CONFINEMENT AT THE MARGINS: PRELIMINARY NOTES ON TRANSGENDER PRISONERS IN INDIA

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Transgender persons in India have historically been subject to violence and erasure through laws that have criminalised their lives and livelihoods. Despite recent legal and judicial developments that have purported to correct these historical wrongs, transgender persons’ relationship with the penal state continues to be fraught, evident in laws and practices that either target them, or address them as a distinct category, or neglect them entirely. One such site of legal and policy exclusion is a space that is itself relegated to the peripheries of public thought – the prison. Transgender persons in prison are likely to face particular harms on the basis of their gender identity that are compounded by harms that characterise the conditions of confinement. This paper is a preliminary inquiry into the status of transgender persons in Indian prisons. It demonstrates that while transgender persons are policed, criminalised, and made ‘hyper-visible’ in public spaces, they are ‘invisible’ in laws, rules, and practices that are framed for prison management. Further, it argues that centring the self-narratives of transgender prisoners is a necessary first step in understanding their experiences of prison and developing legal and policy responses.

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I. INTRODUCTION

In 2018, following a three-decade long campaign by sexual and gender minorities,¹ the Supreme Court of India (‘Supreme Court/Court/Apex Court’) read down §377 of the Indian

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¹ We use the following definition for the term “sexual and gender minorities” (‘SGM’):

“SGM populations include, but are not limited to, individuals who identify as lesbian, gay, bisexual, asexual, transgender, Two-Spirit, queer, and/or intersex. Individuals with same-sex or gender attractions or behaviours and those with a difference in sex development are also included. These populations also encompass those who do not self-identify with one of these terms but whose sexual orientation, gender identity or expression, or reproductive development is characterized by non-binary constructs of sexual orientation, gender, and/or sex.”

Penal Code, 1860 (‘IPC’) and decriminalised all consensual sexual relations between two adults in *Navtej Johar v. Union of India*. This decision, which has since been hailed as correcting a historical wrong, declared that “[t]he very existence of Section 377 IPC criminalising transgenders casts a great stigma on an already oppressed and discriminated class of people.” Yet, transgender activists have argued that the reading down of §377 does not mitigate the specific harms faced by the transgender community in India. They note that transgender persons are often unjustly arrested and detained under laws and penal provisions besides §377 and forced to negotiate a violent and gendered state apparatus.

Transgender persons encounter social, legal, and political hostilities on the basis of their gender identity, inflected by their caste, class, and religious location. Routine discrimination in accessing education, employment, health care, and housing, and a range of other socio-economic and cultural factors compel some transgender persons to engage in often criminalised means of making a living, such as begging and sex work. The ‘hyper-visibility’ of many transgender persons in public spaces entails discriminatory treatment. It also informs a policing
culture which views transgender persons as ‘deviant’, resulting in harassment, violence, arbitrary arrest, and illegal detention,\(^9\) in turn, creating a fear of engaging with the justice system.\(^{10}\) While human rights reports and transgender rights activists have documented the disciplinary practices, violence, and brutality that marks transgender persons’ encounters with the police and courts, less is known about their experience in one of the most invisible sites of violence – prisons.\(^{11}\)

The experiences of transgender prisoners are at the nexus of marginalisation based on gender identity and the routine violations of the right to life and dignity that characterise the prison system. In other words, the specific vulnerabilities that a transgender prisoner might face intersect with and are compounded by the harms that all prisoners face in confinement. The prison apparatus, built on the male-female gender binary, reproduces dominant notions of sex and gender that are pervasive across society.\(^{12}\) Consequently, transgender prisoners’ engagement with the prison system is marked by both “deliberate indifference”\(^{13}\) and multifarious forms of abuse that are not only endemic to prisons but which are especially used against sexual and gender minorities.

As we set out to inquire about the particular issues that transgender persons are likely to face within the Indian prison system, we encountered ad-hoc institutional responses of prison officials and a dearth of statistics and human rights research. This paper, therefore, is a preliminary exercise in reviewing the laws and policies that shape the experience of transgender prisoners and deliberares on how we might approach legal and policy reform. We argue that self-


\(^{10}\) See generally INTERNATIONAL COMMISSION OF JURISTS, “Unnatural Offences”: Obstacles to Justice in India Based on Sexual Orientation and Gender Identity (February 2017).

\(^{11}\) See Bernard E. Harcourt, \textit{The Invisibility of the Prison in Democratic Theory: A Problem of “Virtual Democracy”}, Vol.23(1), THE GOOD SOCIETY, 6 (2014) (in the context of the American legal and democratic set up, the author argues that prisons have remained invisible in democratic theory and practice involving a “collective non-seeing or dis-engagement”).


narratives\textsuperscript{14} of transgender prisoners help identify their particular needs and concerns and are valuable to developing legal and policy responses.\textsuperscript{15}

The paper is divided into three parts. Part II examines the legacy of colonial laws which have a bearing on transgender persons’ engagement with the criminal justice system in India. This brief account provides context on the construction of transgender persons as ‘deviant’ legal subjects and their consequent vulnerabilities to harm, and helps us extrapolate this position to the prison framework. Part III reviews laws and prison practices that are likely to exert influence on transgender prisoners and identify issues they may face within the existing framework. In Part IV, we elaborate on the need for self-narratives of transgender prisoners by demonstrating their role in international and local human rights reports.\textsuperscript{16} Further, we draw on and compare reports focusing on transgender prisoners from other countries to suggest that law and policy reform in India should be driven by narratives that centre the voices of transgender prisoners.

