



# Legal Invisibility of Other Dalits

By Sumit Baudh

## Introduction

For the first time, the census of India 2011 counted a population ‘other’ than male or female. This essay takes a cue from this census and traces the legal invisibility of ‘other’ Dalits. This invisibility is located in a puzzling legal moment in which transgender status is protected but sexual orientation is proscribed; and while transgender persons are compared with ‘untouchable’ Dalits, there is no legal understanding of persons who are both transgender and Dalit. Using this as a starting point, this essay shows the legal invisibility of other Dalits.

This essay relies on the conceptual framework of ‘intersectionality’ to show a broader significance of ‘other’ Dalits. It opens the contours of ‘othering’ and extrapolates that understanding to other ‘intersectional subjects’ like Dalit women, Dalit Muslims and Dalit Christians.

Dalit translates in English as broken, downtrodden or crushed. It is a figurative usage that calls out centuries of subordination based on caste. Dalits are considered polluted and unclean, and deemed 'untouchable'. Some of these practices of untouchability and discrimination flourish to date. Cleaning tasks are typically assigned to Dalits. 'Manual scavenging' is a euphemism for cleaning sewers and latrines by hand. Residential areas in rural India are segregated on caste lines. Although urban India allows greater anonymity of caste, dominant caste identities are still apparent in caste-oriented surnames, like Sharma, Verma, Menon, Narrain, Gupta, and Kapur. These are just a few examples of caste-oriented surnames, not an exhaustive list. Dalit status is implied or presumed in lesser-known obscure surnames—or no surnames at all.

For the purposes of this paper, and in addition to its given usage in the census of 2011, my usage of 'other' includes sexual identities and expressions, such as lesbian, gay, bisexual, and queer. Later in this essay, I open this category of 'other' (based on an 'intersectional' understanding) and I argue that this understanding is useful in its application to other intersectionally subordinate subjects like Dalit women, Dalit Muslims and Dalit Christians.

This essay has resulted from various collaborative efforts. It draws in parts from a collaborative project between the Indian Institute of Dalit Studies (IIDS) and this author, Sumit Baudh, in my role as University of California Human Rights Fellow of 2014; this collaboration culminated into a roundtable seminar, 'Law at the Intersection of Caste, Gender, and Sexuality', August 6, 2014 in New Delhi; where a former Aneka fellow, Usha Kiran shared his personal narrative; and the Ford Foundation provided financial support for the travel of outstation participants. Other parts of this essay are drawn from this author's panel presentation at "Creating collaborative spaces and partnership opportunities to address the issue of sexual

harassment”, organized by Breakthrough, in New Delhi, on March 12, 2015 —the author is grateful to Madhu Mehra, Partners for Law in Development (PLD), Nivedita Menon, Jawaharlal Nehru University (JNU), and Asha Kowtal, All India Dalit Mahila Adhikar Manch (AIDMAM) for their comments on that panel presentation. Other parts of this essay are drawn from the transcriptions of the session Beyond the Gender Binary: Working with Genders and Sexualities of The 2nd MenEngage Global Symposium 2014 – Men and Boys for Gender Justice, held in New Delhi from November 10-13. The author is grateful to the Arcus Foundation and the Center for Health and Social Justice for financial support toward the writing of this essay. Overall this essay is informed by the author’s enrollment in the Doctor of Juridical Science (S.J.D.) program at the University of California, Los Angeles (UCLA) School of Law and the guidance from the Chair of the S.J.D. dissertation committee, Professor Kimberlé Crenshaw. The author is grateful to everyone for their contributions and he remains responsible for all errors and omissions.

This essay is structured in two parts: in Part 1, it gives a glimpse of the invisibility of ‘other’ Dalits through the personal narrative of a trans man, Kiran. This legal invisibility appears starker in two recent judicial decisions, one from the Supreme Court of India in 2014 and another from the High Court of Delhi in 2009. In Part 2, this essay uses the framework of intersectionality to show the legal erasure of other ‘intersectional subjects’ namely Dalit women, and develops a broader intersectional understanding of ‘othering’.

