



TRANS FORM

NATIONAL CONFERENCE ON TRANSGENDER RIGHTS AND THE LAW

14/15
DEC 2016

VENUE:
Indian Institute of Human
Settlements, Bangalore

The experience of marginality and exclusion within the transgender movement is complex and multi layered, with gender identity, disability and caste compounding social discrimination. In this conference we aim to critically examine how law impacts the lives of transgender persons and articulate rights within the complex discourse of gender identity.

Visit www.clpr.org.in/transform for details



CENTRE FOR
LAW & POLICY
RESEARCH

Friedrich Naumann
STIFTUNG

FÜR DIE FREIHEIT

SPEAKERS



Akkai Padamshali



Anindya Hajra



Arun Thiruvengadam



Chayanika Shah



Diksha Sanyal



Gee Imaan
Semmalar



Jayna Kothari



Karthik Bittu
Kondaiah



Raina Roy



Siddharth Narrain



Siddharth
Swaminathan



Sudhir Krishnaswamy



Sushila Lama



Vivek Divan



Vikramaditya Sahai



Vyjayanti Vasanti
Mogli

1. **Dr. Akkai Padamshali:** Transgender activist and co-founder of Ondede and Swatantra organisations
2. **Anindya Hajra:** Founder Member, Pratyoy Gender Trust
3. **Arun Thiruvengadam:** Azim Premji University
4. **Chayanika Shah:** Visiting Faculty Tata Institute of Social Sciences and LABIA (Lesbians and Bisexuals in Action), Bombay
5. **Diksha Sanyal:** Researcher, Centre for Law and Policy Research
6. **Gee Imaan Semmalar:** Writer and activist
7. **Jayna Kothari:** Executive Director, Centre for Law & Policy Research
8. **Karthik Bittu Kondaiah:** Member of Telingana Hijra Intersex Transgender Samithi and Faculty Fellow, University of Hyderabad
9. **Raina Roy:** Founder Member, Samabhabana
10. **Siddharth Narrain,** Centre for the Study of Developing Societies, New Delhi
11. **Siddharth Swaminathan,** Azim Premji University
12. **Sudhir Krishnaswamy,** Azim Premji University
13. **Sushila Lama:** Country Officer, South Asian Human Rights Association
14. **Vivek Divan:** Independent Consultant
15. **Vikramaditya Sahai:** Doctoral Student, Delhi University
16. **Vyjayanti Vasanta Mogli,** Co-founder, Telingana Hijra Intersex Transgender Samithi

CONFERENCE AGENDA

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DAY 1 – 14th December 2016

9.00 am: Registration and Tea

9.45 am: Welcome Address – Prof. Sudhir Krishnaswamy, Trustee CLPR and Azim Premji University

10.00 am to 11.30 am - Panel I: Expanding Gender: Gender Non-Conformity as being worthy of constitutional protection

(i) Akkai Padmashali, Founder, Swatantra and Ondede (ii) Chayanika Shah, Visiting Faculty, Tata Institute of Social Science, Mumbai, India and member of Lesbians and Bisexuals in Action (LABIA) (iii) Jayna Kothari, Executive Director CLPR

Moderator: Sudhir Krishnaswamy

11.30 – 11.45 pm : Tea

11.45 am to 1.30 pm - Panel II: Discrimination and Intersectionalities

(i) Vyjayanti Vasanta Mogli, Co-founder, Telangana Hijra Intersex Transgender Samithi (ii) Raina Roy, Samabhabana, Kolkotta (iii) Vikramaditya Sahai

Moderator: Prof. Arun Thiruvengadam, Azim Premji University, Bangalore

1.30 to 2.30 pm Lunch

2.30 to 4.00 pm - Panel III: Criminalization of the Transgender Identity

(i) Anindya Hajra, Founder, Pratyay Gender Trust, Kolkatta (ii) Siddharth Narrain, Centre for the Study of Developing Societies, New Delhi

Moderator: Prof. Siddharth Swaminathan

DAY 2 - 15th December

9.30 am to 11.15 am - Panel I: Broadening the Contours of the Right to Health

(i) Sushila Lama, Country Head, South Asian Human Rights Commission, Kathmandu (ii) Gee Semmalar, Independent Writer and Activist (iii) Diksha Sanyal, Researcher, Centre for Law and Policy Research, Bangalore

Moderator: Vivek Divan

11.15 to 11.30 am – Tea

11.30 am to 1.00 pm - Panel II: Is the Transgender Bill a Promise? Strategies for the Future

(i) Karthik Bittu Kondaiah, Faculty Fellow, University of Hyderabad, and a member of Telangana Hijra Intersex Transgender Samiti. (ii) Vivek Divan, Law and Policy Expert on health, HIV and sexuality (iii) Akkai Padmashali, Co-Founder Ondede and Swatantra

Moderator: Siddharth Narrain, Centre for the Study of Developing Societies, New Delhi

1.00 pm - Announcement of Winner of the Essay Contest, Vote of Thanks and Closing

1.30 pm - Lunch



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The *Transform National Conference on Transgender Rights and Law* was an attempt to initiate a dialogue around gender identity and its complex relationship with the law. It was organized by the Centre for Law and Policy Research, Bangalore ('CLPR') a not for profit organization engaged in law and policy advocacy research supported by strategic litigation. The Conference was hosted at Indian Institute of Human Settlements in Bangalore on 14th-15th December 2016 and was supported by the Friedrich Naumann Foundation.

In 2014, the Supreme Court in *National Legal Services Authority v. Union of India (NALSA)* recognized the rights of transgender persons to gender identity, freedom of speech and expression, relying on the golden trinity of Articles 14, 19 and Article 21 of the Constitution.

Despite the progressiveness of the *NALSA* judgment which recognized the right of every citizen to self-identify their gender, it did not address how the vast body of law, operating on a gender binary framework, would be affected by this change. The recognition of the transgender identity as the 'third gender' is also problematic. Whether it be criminal law or rights pertaining to marriage, divorce, inheritance or adoption, the law is constrained by its limited imagination and understanding of gender.

Post *NALSA*, attempts have been made to enact a law that consolidates the rights of transgender persons. This led to the drafting of the Transgender Persons (Protection of Rights) Bill, 2016 ('2016 bill') by the Ministry of Social Justice and Empowerment and is currently pending before the Parliamentary Standing Committee. Though the 2016 bill aimed to crystallise the rights of transgender persons, it has been widely condemned as being regressive.

