



OR

IN PURSUIT OF
FREEDOM

CLPR | TRANSFORM 2019

**QUEER REALNESS -
THE WAY FORWARD
FOR THE TRANS AND
INTERSEX
COMMUNITIES IN A
POST-SECTION 377
WORLD**

BY C. ANZIO JACOBS

**SANTA -
NUPIMANBI
ACTIVIST &
DANCER**



CLPR | TRANSFORM 2019

**FOR THE
REALIZATION OF
RIGHTS AND THE
GUARANTEE OF
INCLUSIVITY,
EQUALITY AND
JUSTICE.**

A unanimous ruling by the constitutional court on the 6th of September 2018 found the Penal Code unconstitutional as it was criminalising consensual sexual relationships. The outcome of this finding was far-reaching as it in effect simultaneously affected the treatment of LGBT persons in India who were adversely affected by the law.

"SECTION 377, TO THE EXTENT IT CRIMINALISES SEXUAL ACTS BETWEEN CONSENTING ADULTS, WHETHER HOMOSEXUAL OR HETEROSEXUAL, IS UNCONSTITUTIONAL"
- CHIEF JUSTICE MISRA AND JUSTICE KHANWILKAR

The Transform conference 2019 was premised on the discussions which ensued after the ruling and how those discussions impacted the lived experiences of trans and intersex persons in particular. The battle for the repeal of the law began almost twenty years before the judgement, beginning in 1991 with a report detailing the discriminatory treatment of LGBTQ persons resultant in extortion, and violence among other things. This report was released by an organisation called AIDS Bhedbhav Virodhi Andolan (ABVA). By 1994 in response to the refusal of condoms for inmates in Dehli, ABVA again called for the repeal of section 377. By 2001 The Naz Foundation filed for public litigation with the Delhi high court, the case was dismissed in 2004. In 2006 the Naz Foundation filed for a special leave petition and reinstated in the Dehli high court in favour of public interest. Despite these efforts, other groups began to emerge against such decriminalisation. Finally, in 2009 a landmark case in the Dehli high court struck down section 377 finding that it violated fundamental rights including liberty and equality enshrined in the Indian constitution. After the significant challenge, by 2013 the ruling was overturned by the supreme court where it was found that section 377 "does not suffer from the vice of unconstitutionality and the declaration made by the division bench of the high court is legally unsustainable". When a writ to the petition was filed again in June 2016, the court found that "a section of people or individuals who exercise their choice should never remain in

a state of fear”. This finding ultimately called for the matter to be reviewed by a larger bench which was to be reconstituted by the Chief Justice of India. In August 2017 a nine-judge supreme court bench found that the right to privacy is a fundamental right in a case India’s biometrics program. The finding further notes that sexual orientation is an essential attribute of privacy. By July 2018, a five-judge bench of the supreme court, including the chief justice began hearing the petitions. Petitions against cited issues such as the transmission of sexually transmitted diseases and the protection of India’s social fabric.

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CONSENTING ADULTS AND THE MANIFESTATION OF THEIR RIGHTS UNDER ARTICLES 14 AND
21...WE ARE DWELLING ON THE NATURE OF RELATIONSHIP AND NOT MARRIAGE...WE WANT THE
RELATIONSHIP TO BE PROTECTED UNDER FUNDAMENTAL RIGHTS AND TO NOT SUFFER MORAL
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—JUSTICE DY CHANDRACHUD

In April 2018 a petition was filed by hotelier Keshav Suri with the supreme court. By July 2018, a five-judge bench of the supreme court, including the chief justice began hearing the petitions. Petitions against cited issues such as the transmission of sexually transmitted diseases and the protection of India’s social fabric.

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Eventually, a government affidavit leaves the decision to the supreme court which decided to reserve its verdict. Finally, in September 2018 a unanimous verdict was reached scrapping section 377. Justice Misra described the section as “irrational, indefensible and manifestly arbitrary.”

The ruling was a crucial point in the discussions in the opening of the conference. The further discussion pertained to the reach of the law as it broached the Transgender Persons Bill which in part insisted on the institutionalisation of transgender persons without families. But

also made proof of lineage a requirement for formal registration which inadvertently prejudiced the transgender community which existed outside of their familial networks due to discrimination or merely leaving their homesteads to live with other transgender persons.

"ALL OF OUR EXPERIENCES OF STRATEGIC LITIGATION HAVE SHOWN THAT LITIGATION SUCCEEDS WHEN THERE IS CAMPAIGNING, ACTION AND MOMENTUM ON THE GROUND, AND THIS IS BOLSTERED WHEN THERE ARE COLLABORATIONS ACROSS THE BROAD HUMAN RIGHTS MOVEMENT".

-DIRECTOR OF CPLR, JANYNA KOTHARI

Noting that the constitutional right to privacy was indeed a massive win for the development and protection of the right of gender and sexuality. Jayna Kothari Senior Advocate and the Executive Director of the CLPR in opening the conference offers the space as one for lawyers, academics, activists and members of the transgender community. She shared that the litigation which has ensued from the very first conference has resulted in rigorous academic focus on transgender right and action on the ground.

On the African continent, litigation has become a key tenant in terms of legal recognitions as they pertain to gender markers, social inclusions and integration into society. The battle for such recognitions has been long, and it is ongoing still, but the African story as it pertains to litigation and ongoing change within the context of the law is at least promising.

This kind of action on the ground has been the key to success in the South African context. Shared time and again,

the story of South African activists within the legal fraternity have invoked an urgent sense of mobilisation in favour of legal recognition. One such activist, Sally Gross was involved for many years in work towards the legal recognition of intersex persons in the South African constitution. Her work was steeped in the necessity for both legal and social action to be taken for recognition of rights for persons missed in the purview of lawmakers. For activists like Sally Gross, the issue of legal recognition was one that was dear, as the restrictive perimeters of the law meant that someones lived reality is affected by it. Sally was disturbed by the treatment of Caster Semenya, and noted in an opinion piece to a newspaper that;

"THESE THINGS WERE DONE NOT BECAUSE I HAD COMMITTED A CRIME OR SINNED, BUT BECAUSE MY BODY TURNED OUT NOT TO FIT NEATLY INTO THE PRESUMED BINARY DIVIDE BETWEEN MALE AND FEMALE. THE UNRAVELLING OF MY LIFE, STANDING, EXPECTATIONS AND HOPES WAS A WITTING AND BRUTAL DISPLAY OF POWER. THE MESSAGE: THIS IS WHAT HAPPENS TO THOSE WITH ABERRANT BODIES".
- SALLY GROSS

Both Gross and Semenya continuously fought for the rights of intersex persons. However, Gross took particular issue with the way that 18-year-old Caster Semenya was forced into public scrutiny, herself not aware that she was born intersex. Conversely while both Gross and Semenya faced challenges concerning being intersex, their struggles in the face of legal recognition within the South African context unfortunately only paint half the picture.

