

THE STATE AND THE CONSTRUCTION OF NON-NORMATIVE CITIZEN

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This paper looks at the construction of the Transgender Citizen through an examination of the NALSA Judgment¹ and the various drafts of Bills for Rights of Transgender Persons. The paper also examines the parallels between the drafts of Bills for Rights of Transgender Persons and other legislations that have been passed during the same time, namely the National Register of Citizens², Surrogacy Bill³ and Trafficking Bill⁴, to discuss the construction of the normative Indian citizen as imagined by the State.

I. INTRODUCTION

Citizenship becomes an important marker for individuals and communities to be included to ensure their Rights. It has been recognized that the idea of citizenship has itself been very gender- blind and queer people only get included into this partially even in countries where queer rights are recognized.⁵ In the context of India, Transgender Persons were not recognized as Citizens until recently. As the NALSA Judgment⁶ gave recognition to the Transgender Identity, it also constructed a certain idea of the Transgender Citizen.

This paper is a part of my PhD work on Queer Citizenship and Nationalism. In this paper, I have explored the ways in which the Transgender Citizen has been constructed by the State. This has been done through a detailed textual analysis of the following judgments and legislations: National Legal

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¹ Ministry of Home Affairs, Government of India, available at <<https://censusindia.gov.in/2011-Common/NRIC.html>>last seen on 27-2-2020.

² Ministry of Health and Family Welfare, Government of India, available at <<https://www.prindia.org/billtrack/surrogacy-regulation-bill-2019>> last seen on 27-2-2020.

³ Ministry of Women and Child Development, available at <<https://www.prindia.org/billtrack/trafficking-persons-prevention-protection-and-rehabilitation-bill-2018>>last seen on 27-2-2020.

⁴ Richardson, D., *Rethinking Sexuality*, New Delhi: Sage Publications, 92, (2000).

⁵ *Supra* note 1.

Services Authority Vs Union of India Judgment; The Rights of Transgender Persons Bill, 2014; The Rights of Transgender Persons Bill, 2015; The Transgender Persons (Protection of Rights) Bill, 2016; The Transgender Persons (Protection of Rights) Bill, 2018 and The Transgender Persons (Protection of Rights) Act, 2019.⁷ I have used various reports and recommendations on the Bills given by LGBTQ groups as well as committees set up by the Government as well as statements, *par-chas* and petitions used for the protests and campaigns as secondary data.

I have made an attempt at queering methodology and employing a feminist lens to this research. I have used queering as a verb rather than adjective here because I see it as a process and journey rather than a fixed position⁸. Hence, there is constant reflexivity and deconstruction employed while analyzing the texts as well as writing the research. The idea of this research is not to look at people who identify as queer, but it is an attempt to challenge normative ways of reading texts which is both masculinist as well as heteronormative.

II. TRANSGENDER RIGHTS: A BRIEF TIMELINE

In this section, I will look at the trajectory through which transgender rights have come about in India. While looking at the trajectory, I have also looked at the activism that has taken place around the legislations.

National Legal Services Authority Vs Union of India or NALSA⁹ which gave recognition to Transgender Identified persons as “Third Gender”, passed on 15th April 2014 by the Supreme Court, marked a significant turn for transgender individuals, because it distinguished them from the communities that came under the acronym of ‘LGB’, especially because it came right after the re-criminalisation of homosexuality. NALSA had filed a writ petition with the Supreme Court in 2012 which was tagged with another petition filed in the Supreme Court by the Poojaya Mata Nasib Kaur Ji Women’s Welfare Society. Subsequently, Transgender Activist Laxmi Narayan Tripathi filed an intervention with the help of Lawyer Anand Grover.¹⁰

Following the NALSA Judgment, on 12th December 2014, DMK party leader Tiruchi Siva, a Member of the Parliament of the Rajya Sabha (Upper House) introduced the Rights of Transgender Persons Bill, 2014 as a private

⁷ Ministry of Social Justice and Welfare, Government of India, available at <<https://www.prsindia.org/billtrack/transgender-persons-protection-rights-bill-2019>> last seen on 27-2-2020.

⁸ Hammer and, Brown III, Towards a Feminist–Queer Alliance: A Paradigmatic Shift in the Research Process, 18(1) Social Epistemology 85(2004).

⁹ *Supra* note 1.

¹⁰ Semmalar, G.I., Gender Outlawed: The Supreme Court Judgment on Third Gender and its Implications (19-4-2014), available at Round Table India<http://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>last seen on 27-2-2009.

member's bill.¹¹ The Bill was unanimously passed by the Rajya Sabha on 24th April 2015 and later introduced in the Lok Sabha (Lower House) for debate on 27th February 2016.¹² The prompt action by Raj Sabha has been speculated to be a result of the pressure of emancipation that the judgment had placed on the parliamentarians.¹³

In December 2015, the Ministry of Social Justice and Empowerment (MSJE) uploaded a draft Bill on transgender "protection" on its website.¹⁴ After calling for recommendations, in August 2016, the Ministry introduced another Bill, namely The Transgender Persons (Protection of Rights) Bill 2016¹⁵ which was severely criticized by the community and was sent to the Standing Committee after several protests against the same. The Committee presented the 43rd report on the Transgender Persons (Protection of Rights) Bill, 2016 in July 2017.¹⁶ In November 2017, media reports announced that the MSJE had decided to reject all the recommendations of the Report and table the original Bill in the winter session of 2017.¹⁷ This resulted into a Campaign to "**Stop the atrocious Transgender Persons (Protection of Rights) Bill 2016**" across several parts of the country. However, the Bill did not come up for hearing till the Lok Sabha Session on 17th December 2018 and was passed in the middle of protests over the Rafale deal and Cauvery issue.¹⁸ Despite the huge protests, only one recommendation regarding the change of definition was incorporated. The Bill then lapsed on March 2019 because it could not be passed at the Rajya Sabha and the Lok Sabha term ended in April 2019. It was finally passed in the Lok Sabha in August 2019 by the newly formed government, by the Rajya Sabha in November 2019 and signed by the President on 5th December 2019 to be made into a law.¹⁹

Interestingly, this process also started around the time when there was a change of Government. In May 2014, Bharatiya Janta Party (BJP) came into

¹¹ The Rights of Transgender Persons Bill, 2014 (passed by Rajya Sabha, 24-4-2015).

¹² Amit Agnihotri, Rajya Sabha Passes Bill to Promote Transgender Rights, India Today (25-4-2015), available at <<https://www.indiatoday.in/india/story/transgender-rights-bill-passed-rajya-sabha-dmk-250137-2015-04-25>> last seen on 5-1-2020.

¹³ S. Datta, Transfeminist Mobilisations Need to be Both Transformative and Transgressive, 53(30) Economic and Political Weekly (2018), available at <<https://www.epw.in/engage/article/transfeminist-mobilisations-need-to-be-both-transformative-and-transgressive>> last seen on 5-1-2020.

