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TRANSGENDER PEOPLE AND EMPLOYMENT IN THE ERA OF DIVERSITY AND INCLUSION

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Introduction

As more rapid changes in labour demographics have driven businesses to accept, embrace, and value workplace diversity (in terms of race, ethnicity, religion, sexual orientation, disability, and other factors), diversity and inclusion have become prominent topics in the corporate sector. More rapid changes in labour demographics have driven businesses to accept, embrace, and value workplace diversity in terms of race, ethnicity, religion, sexual orientation, disability, and other factors. An example is the diversity and inclusion programme at Tata Steel which values their diverse workforce and has extended many benefits to cover same-sex partners (Bharadwaj and Singh, 2021). In today's environment of volatility, uncertainty, complexity, and ambiguity, inclusiveness and diversity in the workforce are critical for organisations to maintain their competitive edge. Employers have also started to realise the importance of diversity and inclusion in terms of productivity, retention of employees, amongst other issues.

Many companies around the globe have begun to pay particular attention lately to the LGBTQ+ community, including celebrating Pride Month in June (a month-long celebration honouring the struggles of LGBTQ+ individuals around the globe and commemorating the Stonewall Riots that laid the foundation of the gay rights movement in the USA and subsequently, all over the globe). However, the question remains if they genuinely believe in workplace diversity and inclusion, or if it is all just a “publicity stunt”? This essay will set out the need for research on the experiences of transgender and gender-variant people in the employment sector and explain a few barriers to this research in the context of India. The essay will also seek to decolonise the term “transgender” by looking at gender-variant communities in India, and the laws that have come to affect the transgender community.

What Is Transgender? - Western and Decolonial Perspectives

Transgender is a relatively newer term used to explain all forms of gender variance from the gender assigned at birth. The word "transgender" has no universal definition and can refer to various identities, including transwoman, transman, non-binary, genderqueer, drag queen, drag king, and crossdresser, among others. It might also include those who have had their

bodies changed by medical intervention or who have crossed gender lines in various ways without the need for medical intervention. (Cammniga, 2019). Stryker (1998) has defined transgender as:

“not to refer to one particular identity or way of being embodied but rather as an umbrella term for a wide variety of bodily effects that disrupt or denaturalise heteronormatively constructed linkages between an individual’s anatomy at birth, a non-consensually assigned gender category, psychical identifications with sexed body images and/or gendered subject positions, and the performance of specifically gendered social, sexual, or kinship functions”.

However, the Western definitions of transgender have been strongly critiqued by decolonial transgender theorists. As Dutta and Roy (2014) have stated, the global term “transgender” used by the development sector, the state and their funders tend to subsume South Asian gender/sexual variance discourses and practises as merely "local" expressions of transgender identity, often without questioning the conceptual baggage (such as homo-trans and cis-trans binaries) associated with the transgender category. Statist and developmentalist deployments of the transgender category may generalise linear narratives of transition and stable identification with the "opposite" gender as defining features of trans identities, and even when they acknowledge possibilities beyond the gender binary, such as a "third gender," they tend to delimit and define such categories through a model of stable, consistent, and authentic identification that seeks to distinguish transgender identities clearly. However, South Asian discourses on gender/sexual variation may muddy the lines between cis-trans and homo-trans identities. While this discourse is important to keep in mind, I will use the words “transgender” and “gender variant” interchangeably for the purpose of this article.

Transgender Laws in India

Different forms of gender-variant communities have been said to be existing in India throughout the ages. With the colonial rule in India, the gender variant communities were outlawed as a more Western notion of binary gender was introduced in the subcontinent. Even after Independence, the oppression and denial of rights for gender-variant communities continued. Gender variance only started getting attention from the NGOs at the beginning of the 1990s at the peak of the AIDS crisis. However, most attention was paid to HIV prevention and care, and their fundamental rights were rarely discussed (Ghosh, 2022). There

exist various gender variant communities in India like Hijra, Aravani, Jogta, Jogappa, Shivshakti, Koti, Zenana, amongst others, besides the Westernised notions of transwomen, transmen, and non-binary identities. While it is not possible to bring together all the identities under one umbrella due to the multitude of different practices within the relevant communities, some theorists such as Agrawal (1997), Lal (1999), Reddy (2005), Dutta (2012), Dey (2013), Kumar (2018) have brought in definitions of different gender-variant communities. In contrast to the earlier essentialist constructions, these scholars have attempted to define the communities as identities concerning the state and are constantly being deconstructed and reconstructed.