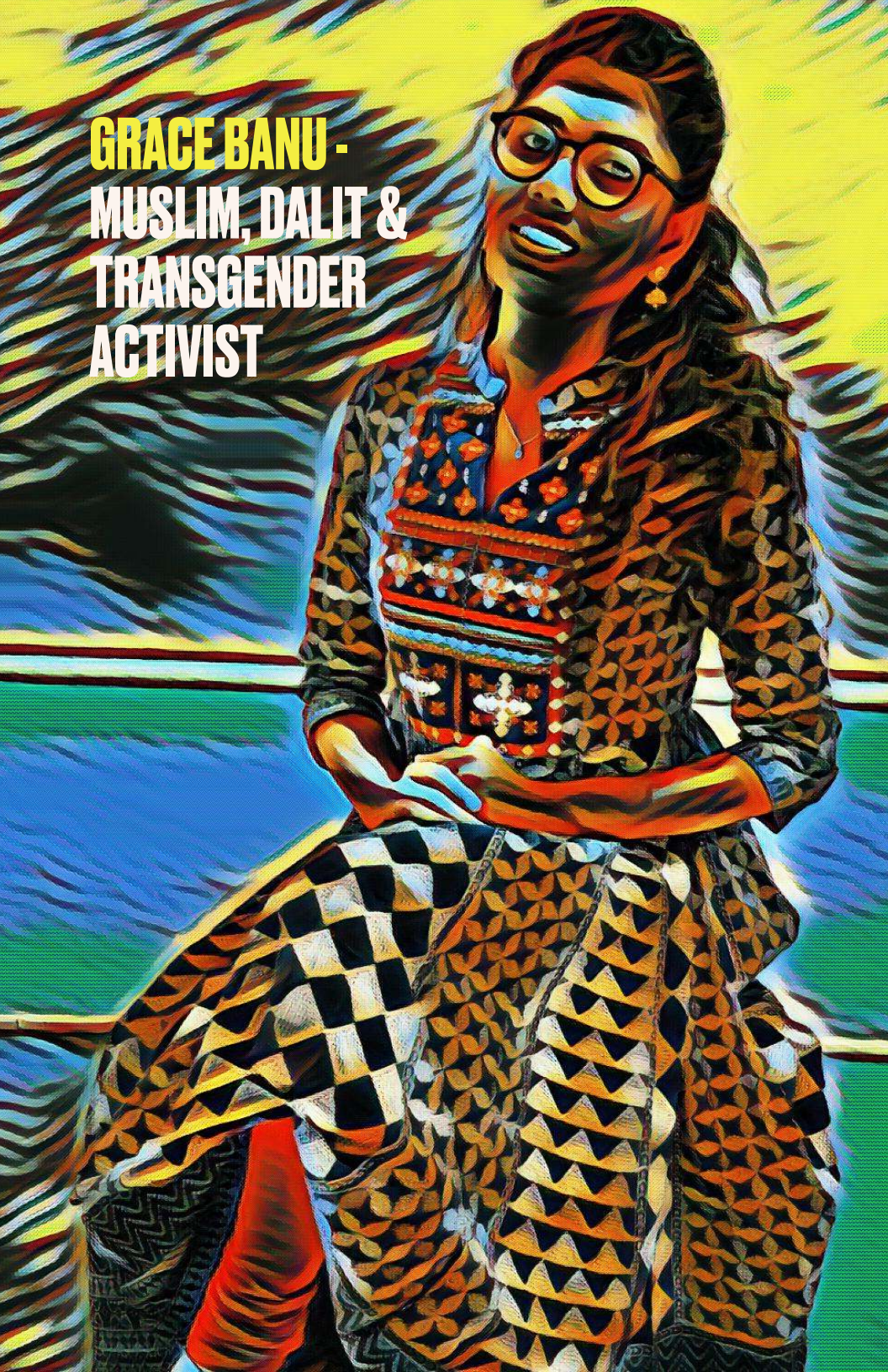
Much like India, the South African context qua the African context more broadly is one which cannot be read separately from the desperate struggles against extreme inequality, especially as it pertains to financial security. It is within the context of dire economic conditions that yet another parallel could be drawn between India and South Africa. In the South African context, and involved in much of my work, it is hard not to notice the similarities faced by transgender persons, more especially transgender women.

It is easy to forget that advocacy does not see race, class, caste or gender. It is not merely the work of the lawyers, academics or activists in the comfort of a funded civil society. It is instead the combined efforts of those, mixed and nonchalantly pieced together without a second thought which makes Kothari's vision for the conference groundbreaking—taking those dismissed into account with those who exist on the margins of society, and hearing their voices. It is a move beyond simply exploiting their stories for the furtherance of careers or organisational objectives. For Kothari, those lives and stories are informed by the struggles of the Hijras, Kinner and Thirunangai. They too belong to society, even in an Indian context which makes some untouchable. It is often those who exist in societal margins whose narratives are used to advocate for inclusivity, while they remain in the societal periphery.

In South Africa, their stories echo those of trans women sex workers who live on the streets, especially. The Sistazhood in terms of the organisation has approached advocacy in previously unimagined ways. It is their work as sex workers based in the tourism capital of South Africa which has aided their ability to provide for themselves despite a lack of housing, and with little security from the state. One of the founding members of the Sistazhood in attempts to bring attention to the differential treatment of activists in spaces where academics lawyers and activists meet to discuss issues such as legislation and the position of the sector. Advocating for the rights of trans persons reminded a gathering of civil society actors that they do not speak her language and are disingenuous if they purport to do so. Her name was Leigh Davids, and she shook the foundations of the LGBTQIA civil society sector when she chastised us for being disingenuous. Here, her story is woven in with those of activists as resilient as her whom I had the great fortune of meeting at Transform 2019.

Kothari through the Transform conference highlights many stories, and through her work generates opportunities for trans and intersex persons in the Indian context to come

**GRACE BANU -
MUSLIM, DALIT &
TRANSGENDER
ACTIVIST**



together, listen to one another and the work being done in other parts of India and for them to become active participants in what is best described as a tried and tested theory of change. One which is mindful that all of these actors together have the potential to confront the law where it prejudices them, thereby generating strategies in pursuit of an India sans discriminatory laws.

As the discrimination permeates through vague laws and continues to aid inequality, the conference offers a meeting place where the community along with lawyers and academics can regroup and consider the implications of the legal reform which they seek. The combination of minds ensures a holistic approach to the litigation. Such an approach is mindful of the yearning for equality, the imbalances in gender and the activism on transgender rights. This op-ed on the conference delves just a little deeper.

But while the lived experiences of transgender and intersex persons alike underpin the discussions in the conference. The lesser-seen side of the gathering is one which exists in the common areas of the accommodation organised for the panellists and during the tea breaks where saris and kurtas are put on a show. It is in these spaces that the stories behind the story of litigation and all of its incumbent struggles come to life. It is here where kin comes together to share the events of the last year, to break bread and to give thanks to one another for the tireless efforts being put into a struggle however big or small, in the North or the South. These stories may not be the talk of the conference within the auditorium, but offer an insight into a world which Transform 2019 showed to me. These stories have been woven together in a forthcoming podcast called Queer Realness.

1.

GENDER IDENTITY IN SPORT

The first panel in the conference was titled Gender Identity in Sport. The panel brought together: Boni Paul, a coach and Intersex activist; Pinki Pramanik, a former athlete; Dr. Payoshni Mitra who is an Associate Lecturer at the University of London and principal lawyer Nandan Kamath, Principal Lawyer. Paul and Pramanik shared their experiences within the sporting world, noting the discriminatory laws which have hampered their careers in both instances despite their accolades. It was apparent in their presentations that the effect of the legal restrictions in place about both gender and sexual orientation affected their ability to engage in the sporting world because of praxis which is discriminatory.