\section{II. CONTEXTUALISING THE CRIMINALISED TRANSGENDER LEGAL SUBJECT}

Transgender persons have had distinct and diverse localised identities and roles in society.\textsuperscript{17} Yet, entangled with the rise of European colonisation, the overarching notion that transgender persons are ‘deviant’ and ‘unnatural’ led to a range of disciplinary practices congealed in law.\textsuperscript{18} In pre-modern South Asia, transgender identities such as \textit{hijra}, \textit{aravani}, \textit{kinnar},

\textsuperscript{14} In this paper, we use the term “\textit{narratives}” to mean stories and accounts of people’s everyday lives, and “\textit{self-narratives}” to refer to first person storytelling. We limit our discussion specifically to discussing their significance in the context of engaging with the lives of transgender prisoners in India within the scope of human rights reporting and advocacy. We note that narrative theory and practice has come to be used in multiple disciplines and, as a methodology, is itself a burgeoning area of study in the social sciences, including human rights law and gender studies. See generally E. Yardley et. al., \textit{Narrative Beyond Prison Gates: Contradiction, Complexity, and Reconciliation}, Vol.59, CULTURAL STUDIES INTERNATIONAL JOURNAL OF OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY, 159 (2015); B. Davidson, \textit{Storytelling and Evidence-Based Policy: Lessons from the Grey Literature}, Vol.3(1) PALGRAVE COMMUNICATIONS, 1 (2017); Jamie K. Lange, \textit{Narrating Gender: A Feminist Approach to the Narratives of the Transgender Experience} (May 2014) (unpublished Ph.D. dissertation, Boise State University Graduate College) on file with the author available at https://scholarworks.boisestate.edu/cgi/viewcontent.cgi?article=1818&context=td (Last visited on September 9, 2020); J Saibih, \textit{Using Narrative Theory on Analysis of Law and Human Rights: Searching Truth on Tanjung Priok’s Incident in Indonesia}, 3rd International Conference on Law and Governance (2019); KAY SCHAFFER & SIDONIE SMITH, \textit{HUMAN RIGHTS AND NARRATED LIVES: THE ETHICS OF RECOGNITION} (2004); JONATHAN R. SLAUGHTER, \textit{HUMAN RIGHTS INC: THE WORLD NOVEL, NARRATIVE FORM, AND INTERNATIONAL LAW} (2015).

\textsuperscript{15} We note that social locations are deeply interlinked with the dynamics of knowledge production and would be remiss if we were not to recognise and acknowledge our position as caste and class privileged cisgender women. Our intention is not to direct the course of ongoing struggles for securing transgender rights, in which we are not centred. Therefore, our objective with this piece is not to speak for transgender persons or for transgender prisoners, but rather to present research and analysis towards legal and policy reform.

\textsuperscript{16} For this paper, we have chosen to focus on human rights reporting for its explicit objective in enabling and furthering legal and policy reform.

\textsuperscript{17} See Susan Stryker, \textit{(De)subjugated Knowledges: An Introduction to Transgender Studies} in SUSAN STRYKER & STEPHEN WHITTE (EDS.), \textit{TRANSGENDER STUDIES READER}, 1 (Routledge, 2006); Evan B. Towle & M. Morgan, \textit{Romancing the Transgender Native: Rethinking the Use of the ‘Third Gender’ Concept} in SUSAN STRYKER & STEPHEN WHITTE (EDS.), \textit{TRANSGENDER STUDIES READER}, 666 (Routledge, 2006).

mangalamukhi, kothi, shiva shakthi and jogappa\(^{19}\) played crucial social, religious, and political roles\(^{20}\) but were simultaneously outcast.\(^{21}\)

In 19th century South Asia, transgender persons were typecast as ‘sodomites’, ‘prostitutes’, ‘kidnappers’, and ‘castrators’, often because their means of livelihood involved begging and sex work.\(^{22}\) As a result, they were regularly targeted by the colonial police. One of the most infamous penal provisions introduced by the colonial government – §377 of the IPC – created a category of ‘unnatural offences’ such as ‘carnal intercourse against the order of nature’, and was used to threaten and persecute sexual and gender minorities. The representation of transgender persons as ‘deviant’ and ‘immoral’ led to the introduction of Part 2 of the Criminal Tribes Act, 1871 (often known as the Eunuchs Act).\(^{23}\) Even though colonial officials struggled to define and classify transgender persons, the Act labelled certain groups using the “pejorative and stigmatising”\(^{24}\) term “eunuchs”.\(^{25}\) It criminalised feminine gender expression, singing, dancing, and other public performances of some transgender communities, creating a system of surveillance and police harassment intended towards their erasure.\(^{26}\)

Although the portion of the Act on eunuchs was repealed in 1911,\(^{27}\) its vestiges could be found in laws that continued to give unfettered powers to the police to regulate transgender persons well into the last decade.\(^{28}\) For instance, the Telangana Eunuchs Act, 1329F

\(^{19}\) These identity categories were not static or fixed due to their complex emergence during different phases of the LGBTQI movement in India. For instance, Aniruddha Dutta argues that: “hijra and kothi, while evidencing distinct histories of construction, emerge as (seemingly) coherent identities through the collusion of multiple subcultural and governmental processes.” See Aniruddha Dutta, An Epistemology of Collusion: Hijras, Kothis and the Historical (Dis)Continuity of Gender/Sexual Identities in Eastern India, Vol. 24(3), GENDER & HISTORY, 825, 844 (2012).


\(^{24}\) The first Criminal Tribes Act was enacted in 1871, extending to parts of present-day Uttar Pradesh, Uttarakhand and Punjab, and sought to criminalise groups based on hereditary caste occupation. Similar such laws were enacted to cover most of the colonial state in the following years, such as the Criminal Tribes Act, 1911 which extended to the Madras Presidency. Finally, a consolidated Criminal Tribes Act, 1924 was enacted which was applicable to most of the colonial state, and was repealed after independence, see Jessica Hinchy, The Long History of Criminalising Hijras, HIMAL SOUTHASIA, July 2, 2019, available at https://www.himalmag.com/long-history-criminalising-hijras-india-jessica-hinchy-2019/ (Last visited on August 13, 2020).

