

TRANSGENDER RIGHTS IN PRISONS

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ABSTRACT

Gender is a social construct and one of the most important factors in prison management. This classification is omnipotent for protecting basic essential human rights. when it comes to prisons we have a total lack of sensitization in the way transgender prisoners are handled in our country.. This can be seen in the policies, management and normal day to day activities and interactions. However, their problems are never ending. Apart from the social stigma , they face chaos in their minds as society recognizes only two genders i.e., male or female. Article 14 and article 21 recognizes the term “ person or citizen“ which stresses on gender neutrality. The study limits itself to the rights of transgenders in jail and the problems faced by them. When it comes to prisons, our society needs to be sensitized how the transgender prisoners should be handled in jails in our country. This can be seen in the policies, management and normal day to day activities and interactions.

Keywords: Transgender, gender dysphoria, gender neutrality

INTRODUCTION

Gender is a social construct and one of the most important factors in prison management. This classification is omnipotent for protecting basic essential human rights. However in this binary classification, what has been neglected from years is a hidden and vulnerable category, transgender. A community facing discrimination both inside and outside Prisons throughout the world, but the threats and the risks that community faces increase extremely high behind the bars leading to some of the most gross human rights violations. It is visible in its procedures, management and consequences after release. But to understand these threats we need to understand transgender and their position in India. “A person whose physical sex at birth differs

from the sex with which the person later identifies is a transgender”¹ It is an umbrella term which may include transgender males, Transgender females, intersex, non-binary or gender fluid. Many of these people may or may not choose to undergo Gender reassignment surgery. In India we find many socio cultural identities of these community socio-cultural identities as kinner, hijra, aravani and jogta. ² Hijras may not show any inclination to any male or female or may prefer an in between role whereas Kothis are biological male with feminine inclination. Jogis and Shiv Shakti devote themselves to different gods or deities. They may have a feminine gender expression and cross-dress as women during religious rituals and festivals. It’s important to remove myths or stereotypes associated with transgender in a society to ensure they are accepted and able to live freely.

PSYCHOLOGICAL PERCEPTION OF GENDER

Many a times your biological gender at birth is not in conformity with your inception of self and your psychology. Biological perception of gender was recognized in most of part of the country and India before section 377 was decriminalized. New York family court in *Corbett v. Corbett* ³and *R v. Tan*⁴ recognized a biological perception of test and rejected the use of Psyche in perception of gender, this also includes Australian courts.⁵ However *NALSA v. U.O.I* had brought out a number of cases globally that had acknowledged a psychological perception of gender. This also includes Australia with a special anti-discrimination legislation to protect transgender rights.⁶ It noted that “Gender is not a matter of chromosomes, but is purely a psychological question, one of self-

¹ Black's Law Dictionary 513 (10th ed. 2015).

² Transgender People (Protection of Rights) Act 2019 : "transgender person" means 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, gender queer and person having such socio-cultural identities as kinner, hijra, aravani and jogta”.

³ *Matter of Corbett v. Corbett*, 100 Misc. 2d 270, 418 N.Y.S.2d 981 (N.Y. Fam. Ct. 1979).

⁴ *R v TAN* [2020] QCA 64.

⁵ *MT v JT* 355 A 2d 204 (1976).

⁶ Anti-Discrimination Act 1977 (NSW) s 38A; Transgender (Anti-Discrimination and Other Acts Amendment) Bill 1996 (NSW); Discrimination Act 1991 (ACT) Dictionary; Anti-Discrimination Act 1991 (Qld) Dictionary; Equal Opportunity Act 1984 (SA) s 5(5); Anti-Discrimination Act 1998 (Tas) s 3; Equal Opportunity Act 2010 (Vic) s 4; Anti-Discrimination Act 1992 (NT) s 4; Equal Opportunity Act 1984 (WA) s 4.

perception, and partly a social question, how society perceives the individual.”⁷ NALSA v. U.O.I⁸ have laid down extensively guidelines to recognize gender identity and equal constitutional rights.