While the acknowledgment of the existence of a third gender is significant, it does not tap into the full subversive potential of recognizing a constitutional right to gender autonomy which includes gender non-conformity. Doing so would mean going far beyond the tokenistic inclusion of the 'third gender' on identity cards. If the goal is to move towards a

post-gender world, then the boundaries of the current discourse needs to be expanded.

Transform provided a platform to academics, lawyers, social activists and students to do exactly this. The silences within the law provided us an opportunity to re-imagine and expand our understanding of gender and the legal reform that such an understanding necessitates. The conference was organized in the form of panel discussions which sought to explore various themes and issues of relevance within the transgender rights movement.

DAY 1

Dr. Sudhir Krishnaswamy, Managing Trustee of CLPR, inaugurated the Conference by providing a background to the Transform Conference and introducing CLPR.

Panel 1 - Expanding Gender: Gender Non-Conformity As Being Worthy of Constitutional Protection

The speakers on the first panel were Akkai Padmashali, Chayanika Shah and Jayna Kothari. Dr. Sudhir Krishnaswamy moderated the first panel and began by introducing the speakers briefly and thereafter handed over the floor to them.



AKKAI PADMASHALI

Akkai's opening speech set the tone for the conference by making a reasoned argument on the irrationality of socially constructed norms that designated certain bodies as 'male', 'female' and

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designated certain bodies as 'male', 'female' and 'third gender' based on sexual characteristics and critiqued the tendency of society to box people into rigid social identities. She argued that patriarchal norms dictated the performance of masculinity and femininity in restrictive ways and punishes those who question them or do not conform to such norms. She emphasized the need for social acceptance for all, and reiterated that the right to self-determine one's gender identity was crucial to the dignity of all individuals and in particular, transgender persons.

Akkai drew on her experiences as a social activist fighting for transgender rights reflecting on the social biases and transphobia which is responsible for denying them a life of dignity. For instance, she narrated the difficulties she faced in obtaining a passport. Though Akkai identifies as a woman, she was asked to mark the 'Others' box in her passport application based on her appearance. When she refused, she was harassed and received her passport after a prolonged delay; such problems, she emphasized, were routinely faced by the transgender community.

While finding acceptance and inclusivity within society was a significant hurdle, Akkai felt that this challenge of inclusivity was faced even within more progressive spaces such as the woman's rights movements. Here, she pointed out how mainstream feminist movements were not inclusive enough to include transwomen and often used a rigid biological definition of 'women' to keep them out.

Ultimately, Akkai argued that the goal of the transgender movement was the unboxing of our rigid understanding of gender. Pointing to the diversity of various gender identities in India, Akkai explained that 'transgender' is a global terminology which has subsumed within it a variety of cultural, global, local identities such as castrated Kothis, Non-castrated Kothis, Pant-Shirt Kothis, and Jogappas to name just a few. She concluded by articulating her desire to see a gender-less or gender neutral world.



JAYNA KOTHARI

Jayna's presentation explored the contours of the constitutional right to gender non-conformity. She began by explaining that the concept of gender is widely understood in an expansive way to comprise dress, mannerisms, appearance, expressions and behaviour.

For the purpose of understanding what a constitutional right to gender non-conformity would entail, she traced the development of the jurisprudence on sex discrimination in the U.S to bring in a comparative perspective vis-à-vis India.

Jayna pointed out that although the U.S has very strong anti-discrimination laws, the journey towards expanding this understanding to include transgender persons within it, had not been easy. Initially, there were regressive judgments such as *Ulane v Eastern Airlines* where the U.S Court of Appeals for the Seventh Circuit held that the termination of a transgender person from her employment did not amount to sex discrimination. The court narrowly interpreted sex discrimination to include discrimination that one experienced solely because of their gender and not because of a particular disorder, in this case, sexual identity disorder.

The case which broadened the boundaries of sex discrimination law was *Price Water-House v Hopkins*. This was an important decision by the United States Supreme Court on the issue of employer liability

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for sex discrimination where a woman was denied promotion to partnership at her firm based on sex-stereotyping against her. In *Hopkins* the Supreme Court ruled that sex-stereotyping where women were expected to act, dress and behave in certain sex-stereotyped ways also amounted to sex discrimination.

Jayna pointed out that after this decision, the scope for the protection of transgender persons against employment discrimination was widened. The soundness of this argument was demonstrated in other cases such as *Schwenk v. Hartford* and *Smith v City of Salem* where the courts found discrimination against transgender persons within employment and held that this was discrimination on the basis of sex.

In the context of India, Jayna argued that such expanded notions of gender should be read into the jurisprudence of 'sex' within Article 15 of the Indian Constitution. This is now possible because post *NALSA*, gender identity is regarded as integral to personality and includes gender non-conformity under the scope of Article 15. She also argued to derive the constitutional right to gender autonomy from the concept of privacy wherein one's most personal life choices are decided. Violation of an individual's privacy violates their right to equality and dignity and under Article 21 and Article 14 and the right to gender identity is at the core of right to dignity. The right to dignity jurisprudence in India is well developed and comprises of both negative and positive obligations. On a concluding note, Jayna argued that rather than having a particular Bill for the protection of rights of certain marginalized communities, the more pressing need was to perhaps make the understanding of gender more robust within the constitution.

CHAYANIKA SHAH

Chayanika Shah's talk sought to bring to the forefront the experience with reforming patriarchal power structures and the role of law as a tool of social emancipation. Her talk aimed at problematizing our understanding of transgender rights as 'third gender

rights'. She began her talk by locating herself as an active participant within the women's movement and the queer political movement. She argued that the transgender rights movement had pointed out the fault in assuming a persons from their dress, mannerisms and appearance.

She noted that while the transgender movement was about giving recognition to a marginalized community, it is equally about shifting how we understand the concept of gender and society's tendency to constantly assign gender and fit people into categories. It is this process, Chayanika argued, that has to be reformulated. She argued that the difficulty in doing this was in moving from a deeply gender hierarchical and stereotypical world towards a social utopia where gender did not matter. While this transition may be possible through various means, Shah focused on the use of law.