¹⁴ Ministry of Social Justice and Empowerment, Government of India, Transgender Protection Bill, available at <<http://prsindia.org/uploads/media/draft/Draft%20Rights%20of%20Transgender%20Persons%20Bill%202015.pdf>>, last seen on 5-1-2020.

¹⁵ The Transgender Persons (Protection of Rights) Bill, 2016 (Draft Bill, August 2016).

¹⁶ *Ibid.*

¹⁷ Arvind Narrain, How the Centre's Bill to Protect the Rights of Transgender People will Actually Hurt them, The Scroll, (1-12-2017), available at <<https://scroll.in/article/859620/how-the-centres-bill-to-protect-the-rights-of-transgender-people-will-actually-hurt-them>>.

¹⁸ The Transgender Persons (Protection of Rights) Bill, 2018 (passed by Lok Sabha, 17-12-2018).

¹⁹ The Transgender Persons (Protection of Rights) Act, 2019; Sanyukta Dharmadhikari, Trans Bill 2019 Passed in Lok Sabha: Why the Trans Community in India is Rejecting it, The News Minute (5-8-2019), available at <<https://www.thenewsminute.com/article/trans-bill-2019-passed-lok-sabha-why-trans-community-india-rejecting-it-106695>> last seen on 5-1-2020.

power with a sweeping majority without any official party to be in Opposition and it continued its second term in 2019.²⁰ Since the 1990s, BJP's position on homosexuality has shifted and it is not opposed to the decriminalization of homosexuality anymore.²¹ The national culture is now seen to be in congruence with homosexuality.²² Invocation of nationalism as a troupe to claim Indian citizenship has become prevalent in the representation by queer individuals and activists.²³ The attempts at including queer people into the citizenship paradigm have also been based on the same invocation.

III. THE NALSA JUDGMENT

In this section, I will be looking at the NALSA Judgment and laying out the various issues in the text of the NALSA Judgment. Through an analysis of the text, I would also like to discuss the ideology laid out in the Judgment which then gets carried forward during the formulation of the legislations.

While all the Bills have received a lot of criticism from academics and activists alike, the NALSA judgment was lauded as one of the most progressive judgments by several activists²⁴ as well as lawyers²⁵. However, there have been people from the transgender community who have been disappointed with the Judgment²⁶ called it incomplete²⁷ and confused.²⁸ Although it talks about self identification being sufficient to identify as a Transgender person, it does so without having an understanding of gender and does not challenge the binary

²⁰ Saptarshi Ray, Narendra Modi Wins Landslide Victory in Indian Election, *The Telegraph* (23-5-2019), available at <<https://www.telegraph.co.uk/news/2019/05/23/india-election-narendra-modi-heading-landslide-win-early-results/>> last seen on 5-1-2020.

²¹ S. Bhattacharya, The Transgender Nation and its Margins: The Many Lives of the Law20 South Asia Multidisciplinary Academic Journal (2019), available at <<https://journals.openedition.org/samaj/4930>> last seen on 5-1-2020.

²² *Ibid.*

²³ *Ibid.*

²⁴ Danish Sheikh, Not Just His and Hers, *Indian Express* (25-4-2014), available at <<https://indian-express.com/article/opinion/columns/not-just-his-and-hers/>> last seen on 5-1-2020; Narrain, Third, but not Insignificant, DNA India (21-4-2014), available at <<https://www.dnaindia.com/india/report-third-but-not-insignificant-1980382>> last seen on 5-1-2020.

²⁵ Statement from Lawyers Collective, Supreme Court Recognises the Right to Determine and Express One's Gender; Grants Legal Status to "Third Gender", available at <http://orinam.net/content/wp-content/uploads/2014/04/LC_statement.pdf> last seen on 5-1-2020.

²⁶ Semmalar, Gender Outlawed: The Supreme Court Judgment on Third Gender and its Implications, RoundTable India (2014), available at <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%ltemid=133> last seen on 5-1-2020.

²⁷ Satya, Why the Transgender Verdict is an Incomplete One, LiveMint (18-4-2017), available at <<https://www.livemint.com/Leisure/Nv9Azw4bFA3oCGbyCWSXUJ/LOUNGE-OPINION-Why-the-transgender-verdict-is-an-incomplete.html>> last seen on 5-1-2020.

²⁸ *Supra* note 6.

understanding of gender.²⁹ The offensive generalization that all hijras are third gender and “emasculated men” and do not identify as women as well as the inclusion of cross-dressers without understanding gender identity as a concept. Persons with intersex variation are referred to as “having genital anatomy problems” and are conflated with transgender people.³⁰ The Judgment uses the word eunuch which has been completely rejected by the community. Transmen and their issues have been completely erased.³¹ There is no clarity if transpersons can choose to identify with binary genders in the papers or they will be forced to choose third gender and their gender identity.

While it says that transpersons will be accorded the Other Backward Category (OBC) status, there is no clarity of the implications of it. Further there is no clarity regarding what would happen to transpersons who already belong to SC/ST communities.³²

Thus, it can be seen that the Judgment not only does not have an understanding of gender identity, it also does not understand that gender identity works in relationship with other identities. It assumes that transgender individuals are a homogeneous group and refuses to recognize the differences.

Another problem is that it uses mythology, particularly text from Hindu mythology to invoke that the transgender identity has been part of Indian Historical background.³³ However, it does not acknowledge the Islamic and Sufi traditions with which several *Hijra* Gharanas relate to.³⁴ It also states that the British rule changed the conditions for transgender persons by tracing it to the Criminal Tribes act 1871.³⁵ This is a case of invoking **Homonostalgia**, a concept coined by Barcke, the sentiment that takes the shape of longing for a time when gay liberation could allegedly be taken for granted before it was under threat by the racial other.³⁶ The collation of the *Hijra* identity with the ‘transgender’ identity is a reflection of the ‘Hindu-ised’ historic influence of the transgender existence.³⁷ Hence, although the petition gave a background of the ‘*hijras*’ during the Mughal era, their recognition in ‘ancient’ India and their criminalization under the British colonial rule, the Judgment focuses on Hindu transgender identities

²⁹ Dutta, Thoughts on the Supreme Court Judgment on Transgender Recognition and Rights, Orinam (19-4-2014), available at <<http://orinam.net/thoughts-supreme-court-judgment-transgender-recognition-rights/>> last seen on 5-1-2020.

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Supra* note 21.

³³ *Supra* note 1, at 10-122.

³⁴ *Ibid.*

³⁵ *Supra* note 1, at 78.

³⁶ Bracke, From “Saving Women” to “Saving Gays”: Rescue Narratives and their Dis/continuities, 19(2) European Journal of Women’s Studies 237-252.