While their individual stories not told in English, based off some translations during the presentations, it became apparent that the experiences of both Paul and Pramanik had striking resemblances to those of South African athlete Caster Semenya. Semenya has been hailed as a South African hero. Her outstanding athletic performances have illustrated her remarkable ability to outperform her competition, and she has indeed been an enormous source of inspiration for South African youth in particular. But it is the similarity in the discriminatory treatment of Semenya which Paul and Pramanik argue is universal in the sporting world for trans and intersex persons. Subjected to intrusive testing and often having to endure the scrutiny of the sporting world, trans and intersex persons alike are faced with either having to succumb to unfair treatment or to seek legal recourse.

In this instance, Dr Mitra advocates for a safer and more inclusive playing field concerning the sport. In her

presentation, she highlights the International Association of Athletics Federations (IAAF) regulations on hyperandrogenising which were brought into practice in 2011. This after Caster Semenya's treatment in 2009. Her presentation on the topic illustrated the unfair practice of mandatory eligibility testing for women using the rationale that hyperandrogenism confers an unfair advantage. This, in turn, has resulted in the recommendation of invasive medical interventions which include in some instances included surgery and other hormone therapy. Mitra continued to illustrate the effects of the regulations in her presentation by presenting the case of Dutee Chand, who was dropped from two teams at an international level. In 2014 an appeal was lodged to the Court of Arbitration in Sport, in 2015 the policy was suspended for two years. Between 2015 and 2017, the body was allowed to file evidence supporting the regulation. The Court of Arbitration for Sport (CAS) judgement insisted that the IAAF establish evidence those women enjoyed a significant performance advantage. Upon their failure to do so, the CAS suspended the IAAF's Hyperandrogenism Regulations.

According to Mitra, there is a likelihood that because of the ruling, the IAAF has taken it upon itself to tighten regulations in response to the ruling, seemingly to target individual athletes. In so doing, they are through regulations coercing athletes into submission for assessment, medical intervention, consent. Also, they are restricting potential to compete and set records going to the extent of even suggesting a new category be created for intersex athletes despite them identifying themselves as women.

Nandan Kamath discussed the rights and freedoms in the context of the IAAF considering the International Olympic Committee charter which states that

"EVERY INDIVIDUAL MUST HAVE THE POSSIBILITY OF PRACTISING SPORT, WITHOUT DISCRIMINATION OF ANY KIND AND IN THE OLYMPIC SPIRIT, WHICH REQUIRES MUTUAL UNDERSTANDING WITH A SPIRIT OF FRIENDSHIP, SOLIDARITY AND FAIR PLAY".
- OLYMPIC CHARTER

Kamath explains that binary gender in sport has been historically generated, advancing the argument that men have a natural advantage in sports over women. He argues that the binary is couched in principles of integrity and fair play which he admits is not clear cut. He makes the point that sport is not intended to find equality, but rather in fair play. This, in turn, generates persons who stand out beyond the rest. Where this ambiguity becomes interesting is where one needs to determine whether the discrimination is justified in the nexus of the objective and the result sought.

Kamath argues that the sporting world is underpinned by integrity and fair play, and for that reason, he believes that solidarity and a freedom/rights-based approach is the better modus for the sector. Concerning leading on social issues, Kamath feels that there is scope for the sector to reengineer sports through deemphasising integrity in favour of a broader perspective which is considerate of solidarity. Doing so would in his opinion, would likely result in the enjoyment of sports instead of its restriction. In his opinion, a rights-based approach would shift the burden of proof as it related to regulation onto sports regulators and not the athletes themselves. This would instead of excluding athletes make more stringent other classificatory mechanisms which would be less discriminatory such as grouping by weight instead of gender. His concern is that a body with funding and a dominant voice within the sector may well enforce discriminatory regulation leaving athletes with little to no recourse because of their stature in the sector.

2.

INTERSECTIONAL EXPLORATIONS:

TRANSGENDER RIGHTS IN THE NORTH-EAST AND TRANSPERSONS WITH DISABILITY

Swati Bidhan Baruah from the All Assam Transgender Association shares her experiences as an activist and lawyer from the North-east of India. National Register of Citizens (NRC) process came as an affront to the community of Assam. Baruah called on those present in the conference to pay attention to the roll-out of the NRC process across India, noting that the implications of such roll out have particularly bad ramifications for transgender persons. She noted that the rollout of the NRC and its adoption by other parts of India would adversely affect those who were estranged from their families because of their gender, and those who chose to live among transgender community sects as they were unlikely to possess the necessary documentation to be included in the registry and would, therefore, become alien if they failed to produce appropriate identification as per the NRC. The subsequent exclusions have resulted in inadequate treatment by the government. For Baruah, filing an intervention application in the supreme court was necessary because after the first draft of the NRC in Assam had listed citizens, those who were excluded needed to file claims and objections. Baruah shared that the concern came because the claims and objections from excluded gender which would correctly list those persons filing claims and objections and it was therefore impossible to file claims and objections because there was no category for them. The NRC had thereby inadvertently made it impossible for transgender persons to be included, making natives to Assam alien in Assam. Despite numerous assurances that they would

develop the appropriate measure to rectify this error. The NRC coordinator failed to do so, and at that stage, the All Assam Transgender Association filed an intervention application. The chief justice ultimately agreed to make provisions for the inclusion; however, despite this, the list was not consolidated to include transgender persons. The All Assam Transgender Association had requested that transgender persons instead of having to adhere to the production of documents dated 1971 or older, could instead produce an affidavit confirming their citizenship.

For Santa Khurai also from the All Assam Transgender Association, the politics and experiences of Transgender Identity in Meghalaya, Nagaland and Manipur informs her lived experiences. She describes the multiplicity and diversity present in the region, which she explains is a challenging context in which to work.

According to her, the authorities questioned whom she wanted to do the work for because they were not aware of the transgender persons whom she was going to be working with.

Implementation of NALSA judgement, social welfare department appeared to be deliberately hampering the implementation of the law. She questioned how the law would affect the lived realities of transgender persons. A faith-based organisation rallied in order to assert that transgender persons were not part of the culture of North East India, which they hoped would nullify the position taken that Nupimanbi who claimed to be historically present in that region. Khurai expresses frustration at the move in favour of the erasure of this history. Khurai together with researcher Rubani Yumkhaibam began to unearth the history of the Faitas of Manipur who Yumkhaibam explains derived cultural and ritualistic capital from the kings which they had lost during the Burmese invasions of that area. During this time, the Faitas lost their royal patronage. Yumkhaibam explains the salience of having a dedicated category of persons such

as the Nupimanbi which differs from other categories such as the Kinnars. She notes that identity is derived from culture, language forms of worship and rituals of worship which differ in each instance. She notes historically in the Manipuri area; gender was not of huge concern as gender identity was not fixated upon. She further illustrates linguistically that three categories for gender were created in order to distinguish between kings, queens and faitas who performed specific tasks within the king's court. She further noted that the space of the king was often entered by the faitas who performed tasks that other members of the royal court were not able to illustrate their importance at the time.