\(^{25}\) Jayna Kothari, Section 377 and Beyond: A New Era for Transgender Equality in RONALD MEINARDUS (EDS.), HOW LIBERAL IS INDIA, 183, 185 (Academic Foundation, 2008).

\(^{26}\) Part 2 of the Criminal Tribes Act, 1871 stated that the term ‘eunuch’ shall be deemed “to include all persons of the male sex who admit themselves, or on medical inspection clearly appear, to be impotent”.

\(^{27}\) See generally Hinchy, supra note 18; Anuja Agrawal, Gendered Bodies: The Case of the 'Third Gender' in India, Vol. 31(2), CONTRIBUTIONS TO INDIAN SOCIOLOGY, 273 (1997).

\(^{28}\) See Ajita Banerjee, Beyond Decriminalisation: Understanding Queer Citizenship Through Access To Public Spaces in India Vol.12(2). NUJS LAW REVIEW, 5 (2019); ONDEDE (Prerna Kodur & Gowthaman Ranganathan), A Report on...
permitted the police to maintain a register of eunuchs and permitted arrest if they were found “in female dress” or singing and dancing in public spaces. §36A of the Karnataka Police Act, 1963 was introduced as recently as in 2011 with similar powers to maintain registers and regulate the behaviour of eunuchs. It is only after years of advocacy and litigation by the transgender community that, in 2018, the Hyderabad High Court stayed the operation of the Telangana Eunuchs Act and, in 2016, the State of Karnataka amended §36A, replacing the word “eunuch” with “person”.

Transgender persons continue to be targeted and detained under laws that may not explicitly discriminate on the basis of gender identity but which entail policing of the streets, such as §268 and §290 (public nuisance) and §320 (grievous hurt) of the IPC, the Immoral Traffic (Prevention) Act, 1956, and the laws against begging. More recently, the proposed Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018, which does not explicitly exclude sex work from the ambit of trafficking, similarly puts transgender persons at risk of persecution.

Harmful stereotypes regarding transgender persons, stigmatisation, regular harassment and violence have characterised their engagement with the criminal justice system in India. In a report on the status of policing in India, 27% of the police personnel who were interviewed felt that transgender persons are ‘somewhat’ naturally prone to committing offences. Considering that Scheduled Caste and Scheduled Tribe (‘SC/ST’) communities are also routinely targeted by the police, transgender persons from SC/ST backgrounds are particularly vulnerable to police harassment, arbitrary arrests, and custodial violence.

The historical and contemporary legal trappings, systemic violence encoded in the criminal justice system, and discriminatory attitudes and social ostracisation mediates the everyday


32 Aditya, supra note 5, at 2.
33 See INTERNATIONAL COMMISSION OF JURISTS, supra note 10, at 3.
34 Semmalar, supra note 5, at 289.
36 Aditya, supra note 5, at 2.
37 See PUCL–KARNATAKA, supra note 7, at 2; Kodur & Ranganathan, supra note 28, at 5.
38 COMMON CAUSE ET AL., supra note 9, at 108.
40 Kothari, supra note 7, at 79–80.
lives of transgender persons across spaces. Since prisons reproduce the dynamics of power observed in society, transgender prisoners are likely to experience identical forms of harm in confinement, exacerbated by the harms endemic to prisons. Transgender prisoners are also compelled to negotiate exclusionary laws, rules, and policies and the internal social dynamics of confinement where “the cult of masculinity promoted by the jail environment necessarily entails a targeting of those not considered masculine enough.”

This confluence of factors raises the question of whether prison laws, rules, and policies recognise transgender persons and the extent to which prisons perpetuate the patterns of violence set out above. In the next section, we provide an overview of legal developments and practices that impact the treatment of transgender prisoners with the aim of identifying some issues that need attention.

III. ENCOUNTERING INVISIBILITY:
TRANSGENDER PERSONS IN PRISON LAWS AND PRACTICES

The National Crime Record Bureau’s annual Prison Statistics reports the latest data on prisons and prisoners in India. Transgender prisoners find no mention in any of these reports, including the most recent 2019 report, as they disaggregate data on gender only by male and female categories. In response to a question raised in the Lok Sabha on whether the Central Government maintains any data on the number of transgender persons in various Central prisons, the Ministry of Home Affairs responded that as ‘prisons’ is a state subject under the Seventh Schedule of the Indian Constitution, the management of prisons would be the responsibility of respective State Governments.

The National Prisons Information Portal reports data on the number of prisoners by state and disaggregates gender data by “male”, “female”, and “others” categories. A total count of the numbers in the ‘others’ category across states adds up to seventy; however, it is unclear who this constitutes because there are no definitions provided or details given on how this data has been collected. Presuming the ‘others’ category refers to transgender prisoners, this number is likely to be a gross underestimation as a forthcoming report estimates the preliminary number to be as high as 214, based on responses received under the Right to Information Act, 2005 (‘RTI’).