³⁷ Loh, Transgender Identity, Sexual Versus Gender “Rights” and the Tools of the Indian State, 119(1) The Feminist Review Collective 39-55.

and their presence in Hindu mythology and religious texts.³⁸ In the haste to look at the criminalization of the “eunuch” as a Colonial idea, the Judgment completely ignores that it was also the reflection of the emerging ‘middle class’ of the late 19th century as reflected in their writings³⁹

However, the Judgment not just invokes a glorious Hindu past; it also invokes modern Human Rights treaties and policies. It invokes the Universal Declaration of Human Rights, 1948; International Covenant on Civil and Political Rights, 1966; Yogyakarta Principles, 2006 and Committee on Elimination of Discrimination against Woman Reports 1979 and 2010.⁴⁰ It has to be noted that some of these Human Rights Treaties, like the Universal Declaration of Human Rights itself defines the family as a natural unit.⁴¹ It also has reference to Judgments from the Courts of England, New Zealand, Australia, Kuala Lumpur, New South Wales and Germany and legislation of other countries including South Asian countries of Pakistan and Nepal.⁴² The trans-national invocation of rights for transgender persons puts pressure on the Indian court to take a progressive stand on the rights of transgender persons.

The Judgment also invokes Fundamental Rights enshrined under the Indian Constitution. It reinterprets the expression “person” in Article 14 and Article 21; “citizen” and “sex” and Article 15; and the expression “citizens” in Article 16 and Article 19 as gender neutral expressions to refer to human-beings⁴³. On the basis of this, the Court argued that this takes within their purview Hijras/Transgenders and are not limited to the male or female gender⁴⁴

Hence, the NALSA Judgment reflects the tendency to globalize while co-existing with its Hindu past. In that sense, it is a reflection not of conservatism but that of the Indian state which is both feudal and modern in its characteristics at the same time.

IV. THE TRANSGENDER BILLS

After the NALSA judgment, a series of Bills were drafted which promised to ensure rights of transgender persons. In this section, I will discuss the issues with the different drafts of the Bills.

³⁸ *Ibid.*

³⁹ Hinchy, The Long History of Criminalising Hijras, *Himal South Asian* (2-7-2019), available at <<https://himalmag.com/long-history-criminalising-hijras-india-jessica-hinchy-2019/>> last seen on 5-1-2020.

⁴⁰ *Supra* note1.

⁴¹ Narrain, Rethinking Citizenship: A Queer Journey, 14(1) *Indian Journal of Gender Studies*, (2007).

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

The first Bill on Transgender Rights that was tabled in the Parliament was Tirchy Siva's Bill⁴⁵. It showed potential to end discriminatory practices towards the community. This private member Bill was passed almost unanimously by the Rajya Sabha. However, the government later announced that they would introduce their own Bill but the Bills tabled by the Ministry of Social Justice and Empowerment (MSJE) drew a lot of criticism for moving away from the "spirit of the NALSA Judgment."⁴⁶ The criticisms have been discussed in the various pamphlets, protests, statements, interviews and reports made by the community.⁴⁷

One of the biggest criticisms of the Bills is with the **definition of the term Transgender**. The NALSA Judgment defines Transgender as an umbrella term for persons whose gender identity, gender expression or behaviour does not conform to their biological sex and states that Self Identification of a person is sufficient for them to be recognized to the gender of their choice and Sex Reassignment Surgery or hormone treatment is not a precondition to the same.⁴⁸

The definition given in NALSA was also recommended by the MSJE Expert Community which further recommended that transgender persons should have the option to choose 'male', 'female' or 'transgender' independent of surgery and hormones.⁴⁹

The 2016 Bill moves away from this understanding of transgender by defining "*transgender person*" means a person who is — (A) neither wholly female nor wholly male; or (B) a combination of female or male; or (C) neither female nor male; and whose sense of gender does not match with the gender assigned to that person at the time of birth, and includes trans-men and trans-women, persons with intersex variations and gender-queers.⁵⁰

Thus, I would argue that in the 2016 Bill, the gender of the person is reduced to their body and it conflates between the Transgender Identity with that of Persons with Intersex Variations. It needs to be noted that while persons with intersex variations face discriminations, their issues may not be the same as those of people who identify as transgender. Persons with intersex variations are often

⁴⁵ *Supra* note 4.

⁴⁶ Ramya Jawahar Kudekallu, Why Transgender Community is Struggling in spite of NALSA Judgment, DailyO (3-2-2017), available at <<https://www.dailyo.in/politics/transgender-nalsa-judgment-aadhar-card-gender-rights-self-identification/story/1/15462.html>> last seen on 5-1-2020; Shreya Ila Anasuya, Over Two Years After Landmark Judgment, Transgender People are still Struggling, The Wire (15-5-2016), available at <<https://thewire.in/gender/over-two-years-after-landmark-judgment-transgender-people-are-still-struggling>> last seen on 5-1-2020.

⁴⁷ Danish Sheikh, The New Transgender Bill Fails the Community, The Wire (4-8-2016), available at <<https://thewire.in/gender/failures-of-the-new-transgender-bill>> last seen on 5-1-2020.

⁴⁸ *Supra* note 1, at 9.

⁴⁹ Ministry of Social Justice and Empowerment, Government of India, Report of the Expert Committee on the Issues Relating to Transgender Persons, available at <<http://socialjustice.nic.in/writeraddata/UploadFile/Binder2.pdf>> last seen on 5-1-2020.

⁵⁰ *Supra* note 8.

assigned a gender at birth and some of them continue to identify with the same through life while others may identify as transgender at some point of their lives.

Secondly, the 2016 Bill states that there would be a **Screening Committee** which would issue a certificate of gender identity.⁵¹ The Screening Committee goes against the spirit of the NALSA Judgment's right to self determination. As such, we can say that the 2016 Bill understands gender in highly biologically deterministic terms and completely undermines right to self determination of gender. It is limited to the body and looks at being transgender as pathological needing certification by doctors and counselors. The transgender person would have to go through the humiliating process of being physically and psychologically examined by medical practitioners in order for their gender to be recognized. It also says that the gender of the person would be indicated as transgender and says nothing of whether they can choose to identify as man and woman. Several people identify with the binary genders of male and female while several others may choose to identify as transgender. Some transgender people would like their papers to identify with the binary genders or other gender identities due to several reasons such as security, stigma and indigenous location.

The 2018 Bill goes a step further, after the 2016 Bill resulted in several protests as well as lobbying with Ministers. The 2018 Bill has two clauses, first one says that a District Magistrate will send the application to the District Screening Committee which will recommend a certificate of Identity as a transgender person; and the second clause is that if a person applies for change in gender as male or female, they need a certificate by a Medical Superintendent or Chief Medical Officer of the medical institution in which that person has undergone surgery.⁵² The Bill of 2019 which went on to become an Act continues to carry forward the same clauses.

Thus, we can argue that the Screening Committee reinforces that the idea of gender back to the biology without disturbing the male-female binary. I would also argue that the purpose of the Screening Committee is also to increase surveillance on the transgender person's body firstly by conducting physical examinations on it and then monitoring the transition it goes through as they seek recognition of their gender identity.