For Kiran Nayak the founder of Karnataka Vikalachetanara Samasthe (KVS), disability is connected to the body. However, gender is connected to the mind and soul and is a question of life. He has founded several organisations focussing on persons with a disability, noting that when people speak about disability, they do not speak about gender and the inverse is true. He has slowly tried to integrate the work he has been instrumental in, in terms of disability and gender. His concern has been that NGOs which work on disability often health-related support but do not address sexuality issues. This frustrates him as the intersectionality of his identity as a transgender man with a disability is not considered by organisations who offer support in one area or the other. The system is for him linked to a society that regulates gender. His work is aimed at bringing movements together in favour of intersectionality in and bridge the gap identified.

Carmeliza Rosario, an associate researcher from the Centre for Law and Social Transformation at the University of Bergen, engaged from the perspective of legislative work in Mozambique. The research she discussed was to be

conducted through a survey with 90 LGBTI persons and within that group 15 trans women and 15 trans men. The research focussed on health and aimed to identify the experiences of those persons in relation to the criminalisation of sexuality. The study would consider persons whose sexual orientation is legally criminalised in their country and juxtaposed them with those in countries where their sexual orientation is not criminalised. This was in order to ascertain whether experiences would be similar and to try and illustrate that legislation is not necessarily enough to prevent discrimination.

She noted that simply lumping experiences with one another was not a useful way through which to engage on LGBTQIA issues as the categories are not treated equally. She shared the experiences collected in the project through photo-voices collected in the research. She explained that gender fluidity was described by the participants as disconnected because of the lack of information or awareness, which in turn could be attributed to the performance of gender. She discussed that the study would consider whether biology had an effect on autonomy, especially because of the ways that trans women experienced discrimination because of expectations of masculinity.

3.

POST NAVTEJ JOHAR:

MOVING BEYOND DECRIMINALISATION?

Prof. Siddharth Swaminathan from the Azim Premji University shared his research work on the topic of politics and society between elections. Centre for Regional and Political Economy, attempted to measure public opinion; in the instance, the surveys collected information to ascertain between 48000 participants across 22 states in India. The study began before the judgement and concluded in 2018. The rationale in the survey was to find out what happens in terms of discourse and how it finds root in-between elections. The survey found that in terms of attitudes and two factors, namely education and youth, are influencing factors in terms of support for same-sex intimate relations. The data shows that in rural areas, younger people with a higher level of education are more likely to support same-sex relationships. In another question, the survey considered media exposure and found that despite nationalism, there was not more significant support for intimate same-sex relations despite liberal beliefs. In terms of its findings, the survey found that there has been little generational shift which has informed public opinion. It also found that there was no more support from those who were considered liberal despite that being the assumption. The report had examined perceptions, public opinion, and political subjectivities of citizens. It took into account stereotypes, the regional-national dichotomy in political expression, as well as the libertarian and majoritarian impulses which characterise freedom of expression and nationalism respectively. In its conclusion, the study finds the following:

THESE POLITICAL CULTURAL PATTERNS MAY BE SUMMARIZED AS FOLLOW: (A) THE CASTE-COMMUNITY DRIVEN SOCIAL UNIVERSE AND THE SOMEWHAT BROAD-BASED POLITICAL UNIVERSE CONSTITUTE THE CONTEXT IN WHICH CITIZENS RELATE TO EACH OTHER; (B) MORE IMPORTANTLY, CASTE-COMMUNITY BASED IDENTITIES ARE NOT ONLY INWARD LOOKING IMAGES OF THE SELF, THEY ALSO IMPOSE DEEP BURDENS ON CERTAIN COMMUNITIES. (C) THIRD, THE STUDY HINTS AT THE NEED TO MORE CAREFULLY REDEFINE THE MEANINGS AND SIGNIFICANCE OF IDEAS OF FREEDOM OF EXPRESSION AND REVISIT LIBERAL FUNDAMENTALS IN AN INDIAN CONTEXT (D) FOURTH, SEVERAL LARGE STATES UNDER STUDY INDICATE STRONG PUBLIC SUPPORT FOR EMERGING MAJORITARIAN NATIONALISM AS WELL AS A TENDENCY

TOWARD POPULISM WHICH MUST BE TAKEN VERY SERIOUSLY AS IT IS LIKELY TO DOMINATE BOTH PUBLIC DISCOURSE AND OUR COLLECTIVE LIVES IN THE NEAR FUTURE.

**- POLITICS AND SOCIETY
BETWEEN ELECTIONS 2019**

Hon'ble Mr. Justice G.R. Swaminathan of Madras High Court shares his experiences in terms of the right to marry. The justice shared an anecdote during his presentation, illustrating that the institution of marriage in the country is under stress. According to him several dubious applications being lodged with the courts. He is aware arguments have been made for the extension of marriage and inclusion of the LGBTQIA community in marriage, but feels that this is the choice of the community itself. He feels because of applications being made concerning marriage, that the relaxations indicate that it is the ideal time for the LGBTQIA community to petition for the recognition necessary under the marriage act. Using the NALSA judgement, justice was able to extend the right to marry to include trans women. He indicates that where binary in the marriage is present concerning gender identity that there are no constrictions to the marriage application; however, he notes that the same would not be valid for same-sex relationships. The supreme court while it ruled in favour of the repeal of section 377, neglected to make a ruling in terms of marriage, according to the justice, this it is the logical next step.

He offers advice in relation to the draft Equality Bill worked on by many of the conference attendees noting that the draft is too elaborate and suggests instead a set of moral regulations in favour of proper regulations following. He argues that this would provide a basis for instituting same-sex marriage. He feels that while the government may not have the incentive to support same-sex marriage, but feels that if the courts support it, that government will not oppose. He noted the Arunkumar vs The Inspector General of Registration ruling, illustrating the potential reach of the courts.

Anindya Hajra of the Pratyay Gender Trust presented on trans* and gender non-conforming persons and labour rights. Transgender persons and their work have been invisibilised. This invisibility obscures their economic role despite the already present barriers to entering the economy. The National Human Rights Commission (NHRC) and the Kerala Development Society (KDS) together conducted the research. Not surprisingly, the stories of discrimination, violence, deprivation and abuse by the melted out on this community held true. There is a direct correlation between harassment in education and in the workplace. Transgender data has previously been collected under other or male categories which may suggest that the reflected statistics are not based on the real numbers of transgender persons in the Kerala area. Trans persons employability becomes very vulnerable.