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42 PUCL–KARNATAKA, supra note 7, at 37.
46 This number is dynamic and is likely to change on a day-to-day basis. These figures were collected on August 12, 2020: Bihar (1), Chhattisgarh (3), Delhi (7), Gujarat (7), Haryana (6), Jammu and Kashmir (1), Karnataka (2), Madhya Pradesh (4), Orissa (2), Puducherry (5), Punjab (3), Rajasthan (3), Tamil Nadu (1), Uttar Pradesh (10), Uttarakhand (1) and West Bengal (14) reported figures under the ‘Others’ category.
The lack of definitive data on the number of transgender prisoners raises questions of how gender is determined in prison data-collection processes. In National Legal Services Authority of India v. Union of India (‘NALSA’), the Supreme Court recognised the right to self-identify gender and held that no medical procedure or examination shall be a prerequisite to self-identification. The Court also observed that non-recognition of transgender persons makes them “extremely vulnerable to harassment, violence and sexual assault in public spaces, at home and in jail, also by the police” and went on to direct the Centre and State Governments to grant legal recognition of gender identity as male, female, or third gender. State Governments have devised their own methods of enabling self-identification like declaration on affidavit or appearance before a transgender welfare board sometimes involving medical examination. The recent Transgender Persons (Protection of Rights) Act, 2019 lays down a two-step process for self-identification of gender identity. This process allows a person to identify as ‘transgender’ by submitting an application to the District Magistrate, but only permits identification as ‘male’ or ‘female’ if they have undergone a Sex-Reassignment Surgery (‘SRS’), contrary to NALSA. Even as the Act is under challenge before the Supreme Court, draft rules setting out the procedure to be followed for the two step self-identification process under the law have been released.

49 Id., ¶74, 80 (per Radhakrishnan J.) (the Supreme Court held that:
“the recognition of one’s gender identity lies at the heart of the fundamental right to dignity. Gender, as already indicated, constitutes the core of one’s sense of being as well as an integral part of a person’s identity. Legal recognition of gender identity is, therefore, part of the right to dignity and freedom guaranteed under our Constitution.”

It further held that:
“Article 21, as already indicated, protects one’s right of self-determination of the gender to which a person belongs. Determination of gender to which a person belongs is to be decided by the person concerned. In other words, gender identity is integral to the dignity of an individual and is at the core “personal autonomy” and “self-determination [...]”).

50 Id., (2014) 5 SCC 438, ¶22, 82 (per Radhakrishnan J.) the Court held that:
“Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom and no one shall be forced to undergo medical procedures, including SRS, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity.”

The Supreme Court further held that “Gender identity as already indicated forms the core of one’s personal self, based on self-identification, not on surgical or medical procedure.”

51 Id., ¶62 (per Radhakrishnan J.).
55 Transgender Persons (Protection of Rights) Act, 2019, §§6, 7.
56 THE LEAFLET, SC issues notice to Centre on a plea against ‘Transgender (Protection of Rights) Act, 2019’, January 27, 2020, available at https://thelifeleaf.in/sc-issues-notice-to-centre-on-a-plea-against-transgender-protection-of-rights-act-2019/ (Last visited on August 13, 2020); Transgender Persons (Protection of Rights) Rules, 2020 (draft) (the draft rules were released in April 2020, during the early days of COVID-19 lockdown which was a particularly challenging time for the transgender community to access basic needs. The government also gave only two weeks for the public to comment, effectively excluding the transgender community from the process. This was challenged widely by community members and subsequently the timeline was extended); See Johanna Deekscha, How can we respond
These experiments with instituting self-identification processes underscore that engagement with law entails identification, enumeration, and classification of persons that both fail to account for the fluid and complex nature of identity and reinforce boundaries between gender categories. The female-male binary is a critical feature of the built environment of the prison and has enforced sex-segregation, making invisible bodies, identities, and expressions that do not fall neatly within the gender binary.\(^{57}\) Several historians have also argued that gendered notions of morality and disciplinary practices which uphold compulsory heterosexuality\(^{58}\) and gender norms have contributed to reformatory and rehabilitative programs in prisons.\(^{59}\) Nevertheless, to the extent that the principle of self-identification provides some capacity for the State to recognise and respond to diverse gender identities within the existing legal framework, the discourse on prison management must confront it. Absence of a self-identification mechanism that aligns with the right recognised in NALSA will have multiple consequences in the prison context, ranging from inaccurate data collection to more serious challenges like placement of transgender prisoners. Failure of the law to acknowledge the existence of transgender prisoners will undoubtedly have a bearing on concerns of healthcare, gender expression, body searches, and sexual and physical violence by jail staff and other prisoners.

State jail manuals, which are the primary source of information on prison management, do not make any provisions for transgender prisoners.\(^{60}\) Most jail manuals have not


\(^{58}\) The belief that a lack of female companionship resulted in homosexual activity influenced British colonial concerns about gender ratios within prisons. For instance, Clare Anderson notes: “By the second half of the nineteenth century, the Andamans authorities were so concerned about imbalanced gender ratios that they appointed a committee for the ‘elimination and identification of men addicted to this nefarious practice’, a veiled reference to homosexual activity.” CLARE ANDERSON, *LEGIBLE BODIES: RACE, CRIMINALITY, AND COLONIALISM IN SOUTH ASIA* 118 (Berg Publishers, 2004); See also Satradu Sen, *Rationing Sex: Female Convicts in the Andamans*, Vol.21(2), JOURNAL OF SOUTH ASIAN STUDIES, 29 (1998).

\(^{59}\) Satradu Sen evaluates the rehabilitation programs across prisons in colonial India, comparing prison spaces dedicated to female prisoners with those that accommodated male and female prisoners. Sen demonstrates that sex segregation was a feature of rehabilitation and argues:

“unless sexual segregation was enforced, long-term rehabilitation in prison would lose one of its central messages, which was the idea of appropriately separated and ordered gender roles in colonial society. For this reason, most British-Indian prisons which cared to advertise their programmes of education and labour emphasised that men and women not only learned different skills while in jail but learned separately.”


\(^{60}\) The state jail manuals and rules that were reviewed are the Bombay Jail Manual, Punjab Jail Manual, Kerala Prison Rules, Rajasthan Jail Manual, Sikkim Prison Manual, Delhi Prison Rules, Assam Jail Manual, Karnataka Prison Rules,
been updated in the last decade and the latest Model Jail Manual, 2016, which is meant to serve as a guiding document, also does not account for transgender prisoners. Only the Delhi Prison Rules, 2018 expressly recognise transgender prisoners as ‘Prisoners with Special Needs’, although they are by no means comprehensive. While the rules provide that the prison administration will ensure the separation of transgender prisoners and that the Government of the National Capital Territory of Delhi shall take adequate steps to provide institutional facilities, it stops short of identifying any other concerns that they might face within the institution.

