSGENDER WOMAN LESS THAN A WOMAN?

A study of Trans-women rights under the Transgender Person's (Protection of Rights) Act

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ABSTRACT

A transgender person is one who has adopted a different gender as he or she grew old than what he or she was assigned to them by the doctor at the time of their birth. Some transgender people, after their transition, may want to be known by the gender they have chosen to adopt. Therefore not accepting them in that particular gender and segregating them from cisgender people is a result of deep-rooted prejudice in society against them. It is seen in the Transgender Person's Act that there are many lacunas when it comes to the rights of trans-women since it has not been specified whether trans-women have the same rights as cis women. The discrimination is especially apparent in the rape laws of India, specifically because such laws are gendered and the punishment for rape of a woman and a trans-woman vary greatly. Trans women face and may have to encounter in the future as well, much such injustice because of the great discrepancy in in-laws for women and trans women. It is, therefore, correct and beneficial for trans-women to be given the same definition which the constitution gives to a 'woman' and accorded the same rights as any cis woman.

INTRODUCTION

A transgender person is one who chooses to adopt an identity of a different gender or different gender expression regardless of the one that was assigned to them at the time of their birth. To understand the terms transgender or transsexual in its entirety, the difference between gender and sex has to be explicated. Sex is related to physical attributes a person is born with, while gender is a social and psychological attribute that includes a person's behaviour, perception, mannerism, and the role they play in society. Therefore when a person born with certain anatomy and other physiological conditions that lead to them being assigned or denoted particular sex, wants to re-determine their identity, they are transgender.

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Transgender people often choose to interact or express themselves in a way that does not conform to their gender assigned to them at birth. The term 'trans' is used interchangeably for transgender or transsexual.

It is pertinent to mention that transgender identity does not always establish the fact that the person has undergone surgery in the process of bringing out any kind of change in the physiology of themselves although many transgender people opt for surgery or medical treatment to align their sex with their identity. However, surgery is not the only way of transitioning and many transgender people do not even undergo surgery but simply choose to transition socially or through counselling or therapy. They may want to change their name, their way of dressing, the way they interact with society, their sex designation in identity cards, etc. So not wanting to undergo surgery or medical treatment does not in any way make their transgender identity invalid. After transitioning some Trans people do not want to be known as transgender but they want to be known by the gender they have chosen to adopt. From that time onwards a person who had particular sex or gender assigned at birth will be known by a different gender. Therefore a male who has chosen to transition and becomes a female may prefer to be called a woman from that time on and vice versa.

The rise in consciousness about the LGBTQ+ community has made the acceptance of transgender people in the main fabric of society possible to some extent although transphobia is still rampant in society and sometimes even among the LGBTQ+ community. A person of transgender identity may be known as a trans-man or a Trans woman or simply Trans, but they are hardly accepted or thought of or referred to as just a man or a woman- whatever identity they have chosen. It is problematic because if the person does not want to go by the Trans identity and just want to be of a particular gender, then not fully accepting the person as someone belonging to that gender is displaying discrimination towards them. Even in the 21st-century Trans-people are considered to be a social anomaly and do not have the place that cis-gendered people have. So a man transitioning into a woman is still not considered a woman.

This kind of discrimination is glaringly conspicuous in the various laws in India which also include the legislation made especially for transgender people. As per the NALSA judgment, where it was held that discrimination based on the identity of any kind of gender breaches the Right of equality by the law or it can also be called the equally given protection of laws constituted in Article 14 of the Constitution of India. Based on this historic judgment where

for the first time transgenders were brought under the purview of equal rights as much as cisgenders that the Transgender Person's (Protection of Rights) Bill came into existence. But it needs to be examined whether the Transgender Bill has been able to fulfill its intention of providing equal rights to transgenders, especially trans women.

TRANS WOMEN AS SEEN THROUGH THE TRANSGENDER PERSON'S ACT

In the Indian Penal Code, a “man” is called a “male human being of any age” and a “woman” is called “a female human being of any age”. However, it does not specify whether the terms male and female have to do with sex or gender identity. The Indian government enacted the Transgender Person's (Protection of Rights) Bill in November 2019 and the widespread protest by the transgender community across the country against the Bill proves that it is not what was expected or desired by the Trans community. In S. 2(k), the Bill, which has now become an Act, provides the meaning of a ‘transgender person’ as “a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as *more kin, hijra, aravani and jogta*.”² In this definition, the clause ‘a person whose gender is as such that it does not match with the gender that was assigned to that person during the time of their birth’ denotes that even if a person who is a trans man or a person who is a trans woman requires to be known as just a man or a woman they cannot be added to in the definition of a man or woman as per IPC and will be known as a transgender person because that was not the gender which was assigned to them at the time of their birth. It holds even if the person, in any case, has undergone any kind of sex reassignment surgery and possesses the physical attributes of the gender of their choice.