REASON OF THREATS IN PRISONS

It is important to understand why threats to transgender increase inside Prisons. *First* reason involves binary categorization of Prisoners in Indian system. Prisoners are ordinarily to be housed according to their legally-recognized gender, the basis of it being derived from documental identity and biological sex. Because of which we don't have data on transgender prisoner and recognition of their problems and rights then becomes an even more farfetched idea. National Crime Records Bureau (NCRB) has no such data in its annual Prison Statistics. It was in 2020 recently after filing a public suit in Delhi High Court, NCRB was directed to recognize and classify transgender as a separate third gender in their annual publication of prison statistics from 2019 onwards.⁹ Only ten states, including Karnataka Andhra Pradesh, Telangana, Gujarat, Maharashtra and Rajasthan, keep transgender inmates separately from male and female inmates.¹⁰ Some other states follow the same by **segregation by either confining them in separate cells, isolation wards or inside hospitals**. States like Punjab and some jails in Jharkhand and Kerala said in RTI responses have mentioned that such segregation also happens only after court warrants for judicial custody.¹¹ These insights have been from an initiative of a report by Justice Madan Lokur. Rule 7 A of Mandela rules¹² specifically states that precise information enabling determination of his or her unique identity, respecting his or her self-perceived gender should be provided to prisoners and many prison manuals in India

⁷ Lockhart, J. in Secretary, Department of Social Security v. “SRA”, (1993) 43 FCR 299. *See also* Re JG, JG v. Pengarah Jabatan Pendaftaran Negara (2006) 1 MLJ 90.

⁸ National Legal Services Authority v. Union Of India & Ors, AIR 2014 SC 1863.

⁹ KARAN TRIPATHI V. NCRB, WRIT PETITION (CRIMINAL) NO. 9596 OF 2020.

¹⁰ Read more at: <https://www.deccanherald.com/national/ncrb-doesn-t-have-transgender-prisoners-data-rtis-count-214-such-prisoners-923188.html>.

¹¹ Ghosh, Arijeet ; Dhanuka, Madhurima ; Bourtoth, Sai ; Fernandes, Fernando Lannes ; Singh, Niyati ; Kumar, Chenthil. / **Lost Identity : Transgender Persons Inside Indian Prisons**. New Dehli : Commonwealth Human Rights Initiative, 2020. 128 p.

¹² UN General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) : resolution / adopted by the General Assembly, 8 January 2016, A/RES/70/175, available at: <https://www.refworld.org/docid/5698a3a44.html> [accessed 3 September 2021]. Hereinafter Mandela Rules.

do not support this in action. The Yogyakarta Principles, under Principles 9 and 10, cover the basic right to be treated with respect and humanity as well to be free from torture, cruelty, and other inhuman and degrading treatment.¹³

Since third gender is still a stereotype and myth in the minds of most of the people in India, so when it comes to prisons we have a total lack of sensitization in the way transgender prisoners are handled in our country. This can be seen in the policies, management and normal day to day activities and interactions. Absence of any national or state policy regulating discrimination of transgenders can also be one of the reasons for it and thereby leads to no accountability at all along with gross human rights violations. Therefore transgenders are terrorized, tortured and humiliated inside Indian Prisons. We can understand the difficulties faced by them with comparison conducted from other countries.

Many of the transgenders follow some practices that help them confirm or live according to their self-perceived genders. This becomes even more difficult when they have changed their body in accordance with their identity. This may include Gender Reassigning Surgery which comes with its own risks and side effects in its procedure¹⁴ some may choose to not undergo surgery and some surgeries might not be successful, then they use alternative methods which becomes a part of their identity that needs to be respected by Prison officers. This can be explained through Scottish example.

The Scottish Prison Service has issued a series of short films designed in collaboration with Equality network to provide guidance to prison staff on searching transgender prisoners. Name- “ Searching A Transgender Prisoner: Training Series”¹⁵The films demonstrate a promising practice in that they clearly outline issues around the arrival of a transgender prisoner and make it clear why a gender-sensitive approach is so important by showing how-

¹³ International Commission of Jurists (ICJ), Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity, March 2007, available at: <https://www.refworld.org/docid/48244e602.html> [accessed 3 September 2021].