In India, the law has been a powerful tool for regulating transgender people's lives. Discriminatory legislation has always made it difficult for them to exist. The legislation did not adequately protect civil liberties. Some criminal laws have given cops and other authorities much power, making transgender people vulnerable to abuse. The Criminal Tribes Act, 1871, introduced during British rule, sought to criminalise eunuchs or impotent males, including gender-variant communities. Being a eunuch automatically made them criminals and subjected them to constant observation. According to the local authorities, they were suspected of kidnapping or castrating minors or committing offences under Section 377 of the Indian Penal Code. If they were caught dressed as women or participating in any public show, they might be arrested without a warrant and sentenced to two years in prison or a fine, or both. They were not allowed to serve as guardians, give gifts, or adopt a son. Although this colonial statute has since been abolished, it undoubtedly set the way for the view of hijras as thieves and subsequent horrific violence against them (Peter and George, 2021). Section 377, which criminalised unnatural sex (all types of sexual intercourse except peno-vaginal intercourse), and the Immoral Traffic Prevention Act of 1956, which criminalised all forms of sex work, mainly affected the gender variant communities in India, further marginalising them.

However, after years of activism, the gender variant communities were finally recognised by the *National Legal Services Authority vs. Union of India* judgement (hereafter, NALSA judgement) in 2014 as a third gender. The Supreme Court directed the central government and state governments to take appropriate steps to offer medical treatment for transgender people in hospitals and separate public restrooms and other amenities. They have also been told to run separate HIV/Sero-surveillance programmes for transgender persons. The group has been requested to participate in different social welfare programmes and be treated as a socially and economically backward class by the federal and state governments.

They have also been requested to extend reservations in educational institutions and government positions. However, a critical reading of the NALSA judgement by Dutta (2014) brings to attention certain shortcomings of the judgement. First, the judgement seems to be directed towards the Hijras and transfeminine spectrum, while it fails to take account of the transmasculine spectrum. The judgement also contradicts the principle of self-determination with biological essentialist assumptions, as Hijras are considered to be transgender automatically, despite not every Hijra identifying as 'third gender', but female. While Justice Radhakrishnan's opinion opted for psychological tests to determine one's gender identity rather than biological tests, Justice Sikri's opinion advocated for the requirement of sex reassignment surgery to identify as male or female but did not require any such test to identify as third gender.

The Transgender Person's (Protection of Rights) Act, 2019 was passed by both the houses of the Parliament despite protests from transgender activists all over the country. The Act further reduced the transgender community to transmen, transwomen, hijras, jogtas, kinner, aravani, and persons with intersex variations. The Act conflates gender with sex and excludes gender non-conforming individuals and other gender variant communities like kothis, shivshaktis, eunuchs, nupa manabi amongst others. The Act also reduced the transgender identities to biological essentialism where a person must go through medical procedures to identify as a male or female on legal certificates. The Act further introduced provisions for equal opportunities in education and employment without discrimination but without any penalty for breaching the Act, rendering it a toothless tiger. The Act criminalised any form of harassment or sexual violence with a minimum sentence of six months, extending up to two years. On the other hand, the minimum sentence for harassment or sexual violence against cis-women is seven years, which can extend up to a lifelong imprisonment. This Act thus appears to treat transgender people as sub-humans [Ministry of Social Justice and Empowerment, 2019; Khanna and Sawhney, 2021].

Transgender Persons in Employment - Global Scenario and Indian Context

There have been studies conducted in many countries in the world, but primarily in the UK and US in terms of discrimination related to transgender and gender non-conforming people in employment. The UK and US have been chosen as the case studies because of more availability of data and research in this context. Yet given the a lack of such studies

conducted in India, this section serves to present the work that has been done in the global scenario and apply it to the context of India. Through the comparison of the literature that exists globally, this paper presents the kind of research that would be useful in India and discuss some of the barriers to this research.

A report by Crossland Employment Solicitors found widespread bias against transgender employees among UK businesses, with one in three saying they are 'less inclined' to hire one, and nearly half (43 percent) wondering if they would hire one. According to a survey by recruiting business TotalJobs (2021), over two-thirds of trans persons (65%) believe it is vital to keep their identity hidden from co-workers to feel comfortable and secure at work. Just over half of trans persons felt this way five years ago. Half of the respondents claimed they had left a job due of a hostile work environment, a 7% rise since 2016. Workers believe that finding a new job is the greatest remedy to discrimination, rather than relying on their employer to intervene, according to the authors of the survey. This is even though trans individuals are legally protected from discrimination under the Equality Act 2010. A third of those polled said they had been bullied at work, including being called by the incorrect name or pronoun (McConnell, 2021). As Rundall and Vechietti (2010) have discovered, even though not all trans-employees with visible features of their gender variety suffered workplace discrimination, more than half of respondents (57.8%) reported bad working experiences, including harassment and, in some cases, assault. The findings revealed the pervasiveness of trans-discrimination in the workplace, and they discovered that, like inclusion, discrimination was context and scenario specific. Furthermore, their study discovered that 75.3 percent of participants transitioned, started transitioning, or want to transition while at work. In addition, 73.9 percent of participants have changed jobs, positions, or industries after beginning to transition or transitioning. Discrimination led many respondents to alter or leave their jobs because of their experiences. The lack of gender-neutral toilets also serve as a deterrent for transgender people in employment. As Marvel et al. (2017) have observed, transgender people are forced to use toilet facilities according to their assigned sex at birth and this leads to many transgender people quitting their workplace.