This discrepancy and vagueness in the definitions of man, woman, and transgender are suggestive of the fact that Trans women are not considered to be fully women or less than women. The statute does not mention anywhere whether a trans woman will be liable to the rights and facilities available to a cis-gendered woman. For example, the Act says in S. 3(e) that trans people will not be denied access to or given unfair treatment regarding any service or facility. Therefore it can be assumed from the provision that trans people have the equal right of using public transport as cis-gendered people. However, there is a distinct lack of

² The Transgender Persons (Protection of Rights) Act, 2019, No. 40, Acts of Parliament, 2019 (India).

such provision that deals with the issue of whether a trans woman who has transitioned through surgery or otherwise, has the right to occupy the seat reserved for women. This casts a shadow on the rights of trans women and sheds light on the arbitrariness and ineffectiveness of the Transgender Person's Act. Various other unaddressed issues have not been touched by the Transgender Person's Act, such as the use of public restrooms by transgender people. It is still a matter of concern across the world whether trans women can use the Women's Restroom in public places. In the United States, many states protect the rights of transgender people and let them use the restroom that best matches or which they want as per their gender identity, and harassing the person for the same is against the law.³ It is as important to have separate restrooms for transgender or intersex people although forcing trans men or trans women to use only the separate restroom amounts to segregation and unfair treatment. Such important matters have not been addressed by the Transgender Person's Act and including the sweeping statement 'facility dedicated or made for the welfare or the use of general public and is always available to the public' only serves to increase the opacity surrounding the rights of trans women.

TRANS WOMAN'S RAPE: A NEGLECTED ISSUE

This inherent prejudice against transgender people in society extends to the Section of the Transgender Person's (Protection of Rights) Act, 2019, which lays down one main provision for punishment of sexual abuse against any transgender. S.18 (d) of the Act lays down that whoever tries to harm or harms or endangers the life of transgender people or their safety, well-being, and health, whether mental or physical, including sexual abuse and other kinds of abuse must be made punishable and tends to be given imprisonment for not less than six months but which may increase to two years and also with a heavy fine. This Act conflates the clause for sexual abuse with such other clauses such as bonded labour, obstruction of passage, and forcefully making a trans person leave their household or village and the punishment for all of them are same as the punishment for acts of physical, mental, emotional and sexual abuse against a trans person.

³ Transgender People and Bathroom Access, NATIONAL CENTRE FOR TRANSGENDER EQUALITY (July 10, 2016), <https://transequality.org/issues/resources/transgender-people-and-bathroom-access>, last visited Sep. 26, 2020

It is, first of all, problematic that no separate clause or provision for sexual abuse or rape exists for trans women. In the IPC ‘rape’ is defined in a diverse, gendered, and explanatory manner such as: “Any man is called to commit the heinous crime “rape” if he—

(a) dares to perforate his penis, to any magnitude, into the mouth, anus, urethra, or vagina of any female or makes her violently to do so to any extent with him or anyone else; or

(b) tries to put or puts in any way, any kind of object or any part of his or any other person’s body which is not the penis, into the urethra, anus, or vagina of any lady or makes that lady violently do so with him or anyone else; or

(c) leads to manipulation of any part of the body of any female so that it leads to perforation into the vagina, anus or urethra or any body part of such female or makes her violently to do so with him or anyone else; or

(d) dares to apply or applies his mouth to the vagina, anus, and urethra of a lady or makes her violently to do so with him or anyone else”⁴

But the fact that trans women are raped is only acknowledged through the expression ‘sexual abuse’ and neither the word ‘rape’ is used nor is it specified what constitutes sexual abuse that is mentioned in the Act. This is especially discriminatory towards trans women and humiliating for them because they are not included in the definition of ‘women’ in IPC and therefore have no right or eligibility to demand justice under the rape laws in IPC in case of any incident of sexual assault against them.

There have been many instances of rape of trans women. It was reported in 2019 two transgender students were gang-raped in Bengaluru⁵ and how a trans woman who had won the title of Miss Diversity in 2018 had been gang-raped at the age of 11.⁶ However, there may be fewer statistics available due to the low number of reporting of such cases since trans women may not file a complaint because of the deep-rooted distrust the society has towards the transgender and also because the rape laws in India are gender-specific and does not

⁴ Section 45, Indian Penal Code, 1860.