¹⁴ P Fitzgibbons R. (2015). Transsexual attractions and sexual reassignment surgery: Risks and potential risks. *The Linacre quarterly*, 82(4), 337–350. <https://doi.org/10.1080/00243639.2015.1125574>.

¹⁵ Searching A Transgender Prisoner: Training Series
Training / Instructional / Corporate Video / Testimonial for the Scottish Prison Service & the Equality Network, https://www.productionattic.com/portfolio/prison_

PROSTHETICS- The series points out how many of the transgenders undergoing or not undergoing surgeries use prosthetics. “A transgender male (transforming from male to female) may use silicon breast or breast prosthetics or may use a commercially purchased sports binder. They may use even rice or lentils filled inside tides when they have no other option. Use of wigs is also another thing used which is essential to their part of identity. Similarly a transgender female (transforming from female to male) may use artificial penis, sponge in a pair of tides, hair gel filled in a condom and some peeing devices.” Scrutiny of all this should be done carefully and respectfully to ensure there is no presence of harmful devices for security reasons. And correction officers in India need to be sensitized about it and there should be no discriminatory marks or any behaviour that makes them feel abused or less than a human. All these objects used should be treated with respect, just like a part of their bodies with utmost respect and professionalism.

BODY SEARCHES – It is an instrumental part of transgenders personality. According to the interview in series, why this is crucial as body searches require inspection of private body parts that some transgenders themselves feel nervous about as it does not matches with their innate sense of gender. Therefore exposing such parts in front of a stranger becomes even more horrifying experiences especially when you are not comfortable with that person. Therefore there should be a proper professional procedure adopted for body searches. Ordinarily in binary systems of Indian Prisons, body searches are performed by female officers for female prisoners and vice versa for males. Male and female is determined by biological sex. But when it comes to transgenders, a transgender should be given an option for choosing the gender of the prison officer with whom they will be comfortable for body searchers. This process should be explained by them by a prison officer, if it is accompanied by a transgender officer or prison staff that will be better as that will make them feel comfortable. The process of prison systems is rehabilitation that should be remembered at all times. Before the conduct of body searches, the prisoner should be asked if they feel any sort of harm or danger of abuse from the prison officer conducting such search and it should be a systematic process. First upper half of the body should be checked followed by lower half and not the whole body at once. Search should

be bearable for transgenders respecting their dignity and not treating them as someone freakishly different. Mandela rules guides that “Intrusive searches, including strip and body cavity searches, should be undertaken only if absolutely necessary. Prison administrations shall be encouraged to develop and use appropriate alternatives to intrusive searches.”¹⁶ In America it is promoted through various guidelines that undertake to protect transgender prisoners’ privacy, such as allowing them to shower separately from others if they choose.¹⁷

SUICIDES AND SELF HARM -

It is said that many of the transgenders suffers gender dysphoria and other mental health problems inside prisons which make them even more vulnerable to suicides. Prisoners should be given the right to perceive their gender as soon as they enter prisons. In case of any doubt on their identity for security reasons, their previous history of medicines for their hormones, or medical proofs or any medical help might be relied upon. Their previous gender history should strictly be kept confidential. Transgenders medical status, HIV treatment, dysphoria should ideally be kept be confidential respecting their right to privacy constitutionally recognized by Indian court.

Gender dysphoria is psychological stress about one’s gender identity that may include depression, anxiety, compulsivity, behavior disorders, personality disorders, and may also lead to self-harm and suicide.¹⁸ This also happens when they are not allowed to continue with their hormone medicines, their specific clothes essential to their identity or a male transgender being given male clothing. No government policy also allows them to continue with their gender reassigning surgery or medicines that comes with that procedure. Right to equal medical help is a fundamental right of the prisoner. Even mental health checkups and counseling are not sensitized about transgender issues and there specific issues are left unaddressed. This may lead to suicidal tendencies. In jails more often than not suicides and suicidal attempts happen within first month of

¹⁶ *Id* at 6. (Rule no. 52, Mandela Rules.)

¹⁷ Prison Rape Elimination Act National Standards—Prisons and Jails: Use of Screening Information. C.F.R. § 115.42 (2012).