## **1. Invisibility**

Kiran is a disabled transman. He says, “I was born female and I was disabled so my family thought, ‘What is the point of educating a disabled girl?’”. Born in a subordinate-caste Lambani, Kiran fell in love with a dominant-caste woman, and they decided to live together. “Radhika’s

family was upset because they thought I was a girl and how could two girls be married and live together?” Kiran explains. Radhika’s family considered Kiran someone with whom they wouldn’t even drink water. “How could you have a relationship with someone like that?” they said (Kiran speaking at the Indian Institute of Dalit Studies, Roundtable seminar, ‘Law at the Intersection of Caste, Gender, and Sexuality’, August 6, 2014 in New Delhi; translate from Kannada to English by Shubha Chacko).

Because of this hostility in their hometown in Andhra Pradesh, Radhika and Kiran moved to the neighboring state of Karnataka. Their problems were far from over. Kiran could not avail ‘reservations’ because his ethnic group, Lambanis are categorized as Scheduled Caste (SC) in Karnataka, while Lambanis are categorized as Scheduled Tribe (ST) in Andhra Pradesh. ST connotes tribal status and SC connotes caste status—that is associated with the practice of ‘untouchability’. Both SC and ST are subordinate groups but they are different legal categories. Because of this difference of legal categories, Kiran lost his legal status of ST; and on the other hand, Kiran was not accepted as SC because he did not have the legal certification of SC.

Aside from falling into the cracks of legal categories, Kiran is now subject of another legal category, called the ‘Backward Class’ (BC). In April 2014 the Supreme Court granted legal recognition and protection to transgender persons as BC (*NLSA v. Union of India* 2014). This legal category of BC is based on social and economic backwardness, and is different from both SC and ST.

Kiran is thus disabled SC/ST/BC trans man. He continues to jostle with overlapping forms of discrimination in a legal scenario that is fraught with ambiguities. “I have so many

identities and the government wants just one,” he says. To secure his disability pension, Kiran had to show several certificates related to his gender, disability, and caste. “The government is very confused about what pension to give me. It took six months to negotiate [with the government] and get my due.” (Kiran 2014).

This conflation of legal categories is not unique to Kiran. There are more than one hundred thousand SC and ST transgender persons who are rendered invisible in the law. Transgender persons in India were counted for the first time in the Census of India 2011. The Census had a category ‘other’ than male and female. Thus in principle, this ‘other’ category could have included all those who are neither male nor female. For example *hijra*, *kinnar*, *kothi*, *aravani*, *jogappas*, *jogtis*. The census found that there are almost half a million of this ‘other’ population; and of these, more than 16 percent (78,811) are SC and about 7 percent (33,293) are ST. Cumulatively, almost one quarter (23%) are SC and ST.

There is strong likelihood of undercounting of this ‘other’ category. After all, this was a new category and it was difficult to explain to the surveyors, and for them in turn to explain to the surveyed – at the stages of data collection. It is likely that many surveyors were unable to understand this new category and they were unable to collect all the data, resulting in an undercounting.

PhD scholar and transgender activist, Reshma Prasad reflected on the misconceptions associated with the word transgender and the prevalent association with hijras. Speaking as a panelist at The 2nd MenEngage Global Symposium 2014, Reshma said,

“Indian transgender, especially transgender woman, not talking about the trans men, are associated with the hijra identity, although the transgender community includes everyone. When I step out, most people associate me with only one thing—that I am a hijra, ignoring that I am an activist and I work for the community.

They think that I only beg and there is always a negative sentiment associated with us.”

Thus by not taking about trans men, Reshma made an implicit and true commentary about the invisibility of trans men. Yes, the word transgender is commonly understood as hijra, and there is little or no understanding about trans men.

This misunderstanding appears to have taken place in the Census even at the stages of data tabulation. As the Census figures began to be tabulated and declared, it became clear that the ‘other’ population was initially included in the male population, and this betrayed the common misconception that transgender persons are understood as male-to-female. It is likely that this misconception also prevailed at the stages of data collection —and that resulted in a near total omission of trans men.