In the absence of state rules, practices on placement of transgender prisoners are inconsistent and often in contravention with the principle of self-determination. In one of the only investigations on transgender prisoners in India by the Commonwealth Human Rights Initiative, RTI responses revealed two processes to place transgender persons upon entry in prison. While some states determined placement based on the gender mentioned in the court warrant, a few others relied on the advice of the medical officer on admission to prison.

In Tamil Nadu, it appears that the placement of transgender prisoners is based on a court warrant. Rule 6(11) of the recently amended Madras Criminal Rules of Practice, 2019 provides that when a transgender person is arrested and produced before a Magistrate, the court should pass an order to conduct a medical test to ascertain the person’s ‘predominant sex orientation’. Based on the medical report, the Magistrate should pass an order of detention in the men’s or women’s prison, “with a direction to the prison authorities to provide the necessary safeguards to ensure that no inconvenience is caused to the transgender person by the other inmates and vice versa”. This procedure mandates medical examination to determine gender for placement and also assumes foreknowledge of a person’s transgender status. It is also unclear why a medical test is necessary in all cases involving transgender persons when a separate Transgender Welfare Board in Tamil Nadu issues identity cards to enable access to public services.

Similar to RTI responses of a few other states in the report, Karnataka claimed that they placed transgender prisoners separately from male and female inmates. However, these

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63 Delhi Prison Rules, 2018, Rules 4(iii), 5; (This change appears to have been made following a judgment of a lower court in Delhi which held that they should be housed separately with facilities for lock-ups and toilets and cannot be shuttled between men and women’s prisons based on the convenience of the prison administration). See THE TIMES OF INDIA, Give separate jail facilities to transgenders, July 29, 2014, available at https://timesofindia.indiatimes.com/city/delhi/Give-separate-jail-facilities-to-transgenders/articleshow/39185229.cms (Last visited on August 13, 2020).
64 COMMONWEALTH HUMAN RIGHTS INITIATIVE, supra note 47, at 7.
65 Not all states or all prisons in a state responded to the RTI requests. See COMMONWEALTH HUMAN RIGHTS INITIATIVE, supra note 47, at 43–44.
66 COMMONWEALTH HUMAN RIGHTS INITIATIVE, supra note 47, at 43–44.
67 Madras Criminal Rules of Practice, 2019, Rule 6(11).
68 The Board also requires a physical examination, contrary to NALSA, and this issue is under challenge. See Grace Banu v. State of Tamil Nadu, Affidavit in Rejoinder of the Petitioner, W.P. 6035 of 2019, ¶5 (Pending).
69 COMMONWEALTH HUMAN RIGHTS INITIATIVE, supra note 47, at 44 (according to the report, besides Karnataka, states of Andhra Pradesh, Telangana, Gujarat, Maharashtra, Kerala, Rajasthan, Sikkim, Puducherry, Andaman &

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responses do not clarify whether separate wards are provided or if transgender prisoners are merely placed in separate cells within the male and female wards. For instance, shortly after the arrest of four transgender persons in 2016, the Bangalore Central Prison revealed that while they have created separate cells for transgender prisoners, separate wards are not provided. At the time of admission, transgender persons are examined and assigned to either the male or female wards, based on their sexual organs. It is unclear where people are placed if these medical examinations are inconclusive, as might be the case for intersex persons. We also do not know if all prisons within a state follow the same practices in terms of identification and placement.

At present, Kerala might be the only state in India which has made arrangements for separate blocks for transgender prisoners in its new prisons and is considering setting up separate blocks in existing Central prisons. While Kerala was one of the first States to implement a policy for transgender persons and its decision to accommodate transgender prisoners came at the heels of NALSA, no large scale changes to the prison rules or jail manual in Kerala have been carried out.

The placement of transgender prisoners in men’s or women’s prisons influences their treatment due to gender-specific practices, such as dress codes and body searches and the gendered hierarchies that characterise prison culture. Activists in Telangana have contended that since placement is based on medical examination, transgender women who have not undergone SRS are placed in male prisons and are forced to limit gender expression by altering other feminine markers, such as shaving long hair, and removing jewellery. Accounts by transgender persons reveal that they face verbal, physical, and sexual violence in prisons by jail wardens and other inmates. Further, unlike in the case of women prisoners where most state jail manuals clarify that body searches can be conducted only by women jail officials (the presumption being that body searches by officials of the same sex as the prisoner protects against sexual harassment), similar considerations respecting the bodily integrity of transgender persons are absent. Further, no provisions have been made for the specific medical care facilities that transgender prisoners might

Nicobar Islands, some prisons in Uttar Pradesh and a Women’s Prison in Tamil Nadu also claimed that transgender prisoners are kept separately from male and female inmates).


71. Id.

72. See supra note 4, at 2 (definition of ‘intersex’).


require, including access to regular hormonal medication, gender re-assignment surgeries during incarceration, and mental healthcare services. Finally, given the exclusionary socio-economic and cultural contexts which influence the arrest and detention of transgender persons, a gamut of questions regarding education, skill-development, and employment of transgender prisoners upon release also need in-depth consideration.

An analysis of the legal framework in this section has shown neglect and inconsistency in addressing the experiences of transgender prisoners. The hyper-visibility of transgender prisoners which puts them at risk of physical and sexual violence stands in contrast with their invisibility in statistics, policies, and practices. This invisibility leads to a poor understanding of the particular challenges faced by transgender prisoners and consequently limits the ability to devise appropriate legal and policy responses. To develop a deeper and sophisticated understanding of the needs of transgender prisoners, we first need to make visible their experiences in prisons. In the absence of studies focusing on transgender prisoners in India, the narratives in international reports helped us piece together their potential needs and the propensity for harms. In the next section, we delve into the significance of the narrative method with examples from international reports to emphasise the need for centring the narratives of transgender prisoners in India.