I would further argue that the legislation refuses to acknowledge that not every transgender person who identifies with the binary gender may want or can afford surgery. Furthermore, there isn't one surgery or medical procedure which all transgender people undergo. Different transgender persons may undergo different kinds of medical interventions depending upon their discomforts with their bodies and also depending upon the accessibility they have to these medical procedures. At times certain sections of the community have also pushed for

⁵¹ *Supra* note 8.

⁵² *Supra* note 44.

screening because they fear that giving welfare provisions to transgender persons would encourage the rise of “fake transgender” cases.

Furthermore, navigating a screening committee is tougher for DBA (Dalit Bahujan Adivasi) transfolks without support from the natal family and access to a lawyer.⁵³ This is supported by the fact that there is a very limited resource allotted for a community which has been historically marginalized, is finally getting some recognition and certain sections among them get marginal power.⁵⁴ The District Screening Committee also enables fracturing the community through identities and breaks down the collectivisation of the community.⁵⁵ It enables to separate the fight for equality on the basis of intra identarian power politics because certain people from the community are “befooled” with the thought that they have the power to certify others.⁵⁶ This starts a new form of oppression where some people are seen as ‘more trans’ than others. This has led to a large policing of transgender persons even within the community.

This concept of a Screening Committee is not just written into the Transgender Bills but has been in practice since the Tamil Nadu Aravani welfare board was set up in 2008 and had the involvement of the community.⁵⁷ However, it did not recognize transmen and it required a physical examination for the issue of ID cards.⁵⁸

The third problem with the Bills is the **Erasure of Violence**. The 2015 Bill had a provision to address abuse, violence and exploitation inflicted on transgender persons both within and outside the home.⁵⁹ The 2016 Bill did away with the language of violence. Instead, the latter reduces the idea of discrimination to “*denial, discontinuation and unfair treatment*”.⁶⁰ Both Bills do not address the issue of discrimination which can take place through ghettoisation and segregation which operationalised in the name of inclusion.⁶¹ The MSJE Report had

⁵³ Vihaan, Violence in the Name of Protection: A Bahujan Transman on the Transgender Bill, 2018, RoundTable India (26-12-2018), available at <http://roundtableindia.co.in/index.php?option=com_content&view=article&id=9533:violence-in-the-name-of-protection-a-bahujan-transman-on-the-transgender-bill-2018-1&catid=119&Itemid=132> last seen on 5-1-2020.

⁵⁴ *Ibid.*

⁵⁵ Datta, We Refuse to be Subjects of Experiment for those who do not Understand us: Transgender Persons Bill, 52(49) Economic and Political Weekly (2017).

⁵⁶ *Ibid.*

⁵⁷ Venkatesan Chakrapani, The Case of Tamil Nadu Transgender Welfare Board: Insights for Developing Practical Models of Social Protection Programmes for Transgender People in India, report submitted to UNDP (2012), available at <https://www.c-sharp.in/research_policy/Download/CaseStudyReport_TGWB_2013.pdf> last seen on 5-1-2020.

⁵⁸ Nambiar & Shahani, A Manifesto for Trans Inclusion in the Indian Workplace, India Culture Lab (2018), available at <<https://indiaculturelab.org/assets/Uploads/Godrej-India-Culture-Lab-Trans-Inclusion-Manifesto-Paper.pdf>> last seen on 5-1-2020.

⁵⁹ *Supra* note 4.

⁶⁰ *Supra* note 8.

⁶¹ S. Mohan & Murthy, S., (2013), Towards Gender Inclusivity: A Study on Contemporary Concerns around Gender Alternative Law Forum (2013), available at <<http://altlawforum.org/>

spoken extensively about violence, stigma and discrimination faced by transpersons and had recommended that action be taken against police authority and families who violate their rights.⁶² It had recommended that the sexual harassment laws be amended to include transgender persons and a formulation of anti-discrimination policies for transpersons.⁶³ The 2016 Bill and the subsequent Bills have one clause on Offenses and Penalties under which it put together all forms of violence including verbal, emotional, physical, mental, sexual, bonded labor, denial of access to public spaces and forces them to leave the house.⁶⁴ The punishment for all these offences is “*imprisonment for a term which shall not be less than six months but which may extend to two years and with fine.*”⁶⁵ It needs to be noted that the minimum penalty for Rape of a cis-gender woman under the Indian Penal Code is 7 years of imprisonment.⁶⁶ The community has pointed out this travesty to the rights of bodily integrity of transpersons given that they are rampantly subjected to sexual violence and rape.⁶⁷ However, this clause has not been changed by the legislators. The 2016 Bill to the 2019 Act continues to carry the clause in the same form. This goes on to show that either the State does not value the dignity and bodily integrity of transgender persons in the same way, or the State wants to incentivize violence against transgender persons.

In the 2016 Bill, the same clause which mentions the punishments for offenses against transgender persons also ends up **criminalizing them, their family structures and their livelihood options**. The 2016 Bill made begging as an offense.⁶⁸

The *Hijra* Community particularly is dependent on begging and sex work for its livelihood. By stating that transgender persons are being enticed to beg is a direct attack on the community living arrangement of the *Hijra* Community. Also, by criminalising begging, it puts an already vulnerable population in a state of further vulnerability. This provision was however removed in the 2018 Bill.

While the 2016 Bill does not explicitly mention sex work, till September 2018, Section 377, which criminalized sexual acts “against the order of nature”, sex work by the *Hijra* Community was criminalized.⁶⁹ The Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018 which came in a couple of months before Section 377 was read down does not make a distinction between

wp-content/uploads/2018/08/Towards-gender-inclusivity-a-st-Unknown.pdf> last seen on 5-1-2020.

⁶² *Supra* note 43.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Supra* note 8.

⁶⁶ S. 376, The Indian Penal Code, 1960.

⁶⁷ Mudraboyina, Jagirdar & Philip, A Critique of Transgender Persons (Protection of Rights) Bill, 2019, Feminism in India (5-8-2019), available at <<https://feminisminindia.com/2019/08/05/critique-transgender-persons-protection-of-rights-bill-2019/>> last seen on 5-1-2020.

⁶⁸ *Supra* note 8, at 19(a).

⁶⁹ S. 377, The Indian Penal Code, 1960.

trafficking and consensual sex work, thus continuing to criminalize sex work.⁷⁰ So, even as reading down of Section 377 is seen to have decriminalized the “community”, it is only the sexual acts of a certain section that is decriminalized. At the same time, the Bill does nothing to protect the community from violence perpetrated by the police after they are arrested for sex work, even after the community repeatedly highlighted such atrocities.