¹⁸ Yvette K. W. Bourcicot & Daniel Hirotsu Woofter, Prudent Policy: Accommodating Prisoners with Gender Dysphoria, 12 *Stan. J. C.R. & C.L.* 283 (2016). *See also* AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 458 (5th ed. 2013).

incarceration.¹⁹ Now one of the reasons for self-harm and suicides are social adjustment which includes social isolation and difficulties with rules adherence. What happens when rules and system designed are against the basic perception of who they are? That has a tormenting impact on a person and till date there has been no state liability for it. Deliberate indifference may be manifested by prison doctors or officials in their response to the transgender prisoner's needs or they also intentionally deny or delay the access to medical care or intentionally interfering with the treatment if they have any prejudices with the community or as a result of their previous biases. Treatment of gender dysphoria may include medical and psychological change in identity that is consistent with the individual's gender identity, hormone therapy, surgery to change sex characteristics (for example, chest surgery, external or internal genitalia, facial features, and body contouring), and psychotherapy.²⁰ Sometimes sex reassignment surgery has been seen to reduce the chances of self-harm but in American federal courts this has debated whether such a remedy goes beyond constitutionally mandated medical care.²¹ However globally gender dysphoria has been recognized as a serious medical need and if it is necessary to save a life and mental health of individual severe cases , there should be an option for it in prisons. American Courts have also found that psychotherapy may be constitutionally required in specific cases.²² In many of such treatments hormonal medicines are provided to release the psychological stress, which many Indian jails do not allow prisoners to continue with, once they enter prison.

WHY A SEPARATE ISOLATED CELL IS ALSO HARMFUL?

Prisons where allotments of prison cells are based on biological gender poses a great threat to the transgender person as well as the inmates. In Telangana it was seen that since the transgender women had not undergone sex reassigning therapy, they were placed in male prisons and are forced to limit gender expression by altering other

¹⁹ John Gannon, Suicide Prevention , Intervention and Post Event Mentoring webinar , International Network of Justice Improvement Organizations.

²⁰ Yvette K. W. Bourcicot & Daniel Hirotsu Woofter, Prudent Policy: Accommodating Prisoners with Gender Dysphoria, 12 Stan. J. C.R. & C.L. 283 (2016).

²¹ Kosilek v. Spencer, 774 F.3d 63, 90 (1st Cir. 2014).

²² *Bowring v. Godwin*, 551 F.2d 44 (4th Cir. 1977).

feminine markers, such as shaving long hair, and removing jewelry. ²³Sometimes transgenders are housed with people who are already suffering from mental illnesses or HIV or rabies due to lack of accommodations.²⁴ Accounts by transgender persons reveal that they face verbal, physical, and sexual violence in prisons by jail wardens and other inmates. This can pave way for sexual abuse and harassment. In an Australian case , Veronica arrested for selling drugs; despite identifying as female, Veronica was housed with the male population and was not given the hormone medication which she had been prescribed. Not even a week later, Veronica was found dead in her cell, having committed suicide. ²⁵ Therefore, India having similar positions in many correction centers and inadequate state policy leads to many such incidents going unnoticed. Ordinarily we have seen a trend in putting transgenders in separate isolated cells and not involving them in other daily activities of prison to avoid any threat or danger to them. But this policy also has negative consequences. As it one way or another turns into a solitary confinement. No interaction in jails can have major consequences on a person's mind. The trauma of these kinds of conditions can lead to long-term psychological harm, and they can be especially damaging for youth and those with preexisting mental health conditions or cognitive or developmental disabilities. Therefore, our aim should be to reintegrate them, create a separate cell for them and still allowing them be the part of other activities like vocational skills. Education, meditation and counseling programs and other activities.

ISSUE IN INDIAN ACT-

Biggest issue in India is that unlike Australia, there is no separate legislation that makes states and individuals accountable for any kind of discrimination against transgenders. In 2019 government of India passed Transgender Persons (Protection of Rights) Act²⁶

²³ 5 Donita Jose, Telangana prisons too prejudiced against transgender persons, THE INDIAN EXPRESS, January 17,

2019, available at <https://www.newindianexpress.com/cities/hyderabad/2019/jan/17/prisons-too-prejudiced-againsttranspersons-1926129.html> (Last visited on August 13, 2020).