IV. COUNTERING INVISIBILITY: THE ROLE OF SELF-NARRATIVES

Scholars have argued that “human rights violations target the voice...therefore the voice should be the focus of human rights instruments”. Marked by distinct but overlapping notions of deviance and immorality, the voices of both prisoners and transgender persons have occupied the margins, often spoken for or unheard entirely in the discourse on prisoner rights and gender justice respectively. Narratives of transgender prisoners are not only vital to understanding their daily lives, needs, struggles, and aspirations but also offer an essential perspective on the criminal justice system and the institution of prison as a whole. While numerical data is helpful in making sense of the scale of concerns and prominent dimensions, self-narratives provide insight into the universal and particular issues faced by transgender prisoners. Schaffer and Smith note that in Human Rights campaigns “personal stories are narrated to remember a past that has been forgotten; to begin a healing process between tellers and listeners; to bring rights violations to a global audience; to put a human face on suffering; to mobilise and fund activism”.

77 According to news media reports, when a nineteen year old trans-woman arrested in Bengaluru developed an infection in her silicone implants while in custody, she was prescribed only generic painkillers, until the medical condition escalated and she had to be transferred to a hospital for treatment as the prison wardens and medical officers were not trained on the specific medical concerns that transgender persons might face, see Roy, supra note 70, at 10.


“While at least some transgender individuals also choose to hide their identity in prison, even if this means not living in their true gender identity, many transgender people do not have this option. The hyper-visibility of at least some transgender people, particularly those in men’s prisons, increases the risk of harassment and violence”


Redeulius-Palmer argue that participatory methods in Human Rights reporting can be used in two distinct but overlapping ways: first, as ‘relational’ tools which enable consciousness-raising between peoples, and second, as ‘instrumental tools’ for effecting concrete change to existing systems.  

Human Rights reports that centre the narratives of transgender prisoners utilise different participatory methods with varied objectives. The report ‘Crimes of Hate, Conspiracy of Silence: Torture and ill-treatment based on sexual identity’ by Amnesty international (‘AI’) outlines the local and international legal framework and provides case details, interspersed with quotes from LGBT persons, lawyers, and activists. For example, the report describes the case of Vanessa Lorena Ledesma, a transgender woman in Argentina who faced torture and died in custody after she was isolated from other prisoners due to her HIV status. Ledesma’s case motivated local and international activism which put pressure on the government to convict the police officers involved. The report includes a quote by an Argentinian transgender rights activist who states, “Many of our compañerí as have been beaten to death in police stations and no one cries out or defends them”.

Like Ledesma’s case, several other cases cited in the AI report are those which have motivated local action and spurred international campaigns. While narratives are divided by country within the report, their compilation emphasises the universality of torture and ill-treatment based on gender and sexual identity and is instrumentalised towards making recommendations applicable to governments worldwide.

In contrast, a US-specific report ‘Unjust: How the Broken Criminal Justice System Fails Transgender People’ presents stories in text boxes, which supplement the quantitative data, infographics, and legal frameworks that are the focus of the report. A majority of these stories are presented in third person, adapted from news reports and litigation details, and are arranged thematically. For instance, one text box titled ‘Story: Discrimination in the Justice System’ relates the story of a sixteen year old black transgender girl who faced persistent harassment and abuse in juvenile detention and inadequate legal support. The final text box in the report titled ‘Story: Life as a transgender woman in a Halfway House’ is a reprint of a self-narrative by a transgender woman who was mistreated by the staff in a drug rehabilitation centre and sought legal recourse. These stories have been adapted into a common format to highlight the difficulties faced by transgender individuals in institutional settings. Thus, the narratives have been used as relational tools, intended primarily for policy makers and legislators, to personalise the data presented, garner an affective response, and provoke action.

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83 Id.
84 Id.
In several International reports, narratives serve a combination of relational and instrumental objectives. For instance, another US-specific report, ‘A Roadmap to Change: Federal Policy Recommendations for Addressing Criminalization of LGBT People and People living with HIV’ is organised in thematic chapters. Each chapter begins with sections written by activists and lawyers representing LGBT persons and includes key issues substantiated by quantitative data, self-narratives, case details, and recommendations. Many of these narratives are relational, seeking to ‘generate momentum’ amongst activists and the public. For instance, a self-narrative by an ex-prisoner and activist states:

“As a black trans woman, I experienced sexual violence while in prison. I was put in blatantly dangerous housing situations where officials knew I would be taken advantage of. [...] I knew that being housed in the [Security Housing Unit] would prevent me from participating in the drug program that was allowing me to qualify for early release and I would not be able to attend school programs that I was involved in. I chose to keep quiet about what was happening to me so that I could be part of the [drug] program and be released from prison 18 months early. No one should have to make the choice between enduring a longer prison sentence or being sexually assaulted.”

At the same time, these narratives are also intended to be instrumental in guiding policy change. The section on prisons in the report includes a quote from an LGBT prison activist who shares the experience of Hope, a transgender woman who was assaulted in prison and faced a charge under the Prison Rape Elimination Act (‘PREA’). The activist explains, “[t]he attacker lied and told the guards that Hope had offered him oral sex. As a result, she was punished even though she was the person attacked, and she is now facing being moved to a maximum security prison because of the violation”. The presentation of these narratives alongside quantitative data and recommendations serve to bolster the legislative recommendations made on PREA.