92%

OF TRANSGENDER PERSONS ARE DEPRIVED OF THE RIGHT TO PARTICIPATE IN ANY FORM OF ECONOMIC ACTIVITY, FORCING THE MAJORITY OF TRANSGENDERS TO RESORT TO SEX WORK AND BEGGING

50-60%

OF TRANSGENDER PERSONS HAVE NEVER ATTENDED SCHOOL AND THOSE WHO HAVE FACED CONTINUOUS HARASSMENT FROM CLASSMATES AND TEACHERS

57%

OF TRANSGENDER PERSONS WANT TO UNDERGO SEX-REASSIGNMENT SURGERY BUT CAN'T AFFORD TO DO SO DUE TO POVERTY

89%

OF TRANSGENDER PERSONS IN INDIA WITH EVEN SKILLED AND QUALIFIED TRANSGENDER PERSONS WERE NOT ABLE TO FIND JOBS BECAUSE OF THEIR GENDER EXPRESSION

Transgender and gender non-conforming persons are often the most visible subsets of the gender/sexual minority umbrella have to face violence and discrimination, which they are subjected to because of their gender identity and expression. Hostility and harassment, including sexual harassment experiences by these groups, is significantly under-explored. Transgender communities, according to Hajra are the invisible workforce much like Dalit, migrant and other precarious workers. Trade-unions bear and unclear attitude towards transgender workers inspire of the employer-employee relationships because they have not yet been afforded worker status. Transgender pose a different complexity and challenge to what Hajra described as an already fraught space. Transgender persons who are not part of the. Formal employment sector is difficult to locate, and therefore the statistics cannot possibly be accurate. Scores of transgender persons have worked as farm labour, but are not able to access such things as and restitution because they are not recognised in formal structures and face ongoing discrimination as it applies to labour.

4.

NEXT STEPS FOR STATUTORY REFORM



LEIGH DAVIDS - **ACTIVIST, SEX WORKER, SISTA**

Daniel Mendonca, an Intersex Rights Activist, discussed the issues of rape as a crime considering the reforms to Section 376, IPC. She shared after personally having been raped how it is that the laws do not make provision for non-biological women. She argues for the recognition of all gender as this would merely be recognising humanity ahead of sexual orientation and gender identity. Mendonca describes section 375, which is very descriptive, sharing frustration at the fact that the rape laws are vague in comparison resulting in discriminatory practices. The knock-

on effect of this is that when rape is reported, even the recourse is gendered in such a way that it perpetuates discrimination instead of recourse.

AM I EQUAL IN THE COURT OF JUSTICE?
- DANIEL MENDONCA

She expresses concern about the differential treatment offered in rape cases. They share frustration at the discrepancies in the law which would see consensual sex being criminalised with a seven-year-long punishment. In contrast, those convicted of rape in specific instances only receive two years. For Mendonca it is inappropriate for lawmakers who themselves are not transgender or intersex to make laws on behalf of transgender and intersex persons whose lived realities they are not familiar with.

Grace Banu, the founder of Transrights Now Collective, discussed The Transgender Persons (Protection of Rights) Bill of 2019 considering whether it is needed or not. She argued that the previous versions of the bill did not advantage transgender communities and is therefore ineffective for those communities. Banu begins with the definition for transgender persons in the bill which describes transgender persons as neither male nor female. Outraged by the inaccuracy in the definition, Banu and others in her collective fought the bill. Banu explains that in order to obtain new identity documents, processes included grossly degrading processes such as nude scrutiny by public officials for the recognition of transgender persons. In place of the removal of the screening processes in the new bill, the district magistrate for the certificate, but if you want an identity marker change, this is obtained by the chief medical officer superintendent essentially recreating the old screening committee and writing it up differently. Because of familial discrimination, it is difficult for transgender persons to follow the recommended procedures for leaving home while maintaining identity documents as this legislation would likely

force young persons to go to the court for them to make a decision to move into a transgender community, should the court so chose, the alternative would be the court sending the applicant instead to an orphanage. This, according to Banu, is likely to result in suicide rather than an adequate remedy.

Banu highlighted that previously begging was criminalised, this inadvertently made transgender beggars criminal. Banu finds this ludicrous because of the lack of rights associated with transgender persons. The legislation appears to her to be further discriminating against transgender persons through such language use as that of a third gender to which Banu responds -

**I DON'T WANT THAT NAME, THIRD
GENDER. IF YOU SAY THIRD GENDER,
ASK ME, I WILL ASK YOU WHO IS THE
FIRST GENDER? WHO IS THE SECOND
GENDER...YOU SAY IM A THIRD GENDER,
I DO NOT WANT THAT KIND OF NAME, I
WANT MY IDENTITY, THAT IS MY RIGHT
- GRACE BANU**

Dr. Jeff Redding is a senior research fellow from the Australia India Institute at the Melbourne Law School,

University of Melbourne. His research has recently started considering transgender rights issues in Pakistan. Redding immediately acknowledged his positionally concerning the research he is involved in as he is aware that it would not be possible for a Pakistani to present the same information in light of legal restrictions between Pakistan and India. Redding explains that public interest litigation was brought before the court to consider the treatment of transgender people. He explained that there is no decision similar to the NALSA decision of India, despite there being decisions on the public record. He notes four primary interests that Pakistani courts have had in the last few years. 1) He notes claims of people being denied the right to vote by electoral officials based on officials interrogating gender discrepancies; 2) They are also interested in inheritance rights and how those affect transgender persons who were estranged from family and for that reason had difficulty in terms of inheritance; 3) The national census was also of interest as petitioners were arguing that they would not be counted in the national census because their genders were not recognised on the census; eventually, the courts consolidated transgender and disability issues; 4) the combination of transgender and disability issues in favour of an interactional approach.

Redding explains that there three outstanding issues concerning the act. 1) self-identification is ambiguous; 2) inheritance laws and their application are ambiguous because of the religious aspect in them; 3) how does section 377 mean in the Pakistani context?

Dr. Akkai Padmashali, the founder of Ondede and Social Activist group who moderated the conversation, offered some reflections on the presentations made by the speakers in her session. She highlighted the discrimination faced by transgender persons in terms of public access. How there are several challenges relating to the survival of victims of violent crimes as their experiences of violence are melted out both within transgender communities and society more broadly. For Padmashali there is an incongruence between elite

feminists who discriminate against transgender persons despite their feminism as they argue that transgender persons cannot be raped. TO this Padmashali questions who decides what constitutes rape? She notes that such decisions are often the reason for re-victimisation.

Further to this, she interrogates why and how the legal ramifications change for rape perpetrated by women who are transgender, cisgender or intersex, as she reiterates Banu's assertion that the recourse is ambiguous and unequal in those instances. Padmashali reminded the conference that NALSA should underpin the Transgender Bill in order to ensure that there are no violations of the right to privacy, undermining the dignity of transgender persons. She also reminded the conference that there was a 30-year struggle in the lead up to section 377 judgement (see pg. 4-6). The ambiguities in the law, are the cause of differential treatment, and this is evident even in booking cases where the law enforcement officials themselves are not certain which section to book transgender person under as there were different names for different transgender types of transgender persons as pointed out by Rubani Yumkhaibam. Padmashali ends off by asserting that even as the country celebrates the section 377 judgement, it simultaneously does away with the 30 year-long fight in favour of it, as the judgement names only five applicants.

5.

GENDER IDENTITY & EQUALITY MOVEMENTS



VYJAYANTI VASANTA MOGLI

HUMAN RIGHTS & RTI ACTIVIST

Vyjayanti Vasanta Mogli is a Human Rights & RTI Activist and Co-Founder of Telangana Hijra Intersex Transgender Samiti. Mogli discussed the necessity of Intersectional Solidarities which she feels are necessary in terms of establishing coalitions with other movements.