Similar studies conducted in the USA also revealed that despite having greater levels of education, transgender persons have double the rate of unemployment as the general US population and are four times more likely to report earnings below poverty levels. The National Transgender Discrimination Survey, which polled over 6,000 people, found a 44 percent underemployment rate, with more than a quarter of those polled reporting job loss

due to transphobia. Furthermore, 90% of the participants said they had faced prejudice or harassment at work, or that they had taken attempts to hide their transgender status at work (Mizock et al., 2017). About half of transgender persons have had negative career outcomes due to their gender identity or expression, such as being fired, not recruited, or being refused a promotion. This is greater than the percentages for cisgender persons: 5.6 percent of cisgender people say they were fired because of prejudice, 16.0 percent say they were not recruited because of discrimination, and 12.7 percent say they were denied a promotion because of discrimination. Being transgender may also affect a person's pay. Transgender women lose almost a third of their salary after transitioning, and transgender males observe no change or a little rise in their salary (Davidson, 2016).

In India, according to a study by National Human Rights Commission, around 92 percent of transgender people are denied the right to participate in any type of economic activity, with even competent transgender people being denied jobs, forcing them to beg or pursue sex work. According to the report, 96 percent of transgender persons are forced to work in low-paying or demeaning jobs, such as begging, and sex work, where they are abused by customers and beaten up. 89 percent of transgender people interviewed by researchers indicated that even the most qualified among them are unable to find jobs, and that over 23% are forced to engage in sex work, which has significant health hazards (Chauhan, 2018). However, India has seen some positive changes like 1% reservation for transgender people in government jobs in Karnataka (Venkatesan, 2021).

While many studies (Konduru and Hansing, 2018; Mishra and Negi, 2021) have focused on the denial of livelihood for transgender people, there have been no studies on the discrimination and harassment that transgender people face at the workplace. One barrier to conducting these studies can be the Non-Disclosure Agreement (NDA) made to sign by the workplaces. Globally, during the rise of the #MeToo movement, there has been a lot of attention paid by activists and scholars alike (Zhai, 2020; Macfarlane, 2020) to the role of NDA in suppressing voices of sexual harassment against women in the workplace. Similar restrictions are faced by transgender people and deter them from speaking about employment harassment experiences. When the author of this paper contacted a few gender variant people working in different multinational companies and organisations, almost all of them refused to be interviewed, citing NDAs with their respective companies. However, a few reports have indicated that even if transgender people are employed, they receive little to no help. In 2017, the Koochi Metro Rail Limited in Kerala engaged 23 transgender people, but eight of them departed within a month owing to landlords' unwillingness to provide them with housing.

According to these stories, the job was of little assistance when they were forced to leave their lodging because their employer had no legal commitment to intervene and assist them in their battle against discrimination (Outlook Web Desk, 2022). The NALSA judgement and Transgender Persons (Protection of Rights) Act, 2019 does outlaw discrimination against gender-variant communities but those are just preventive measures and not punitive and does not entail any imprisonment or fine. Without any legal implications, bringing a change in how transgender people interact with the employment market in India is almost impossible.

Conclusion

Transgender and gender variant people face a lot of problems even in getting themselves legally recognised as transgender on legal documents. While the NALSA judgement was a huge step towards recognising the gender variant communities in India, it ignored the voices of people falling on the transmasculine spectrum. The medicalisation of gender variant people with psychological tests made it harder for people who do not fall within the gender binary or communities like Hijras. The Transgender Persons (Protection of Rights) Act further constricted the rights of self-identification for gender variant people. The Act did prohibit discrimination against transgender people in education and employment, but without any punitive measures, they are most likely not going to be effective in countering discrimination. While research has been done on the nature of discrimination of workplaces in countries like the UK and US, such research has not been done in the Indian context. This can be ascribed to the NDA used often in the corporate sector. However, a few measures like reservation of 1% in government jobs for transgender people deserves applaud. More such measures need to be taken in order to secure livelihood opportunities for gender variant people in India.

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