NALSA was the first step and its greatest achievement, Chayanika pointed out, was its recognition of certain marginalised and vulnerable communities. The judgment represented a moment to right a historical wrong. Another major contribution was that it resulted in the concept of gender being reinterpreted and renegotiated. However in the struggle for equality, the law without a larger movement for social and economic equality was bound to fail. Chayanika gave certain examples to prove that though the law may have progressed, society still grapples with the concept of gender fluidity and non-conformity. She gave the example of gender segregated hostels and asked where we would place a gender queer person. She argued that the creation of a third hostel in response to this dilemma would ensure that society would have lost the battle. This is because the central idea is to complicate our understanding of gender, reenvisioning it as a spectrum instead of categories.

Similarly, post *NALSA*, expanding the concept of gender would have huge implications on family laws such as marriage and inheritance. In Maharashtra for instance, Chayanika narrated how the government wanted to bring in a law that would make it mandatory for children to look after their

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parents. This could be quite problematic from the perspective of transgender rights, given that the family and the natal home is often the first site of violence for them. If we are to provide rights to gender non-conforming persons, the entire concept of family embedded in the law would have to be reformulated. So while acknowledging NALSA as a starting point, Chayanika urged that the real obstacle presented itself in the transforming of social relations and interactions.



DISCUSSION:

Some of the interesting questions that came up post the talk pertained to the idea of a genderless world and how this could be imagined. To this, Akkai responded by saying that gender should not be material to us as human beings. On similar lines, Chayanika pointed out that the hierarchy that arose out of gender difference is what is needed to be done away with.

Some questions were also raised as to the role of law in emancipation of marginalized communities and whether reforming society would a better goal to pursue. Chayanika responded that often law was the means through which societal injustice could be addressed. While acknowledging the limitations of the

law, she emphasized that legal reform and social reform were not mutually exclusive and the former often acted as a catalyst for the latter.

Another interesting question pertained to the obligations of mainstream feminism to include transactivism and whether this movement was transphobic. In response, Chayanika noted that though there were many splinters, voices and opinions within the feminist movement, she felt it was robust enough to accommodate a plurality of identities. Akkai narrated her experiences of interacting with the feminist movement in the United States and noted that it had become elitist and cut off from the lives of the people it sought to emancipate. Therefore, she argued, there was little point in categorising individuals by 'isms'. She also contended that the politics of reservation had degenerated into a way to shut out minority voices by pitting one against the other.

Drawing from this observation, a participant from a corporate firm asked whether reservation in the private sector should be provided to transgender persons. Jayna responded by drawing from her experience as a disability rights scholar. While acknowledging that reservations had played an important role in ensuring access to employment opportunities for disabled people, she felt that instead of reservation, the concept of reasonable accommodation, used by the disability rights movement for providing equal opportunities, should be adopted at workplaces. Chayanika added that inclusivity could not be achieved through a 'tick-box approach' but had to be judged by whether it induced change in mindset and attitude.

A student also asked whether allowing transgender persons to use women's bathrooms would lead to more sexual assault. On this point, Vyjayanti, another panelist stated that there were no statistics about sexual violence by transgender persons and that these were negative stereotypes about the transgender community. Chayanika highlighted the fallacy in this argument by responding that those who wanted to assault women could do it anywhere and allowing such persons access to

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bathrooms did not particularly make certain people more susceptible to violence than they already were.

Panel 2: Intersectionality and Discrimination

The speakers on the second panel were Raina Roy, Vikramaditya Sahai and Vyjayanti Vasanti Mogli. The discussion was moderated by Dr. Arun Thiruvengadam who introduced the concept of 'Intersectionality' as developed by legal scholar Kimberlé Crenshaw. Crenshaw advanced it as a framework for understanding discrimination in 1989. As introduced by Dr. Thiruvengadam, Intersectionality theory was derived from a case of workplace discrimination against a black woman. The concept of Intersectionality attempts to understand how discrimination and marginality may be the result of compounding factors such as 'race' and 'gender'. This panel was an exploration of this concept and its viability in India as a useful tool to understand multiple forms of social marginalization within the context of sexuality and gender.



RAINA ROY

Raina Roy's presentation was an open ended exploration on the notions of privilege, elitism and discrimination within society and the transgender movement. Raina described that the root of her activism was her recognition of society's internalized transphobia. She argued that this often manifested itself in the form of ostensibly harmless common phrases such as "You are human first, then transgender". Raina argued that this trivialised the

experiences of marginality in the lives of transgender people.

She noted that state-led interventions of empowerment and upliftment for the trans community were often counterproductive and led to further subjugation. Internalized transphobia makes certain practices that are otherwise acceptable, attain a criminal hue in the eyes of the law. For instance, while the act of people giving alms to Brahmin priests were acceptable but transwomen begging for money was regarded as a criminal offence.

Looking within the trans movement, Raina critiqued Pride Movements in large metropolises in India as not being adequately representative or inclusive. She also commented upon discrimination within the transgender and LGBTQ community that occurs on the basis of religion, socioeconomic status and caste. For instance, she noted having a political understanding of gender and sexuality and being able to speak English already positions one among the elite within the community. Raina stressed the importance of bridging these gaps by adopting a decentralized strategy for dealing with various issues within the community.

On the question of reform and future strategies, Raina questioned the potential of the law to act as a tool of social emancipation. More particularly, she doubted the ability of the legal system to reflect complex lived realities, gender identities and sexualities. She also highlighted the difficulties one would face in upsetting the status quo. For instance, gender neutral bathrooms, while desirable, would be difficult to implement.

On the issue of intersectionality, Raina argued that it was a concept of American import but something that she was already engaging with. Even the term 'transgender' was a westernized form of gendering that does not include cultural identities like 'kothi'. She concluded by expressing her weariness with movements that attempt to further categorize individuals and questioned legal judgments that follow similar politics.

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VIKRAMADITYA SAHAI

Vikramaditya raised a number of issues in his presentation. This ranged from his observation on the heterosexualisation of gender and sexuality, the problems with the NALSA judgment and a criticism of the intersectionality framework to understand discrimination.