In some reports, the self-narratives help identify the critical issues facing transgender prisoners and consequently drives the analysis. A report focusing on Ireland, ‘Out on the Inside: The Rights, Experiences and Needs of LGBT People in Prison’, presents responses from focus group interviews, which are framed by domestic laws and literature from international sources. The sections on harassment, abuse, and physical and sexual violence include self-narratives that describe language and behaviours that are specific to the prison culture. For instance, while some prisoners claimed that sexual violence in Irish prisons was unlikely given the socio-cultural context, one transgender woman stated, “just because you don’t necessarily hear

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81 Id., at 6.
82 Id., at 25.
83 Id., at 23.
84 Supra note 78, at 10: “It is worth noting that there is significantly more research and analysis on transgender persons in prisons, in the US, perhaps due to the scale of incarceration and prison activism, than in Ireland. Therefore, the expressed purpose of the report from Ireland is exploratory”.

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about it [sexual violence] doesn’t mean that it doesn’t go on. I mean I am aware of people who were tied up and raped”.  

Significantly, the section on the lack of specific placement policies includes excerpts which discuss common practices and demonstrate the impact of a lack of policies addressing transgender prisoners. These self-narratives are meaningful for drawing attention to the laws, practices, and systemic issues that impact the daily lives of transgender prisoners.

Similarly, a report titled ‘It’s War in Here: Transgender and Intersex People in New York State’s Men’s Prisons” presents quantitative research and legal analysis and dedicates a chapter to the conditions of confinement titled ‘Daily Realities’. Common threads from the narratives in this chapter help identify key issues such as placement, forms of harassment and abuse by prison officials and other prisoners, denial of medical care, lack of privacy, and regulation of gender expression. For example, one transgender woman says, “Medical services are poor for the average inmate. They see gender-related services as cosmetic, not essential to transition and to a healthy life”.

Significantly, the experience of an intersex prisoner as explained by their transgender advocate sheds light on how placement impacts treatment in prison:

“People with intersex conditions who have not been surgically ‘normalized’ are seen as ‘freaks’ in the prison system, because their bodies defy easy categorization as ‘male’ or ‘female.’ People in prison with intersex conditions have been put into punitive isolation for no other reason than because administrators did not know whether to place them in men’s or women’s prisons. One client of mine who has an intersex condition was repeatedly strip searched by custody staff for no other reason than to see her genitalia. She did not identify as transgender, but the type of mistreatment, harassment, and stigmatization she experienced was similar to that experienced by my transgender clients.”

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92 Supra note 78, at 26.
93 Supra note 78, at 11 (“I have a recollection of at least one incident, ... many years ago... The organisation goes on what’s on a person’s birth cert, so if on the birth cert they are a man they go into a male prison. If they are on the birth cert a woman they going to the women’s prison and that’s where we go, and unfortunately if it is someone ... who’s going through the process [gender transition] it’s a, you know, it’s difficult (CJ01)”; (“A warrant has six points in it, it’s a court document. For want of a better term it is actually a delivery docket and the description of goods on that delivery docket cannot be changed by somebody who is receiving the goods. So therefore the Governor doesn’t have a choice. And if you’re committed to custody in a male institution, well that’s it...or a female institution, that’s it. There is no possibility in law currently for changing that. There’s also I mean if you go back to transfers between prisons, it’s under the 1914 Administration of Prisons Act, and ... effectively that’s to transfer the warrant between addresses so moved from the Governor of Mountjoy to the Governor of Midlands for example, and then the person follows the warrant. But there is no possibility according to that for transferring somebody from a male to a female prison (CJ05”).
95 Id., at 15.
96 Id., at 27.
97 Id., at 22.
The report also included a self-narrative by a transgender man imprisoned in a woman’s correctional facility in California which described harassment based on gender expression, “At one point I was being made to wear a dress, despite the fact that no one else in the prison was forced to. It was just to humiliate me”.98

Narratives from transgender prisoners also demonstrated the “lack of institutional recourse”, “inadequacy of the correctional grievance procedure” and a culture of impunity.99 For instance, one transwoman revealed:

“There was no retaliation (to my claims) per se, but the way in which NYS DOCS (New York State Department of Corrections) prison staff and officials manage to give misdirection, hide identities of responsible staff members through conspiracies of silence and evasive propaganda, and reinterpret complaint of prisoners into entirely different issues that they refuse to address, there is often little need to retaliate because the inmate’s problem is rarely even resolved.”100

While the narratives in ‘Out on the Inside’ and ‘It’s War in Here’ play a ‘relational’ role by raising consciousness,101 their role in shaping the recommendations for reform underscore the ‘instrumental’ function they fulfil. More importantly, self-narratives in these reports do not merely supplement the analysis but are integral to it. The narratives are not constrained by a format that pegs a problem to a particular legal and policy solution but instead highlights how at every step, the prison system is fundamentally hostile towards transgender prisoners. Further, the reports do not synthesise these stories into a singular, cohesive narrative that might be descriptive of the experience of all transgender persons in prison and include opposing views. By affirming ‘transgender persons’ diverse perspectives and experiences of prison life,102 these reports recognise that expertise on what needs to be addressed lies with those who navigate, circumvent, and experience these spaces.

A few reports on violations against transgender persons in India also include accounts of those who were imprisoned. For instance, a 2003 report published by the People’s Union for Civil Liberties, Karnataka on hijra and kothi sex workers in Bangalore includes a self-narrative of a twenty-seven year old kothi who faced sexual violence in prison.103 Similarly, a 2014 report published by Ondede which provides a number of testimonies on illegal detention in police custody, harassment, and violence by the police also includes a self-narrative by a transwoman who was falsely accused of murder and spent three months in Mysore Central Jail.104 Her testimony exemplifies how social and legal discriminatory attitudes towards transgender persons result in ill-treatment by the criminal justice system. For instance, she said:

“From Bilikere Police Station, they took us to Mysore Central Jail. The police told us that they were taking us to Bangalore, but they took us to Mysore Jail instead.