Even as the traditional livelihood options of the transgender persons get criminalized, there are no provisions for either making education more accessible for them or creating alternative livelihood options for them. The Bills lay out that there should not be discrimination of transgender persons but there is no mention of affirmative action policies. This is despite the MSJE Expert Committee (2014) pointing out the lack of education and livelihood options for transgender persons and suggesting methods to include transgender persons into the educational system as well improving livelihood options for them.⁷¹

The final point that I would like to highlight is the way in which the Bills **have imagined the family**. The 2015 Bill, states that where the immediate family is unable to take care of a transgender child, the Court shall place them within “the community in a family setting.”⁷²

Although this is largely *Hijra* centric, because only *Hijras* live in a community setting, it had the potential to break away from the hetero-patriarchal family structure by acknowledging community living.⁷³ However, even when it mentions the community it leaves us without any explanation of how the community is imagined. The 2016 Bill on the other hand completely upholds the natal family of birth as the primary unit of support and states that in case a family cannot take care of the Transgender person, they would be put in a rehabilitation center.⁷⁴

This is contradictory to the lived realities of transgender individuals for whom family structures often become the site of violence. There is no recognition of alternative family systems and/ or community living. Furthermore, it leaves us with the ambiguity whether an adult transgender person would also be forced to live with the family or sent to rehabilitation in the case of violence within families. After the protests against the 2016 Bill, in the 2018 Bill, transgender person was changed back to child. However, it continues to retain the word person when it refers to transpersons being put into a rehabilitation center if the immediately family is unable to take care of it. Interestingly, the 2018 Bill also specifies that the person can only change their first names, thereby insisting upon retaining the

⁷⁰ The Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018 (passed by Lok Sabha, 26-7-2018).

⁷¹ *Supra* note 43.

⁷² *Supra* note 4

⁷³ *Supra* note 4.

⁷⁴ *Supra* note 8.

surname.⁷⁵ This is an indication that the State insists on associating transpersons through their natal family and also in extension the caste that they were born into, because in India surnames have a close connection with caste.⁷⁶

Apart from these issues, none of the Bills acknowledge entitlements of transgender persons in terms of inheritance and civil rights. It did not recognize targeted violence on transgender persons. It does not have any mention of violence and atrocities on transgender like forced gender conformism, forced hormonal treatment and/or surgeries, aversion based pseudo-psychotherapies, forced marriages, stripping, etc., as well as custodial violence, dereliction of duty by state and medical authorities, and violence in educational, residential, medical and employment. Hence the Bills do not address the specific issues the community faces. All the Bills from 2016 to 2019 have no mention of supporting the medical interventions of Transgender individuals or of making the medical system more accessible to them. These are not complete lists of criticisms of the Bills but enough to highlight the problems with the Bills and talk about the way in which the transgender citizen is constructed.

Dutta has argued that for transgender persons, it is difficult to articulate experiences of violence because it is impossible to distinguish it from the power politics that makes domination and exclusion necessary.⁷⁷ The state facilitates the perpetration of this violence through the social and legal premises on which it stands. The author goes on to write that “a state that runs on the ideology of generating a Gross Domestic Product -increasing workforce refuses to engage with transgender persons as they are seen to be intrinsically redundant to what the nation produces.”⁷⁸ This has been called as “making of unproductive” by the nation and this ends with atrocities on transgender persons.⁷⁹

Thus, in this section, I have made an attempt to highlight some of the criticism of the legislations that were drafted for the protection of the rights of Transgender Persons. While these are issues that will adversely impact the lives of Transgender Persons with the implementation of the legislation, these critiques also reflect how the State imagines the transgender person. The following section discusses this imagination in detail.

⁷⁵ Chapter III(3), The Transgender Persons’ (Protection of Rights) Bill, 2019 (passed by Rajya Sabha on 26-11-2019).

⁷⁶ Vihaan, *Trans Bill 2019: When the Protection of Rights becomes a Violation of Rights*, Breakthrough (2019), available at <<https://inbreakthrough.org/trans-bill-2019-when-the-protection-of-rights-becomes-a-violation-of-rights/>> last seen on 5-1-2020.

⁷⁷ Datta, *Transfeminist Mobilisations need to be both Transformative and Transgressive*, 53(30) *Economic and Political Weekly* (2018), available at <<https://www.epw.in/engage/article/transfeminist-mobilisations-need-to-be-both-transformative-and-transgressive>> last seen on 5-1-2020.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

V. THE TRANSGENDER PERSON IN THE IMAGINATION OF THE STATE

Sircar writes that the NALSA judgment depoliticises sexual acts by treating transgender persons as subjects of welfare.⁸⁰ He further writes that it avoids provoking moral panic among the Hindu Right and tries to do a balancing act of fusion between Tradition, by drawing references of transgender identity in Hindu Mythology, and Modernity, by invoking international human rights laws on gender identity and sexual orientation.⁸¹ While it does grant transgender persons citizenship rights, it also distances them from the hetero-normative institutions of marriage, family and property ownership, from which the Hindu Nation draws its cultural, political and economic capital.⁸²

As I had discussed earlier, the State does not imagine transgender persons as occupying multiple locations of class, caste, religion and region; all of which play a major role in the amount of privilege and entitlement that a transgender person may already enjoy. This has been seen in the NALSA Judgment when it has told that the community should be declared as OBC without any clarification about what happens to their other identities.⁸³ As a result of this imagination, while the Government was very enthusiastic to get Aadhaar Cards made for Transgender Persons and had the transgender option, for the longest time the Permanent Account Number (PAN) Card did not have the option. This I believe is because the Government did not even imagine that Transgender people could be taxpayers. Thus, the way Rights of Transgender Persons by the government has been articulated is a reflection of their imagination of what a transgender person is. While the community is viewed as a homogeneously poor and a vulnerable group, the Government doesn't seem keen on giving any entitlements.

In the legislations, there is a language of rehabilitation which has grown progressively over time. As it becomes evident in the 2018 Bill, the government sees its role as taking steps for "the rescue, protection and rehabilitation of transgender persons."⁸⁴ The act of rehabilitating transgender children is like conversion therapy because rehabilitating is associated with 'restoring someone to health or normal life through training and therapy after imprisonment, addiction or illness.'⁸⁵ The government, by using a language of rehabilitation, pathologises transgender persons and wants to make them normal instead of giving rights. In

⁸⁰ Sircar, Homonationalism: Queer Tales of Queer Prides, InfoChange (22-7-2017), available at <<http://infochangeindia.org/governance/373-human-rights/rights-and-resistance/9222-homonationalism-queer-tales-of-queer-prides>> last seen on 5-1-2020.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Supra* note 1.

⁸⁴ *Supra* note 68.

⁸⁵ Vihaan, Violence in the name of Protection: A Bahujan Transman on the Transgender Bill, 2018, RoundTable India (26-12-2018), available at <http://roundtableindia.co.in/index.php?option=com_content&view=article&id=9533:violence-in-the-name-of-protection-a-bahujan-transman-on-the-transgender-bill-2018-1&catid=119&Itemid=132> last seen on 5-1-2020.

the imagination of the government, the transgender person is someone who was outside the society and needed to rehabilitate back.⁸⁶

Through a critique of the various drafts of the Transgender Bills, we can see that the approach of the state towards Rights has shifted since NALSA Judgment. The NALSA Judgment, with all its problems had a more Rights based approach towards Transgender Rights. The 2014 Bill of Siva,⁸⁷ because it was done with Consultation with the community it focused on Right along with the government's welfare-based approach. The 2016 Bill, 2018 Bill and 2019 Bill spoke of a language of rehabilitation without taking into account the needs and the demands of the community.⁸⁸ These three have completely rejected the recommendations by the Expert Committee as well as the demands of a large section of the Transgender Community. The Bills did not reflect their lived realities and instead wanted to rescue and rehabilitate the community from the support systems they had created and bring them back into the hetero-normative family system.