He argued that discrimination against trans people is wielded both from the top as well as from the bottom. Criticizing the top down approach, he referred to Raina's argument on false empowerment claims made by the state. From the bottom-up, he expressed that discrimination occurs through ways in which people succumb to entering the registers of governmentality. He referred in particular, to the feminist movement, due to which, gender and sexuality have been treated as separate analytical fields. He argued that this separation has not only filtered into the law, and as a consequence judgments like NALSA, which has seemingly disregarded sexuality, but have also contributed to the heterosexualisation of gender. Critiquing the NALSA judgment, Vikramaditya pointed to the tautological definition of 'gender identity' and 'transgender' within the judgment. Additionally, he argued that the fundamental flaw with the judgment was that it imposes the complete burden of the fluidity of gender on the transgender subject.

Vikramaditya critiqued the theory of Intersectionality in two ways. First, he argued that only categories that can be seen and named can function as roads of intersection – others are simply left out of the narrative. Secondly, he believes it makes an assumption that these roads are mutually exclusive, or separable. In reality, it may not be as simple to separate complex concepts like 'race' and 'gender'. Moreover, Vikramaditya believes that it results in the othering of women of colour as it privileges the white woman's way of looking. In this case, white women are de-gendered and de-racialized. Drawing from the argument made by Jasbir Puar, a queer theorist, in a piece entitled '*I Would Rather Be a Cyborg than a Goddess*':

Intersectionality, Assemblage, and Affective Politics' Sahai mentioned that often the result of Othering, a by-product of intersectional thinking, is that people do not account for the degree to which they are invested in their genders. It also results in the interchangeability of gender and violence in speech. Vikramaditya went on to add that often feminism did not account for the ways in which people *inhabit* their gender and not simply in the ways that they are asked to be their gender. Vikramaditya argued on the basis of the Assemblage Theory that power resides in the objects and meanings around us in the way they are gendered and therefore, for Vikramaditya, intersectionality could be a useful tool if used in conjunction with Assemblage Theory.

VYJAYANTI VASANTI MOGLI

Vyjayanti's account of discrimination was both personal and political. It spanned a range of issues namely, the pathologization of the trans identity within the medical community, systemic and institutionalized discrimination, difficulty accessing employment, the lack of available and effective redressal and the impunity of state and non-state actors. Vyjayanti shared numerous anecdotes and the defining moments in her life where she had faced discrimination both at home and school. According to her, these stories, drawn from her personal experiences, shed light on what may be a typical trans narrative.

In particular, she expressed her concern at the pathologization of the trans identity in medicine. She was critical of the silence exhibited by the Medical Council of India. She also narrated several instances illustrating the nature of institutionalised discrimination faced by transgender persons. For instance, false cases are routinely lodged, transgender sex workers are often not paid their due and in many cases, they are denied dignified access to public places.

This impunity, Vyjyanthi explained, extends to the legal and political system as well. Filing an FIR becomes virtually impossible for transgender persons and they are often asked to reconcile with the

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perpetrator of the crime. Such a culture of impunity was written into the architecture of certain 'social welfare legislations' such as the 'Prevention, Prohibition, Redressal of Sexual Harassment of Women at Workplace 2013 which includes within it the option of 'reconciliation'. The inclusion of reconciliation requires, in many cases, for the woman to reconcile with her perpetrator. Within the same act, there also exists a provision for false claims. This is problematic as it is up to the corporation and not a judicial body to decide whether a claim can be classified as 'false'. For transgender persons therefore, finding protection within such legislation was not suitable. On the question of employment, Vyjyanthi emphasized the difficulty transgender people face in finding suitable jobs. In her view, the few who are able to access it, are positioned on the top of the economic pyramid and do so with the names and genders assigned to them at birth. Moreover, she argued that a large percent lose employment when they attempt changing their gender.



With regard to intersectionality, she observed that people in positions of power in LGBT organisations and movements have mostly been cisgender, dominant caste, and dominant class men. Agreeing with Raina, she advocated for the need of decentralisation and redistribution of power within the movement.

Concluding on a powerful note, Vyjyanthi emphasised on the need to move away from a tokenistic politics of 'empowerment' often deployed to temporarily silence and appease transgender

people and tackle structural and institutionalised discrimination.

DISCUSSION:

The discussion session saw certain interesting questions being put to the panelists. It was asked if there is a possibility of being a trans person without conforming to the rigid idea of masculinity and femininity. Another question was that if equality jurisprudence is currently limited to the state how could it be imagined in other contexts especially public spaces. Responding to the question of the trans identity conforming to rigid stereotypes of masculinity and femininity, Raina emphasized that gender identity and expression was a subjective choice. Personally she found it liberating to not only identify herself as being feminine but also constantly redefine what constitutes 'femininity'.

Vikramaditya responded to this question by pointing out that the choice between what one is supposed to wear versus what one wants to wear, is not a choice negotiated by trans people alone. He mentioned that there are two alternate ways of looking at the power behind dressing a certain way: first, the ways in which we inhabit clothing and second, the ways that clothes or makeup have meanings socially and structurally. These are not mutually exclusive questions and the two often interact with each other to produce one's choices.

On the point of re-imagining equality beyond the state, Vikramaditya clarified that one must explore whether equality jurisprudence has been effective in giving rights and citizenship to a community which is marginalised and oppressed. The question here, he argued, is not just one of implementation but also necessarily of interpretation. The entry of bodies and personhood into the register of the law for instance, at that primary moment of interpretation is itself an act of violence. Another level of violence occurs when one comes to a welfare body to access what is rightfully theirs. Those interpretations of whether one meets all the necessary criteria or not by the person who is sitting on the other side are completely arbitrary. This is an example of structural violence. Structural violence does not simply happen when a

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law is implemented poorly, rather it happens at the level of interpretation. Therefore, the question of jurisprudence does not necessarily have to only be about execution and effectiveness but also about interpretation.

Vyjayanti also clarified that building the understanding of equality beyond the state did not mean that she was advocating for reservation in the private sector. Reservation is one form of affirmative action and limiting reservation only to gender is not adequate. Bringing about inclusivity within private work spaces meant that there needs to be a systemic redressal of multiple marginalities such as caste, class, gender and religion.

Panel III: CRIMINALIZATION OF THE TRANSGENDER IDENTITY

This panel was moderated by Dr. Siddharth Swaminathan. The speakers were Anindya Hajra and Siddharth Narrain. Dr. Sudhir Krishnaswamy gave a background to the discussion by providing a broad contextual overview of the panel theme. He explained how the Hijra identity was criminalized routinely through the law. This included but was not restricted to Section 377 of the IPC. Police Act, Beggary Acts as well as provisions of hurt and grievous hurt in the IPC are also used against transgender persons with impunity.