Yet 1,12,104 (one lakh, twelve thousand, one hundred and four) is the official census figure and this is a numerical visibility —of the ‘other’ SC and ST population.

In spite of this numerical visibility, there is no understanding of this population in the law. An example of this legal invisibility shows in the Supreme Court judgment on transgender issues. While granting legal protection to transgender persons as BC, the Supreme Court did not clarify the resulting legal status of transgender persons who are categorized as SC or ST. Will SC/ST transgender persons be categorised as BC now?

### *1.1 two recent judicial decisions in India*

The legal invisibility of other Dalits has come to surface more recently and starkly in the Supreme Court decision in *National Legal Services Authority (NLSA) v. Union of India*, wherein the Supreme Court has granted legal recognition to transgender persons as ‘socially and

educationally backward class’ and extended ‘reservations’ to them (*NLSA* 2014). This newly declared judgment, *NLSA* is a step in the direction of affirming gender diversity but it is marred by the recriminalization of same-sex sexual acts in *Suresh Kumar Koushal v. Naz Foundation*, wherein the Supreme Court has validated a colonial era sodomy law, Section 377, Indian Penal Code (IPC), 1860 (*Koushal* 2013). In part, this contradiction could be explained by a disparate reading of sexual acts and gender identities —that the protection of transgender persons is based on gender identity, and the criminalization of ‘carnal intercourse against the order of nature’ is based on sexual acts.

The judicial decisions are not explicit in their setting apart of sexual acts and gender identities, and often the two are conflated and confused. Unconnected to these decisions and speaking at The MenEngage Global Symposium 2014, queer feminist activist, Chayanika Shah called for making this distinction —between sexual orientation and gender identity or gender expression. Chayanika said:

“There is a distinction between a sexual orientation and a gender identity or gender expression, which has to be taken on board, and while these struggles may seem apparently to go together and there are overlapping parts for them, in terms of an understanding, we have to take gender identity and expression as a separate and understand it separately [from sexual orientation].

While this essay does not dwell on this distinction beyond this cursory remark by Chayanika Shah, it is important to flag it as an emerging theme of importance —in any discussion of sexual orientation and gender identity in India.

In 2009, the Delhi High Court had decriminalized sodomy on the constitutional grounds, specifically rights to dignity-privacy, equality, and non-discrimination (*Naz* 2009). This judgment was also based on international human rights law. It relied on the Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights, The

European Convention on Human Rights and the Yogyakarta Principles. The Delhi High Court was conscious also of other colonial era laws like the Criminal Tribes Act, 1871 that had historically imposed criminality upon transgender persons. The High Court ruling referred to the Criminal Tribes Act and noted that the same legislation that had criminalized certain tribes, had also criminalized transgender persons in colonial India. This was done as part of assessing the impact of criminalization on ‘homosexuals’. It was a passing remark made in a single paragraph – that did not develop the analogous comparison – of criminal tribes, hijra communities and homosexuals – to any detail:

“During Colonial period in India, eunuchs (hijras) were criminalized by virtue of their identity. The Criminal Tribes Act, 1871 was enacted by the British in an effort to police those tribes and communities who ‘were addicted to the systematic commission of non-bailable offences.’ These communities and tribes were deemed criminal by their identity, and mere belonging to one of those communities rendered the individual criminal. In 1897, this Act was amended to include eunuchs. According to the amendment the local government was required to keep a register of the names and residences of all eunuchs who are “reasonably suspected of kidnapping or castrating children or of committing offences under Section 377 IPC. ... While this Act has been repealed, the attachment of criminality to the hijra community still continues.” (*Naz*, 2009, para 50).