It is not just the Transgender Bills by the central Government but also the policies of the various State Governments which is showing the trend of adopting a rehabilitation approach on the issues of transgender persons. This is being done by either attempt to assimilate them in non-dignified ways or by pathologising them or by pushing them to the peripheries. There shift from a Right based approach to a Welfare based approach has been seen in the functioning of the State governments as well with almost all of the Boards working on the issue of Transgender Rights are named Transgender Welfare Boards. For the purpose of this paper I will not delve into the details of it.

VI. VIOLENCE IN THE NAME OF RESCUE AND REHABILITATE: A CONTINUOUS TREND

In this section I would like to elucidate how in the process of giving a historically marginalized community citizenship status and promising to make them "good and successful" citizens, they are being co-opted into the paradigm of neo-liberal idea of citizenship and their potentially radical politics is curtailed.

The process of making them citizens, giving rights as well as protection takes place through the exclusion of bodies which challenge the homonormative social order. In the name of giving protection, marginalized groups are made further vulnerable and also criminalized. Ones who do not fit into the imagination of good citizens have to be rescued and rehabilitated and are deprived of any agency to choose. This is being seen in some of the other policies that the government has passed for minority communities in the recent time as well.

⁸⁶ *Ibid.*

⁸⁷ *Supra* note 4.

⁸⁸ *Supra* note 8, 11.

The Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill 2018⁸⁹ is one such instance. While it claims to protect victims of trafficking, it increases the vulnerability of the sex-workers, trafficked or otherwise, in the attempt to rescue them. The Bill conflates sex-work with trafficking and assumes that every sex-worker has to be and wants to be rescued. It doesn't acknowledge that during raid and rescue operations of sex workers large scale human rights violations take place such as debt bondage, fees to lawyers, surety to bail, and bribes to officials and debts due to absence of income.⁹⁰ The legislation also infantilises women and frames it within an issue of morality while assuming that no woman would want to enter sex work of her own decision.⁹¹

The Surrogacy (Regulation) Bill 2016 also in its aim to end the exploitation of women who become surrogates pushes the business underground.⁹² It also has very archaic ideas of familial relationships by mandating only "close relatives" as surrogate mothers. It prohibits homosexual couples and non-married couples from commissioning surrogates.⁹³

The three Bills discussed have been bought in the name of "Rescue, Raid and Rehabilitation", and several groups have protested the three of them together. The Bills are a clear rejection of the idea of self-determination of – what genders people can choose, what kind of labour that can do and where and what kind of families people can make. It does not give adult people who are marginalized by gender and sexuality, autonomy over their own lives. They also write that the Bills ensure that a family may only be formed within heterosexual marriage and through the maintenance of the purity of caste norms. Both the Transgender Bill and Trafficking Bill are motivated by a criminalizing impulse. Instead of taking on welfarist/developmentalist functions, the State has chosen to focus on incarcerating the poor and marginalized sex workers, bonded labourers, contract workers, domestic workers, construction workers, transgender persons, inter-state, intra-state and international migrant workers.

This trend is visible in the other legislations and politics of the government. Another legislation which claims to protect minorities is the removal of Article 370.⁹⁴ It was argued that post 370, there would be an emancipation of the

⁸⁹ The Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018 (passed by Lok Sabha, 26-7-2018).

⁹⁰ Pai, Saraswathi & Murthy, In its Haste to Rescue Sex Workers, "Anti-Trafficking" is Increasing their Vulnerability, 53(28) Economic and Political Weekly (2018), available at <<https://www.epw.in/engage/article/raid-and-rescue-how-anti-trafficking-strategies-increase-sex-workers-vulnerability-to-exploitative-practices>> last seen on 5-1-2020.

⁹¹ *Ibid.*

⁹² The Surrogacy (Regulation) Bill, 2018 (passed by Lok Sabha, 19-12-2018).

⁹³ Yamunan, The Daily Fix: Surrogacy Bill Aims to End Exploitation of Vulnerable Women — but has Serious Flaws, Scroll (20-12-2018), available at <<https://scroll.in/article/906333/the-daily-fix-surrogacy-bill-aims-to-end-exploitation-of-vulnerable-women-but-has-serious-flaws>> last seen on 5-1-2020.

⁹⁴ Art. 370 of the Constitution of India.

marginalized- women, Dalit, Bahujans and queers- in Kashmir. The claim that removal of Article 370 is for protection of gay rights and application of Section 377, was used both as a digital propaganda as well as by BJP representatives on television interviews. This narrative is used to justify violent and inhuman treatment by the State. However, it needs to be noted that the right to sexual orientation and sexuality cannot exist without the right to dignity, self-determination and bodily autonomy. Similarly in this situation, queer Kashmiris are being offered protection of their sexuality, without protection for their basic human rights. Further, it has been widely proved that conflict affects the marginalized the most.⁹⁵ For instance, the long communication blackout in Kashmir would affect the queer Kashmiris very poorly since the home is not a safe space for queer people and the internet becomes a major means of finding solidarity for them.⁹⁶

Another such process is the National Register of Citizens (NRC)⁹⁷ and the Citizenship (Amendment) Bill, 2016. The NRC process has been critiqued mostly because it was done without proper planning of what would happen to people whose names are not listed in it. However, the process has been exclusionary of Muslims, especially Muslim women⁹⁸; the *Namashudra* community, a Scheduled Caste community who were originally the inhabitants of East Bengal⁹⁹ and for the transgender community.

As, per All Assam Transgender Association (AATA) there are at least 2000 transgender women who had applied to be enlisted but their status is unknown.¹⁰⁰ A large number of them could not apply because they did not have the required documents to apply.¹⁰¹ Most Hijras leave their biological families when they are young and are left with no contact with them hence it becomes practically impossible for them to get access to legacy data establishing their link. Some people whose names have appeared on the list are mostly enlisted with their dead names and do not know the repercussion of it. Even as some transgender activists are

⁹⁵ Anish Gawande, The False Link Between Art. 370 and Queer Rights, *The Wire* (6-9-2019), available at <<https://thewire.in/lgbtqia/all-you-need-to-know-about-the-false-link-between-article-370-and-queer-rights>> last seen on 5-1-2020; Shahrukh Alam, Pish Posh, Pink Wash: Lauding Centre's 370 Move as a Benchmark for Gay Rights is Absurd, *The Wire* (11-10-2019), available at <<https://thewire.in/lgbtqia/kashmir-article-370-lgbtq-section-377>> last seen on 5-1-2020; Sohini Chatterjee, Homonationalism, Pinkwashing and the Question of (Queer) Kashmir, *The Asia Dialogue* (28-8-2019), available at <<https://theasiadialogue.com/2019/08/28/homonationalism-pinkwashing-and-the-question-of-queer-kashmir/>> last seen on 5-1-2020.