ANINDYA HAJRA

Anindya Hajra spoke on how the routine unseeing of the lived realities of transgender lives was the cause for the existence of a pervasive culture of violence against them. Going back to the history of trans movement in India, she referred to the period as one marked by several betrayals. For instance, the campaign around Section 377, IPC essentially rendered the transgender community as an afterthought and a footnote in the entire movement. Anindya stated that the perception of transgender persons in India had always been derived from the binary narrative, which was further reflected in laws

and judgments like NALSA. Even NALSA, with the marginalization of the voices of transgender men in the judgement, reflected an exclusionary attitude towards non-dominant narratives. She mentioned similar instances of exclusion in the Justice Verma Committee Report whereby the amended version of the sexual assault law excluded the transgender community, rendering them vulnerable in face of violence.

Anindya went on to describe the common perception of prejudice and discrimination faced by transgender persons. She narrated various cases where trans-communities were torn apart on false charges of kidnapping, castration and sexual assault. She also spoke about the beautification of urban areas under the schemes like JNURRM that had essentially excluded trans persons leading to their removal from public spaces where transgenders are often found begging. A similar pattern was found in cases of residential societies and gated communities in cities, where the security personnel often blocked transgender people from entering such spaces. Based on these examples, Anindya brought to light the complete erasure of transgender lives from the dominant socio-legal discourse. This had resulted in the community being perceived as criminals, reflecting a systemic policy of apartheid.



SIDDHARTH NARRAIN

Siddharth's presentation focussed on the workings of hate speech law vis-à-vis the transgender community. While recognizing the need for a more nuanced understanding of hate speech, he questioned the

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usefulness of criminal law in curbing such speech.

Referring to the provisions of the Indian Penal Code on hate speech viz., Sections 153A and 295, Siddharth pointed out that these provisions dealt only with the grounds of religious and caste identity and excluded 'sex' from its ambit. This was a lacuna in the law in as much as there seems to be no legal remedy for the verbal abuse and humiliation faced by transgender persons.

Drawing from the works of Jeremy Waldron, Siddharth pointed out instances where a community could be rendered as second class and under threat without that speech making any direct call to violence. In this context, Waldron argued for the need for stronger measures in preventing hate speech despite being restrictive of American ideals of free speech and liberalism. However, in India courts under these sections are less inclined to find violations if the speech expressed such sentiments in a veiled or sophisticated language. Given this lacuna, it was argued that while adjudicating hate speech claims, the authority or the position of the person making the speech had to be taken into account. Such an approach had been also advocated for in the works of Susan Benesch. The speaker pointed out the need to include such factors in any assessment of the speech, including its capacity to incite violence against a particular group or community. This was particularly crucial in the context of the Indian legal system where specific sections of penal laws were used to harass people and stifle freedom of expression. Therefore, in his opinion, courts must conduct a nuanced analysis in applying legal provisions of hate speech, where distinctions must be made between a speech tending to ridicule a particular group and one that incited hostility and ouster of a particular community from a democratic framework.

While advocating for a more nuanced approach in differentiating between the various kinds of hate speech, Siddharth did not advocate for a blanket criminalization approach. Instead, he underlined the necessity of making critical distinctions between different categories of speech, with

criminalisation as a tool of last resort.



DISCUSSION:

The discussion for this panel raised several interesting issues. Vyjayanti brought the panel's attention to the Criminal Tribes Act, which although denotified, spawned anti-beggary acts that continue to actively criminalize the transgender community. She questioned whether these acts, remnants of colonial laws, should be challenged in the Supreme Court instead of including them within the scope of the Transgender Person (Protection of Rights) Bill. She also raised the issue of discrimination of transgender persons in the workplace and questioned how instances of firing without cause could be dealt with more effectively than through reconciliation. Jayna also added to these concerns and asserted that anti-begging acts should be challenged and a collective representation by the transgender community could strengthen this position. Addressing the point Anindya put forth on the exclusion of the transgender community when Section 377 was being challenged, she suggested focusing on the current petition put forth by Akkai Padmashali. Section 323 of the IPC and its definition of grievous hurt was also problematically defined, she argued. Jayna added that its specific reference to castration, instead of bodily harm, resulted in the section being used to target transgender persons. Rakshitha, from Swatantra, shared an anecdote of when she was sexually assaulted and questioned how the issue of institutionalized transphobia could be dealt with,

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particularly at police stations. She also questioned of how transphobic and discriminatory remarks in media could be handled by the censor board or other legal means.

In response to Vyjayanti, Anindya mentioned that the challenge to Section 377 and the response to the Transgender Bill 2016 were overshadowing other issues and believed the focus should be on challenging the constitutionality of anti-begging acts. Siddharth also added that reflecting upon the process of challenging Section 36A in Karnataka could be instructive. Both panelists also advocated for a range of civil remedies for inclusion within protective welfare legislations such as the Sexual Harassment laws. Additionally, Anindya argued that a reassessment of anti-discrimination laws and policies to broaden the scope of legal protections could be useful. On the question on legal recourse against media houses, Siddharth advocated caution since relying on criminal defamation against such agencies did not often lead to desired results. Aside from challenging laws, he also recommended looking into manuals such as the one on Medical Jurisprudence and Toxicology used by criminal lawyers and judges for rules of evidence. He added that the latest edition of this manual, created after conducting several consultations, consisted of very progressive views on rape law, homosexuality and gender identity.

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Panel 4: BROADENING THE CONTOURS OF THE RIGHT TO HEALTH

The speakers on this panel were Sushila Lama, Gee Semmalar and Diksha Sanyal. The panel was moderated by Vivek Divan.

SUSHILA LAMA

Sushila Lama began by giving a brief background of Nepal. She spoke of Blue Diamond Society and its founder, Sunil Babu Pant. Blue Diamond Society is a federation of different community based

organizations (CBO) working in multiple districts on issues pertaining to LGBTQ persons. She mentioned that in Nepal, advocacy for transgender rights was carried out through this organization given that there are no particular organizations that focus solely on transgender rights.