²⁴ Misgendering, Sexual Violence, Harassment: What it Is to Be a Transgender Person in an Indian Prison, The Wire, 3 September 2021 , <https://thewire.in/lgbtqia/transgender-prisoners-india>.

²⁵ Alicia Wood, 'Why Did Our Sister Die in a Men's Jail?', The Sydney Morning Herald (online), 10 April 2011 < <http://www.smh.com.au/nsw/why-did-oursister-die-in-a-mens-jail-20110409-1d8fe.html>>.

²⁶ Transgender Persons (Protection of Rights) Act 2020

According to the Bill, Transgenders need to apply for a certificate of identity indicating their gender as “transgender “which would be approved by District Magistrate. If a transgender person undergoes surgery to change their gender either as a male or female, a revised certificate may be obtained. At this point, the District Magistrate will examine the medical certificate issued by a Medical Superintendent or Chief Medical Officer. This ensures a lot of corruption and violates their basic constitutional rights wherein a person might not be allowed to live their life according to the gender they identity. This procedure subject transgender persons to intensive scrutiny *which may also violate their privacy rights. Bill also does not guarantee equal punishment for sexual abuse that is just up to two years. Therefore what may happen from this bill is that transgenders who are not able to produce a certificate or their application is not approved by a District Magistrate, they will be lodged in a prison same as their biological sex posing an extreme harm on their rights and mental health. The whole procedure rests too much power on government and is arbitrary in nature.* Risks are greater for sexual minorities, as additional threats may be used by law enforcement officers to extort a confession. Like police officers may threaten to reveal the detainee’s sexual orientation to family members, friends or colleagues to obtain a confession or a transgender person may even be brought to the police station on a false pretext in order to ask them for money or sexual favours in exchange for their freedom.²⁷ This happens more in countries whose society to a considerable extent still consider them different or states that don’t recognize third gender. In Cameroon, most trials for homosexuality based on confessions, law enforcement officers tend to resort to torture and ill-treatment in order to obtain the ‘evidence’ they are looking for.²⁸ Bribes and extortion by the police may occur not only for the purpose of extracting a confession, but also as a way of securing the person’s release.

²⁷ LGBTI persons deprived of their liberty: a framework for preventive monitoring, Penal Reform International, ISBN: 978-1-909521-49-0, [*lgbti-framework-2nd-ed-v7-web.pdf](#).

²⁸ Such cases were documented in Panama, Brazil and Guatemala, see *The night is another country. Impunity and violence against transgender women human rights defenders in Latin America*, Redlactrans and International HIV/AIDS Alliance, 2012.

REMEDIES-

Equality in practice is long drawn enforcement process which has to be checked time and again. Here I suggest few changes that they may rely in order to ensure transgenders don't go back from prisons as tortured individuals who are more terrorized and with increasing mental health issues but as responsible and healthy citizens .

First in this list is a system of proper sentence planning that is specially designed for the transgenders and focus on individual on case by case basis. It starts from the 1st day of entry of the prisoner by doing a proper risk assessment, knowing their identity and medical history , their present problems along with the kind of hormonal medicines they are taking. This should ideally be done with the help of prison officers who are sensitized about transgender rights or themselves belong to that community or aid can be taken from many transgender rights NGO's. Officers should also enquire about their hobbies and skills which can be capitalized upon during their prison period along with any prior mental health issues or history of self-harm. All these information should be kept confidential and utilized to plan their daily activities, accommodation and the kind of monitoring required. It also helps you to categorize prisoners on high risk. Their should be record for every prisoner that should be re-visited time and again.

“A standardized sentence plan includes: a system of priority setting

keeping the full length of the sentence in mind

Transition back into the community as part of the plan

updating every six month based on case conferences, the

Prisoner should be actively involved”²⁹

²⁹ SENTENCE PLANNING - Toolkit –UK , <http://nomsintranet.org.uk/roh/official-documents/London%20MDP%20-%20sentence%20planning%20handbook.pdf>.