⁹⁶ *Ibid.*

⁹⁷ RAIOT, Doubtful Citizenship, Distorted Rights in Assam, RAIOT (23-6-2018), available at <<http://raiot.in/doubtful-citizenship-distorted-rights-in-assam/>> last seen on 5-1-2020.

⁹⁸ Azad, Assam NRC Draft: How Women in Char Areas were Left High and Dry, *News18* (3-8-2018), available at <<https://www.news18.com/news/opinion/assam-nrc-draft-how-women-in-char-areas-were-left-high-and-dry-1835325.html>> last seen on 5-1-2020.

⁹⁹ Mallik, NRC has Excluded not only Muslims but Dalits, too, *ForwardPress* (20-8-2018), available at <<https://www.forwardpress.in/2018/08/nrc-has-excluded-not-only-muslims-but-dalits-too/>> last seen on 5-1-2020.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

fighting for the inclusion of transgender persons in the NRC, they are also not against the NRC itself because they believe that only the indigenous among them should be listed.

Elsewhere, I have argued that the NRC as a process for determination of Citizenship can never be inclusive for those outside the framework of hetero-normative family structure, because it traces the family through lineage, usually patri-lineage.¹⁰² Queerness is about challenging the hetero-normative family structure. Under such circumstances, the queer person can never get included into this imagination of Citizenship.¹⁰³

The NRC has to be read along with the Citizenship (Amendment) Bill, 2016 which is a draft amendment to the Citizenship Act, 1955.¹⁰⁴ It would provide citizenship to provide citizenship to “illegal migrants” from Bangladesh, Afghanistan and Pakistan who are of Hindu, Sikh, Parsi, Buddhist, Jain or Christian origins; however deny citizenship to Muslims or its sects and communities.¹⁰⁵ This Bill has created tension among the Assamese communities leading to several protests. While the Government claims that this has been done on humanitarian grounds because they are persecuted minorities, the same humanity has not been included for other persecuted minorities such as the Rohingyas in Myanmar or Shias of Pakistan or the queer individuals. While this is likely to protect the *Namashudra* Community which has been a huge determinant for BJP during the Bengal elections it is creating a rift between different minority groups and enraged the indigenous tribal communities of Assam against the *Namashudra* community.¹⁰⁶ Even as it might provide them with citizenship, there is a clause which states that the registration may be cancelled for (a vague) violation of any law, making their citizenship status extremely precarious and leaving them at the mercy of the government.

However, I would also like to argue that both the Transgender Rights Act, 2019 and the NRC along with the Citizenship Amendment Act, 2019 (CAA) have shared agendas¹⁰⁷. Both the Transgender Act and the NRC-CAA claim to ensure rights for minority communities however end up making them more

¹⁰² Sharma, D., Determination of Citizenship Through Lineage in the Assam NRC is Inherently Exclusionary⁵⁴(14), Economic and Political Weekly (2019), available at <<https://www.epw.in/engage/article/determination-citizenship-through-lineage-assam-nrc-exclusionary>> last seen on 5-1-2020.

¹⁰³ *Ibid.*

¹⁰⁴ The Citizenship (Amendment) Bill, 2016 (passed by Lok Sabha 8-1-2019).

¹⁰⁵ RAIOT, Doubtful Citizenship, Distorted Rights in Assam, RAIOT (23-7-2018), available at <<http://raiot.in/doubtful-citizenship-distorted-rights-in-assam/>> last seen on 5-1-2020.

¹⁰⁶ Daniyal, Bengali Dalits Feel the NRC is Targeting their Community. Will this Hurt the BJP in West Bengal? Scroll (17-11-2018), available at <<https://scroll.in/article/888923/bengali-dalits-feel-the-nrc-is-targeting-their-community-will-this-hurt-the-bjp-in-west-bengal>> last seen on 5-1-2020.

¹⁰⁷ Sharma, D., A Shared Agenda Behind the Trans Rights Act & Citizenship Amendment Bill? Youth Ki Awaaz (2019), available at <<https://www.youthkiawaaz.com/2019/12/transgender-persons-bill-2019-and-citizenship-amendment-bill-2019-is-there-a-similarity/>>.

vulnerable by pushing them to undergo multiple levels of bureaucratic paper-work¹⁰⁸. As has been discussed before, the Transgender Act wants to uphold the heterosexual families and by emphasizing on maintaining the surname, it seeks to maintain caste purity and bloodlines. The NRC is also an attempt at tracing bloodlines and the CAA goes on to provide people citizenship status through their familial and religious status¹⁰⁹. While the Transgender Act talks about putting people into Rehabilitation homes, the NRC refers to Detention Centers. In the previous section, I had already pointed out the issues with the idea of Rehabilitation. Both Rehabilitation Centers and Detention Centers have had violent histories and the people in these centers have often been used by the State and Corporates as bonded/unpaid labourers¹¹⁰.

Hence, as has been illustrated in the above measures, the legislations that are being passed for the protection of a minority community are adversely affecting them and making their situation more precarious. A majoritarian State uses and appropriates struggles of minority communities and in the name of Protection increases their vulnerability. Moreover, the protests of the marginalized, their struggles and their aspirations, are also being unheard.

VII. MAKING THE PERFECT TRANSGENDER CITIZEN

These above discussed legislations have enabled the State to construct the transgender citizen, not just by including them into the idea of citizenship but also by creating the “other” to the idea of citizenship. Thus, there is the construction of a perfect transgender citizen that deserves protection and welfare of the state while there are others who are excluded from this idea of citizenship. This is what Jasbir Puar had called Homonationalism which she defined as a “*facet of modernity and a historical shift marked by the entrance of (some) homosexual bodies as worthy of protection by nation-states, a constitutive and fundamental reorientation of the relationship between the state, capitalism, and sexuality.*”¹¹¹

It is interesting to note that unlike the West where homonationalism is being marked by providing Rights and Protection in the name of sexuality, in several of the South East Asian countries liked Bangladesh, Pakistan and India, it is being marked by giving Rights to Transgender People. This is also perhaps to invoke a sense of Homonostalgia,¹¹² because several of these countries have seen

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ Puar, J.K., Rethinking Homonationalism, International Journal of Middle East Studies Vol. 45, No. 2, Special Issue: Queer Affects, (2013), pp. 336-339.