Different techniques have been used, such as making a complaint to the police station, pasting it on the wall and photographing it with a date in the press. Doing such things ensures that the complaints are accurately recorded as a means of resisting police mismanagement of cases. For Mogli, there are essential lessons to be learnt across the anti-caste, gender equality disability rights movements; there are horizontals such as unified and collective resistance that can

Be made use of. If the Transgender Bill were to be passed, there is an opportunity to make use of strategies which could be described as making use of the lower hanging fruits which are more accessible. Mogli spent time thinking through various bills and the kinds of actions that were used in terms of advocacy to bring about change, for her, those are most effective when timing and the readiness of the community is considered to be opportune. She advises that there are specific legislations which are simply a copy of those in other countries where the context is not the same, finding intricacies like this assist in advocating for the creation of legislations particular to the Indian context.

Vqueeram Aditya Sahai, an independent researcher, discussed Sex as Figure and Sex as Structure. She discusses the solidification of a particular transgender figure which she problematises. The language of eroticism had a certain attraction to a national figure not on the basis of attraction but of love. She questions how the intersectional language movements are now being employed in resistance movements noting that such language is no longer readily recognised.

For Sahai who is thinking about the category of gender in the Indian context, the category is no longer useful. She makes this claim considering the historical context in which gender occurs. Feminists started relying on the use of gender, and the biopolitical project which Sahai believes exploited intersex bodies and forcibly doing surgeries on them. It later becomes taken up by development projects. The uses of gender in these instances coalesced around equality, and she called for thinking beyond equality. For Sahai the use of sexuality is more useful in the context of Indian legislation.

The ambiguity of the transgender figure in NALSA for her is an indication that the courts do not understand what the transgender category is beyond transgender, but gender more broadly. For Sahai there is a far more interesting relationship between sex and caste which she makes use of

to think of transness. Sahai using sex as inclusive of sex, sexuality and gender. In doing so, she thinks of sex as equality, difference, orientation and gender. Thinking of sex as a principle that structures society, and within the Indian context, that structure is produced as caste.

Sahai refers to the Hadiya judgement thinking of consent and the right to consent, to marry, to friendships, religious-political economies, to non-normative relationships and partnerships, among other issues. Sex as the structure is also thought of through the Trafficking Bill, which Sahai points out is dangerous to the LGBTQIA community because it empowers anyone to act if they think any house supports any trafficking. It does not allow for the testimony of the persons accused, meaning that if persons are thought to be immoral by other evictions are feasible with little recourse. Surveillance has become part of the legal frameworks, whether deliberately so or not. Such surveillance is a product of social norms which are enforced by the state and make hyper-visible to the state. For this reason, she considers sex as structure as it is the social which makes it figural, by making people distinguishable from one another. Equality and access to opportunity, among other issues perpetuate the states normative structure which institutionalises normativity.

The transgender figure for Sahai has in essence, only become legible as a figure of death, as it is not recognised in other forms such as pleasure and joy. The increasing rights-based approach she warns has the potential for the furtherance of surveillance and incarceration. For the reduction of the trans person to figure has resulted in the trans protest being ritualised when trans persons present themselves before the law.

Sahai proposes a freedom-based approach instead of a rights-based as a supplement for equality. She feels that criminalisation is the result of the fear of the freedom which transgender persons exhibit by being so visible in society. For this reason, she proposes the use of creative approach similar to the creative imagination of queer kinship, survival and even dress sense. Doing this would bring the

transgender figure closer to sexual freedom, whereas she argues that the solidification of sexual difference would be the result of equality.

In closing the panel, Jayna Kothari discussed section 377 thinking through the way forward beyond the ruling in favour of positive rights beyond discrimination. For Kothari, creating an overarching Equality Bill is more useful. She proposes a framework for the bill which envisions protected grounds, with a definition of discrimination and prohibited. Conduct. She argues that it should be clear who it is against as it relates to government and private persons. She calls for specific areas to be cited and for remedies such as injunctions, protection orders, damages to be included. For Kothari, it is equally important that institutions such as the equality courts and equality review commission become involved and that the framework is in favour of definite obligations for equality. It would prohibit discrimination based on caste, race, sexual orientation, ethnicity or descent, socio-economic disadvantage political opinion and belief, food preference, among others. She ended off in response to Vqueeram Aditya Sahai asking whether we cannot instead begin to think of equality inclusive of freedoms.

6.

AT THE BEGINNING OF

TRANSFORMATION IN SOUTH AFRICA :

THE STORY OF SALLY GROSS - FROM THE SALLY GROSS COLLECTION AT THE GALA
ARCHIVES

Gross led a remarkable life during which she wore many caps, including that of a Catholic priest, an anti-apartheid activist and an intersex activist. The collection consists of Gross' personal documents, photographs and memorabilia and reflects her life as a priest, work with the South African government and her crisis of faith and subsequent interest in Buddhism and Quakerism.

Gross was born in 1953 in Cape Town to Jewish parents who upon the advice of doctors was told to raise baby. Gross as a boy despite ambiguous genitalia. Intersex was little understood in the early 1950s, and so Gross was named Selwyn and raised as a boy. Although Selwyn's parents were not particularly religious, young Selwyn became an Orthodox Jew and in high school went to the United Kingdom to attend rabbinical college. Gross also spent two years studying and living in Israel after finishing school.

SALLY GROSS

ANTI-APARTHEID & INTERSEX ACTIVIST

Gross returned to South Africa to continue studying at the University of Cape Town (UCT) and became increasingly involved in anti-apartheid student activism. Gross fled South Africa as a political exile in 1977 having attracted the attention of apartheid authorities, first going to Botswana, then back to Israel, and finally settling in the United Kingdom in 1981 after joining the Dominican Friars at Oxford as a novitiate. Gross had converted to Catholicism while at UCT, having become disillusioned with the rigidity of Orthodox Judaism, as well as the lack of response by the greater Jewish community in South Africa to apartheid. Gross was ordained as a



Dominican Friar in 1987, and continued to teach Philosophy and Theology at Blackfriars Priory, Oxford University.

In 1993, after years of inner conflict, Gross eventually underwent medical tests confirming her intersex status and changed her name to Sally and began living as a woman. Subsequently Rome excused her from her vows and a lengthy and painful battle with the Catholic Church followed – as a woman, Gross could no longer serve as a priest. Much of this correspondence between Gross and the Catholic Church form part of her collection. “I was ostracised, stripped of status and even identity, and forbidden to exercise my vocation” she said. Gross returned to South Africa after 1994 and worked for the Human Rights Commission and the Department of Land Affairs.

She also started an organisation called Intersex South Africa, aimed at supporting other intersex people, was an

advocate and lobbyist for intersex rights and legislation, and also made the documentary *The Third Sex*.

Despite engaging with other religions after leaving the Catholic Church, including Buddhism and Quakerism, Gross died in Cape Town in 2014, having never been able to reconnect with her faith and at the time of her death professed to consider herself an atheist.