Thereafter, she outlined the legal developments pertaining to the rights of Transgender persons in Nepal. In 2015, the term “other” was included in passport formalities. Directions were given to public and private companies to do the same. On the topic of access to healthcare, Sushila mentioned that transgender persons continued to face significant barriers. For instance, they would often self-administer hormones because of the unavailability of prescriptions.

With regard to the initiatives that were being taken in Nepal for the furtherance of the right to health for transgender persons, Sushila referred to the World Health Organization's training package for health providers to reduce stigma in healthcare settings. This was introduced in Nepal and implemented with the help of the Blue Diamond Society. She concluded on an optimistic note by referring to several empowered transgender persons who are doing well in fields as diverse as the modelling industry and politics.



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GEE SEMMALAR

Gee's talk revealed the complex nexus between the transgender identity and healthcare. He spoke on several issues including discrimination, lack of access to basic as well as gender-affirmative healthcare services and the impunity granted to the medical community for negligent treatment. He began by questioning the "authentic" trans-identity, and found it problematic that trans people who found refuge within the gender binary were criticized. In the context of the State, Gee argued that making oneself legible by identifying within the binary was often a necessary sacrifice as it facilitated access to basic benefits for transgender persons. Prefacing his arguments on trans healthcare, he also tackled the common perception that undertaking gender-affirmative healthcare services qualifies one as more authentically 'trans' than others and asserted that there exist multiple ways of being trans.

Regardless of one's choice to undergo these treatments, Gee contended that the universal access to healthcare should be a fundamental right. Currently, he argued, the transgender community, like many other marginalized groups, are routinely excluded from receiving healthcare, and this is further complicated by prohibitive costs, and access was also dependant on caste and class. He added that this access is predicated on psychiatric and medical diagnoses which results in the pathologisation of the

transgender identity.

Gee noted that the pathologisation of trans communities occurs both within discourse and during the physical process of accessing health services. Within discourse, Gee observed that transgender health is viewed from the prism of voyeurism where transgender persons are either reduced to 'lab rats' or considered mentally disordered. He raised the example of the American Psychological Association, which has only recently modified 'gender identity disorder' to 'gender dysphoria'. Gee also condemned the usage of "person assigned gender female at birth", a term still used within academic writing and medical journals, as he believed it contributed to the erasure of the transgender identity. He also spoke of how this discourse punishes intersex people, in particular children, who are forced to undergo corrective surgeries when they are defined as having "ambiguous genitalia" at birth.

The physical process of accessing healthcare is also impeded at various stages. Psychiatrists often lack knowledge and sensitivity of the lived realities of trans people. Many transgender persons face prejudice and discrimination by medical professionals. Another significant problem according to Gee was the low quality of health care in the country. Negligent medical healthcare seldom invites any legal sanction against those responsible for it, due to various loopholes within the law. The broader issue he raised was the research gap on transgender health, as he believed their healthcare is undervalued given that the community does not constitute a large enough customer base.

To remedy this situation, Gee argued depathologising the transgender identity is crucial. In addition, he stressed the importance of re-designing medical education. Equally important, was the need to ensure that negligent doctors were held legally accountable. He concluded by providing suggestions for improving the healthcare system for trans persons and proposed that cis-gendered people could provide help by holding workshops for medical practitioners in Bangalore, talking to doctors within families and creating a database of trans friendly

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doctors in each city.

DIKSHA SANYAL

Diksha's presentation explored the normative justifications for state funded gender affirmative healthcare services given that they are prohibitively expensive. She argued that the common justifications generally provided for state funding are unsatisfactory and therefore a better normative justification for state funding of gender affirmative healthcare service was required.

The first argument advanced is usually that of medical necessity. In order to avail of certain medical services, transgender persons need to show that they are suffering from 'gender identity disorder' or 'gender dysphoria'. Putting them into these strict diagnostic models often pathologises them. This is particularly visible in the context of medical insurance claims. Proving medical necessity however is an onerous procedure. Conflicting medical opinions acts as another complication as it ends up privileging the medical discourse in ignorance of the transgender persons' own self-assessment.

Another argument used to justify the state funding of gender affirmative healthcare services is that of autonomy. Although rhetorically appealing, Diksha argued that autonomy does not often provide a strong basis or justification for state funding such healthcare services. This is because, what goods and services one demands on the basis of autonomy is bound to be subjective. Further, while autonomy does cast a negative obligation on the state to not prevent someone from achieving a particular goal it does not easily explain why the state has a positive obligation to allocate resources for its realization. In this regard, Diksha referred to a European Court of Human Rights Case, *Van Kuck v. Germany* where a trans woman underwent sex reassignment surgery and thereafter demanded that her insurance company reimburse 50% of the cost. This demand was initially rejected because she could not prove that it was a necessity and

declared that if less onerous methods exist the person should go for those instead of surgery. However, when this court went up to appeal to the European Court of Human Rights, they ruled in favour of the plaintiff by invoking the language under Article 8 of the European Convention of Human Rights. Article 8 provides for the right to privacy and family life. It was held that to prove medical necessity for an aspect that was so integral to one's personal life was disproportionate.

Diksha contended that the strongest argument to put forth for public allocation of resources was the impact such gender affirmative healthcare services would have on the quality of life and the dignity of a transgender individual. In building this argument, she referred to Amartya Sen's Capabilities approach. A similar argument has been used within the disability rights movement. The capabilities approach propounded that it is not the mere access to resources that is essential but also how these resources are utilised. Diksha argued that it is a proven fact that post SRS, many transgender persons experienced a significant improvement in their quality of life in terms of their mental health. Ultimately, it allows fuller participation in all aspects of life.

Turning to Indian legal jurisprudence, Diksha pointed out that the contours of Article 21 are broad enough to bring in a right to such healthcare services within it. Article 21 includes the right to dignity. After the *NALSA Judgment* gender identity is now a part of right to life and dignity. Further, right to health is also part of Article 21. She referred to a few well-known cases such as *Pashchim Banga Samiti v State of West Bengal*, *Consumer Education Research Centre v. Union of India* to argue that on many occasions, lack of resources cannot be used as an excuse. In *Mohammad Ahmad (Minor) vs. Union of India*, the Delhi High Court used the language of minimum core obligation to allow the state to fund an expensive hormonal treatment for a young boy suffering from a rare genetic disorder. In this case, it was held that the fundamental right to healthcare is a universal right and the marginalized sections of population needed this the most. Referring to this case, Diksha argued that the language of the minimum core could function as a key conceptual tool

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in understanding and formulating a state policy on Gender affirmative healthcare.