¹¹² Homonostalgia is a term coined by Bracke which they use to refer to the sentiment that takes the shape of longing for a time when gay liberation could allegedly be taken for granted before it was under threat by Islam. Bracke, From “Saving Women” to “Saving Gays”: Rescue Narratives and their Dis/continuities, 19(2) European Journal of Women’s Studies, 237-252 (2012).

the existence of cultural Transgender Identities. In India, this is being done as an attempt to include a certain imagination of the Transgender Citizen into the development agenda of the Nation. This is perhaps also to divide the gender and sexuality movement by proposing tokenistic welfare measures to one section while at the same time completely denying them any kinds of rights to intimacy and family. While Section 377 has now been read down by the Supreme Court, the government has refused to take a stand on the matter.

A. Global Funding and the transgender body

It has been observed that there is increasing emphasis on medicalization of the transgender identity and due to a biologically deterministic way of looking at gender, there is a higher emphasis on the medical transition of transgender persons. The queer movement in India has been funder driven to a very large extent with HIV/AIDS intervention programmes playing a big role in collectivising the community and fighting the legal battle. The funds for HIV intervention programmes are being cut globally. Till 2012 HIV funding was heavily reliant on international funds, however in 2012, India committed to financing 90% of the HIV/AIDS programmes in a period when international funding was declining¹¹³. India's AIDS and TB programmes are facing fiscal shortfalls and its impacts are beginning to show on the ground. Many antiretroviral therapy (ART) clinics are facing shortage of stocks and community based intervention programmes are being cut down in some states.¹¹⁴

With the HIV funds in crisis, the medical community working on gender and sexuality needed to find alternative means of targeting the gender and sexual minorities which provide for a major chunk of their target population. The NGOs which have focused on working with the MSM (Men who have Sex with Men) and transgender population, in which most Projects ran on the Sexual Health and HIV funds, needed to find new avenues for funds.¹¹⁵ Thus, I would like to argue that the Hindu Right and liberal capitalism nexus work hand in hand to medicalize the transgender identity.

At the same time, this is not a recent phenomenon. Decades of activism for gender and sexuality rights had laid the grounds for it.

Dutta writes that it is the political society which has allowed for a negotiation between claims of citizenship for non-elites and a biopolitical management of populations. In contemporary India, queer biopolitics and necropolitics get linked

¹¹³ Global Information and Education on HIV and AIDS, Avert (1-10-2019), available at <<https://www.avert.org/professionals/hiv-around-world/asia-pacific/india>> last seen on 5-1-2020.

¹¹⁴ Sharma, Budget Cuts Threaten AIDS and Tuberculosis Control in India, 386 *The Lancet World Report* (2015).

¹¹⁵ Payal Gwalani, NGOs Working for AIDS Control Facing Funds Crunch (8-9-2014), available at <<https://timesofindia.indiatimes.com/city/nagpur/NGOs-working-for-AIDS-control-facing-funds-crunch/articleshow/41974438.cms>> last seen on 5-1-2020.

through exclusionary inclusion of minorities. Dutta quotes Puar who writes about how the biopolitics of HIV/AIDS gets coupled with necropolitical dispensability of workers in neoliberal economies who get discarded once the prestige and symbolic capital of the funders and the state have been achieved.¹¹⁶ The coming in of the transgender category has established the biopolitical enumeration and management of populations and fixed norms of legible identification.¹¹⁷

B. Curtailing subversion, assimilating transpersons

In this section I would like to argue that in the process of constructing the prefect transgender citizen and giving them certain rights, the State is trying to assimilate them into the heteronormative society and curtailing their subversive potential.

Halberstam writes that failure is being subversive in a hetero-normative capitalist society which has conventional understanding of success.¹¹⁸ *'Failure recognizes that alternatives are embedded already in the dominant and power is never total or consistent.'*¹¹⁹ For queer persons, the story of success is complex because while there is failure at becoming the normative and acceptable, there is also success at challenging the dominant structures in more ways than one.

Here, I would like to point out that the discourse of transgender rights in India seeks to curtail the subversive and radicalness of being queer to making transgender individuals successful in the conventional paradigm of success. The legislations seek to make transgender persons assimilate into the normative heterosexual family, without addressing the violence that families themselves perpetrate. On the one hand it claims to make attempts at bringing transgender persons into Higher Education and formal labour without making the space conducive for such inclusion, which is why transgender persons are pushed out of it in the first place. The fact that the Transgender Bills proposed by the government does not have affirmative action policies for transgender people in education and employment shows that even this desire to bring them within the conventional paradigm of success is half-hearted. On the other hand, the Bill criminalises begging and does not provide for protection within sex work. Hence, while the attempt may be to empower the transgender citizen, it is not empowerment in the true sense because there is no agency for transgender persons to choose their trajectories. Infact, there is no real choice because one choice is criminalized and the other is inaccessible. They are being forced to assimilate into the capitalist heteronormative structure. And in this process of assimilation, binary of the good transgender and bad transgender gets created.

¹¹⁶ Dutta, Legible Identities and Legitimate Citizens: The Globalisation of Transgender and Subjects of Hiv-Aids Prevention in Eastern India, 15(4) International Feminist Journal of Politics, (2013).

¹¹⁷ *Ibid.*

¹¹⁸ Halberstam, *The Queer Art of Failure* (2011).

¹¹⁹ *Ibid.*

Only a person with certain social and cultural capital will be able to fit into this imagination and live up to this imagination of the “perfect transgender citizen” and all others, no matter how hard they try to fit in will always be pushed to the margins. For a transgender person who has been able to assimilate into the mainstream to a certain extent due to their social location, their lived realities are not drastically altered by the Judgment or the Bills because their social privilege already cushions them. The transgender citizen thus remains constantly “out-lawed” despite being given the status of equal citizenship by the Supreme Court.

VIII. CONCLUSION

Thus, with the advent of globalization and gender sexuality activism, the transgender identity, whilst paving the path to attain rights and citizenship also sets the tone for marginalization and exclusion of several gender variant groups. While the Supreme Court NALSA Judgment gave legal recognition to the transgender identity, it also laid precedent for invoking a Hindu history of the Transgender identity alongside the invocation of modern Human Rights tenets.

The Transgender Bills formulated by a Right wing government solidified the imagination of the Transgender person through a heterosexual Hindu perspective. The agenda of the Bills were to protect the middle class, upper caste, Hindu heterosexual family unit and in the process the Transgender person’s body, becomes an abject body. The State-market nexus works together to medicalize the transgender body and create a market out of it, without challenging the gender binary. The Transgender Bill when seen in relation to other Bills and policies which have come up during the same times reflect the ideology of the State which wants to rescue and rehabilitate marginalized people while also making them more vulnerable and criminalizing them.

While the binaries of gender and the heterosexual- patriarchal family remain unchallenged, some kinds of community living get some recognition if they fit into the Hindu alternatives. One such example is that of the *Kinnar Akhada* that has gained popularity and acceptance within the Hindu religious fold. The recognition of certain transgender and queer identities thus become essential to create the idea of progressive nation while institutionalizing the exclusion of certain other identities which do not fit into the paradigm of the perfect citizen.