“MUCH NEEDS TO BE DONE TO EDUCATE THE PUBLIC ABOUT INTERSEX. THEY NEED TO LEARN THAT IT IS PART OF THE FABRIC OF HUMAN DIVERSITY AND NOT A THREAT, A RIGHTS ISSUE AND NOT PATHOLOGY. TEACHERS AND CURRICULA NEED CONTENT ABOUT IT. MEDICAL STUDENTS NEED INPUT FROM A MEDICAL-ETHICS AND HUMAN RIGHTS PERSPECTIVE. RELIGIOUS LEADERS NEED TO BE EDUCATED ABOUT IT TO EDUCATE OTHERS. RESEARCH ABOUT THE PREVALENCE OF INTERSEX IN SA, AND ABOUT ATTITUDES AND PRACTICES, IS NEEDED. WE NEED LEGISLATION TO LIMIT AND REGULATE NON-CONSENSUAL GENITAL SURGERY ON THE INTERSEXED, AND LEGISLATION MUST BE SCREENED WITH IMPLICATIONS FOR THE INTERSEXED IN MIND.”

**SALLY GROSS – AFRICAN SEXUALITIES: A READER, PAGE 236
(ED. SYLVIA TIMALE, 2011)**

7.

PROGRESSIVE BOTSWANA COURT AFFIRMS THAT LEGAL RECOGNITION OF GENDER IDENTITY AT CORE OF HUMAN DIGNITY

WRITTEN BY TASHWILL ESTERHUIZEN & FIRST PUBLISHED IN THE DAILY MAVERICK
NOVEMBER 2017

**FOR THE SECOND TIME IN TWO YEARS, THE BOTSWANA COURTS HAVE SHOWN
THEMSELVES TO BE CHAMPIONS OF JURISPRUDENCE WHICH ACKNOWLEDGES THE
RIGHTS OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER PERSONS AND THEIR RIGHT TO
EQUAL PROTECTION BEFORE THE LAW.**

Identity plays a pivotal role in many activities that comprise our daily lives. Identity documents not only grant us access to routine services in the spheres of healthcare, social security and employment, but allow us to live with dignity.

For many of us, obtaining an identity document that correctly reflects our particulars is a relatively easy process. For transgender persons throughout Africa, however, the road to obtaining an identity document that matches their expressed gender is literally impossible. This exposes transgender people to ongoing stigma and discrimination and essentially denies their human dignity.

In the groundbreaking case of *ND v Attorney General of Botswana and others*, the Lobatse High Court in Botswana took a significant step towards protecting the dignity of transgender people. The court ordered the Registrar to change the gender marker on the identity document of a transgender man from female to male.

The court acknowledged that lack of recognition of gender identity exposes transgender persons to widespread discrimination, stigma and harassment. Judge Nthomiwa Nthomiwa observed: “Recognition of the applicant’s gender identity lies at the heart of his fundamental right to dignity. Gender identity constitutes the core of one’s sense of being and is an integral (part) of a person’s identity. Legal recognition of the applicant’s gender identity is therefore part of the right to dignity and freedom to express himself in a manner he feels ... comfortable with.”

The High Court emphasised that the “State (and society) has a duty to respect and uphold the individual right to human dignity despite opposing and different views it might hold with regards to the applicant’s gender identity.”

The High Court further noted with concern the ongoing distress and discomfort experienced by the applicant when he is required to explain intimate details of his life to strangers whenever he seeks to access routine services.

The High Court correctly observed that this amounts to an invasion of his right to privacy and “that arbitrary interference or embarrassment and the intrusion of privacy faced by the applicant may be avoided or minimised by the state by allowing him to change the gender marker on his identity document.”

For the second time in two years, the Botswana courts have shown themselves to be champions of jurisprudence which acknowledges the rights of lesbian, gay, bisexual and transgender persons and their right to equal protection

before the law. The first decision was from March 2016, when the Botswana Court of Appeal ordered the government to register a non-governmental organisation that promotes the rights of the LGBT community in Botswana.

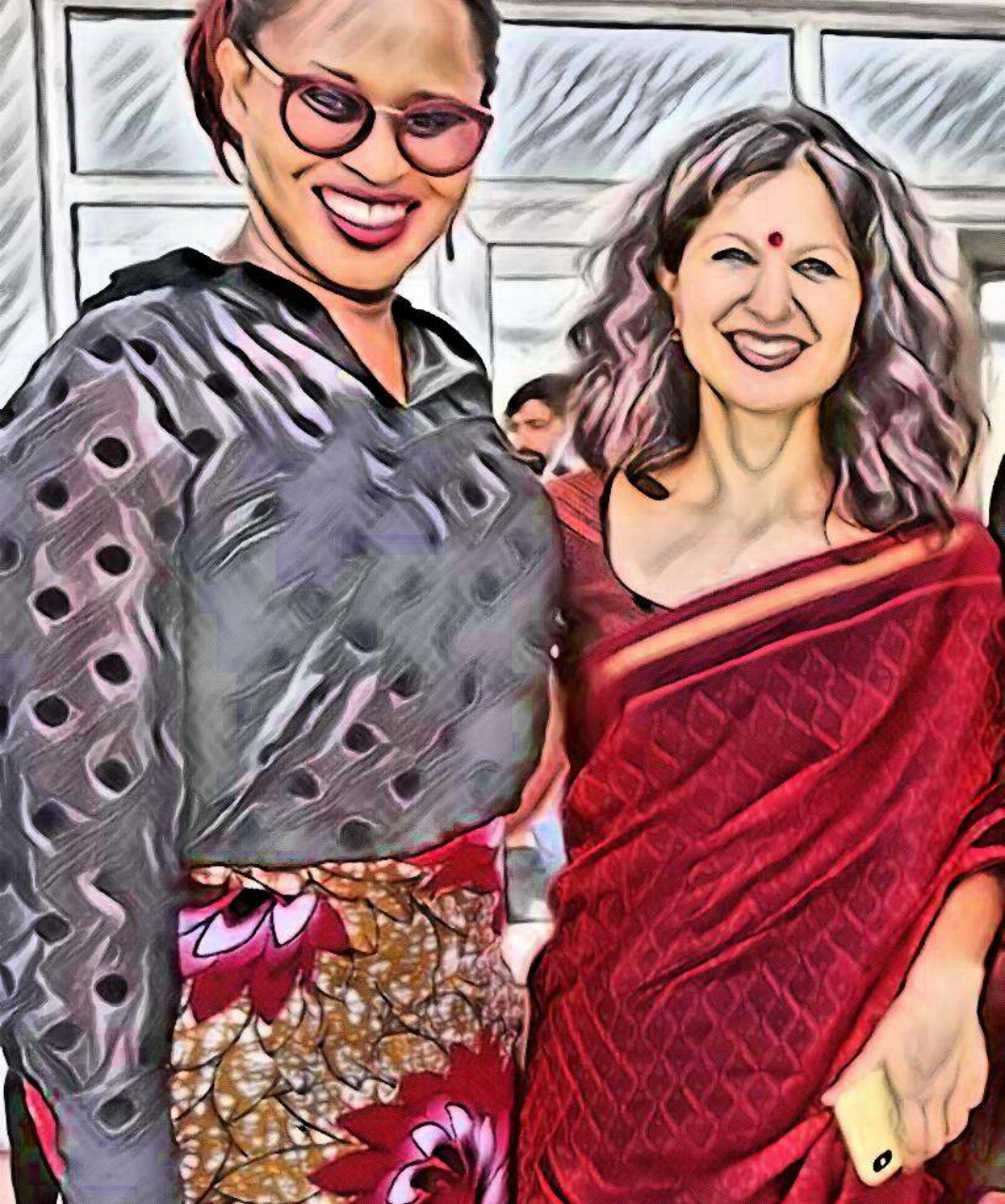
The Court of Appeal held that “as a society, once we recognise that persons who are gay, lesbian, bisexual, transgender or intersex are human beings... we must accord them the human rights which are guaranteed by the constitution to all persons, by virtue of their being human, in order to protect their dignity.”