The Delhi High Court espoused a legal history that made explicit correlation between the hijra community and the erstwhile ‘criminal tribes’. This legal history projected them as separate groups. Were there *any* ‘eunuchs’ in the erstwhile ‘criminal tribes’, and where they not already criminalized in 1871 because of their tribal status? Was their subsequent double criminalization in 1897 redundant or did it make them more vulnerable? Answers to these questions would help us in developing and understanding a legal correlation between the hijra community and the erstwhile ‘criminal tribes’. The Delhi High Court narrative is opaque and it does not consider these questions. Hijras in the erstwhile ‘criminal tribes’ are invisibilized in this legal narrative —of the Delhi High Court.



This may seem too far-fetched in history, hypothetical and speculative. Let us consider a more contemporary example. Kiran was born female – and in a Lambani caste which is categorized as ST in Andhra Pradesh. Kiran’s ethnic and trans identities are inseparable: he is a Lambani trans man. Kiran was forced to migrate from Andhra Pradesh because of his gender and sexuality. Upon arrival in Karnataka, Kiran lost his legal status of ST. The composite character of Kiran’s gender expression and ethnicity was invisibilized and for legal purposes he became non-ST.

This comparison of Kiran in the 21<sup>st</sup> Century with ‘eunuchs’ in the 19<sup>th</sup> Century could be like comparing apples and oranges. They are separated in time and they are two different gender expressions: ‘eunuchs’ are male-to-female transgender persons, and Kiran is female-to-male trans man. Yes they are different and this essay is trying to trace the similarities in these differences. What would it mean for ‘eunuchs’ in ‘criminal tribes’ to embrace the identity and community of hijras? Do they keep their tribal membership or do they leave their tribal communities when they become hijras? Do tribal communities celebrate their diversity of gender expressions, or do they tolerate it in moderation, or quite simply frown upon it so much that gender variance implies an automatic expulsion from their tribes? This author does not know the answers to these questions. These questions being presented to bridge the chronological gap between the ‘eunuchs’ in ‘criminal tribes’ of the nineteenth century and Kiran of the millennium. In his defiance of gender norms, Kiran was forced to leave his tribe and inhabit another land, where he lost his tribal identity —legally. Something similar happens in the Delhi High Court narrative, in which ‘criminal tribes’ and ‘eunuchs’ are projected as mutually exclusive groups.

More recently, the Supreme Court has drawn another analogy in passing – of transgender persons with ‘untouchables’ (Dalits). In the opening paragraph of this judgment, the Supreme Court has stated,

“Our society often ridicules and abuses the Transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are sidelined and treated as untouchables” (underlining added, *NLSA 2014*, para 1)

The Transgender community is not just treated *as* untouchables, some of them *are* untouchable. If the Supreme Court had looked at transgender Dalits, the Court would have seen an overlapping function of caste, gender and sexuality. The Court would have seen that there are similarities and differences between transgender and Dalit statuses. They are similar because both caste and gender are assigned at birth – and they cannot be changed (for the most part). Yet they are different, because gender status could be changed sometimes and this change is now recognized in the law. For example, the unique identification Aadhar card recognizes transgender status (*Hindustan Times 2013*). On the hand, caste status cannot be changed. While the law sometimes imputes a loss of caste, it does not allow for change of caste (*The Hindu 2014*).

There is another kind of rigidity to legal nomenclature that was discussed at The 2nd MenEngage Global Symposium 2014. Queer activist and scholar, Akshay Khanna brought attention to this rigidity in the following words:

“[The supreme court] recognized the third gender as a legal category and came up with directives to the different state governments to come up with affirmative action programs to amend legal documents etc. to accommodate for that. Now, even before the Supreme Court judgment, in the passport, in the electoral roll, in the Adhar card, etc. there was another category of the others. Now, there’s a shift from others, which is a very open category, to third gender, which is a defined category. And now the question is what does that third category. It’s not an open space of gender anymore.”