DISCUSSION:

The panel discussion was followed by several interesting questions. First, Jayna posed a question to Sushila on the status and level of access to medical treatment in Nepal. Then, on Gee's presentation on transgender healthcare, Jayna clarified that the issue of quality healthcare is one that also affects the general population of India significantly, although it afflicts the transgender community to a greater degree. Drawing a parallel with the disability rights movement and its associated literature she also asked what Gee's views are on why terminologies of disability are seen negatively. She noted that the disability movement has reclaimed the term 'disability' in order to detach any stigma associated with it and also moved the issue from one of medical impairment to social exclusion. She questioned whether this practice could also be translated to the transgender movement. She further questioned whether the argument to depathologise 'gender identity disorder' may be considered too simplistic and that by potentially destigmatising the term, it may not be problematic any longer.

Siddharth Narrain asked how issues of gender, identity and sexual orientation were raised while engaging in the constitutional process and what the current state of this is in Nepal. To the two other panelists, he asked whether it would be a more pragmatic strategy to work on the implementation of

NALSA and necessary healthcare policies at the state level through community participation rather than taking it to courts. Then, on the issue of minimum core obligation, Vyjayanti asked whether it could become a means by which rights were diluted on the basis of what got left out from the 'minimum core'. Lastly, it was asked that given how the European Union is moving towards a certain process of unlabelling identities, whether such a development be envisioned in India as well.

To the first question Gee agreed with Jayna that quality of healthcare is a broader issue in India. He also pointed out, however, that there is a fundamental distinction that can be made for trans-specific healthcare as he asserted it is not being funded due to the ways in which capital and medical industry are linked and that transpeople are still structurally excluded from both public and private healthcare systems. This structural exclusion was partly because of transphobia and pathologisation of their identity. Therefore, on the topic of disability, Gee argued that demanding de-pathologization may not be akin to destigmatizing mental health or disability. Gee further suggested that mental health also requires depathologisation to a degree as well in order to encourage neurodiversity. In response to Siddharth, Gee stated that there should be a delinking of medicalisation and legal gender identity and before state advocacy is carried out the Transgender Bill needs to be reworked.

In response to Jayna's question, Sushila remarked that access to Sexual Reassignment Surgery in Nepal is extremely limited and usually restricted to only breast augmentation procedures. To Siddharth's question, she mentioned that issues of gender and sexuality were incorporated in the constitution primarily through a member of parliament who is a transgender rights activist.

On the question of the strategies that could be used by the movement to pressurize states to enact policies for accessing gender affirmative healthcare Diksha answered by pointing out that lobbying with state governments was already an ongoing process. For instance, in Kerala a state policy

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was already in place which contained within it provisions for accessible healthcare. She emphasized that the first step should be lobbying with state governments to bring out a good healthcare policy. In the event that such a process fails, one could approach the Judiciary thereafter. Given the verdict in *NALSA* and the jurisprudence on right to health developed by the courts, it is likely that the courts would hold the states in contempt for not bringing in even a basic policy.

As far as the minimum core obligation was concerned, while acknowledging that this too, like any law or policy, could be misused, Diksha felt that this was precisely where a social movement's strength is tested. Deciding on what the minimum core would contain was an exercise in democratic participation. Within the framework of minimum core obligation, there exist certain benchmarks for the progressive realization of the right. These benchmarks could be seen as a useful conceptual tool to realize the right to transgender healthcare. With regard to the question on unlabelling identities, Gee answered by noting that such an invisibilising of identity and focusing on a 'human rights' discourse came from a certain Westernised privilege. For many transgender persons in India, they had to bear the burden of their identity wherever they went and that is why unlabelling and unseeing of these identities is not a goal to aspire to in the Indian context given the structural exclusion and marginalization faced by people from such communities.

Panel 5: IS THE TRANSGENDER BILL A PROMISE? STRATEGIES FOR THE FUTURE

The speakers on this panel were Karthik Bittu Kondaiah, Vivek Divan, and Akkai Padmashali. The panel was moderated by Siddharth Narrain.

KARTHIK BITTU KONDAIAH

Karthik's presentation focussed on outlining the concerns with the 2016 Transgender Bill. He pointed out some crucial flaws in the bill. For instance, the

definition of 'transgender' in the 2016 bill was unscientific and left out local identities like kinnar, hijra, jogappa and mangalmukhi, which were included in the 2015 Bill.

Further, while Chapter 2 prohibits certain acts, it does not define discrimination. Nor does it provide any penalty for such discrimination. The bill also problematically had the effect of punishing the community it sought to protect by criminalizing begging. Additionally, it infantilized them by requiring them to live within their natal homes and erecting a complicated procedure for rehabilitation. The process of certifying transgender identity was an onerous, undemocratic procedure in as much as the Screening Committee allowed for only one representative from the transgender community. Karthik recommended that various cultural transgender identities should be represented on this committee and even doctors sitting in this committee should be chosen by transgender persons. He also vehemently opposed the idea of gate-keeping identities and argued that the process of self-certifying as laid down in *NALSA* should be followed. He argued that a committee need only be set up for the purpose of accessing benefits.

Karthik also noted, the Bill also lacked adequate provisions for the protection of privacy. It was also inadequate in providing substantive protections for transgender persons. For instance, it did not contain any welfare provisions which would ensure that they would have access to employment opportunities.



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VIVEK DIVAN

Vivek spoke in response to the Transgender Bill by outlining the ideal processes that should shape any legislative drafting. He rejected the 2016 Bill as being a promise and felt that the strategies for the future would have to look beyond the bill. For this, he drew on his insight and experience of having worked closely on the drafting of the HIV bill.

As a part of the HIV Unit of Lawyers Collective, in the early 2000s, Vivek and his colleagues were asked by Parliament to frame an HIV anti-discrimination bill. This bill was the first attempt at holding the private sector responsible for indulging in discrimination and specially enabling marginalized groups to access healthcare services. The drafting procedure comprised of wide-ranging consultations with all stakeholders. This consensus building and community effort was an integral part of the drafting process. Vivek argued that such a procedure ought to be undertaken for the Transgender Bill as well.