Transgenders special needs should be kept in mind for their psychological interventions, vocational training, prosaically contact with the outside world and life skills. They should not feel isolated from the treatment meted out to others just because of their gender and a need to protect that gender from other.

Second, sensitizing prison officers and staff along with non-trans inmates about transgender rights. This also includes the kind of terminology that should be used to refer to them . Ideally a transgender person should always be asked for their pronouns. Other than that there is a standard gender neutral way devised in recent years to refer them , “They” is also used to refer to them and ensure that you respect them and their identity. Some people choose to use the gender-neutral pronouns “ze/hir/hirs” (pronounced “zee/here/heres”) or “ey/em/eir” (pronounced “ay/em/airs”), among others.

“HE/SHE	HIM/HER	HIS/HER	HIS/HERS	HIMSELF/HERSELF
zie	zim	zir	zis	zieself
sie	sie	hir	hirs	hirsself
ey	em	eir	eirs	eirsself
ve	ver	vis	vers	versself
tey	ter	tem	ters	tersself
e	em	eir	eirs	emself” ³⁰

Their prosthetics should be treated as a part of their bodies and they should be allowed to continue with their hormonal medicines and there should also be an option of starting a gender reassigning surgery in some severe cases. There should be separate transgender prisons and they should be allowed to interact and take part on every other prison activity so that they don’t feel isolated.

Third, there should be a accountability mechanism. Like Australia, transgender prisoners should be allowed to report any abuse or any arbitrary behaviour with them or any kind of ridiculing in relation to their identity. We have a similar act for schedule castes and schedule tribes in India, seeing how vulnerable the LGBTQ+ community is, we need a

³⁰ University of Wisconsin, wm.edu/lgbtrc/support/gender-pronouns/, <https://uwm.edu/lgbtrc/about-us/>.

similar legislation in India in reference to LGBTQ+. Present Transgender People (Protect of Rights) Act provide no accountability mechanism. Even if there is no national or state policy in regards to it, every police station can adopt a similar policy at an individual level. Like Born free and equal' a policy by the Human Rights Commission of New Zealand which is based on the Yogyakarta Principles and stipulates that , "all people, regardless of their sexual orientation or gender identity, have the same rights and freedoms."³¹, Establishment of monitoring bodies that will monitor all the prisons and its activities and ensure accountability is another way. Monitoring bodies can put in place an institutional policy encouraging recruitment of Prisons representatives, whether staff, experts or honorary members – from minority groups and vulnerable persons, including LGBTIQ+ people.³²

Fourth , Therapeutic Community – a model that that ensures a community program to learn a positive and caring environment in Prison.³³ It sees Prison staff as positive models and are called rational authorities. This if integrated with Transgender rights, it can really make them feel better and not paranoid being in an environment where nobody identifies them. It will help other inmates as well to respect and recognize transgenders. Here rational authorities helps everyone to accommodate with them, they facilitate rather than punish. This ensures they form a community that over the time, believes and expects that what it has to offer should be valuable and beneficial. It encourages learning by watching others and encourages communication. This can be implemented by rational authorities maintaining accurate records, planning group activities and establishing a system where they earn their rewards and privileges. And through all this also imbibe modern pro-social values.

CONCLUSION-

Gender is a psychological perception where as sex is a biological term, something that is assigned at birth on the basis of your genitals. Prejudice is also a state of mind. It high time that Indian Constitution's core foundation lies in the principle of equality, freedom and liberty for all. To ensure transgenders are given their basic rights, it is important to

³¹ 5. See Sexual orientation and gender identity, New Zealand Human Rights Commission https://www.hrc.co.nz/files/1914/2388/0525/HRNZ_10_rights_of_sexual_and_gender_minorities.pdf.

³² *Id* at 27.

³³ *Id* at 19.

ensure they do not feel vulnerable inside our prisons and even outside. Law making and law enforcing authorities should enforce ideals that help different and diverse communities to reintegrate and live with each other peacefully. Prison systems are one such area that needs to reform itself from scratch to ensure Gender rights.

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