This legal recognition of gender identity permits transgender people to align their identity documents with their expressed gender or gender identity and is an important step towards the realisation of the fundamental rights of transgender persons. However, much more work needs to be done to ensure the respect and recognition of the fundamental rights of transgender people in Botswana, including providing access to adequate gender-affirming treatment and care and the implementation of non-discriminatory employment and education policies.

These cases were brought before the courts after sustained advocacy by brave LGBT activists from Botswana seeking the recognition of their constitutional rights.

A prominent transgender activist, Ricki Kgositau, has brought a similar case on the legal recognition of her gender identity. While that case is currently pending before the Botswana High Court, it has ensured that the discourse on the rights to dignity and equality of transgender persons remains vibrant in Botswana.

Similarly, other transgender activists have approached other courts in the region seeking legal recognition of their gender identity. These judgments from the Botswana courts will provide a useful stepping stone in the development of constitutional jurisprudence in southern Africa on the rights of



RICKI KGOSITAU
LAWYER & ACTIVIST

JAYNA KOTHARI
SENIOR ADVOCATE

LGBT people.

Through their sound legal reasoning and constitutional jurisprudence, the Botswana courts have set an example for other courts in the region on the important role the courts can and should play in protecting and promoting human rights of all persons, including marginalised groups. The Southern Africa Litigation Centre is supporting these cases in Botswana. DM

Tashwill Esterhuizen is Programme Head, LGBTI and Sex Workers Rights Programme Lawyer, Southern Africa Litigation Centre (SALC)

7.

BEYOND TRANSFORM: STORIES OVER TEA

CLICK ON THE LINKS BELOW TO ACCESS SOUND BITES ON SOUNDCLOUD

[SANTA KHURAI & RUBINA YUMKHAIBAM](#)

[RICKI KGOSITAU](#)

[GRACE BANU](#)

[SPEECH BY LEIGH DAVIDS \(FROM GENDER DYNAMIC
ARCHIVE\)](#)

8.

LEIGH DAVIDS: NOT PRIVACY, NOT HOME, THE STREETS!

SPEECH BY LEIGH DAVIDS AT A HERITAGE DAY PARADE FOR THE KEWPIE 2018 - FROM THE LEIGH DAVIDS COLLECTION AT THE GALA ARCHIVES

Thank you for coming to the place where we live. We do not often invite people here. Like anybody else we enjoy our privacy and as you might imagine we don't have a lot of that here.

This is what NOT PRIVACY looks like.

This is what NOT HOME looks like.

This is what parents threaten their children with if they don't do their homework.

This is what Capitalism imprints in your mind to make you work harder,

to spend your money,

to make you work for the man.

This is..... THE STREETS.

But guess what? For us:

This is home. Here we find ways to be private. Here we find ways to be alone.....We thanked everyone and told we'll continue the discussion at the end of the walkabout which will be at the Museum.

We reached the museum and the curator evicts us from presenting by saying the Museum is jot a space for disruption. We just kept quiet and as civilised activists continued with the program, yet feeling left out again but her is what the rest of the presentation looked like.

The human mind and will is amazing. Even when it is hungry. Even when it is in pain all the time. Even when it's spirit has been attacked all it's life. It will find and make community, under the worst stress. The Sistaaz Hood and our allies have been living on this spot for decades. Over there is our lounge and our kitchen. Over here is where we sleep together.

This is home for us.

Well it was until the part of apartheid that never died came and evicted us last week, evicted us yet again from District 6. The first time was because of philosophy called apartheid. Ooh and we hate that word hey? All of us! Black white poor rich.

Say it with all the hate in yourself, all the disgust, feel appalled!

Wasnt it terrible? It was so terrible that once upon a time a government, a city could throw poor black people out of their homes, demolish them, send the people to the outskirts of the city. What terrible prejudice, human rights violation. That one could lose your home because of the colour of your skin, your culture, how you were born. Shocking hey?

But let me tell you that Big Brother Apartheid might be dead but his father is still with us. We never killed his father.

His father's name is the CLASS SYSTEM and his father's job is GENTRIFICATION. In the name of gentrification the father of apartheid is still chasing poor black people from District Six.

And so? How many of you are working class? How many of you are middle class? Do you occupy the street to walk to work or do you occupy the street when you go for a jog or do you drive in it? If you answer yes to any of those you are more or less safe from the father of apartheid and his job - gentrification.

But me and my sisters. He is coming for us. He came for us last week on his first round through Woodstock. He chased us around the corner. Next week he will take us to a concentration camp in a place called Wolwehoek. What is this? It sounds like a TV drama. But it is not. It is my life. It is our life.

And maybe you wonder why I can sleep in the street, how can sleep on a piece of property I don't own, how I can complain when I am evicted from a space I don't own. Are you wondering that? Are you wondering if I am a nuisance to people here? Do I make a noise? Do I use drugs, sell sex, urinate on the street? And isn't it time for me to get my act together, find a job?

First of all - I HAVE A JOB. Sex work is work. You made it illegal.

Second of all. I don't live here by accident. I am not poor by accident. I am not without a home by accident.

There are places in the world where democracy does it's job, nobody sleeps on tar and cardboard there. There are places in the world where Capitalism works, does it's job - people don't sleep under plastic on cement there. There are places in the world where dynamic communities with all the classes are designed by city planners. People from every class is together in one neighbourhood, diversity makes them thrive! Believe it! Those neighbourhoods work! And the most vulnerable? There are shelters for them.....right there in the same neighbourhood where one guy jogs on the street, the other one walks on it to work and the one with mental health challenges sits on a bench under a beautiful tree, protected, maybe even healing. There are places like that in the world.

And do you know how they happened? They did not happen because poor people got their act together. They did not happen because poor people got themselves jobs. They did not happen because poor people got organised. They happened because people with power started doing their job. They built a society for everybody with their power. The middle class agreed to it. Insisted on it. That's how it happened.

So please leave us now and go do your job. Use your power. Get us off the street without evicting us. Gentrify with us in your heart and mind, not like we are trash that needs to be taken out.....of town.

Make the decades and decades of evictions from District 6 stop now and forever. Sixty years after Kewpie and her

friends were evicted from District 6 because of the class she was born into nothing has changed except what Kewpie's tribe call themselves now. We are not moffies. We are trans people. We are women. We are still being evicted. It never ended. Year in year out. 2018.

What GALA, the community of District Six and the Museum don't realise is that they have just erased all the hard work many activists on the ground and organisation in South Africa has done by reliving the drag show! Even as we left District Six the leader presenter in that area announced over the microphone that everyone should have a "Gay Day"..... Again I say we are not a coon carnival, we are not gay to be having a gay day, We are women activists on the ground!

**BECAUSE
IF NOT
US, THEN
WHO?**

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