⁵ Siddhant Pandey, *Bengaluru: Three men gang-rape two Manipuri transgender students*, NEWSBYTES (May 17, 2019) <https://www.newsbytesapp.com/timeline/india/46230/209112/two-manipuri-trans-students-gang-raped-in-bengaluru>.

⁶ Preeti Soni, *Abandoned at 7, raped at 11, India's three-time Miss Diversity, Naaz Joshi, shares the gut wrenching plight of the country's trans community*, BUSINESS INSIDER INDIA (Aug 28, 2019, 13:16) <https://www.businessinsider.in/the-story-of-naaz-joshi-indias-first-trans-international-beauty-queen/articleshow/70871959.cms>.

accommodate non-conforming genders, especially trans women. The question of gender neutrality against rape laws was raised in the first place and time in *Sudesh Jhaku v. K.C. Jhaku*⁷ by the High Court of Delhi. However, it did not get the sanction of law in India and the crime of rape remains narrowly gendered to this day.

Moreover, the punishment for rape in IPC is imprisonment of a minimum of 10 years time period but there are chances that it may extend to imprisonment which is for life and also with a fine. But in the case of transgender people which includes trans women, 'rape' or 'sexual abuse' is treated as a non-serious and dismissible offence with the punishment being imprisonment of a minimum of six months and a maximum of 2 years and a fine. Even if the rape law becomes gender-neutral there is the question of special statute overriding the general one and perpetrators of a heinous crime may easily get away with the lighter punishment prescribed in the special Act, i.e., the Transgender Act.

Therefore, it begs the question of whether the honor or modesty of trans women is not as important as that of cisgender women. Since in *State of Punjab vs. Major Singh*⁸ it has been laid out by the apex court of our country that the soul of any woman's humility is her sex, it raises a major issue that why a trans woman possessing the sex of that of a female should not be considered to have the same modesty that is attributed to cisgendered women. It speaks of the utter indifference and prejudice of the society still prevalent against the transgender community.

QUESTION OF THE RIGHTS OF TRANS WOMEN UNDER VARIOUS LAWS

Trans women being excluded from the definition of 'women' is a pervasive problem not restricted to rape or sexual abuse. In 2019 it has been ruled by Madras High Court that a trans woman can be considered as a "bride" and therefore the marriage if happens between a cisgendered man and a woman of transgender is valid under S.5 of the Hindu Marriage Act.⁹ However, the non-inclusiveness of the term 'woman' raises several issues such as whether a trans woman is allowed to file a complaint under the acts made for women such as the Protection of Women from Domestic violence Act, 2005 since this Act says that an aggrieved person can only be a woman. So if a trans woman faces domestic violence she may stand a chance of not receiving protection, relief, or compensation provided under the Act. Even in

⁷ *Sudesh Jhaku v. K.C. Jhaku*, (1998) Cri. L. J. 2428 (India).

⁸ *State of Punjab v. Major Singh*, A.I.R. 1967 S.C. 63 (India).

⁹ *Arunkumar v. Inspector General of Registration*, (2019) WP (MD) No. 4125 (India).

the case of a divorce whether a trans woman will receive maintenance is something that remained to be seen. The Transgender Persons Act may easily be used as a weapon against the very community it is supposed to protect in such cases.

Another form of deep-rooted prejudice against the trans community is also visible in the adoption policy in India. At present, there are only two options in the adoption of form-male and female and the rules do not allow the transgender community to adopt.¹⁰ So a trans woman still does not have the right to adopt because the law does not give them the status of a woman.

CONCLUSION

The socio-political discrimination against the transgender community is apparent in the statutes framed which may reveal the supercilious attitude of the legislature as well as society in general towards the community. It may be argued that the judiciary and legislature have taken the first steps towards providing equal rights to the community but the fact that trans people have been deprived and discriminated against since time immemorial cannot be effaced. Especially trans women should not have to bear with the pain and suffering of being excluded from the various rights that a woman enjoys, because whatever may be their sex at birth, a trans woman is a woman if they choose to be so. There should not be a demarcation as such between 'woman' and 'trans woman' and trans women should be included in the definition of 'woman' under the Indian statutes if true equality for them is to be achieved. However, for that to be a reality the mindset and attitude of the people in society need to transform. Education must be inclusive and teach equality and respect for all human beings, irrespective of their gender. Even in policy-making, there should be a change that must focus on inclusion rather than framing exclusive policies and legislation for particular communities. It is the right of each transgender person to live a life of their desire.

¹⁰ Mini Muringatheri, *Transgenders Raise the Adoption Question*, THE HINDU (Jan. 5, 2020) <https://www.thehindu.com/news/national/kerala/transgenders-raise-the-adoption-question/article30481170.ece>, last visited Sept. 27, 2020