98 Id., at 33.
99 Id., at 23.
100 Id.
101 Schaffer & Smith, supra note 80, at 271.
102 Supra note 78, at 14. For example, ‘Out on the Inside’ notes: (“It is important to emphasise that this culture and the hierarchy that accompanies it, not only affects GBT prisoners, but also those who are perceived to be GBT. In interviews for this study respondents noted that ‘any difference’ made a person a potential target for victimisation”).
103 PUCL-KARNATAKA, supra note 7, at 37–38.
When we went there, everyone came out to see. They laughed at us. They pointed at us and passed comments. The Officials at the Central Jail made us sit out as they did not know where to put us. While we sat there, the Police laughed at us by passing comments. After checking us, they finally put us in women’s cell. This is the first transgender case in Mysore Central Jail.\textsuperscript{105}

This excerpt demonstrates a lack of consideration by police and prison officials for transgender persons and harassment they face even before entering the prison system.

Human Rights reports in India have highlighted the varied socio-cultural identities within the transgender community and their unique history of criminalisation and stigma. Therefore, while international reports alert us to common concerns, India’s policing culture, structure of incarceration, and caste, class, and religious differences ought to caution us against overreliance on international sources to articulate law and policy reform for transgender prisoners. In order to understand and engage with the issues faced by transgender prisoners in India, human rights research needs to foreground their self-narratives, which can serve three critical goals. First, interviewing and documenting self-narratives can enable perspectives that might not be accounted for. Secondly, self-narratives can counter the processes of silencing, erasure, and suppression of ‘human narrative capacity’\textsuperscript{106} that are often integral to the harm of a human rights violation itself. Thirdly, narratives not only offer insight into the experiences of an individual subject facing violation but also the collective and socio-cultural context within which an individual is embedded.

V. CONCLUSION

Ten years since the judgment of the Delhi High Court in Naz Foundation v. Government of NCT, Delhi,\textsuperscript{107} the litigation history around §377 has become popular knowledge. There is, therefore, no better time to recall that the legal battle against §377 found its origins in the prison system when the AIDS Bhedbhav Virodhi Andolan filed the first petition in 1994 before the Delhi High Court challenging the constitutionality of §377 and seeking the distribution of condoms to male prisoners in response to the AIDS epidemic.\textsuperscript{108}

Since then, §377 has been read down and legal reforms on realising the rights of transgender persons guaranteed in NALSA are taking place, albeit at a snail’s pace. Yet, even as prisons reproduce the dynamics of power observed in society, they remain closed-off institutions, isolating and secluding persons while occupying a marginal space in the public imagination. Therefore, transgender persons who might be viewed as hyper-visible with respect to law, order, and policing, become invisible once they are in custody. That laws and prison practices fail to

\textsuperscript{105} Id., at 24.

\textsuperscript{106} Slaughter, supra note 79, at 412.

\textsuperscript{107} Naz Foundation v. Government of NCT Delhi, 2009 SCC OnLine Del 1762.

\textsuperscript{108} AIDS Bhedbhav Virodhi Andolan v. Union of India & Ors., W.P. (C) 1784 of 1994. See AIDS BHEDBHAV VIRODH ANDOLAN, Summary of Civil Writ Petition 784 of 1994 in the High Court of Delhi, available at http://14.139.60.114.8080/jspui/bitstream/123456789/1150/1/020_Summary%20of%20Civil%20Writ%20Petition%201784%20Petition%201994.pdf (Last visited on August 13, 2020). (This Petition was filed following the refusal of the then Inspector General of Tihar Jail to distribute condoms to prisoners in response to the AIDS epidemic, on the ground that it promotes homosexuality and would violate Section 377. This petition was eventually dismissed by the court).
account for transgender prisoners and do not address their particular needs and concerns demonstrates the deliberate indifference\textsuperscript{109} of the Indian prison system.

In a world where ‘what gets measured gets done’,\textsuperscript{110} the lack of numerical data on transgender persons makes their existence in prisons invisible and poses serious challenges to effecting legal and policy reform. While the ‘challenges around defining and measuring gender minority status, self-identification or presentation’ present hurdles to data collection and analysis,\textsuperscript{111} collecting quantitative data on transgender prisoners is important to acknowledge the scale of concerns. At the same time, the process of framing future inquiries and conceptualising reform requires insight into the daily realities of prison life from transgender prisoners. Therefore, we argue that future studies that aim at legal and policy reform in India foreground the self-narratives of transgender prisoners. At the same time, we acknowledge that the process of collecting narratives is not without significant practical and ethical challenges. Besides the difficulties with accessing prisons in India, the power dynamics inherent in such knowledge production require intense reflection. A lack of awareness of the interviewer's social location, standardised interview practices, and schematic notions of gender, crime, and justice can impede the ability to listen and comprehend people’s narratives.\textsuperscript{112}

The lives of those who occupy prisons remain a critical focal point for advocacy as long as the prison remains the primary site for administering punishment. Therefore, even as we advocate for limiting carceral responses and prioritise addressing the complex factors that lead to imprisonment, we hope that the observations in this paper will set us on a path to providing immediate relief to transgender prisoners.

\textsuperscript{109} Erni, \textit{supra} note 13, at 3.

\textsuperscript{110} UNITED NATIONS DEVELOPMENT PROGRAMME, JEFFREY O’MALLEY, \textit{Sexual and Gender Minorities and the Sustainable Development Goals} (2018).

\textsuperscript{111} \textit{Id.}, at 90.

\textsuperscript{112} For instance, collecting the narratives of transgender persons in prison must also be attentive to the pervasive issues of voyeurism and infringement of privacy that characterise the representations of transgender persons in popular media, see \textit{supra} 80, at 12; Harsh Mander, “\textit{Words from the Heart}”: Researching People’s Stories, Vol.2, \textit{JOURNAL OF HUMAN RIGHTS PRACTICE}, 252 (2010).