The pressing question, according to Vivek was improving the accessibility of the remedies in the Transgender Bill 2016. He pointed out for instance, that there was no one at the local level to deal with the everyday discrimination, stigma or violence faced by transgender persons. Remedies had to be implementable, localised, informal and cheap.

A major lacuna in the bill was that the concept of "reasonable accommodation" had been dropped from the 2016 bill. This concept of reasonable accommodation came from the disability rights context and could be a useful conceptual tool to talk about accessibility of public spaces for transgender persons. Though this found mention in the 2014 bill it had been deleted subsequently.

The 2016 bill also left out crucial aspects of violence against the trans community and even provisions for affirmative action. He also expressed doubt as to how such a bill would ever be used by the community members for the actualisation of their rights.

Vivek felt that it was better to have no law at all than to have a half baked law. This was his insight

from the HIV movement which he felt he could adopt in the context of the Transgender Bill. In terms of strategy, Vivek proposed that it was important to think beyond the Bill. He argued that it could be a better strategy to let the NALSA judgment govern the field while lobbying with state governments to bring in effective policies for the enforcement of transgender rights. It was worth thinking about whether these strategies were enough for the moment given that drafting a law is often a long-winding complex process. While recognizing that the law could be empowering, he cast doubt on its ability to deal with complex questions of identity and its fluidity.

Some other strategies for the movement could be to judicially challenge laws that criminalized the transgender identity such as local Police Acts, the Hyderabad Eunuch's Act and beggary laws and the enactment of an umbrella anti-discrimination bill. In addition, he pointed to the need of ensuring police accountability against atrocities committed against transgender persons.



AKKAI PADMASHALI

Akkai spoke about the need for improving the accessibility of rights and opportunities for transgender persons. While agreeing on the importance of enacting a bill that provides transgender persons accessible healthcare, education and employment she emphasized the need to move beyond the politics of the bill. She pointed to the tension between the social and the legal status of transgender persons and how both have to necessarily interact with each

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other to move forward.

While discussing the strategies for the future, Akkai argued that given that state officials were ill-informed about issues within the transgender movement, it was important to focus on enacting policies rather than push for the enactment of a law. She drew a parallel with the women's movement which had also pushed for the enactment of sexual assault laws. However, this had resulted in very little. She vehemently opposed the 2016 Bill and reiterated the importance of pushing for reforms across various sectors. For instance, she advocated for the legalization of sex work so as to prevent harassment faced by the *Hijra* population. Akkai also spoke of using strategic public interest litigation to challenge the discrimination faced by transgender persons in accessing health, housing, education and employment opportunities. However, she emphasized that knocking on the door of the judiciary could not be the sole strategy and initiating dialogue with society and within families was crucial.

On the point of building solidarity, Akkai commented on the divide that had been created by the NALSA judgment's declaration that the transgender community be included within the ambit of OBC. She saw this as a consequence of failing to engage in an inclusive dialogue with different backward classes minorities.

On a concluding note, Akkai noted the necessity to decentralize power from the hands of the state and give it to the most vulnerable trans groups so that they could have more control in the way laws and policies were designed.

DISCUSSION:

During the discussion session, Vyjyanthi asked how the concept of reasonable accommodation and minimum core would translate into actual policies and standards and in what way could such standards be enforced. Another question was why the transgender community was pressuring the government to come up with a suitable bill instead of drafting such a Bill on its own.

On the question of reasonable accommodation, Vivek clarified that in the HIV bill it was defined as undertaking all necessary steps to accommodate a person. However, the judiciary had interpreted this to mean that all *reasonable* steps had to be undertaken. Where undertaking measures of accommodation would be completely antithetical to the interests of the employer or the business, he could not be expected to do so.

With regard to the community drafting its own bill, Bittu pointed out that sections of the community had already done this. However drafting a bill was often about power politics and a community led bill would not enjoy the same political force as a state enacted bill. Therefore, engagement with the state could not be done away with and communities would have to continue to lobby with the government so that draconian and arbitrary powers are not given to the state government.

Vyjyanthi made an interesting observation with regard to future strategies wherein she advocated that it was important to use delaying tactics to defer the enactment of the 2016 bill by asking the Standing Committee to travel and hold country-wide consultations.



CONCLUSION:

Transform was organized with the aim of providing a platform to activists, academics and lawyers to forge new alliances and relationships in the quest for social transformation. Over the course of two days, varying themes, concepts and ideas exploring the transgender rights movement were debated and

discussed in a nuanced way.

The principle of gender non-conformity was identified as an overarching goal of the movement and its legal and social aspects were also explored in some detail.

The Panel on intersectionality was a reminder that any social movement grapples with the difficulty of inclusivity and working within an intersectional framework. Not only was the concept of intersectionality in the Indian context held up to scrutiny in the conference, but its rightful place within the movement was deliberated upon.



One of the significant achievements of *Transform* was the bringing to the forefront experiences of discrimination, exclusion and marginality faced by transgender persons. The panels on health and criminalization of the transgender identity were especially relevant in tracing out the nature of structural violence and exclusion faced by gender non-conforming people at multiple levels.

Transform was also remarkable for debating the role of law within the movement. Not only was the constitutional protection of gender non-conformity discussed, but also whether positive entitlements such as the state provision of gender affirmative healthcare could find Constitutional support in Article 21. The many loopholes within the legal system that prevent transgender persons from accessing it effectively were highlighted. The duality of having a forward looking protective judgment such as *NALSA* existing simultaneously with the archaic Section 377 of the IPC and other laws criminalizing the

transgender identity was brought to the forefront. Ultimately the limited but important role of law in providing recourse against social injustices was accepted.

Towards the end, in the final panel, future strategies that looked beyond the Transgender Bill, 2016 were discussed. The bill was unanimously discredited by activists, lawyers and academics because of its regressive language and inadequate protections. While some felt that there was a need to move beyond the politics of the enactment of the bill, others believed that energy should be geared towards enacting a better law since some legislation was a more viable proposition than none at all. Some activists also spoke of using strategic public interest litigation to challenge the discrimination faced by transgender persons in accessing health, housing, education and employment opportunities.

The importance of building solidarity across various marginalized communities and decentralization of power from the hands of the most visible communities to most vulnerable trans groups were pitched as the two important goals of the movement in the coming years.