## 1.2 *sameness and differences*

Sameness and differences of legal categories are recurring themes in anti-discrimination law. American law professor, Kimberlé Crenshaw develops an understanding of these themes in the framework of ‘intersectionality’ (Crenshaw 1989). This understanding originated in a series of employment claims of Black women. According to Crenshaw:

“Black women were harmed by court decisions that conditioned their recovery on their sameness to Black men or to white women, as well as by decisions that saw them as too different to represent those who were routinely permitted to represent them - namely, Black men and white women.” (Crenshaw 2010: 156).

As long as Black women could align their experiences with Black male, or alternately with white females, they could succeed in their legal claims. Yet some of their experiences were different and they did not fit the isolated legal categories of race *or* gender because Black women experienced a combined effect of race *and* gender (Crenshaw 2010: 164).

In its omission to consider the sameness and differences of transgender Dalits, the Supreme Court of India did not clarify the resulting legal status of transgender persons who are SC or ST. Will they be assigned an additional status of BC? Will they receive additional legal protection, or will they be denied their existing legal protection —of SC or ST? Kiran’s experience shows the latter —that the ambiguity of multiple legal categories results in red-tape. The Government of India has called on the Supreme Court to clarify these ambiguities (Indian Express 2014).

A step back in time would help us understand the origin and making of legal categories. For instance, the legal understanding of caste, sexual orientation and gender identity has emerged from very different legal trajectories. Contemporary legal understanding of SOGI rights in India has evolved in the last couple of decades and in the context of HIV/AIDS and the

decriminalization of sodomy. This legal understanding is based on a ‘single axis framework’ that is missing intersectional understanding of caste and ethnicity. On the other hand contemporary legal understanding of caste has emerged from a time long before. The historical legal understanding of anti-discrimination in India emerged from caste-based discrimination (with legal categories like religion, race, sex, ethnicity, and place of origin). Caste was a site of major law reforms, litigation and social movements; and this legal trajectory of caste is built upon a ‘single axis framework’ that is missing any intersectional understanding of religion, sex and SOGI.

In the following part, this essay will demonstrate the application of intersectionality to another intersectional subject, a Dalit woman, Bhanwari Devi.

## **2. Intersectionality**

Kimberlé Crenshaw introduced the framework of intersectionality with Black women as a starting point. Crenshaw contrasted the multi-dimensionality of Black women’s experience with the single-axis analysis of anti-discrimination law: “[w]ith Black women as the starting point, it becomes more apparent how dominant conceptions of discrimination condition us to think about subordination as disadvantage occurring along a single categorical axis.” (Crenshaw 1989: 140).

### *2.1 metaphor of traffic intersection*

Crenshaw illustrated the peculiar position of Black women in anti-discrimination law through the metaphor of a traffic intersection:

“Consider an analogy to traffic in an intersection, coming and going in all four directions. Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. If an accident happens in an intersection, it can be caused by cars traveling from any number of directions and, sometimes, from all of them. Similarly, if a Black woman is harmed because she is in the intersection, her injury could result from sex discrimination or race discrimination.

Judicial decisions which premise intersectional relief on showing that Black women are specifically recognized as a class are analogous to a doctor’s decision at the scene of an accident to treat an accident victim only if the injury is recognized by medical insurance. Similarly, providing legal relief only when Black women show that their claims are based on race or on sex is analogous to calling an ambulance for the victim only after the driver responsible for the injuries is identified.” (underlining added, Crenshaw 1989: 149).

According to Crenshaw,

“Black women can experience discrimination in ways that are both similar to and different from those experienced by white women and Black men. Black women sometimes experience discrimination in ways similar to white women's experiences; sometimes they share very similar experiences with Black men. Yet often they experience double discrimination – the combined effects of practices which discriminate on the basis of race, and on the basis of sex. And sometimes, they experience discrimination as Black women – not the sum of race and sex discrimination, but as Black women.” (Crenshaw 1989: 149)

Anti- discrimination law in India operates through Constitutional guarantees in Articles 14, 15 and 16, and through statutory laws like The Protection Civil Rights Act (PCRA), 1955, The Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 and The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. These statutory remedies are formulated along single axes frameworks of caste, disability or gender. For example, the preamble to the PCRA states that it is an “Act to prescribe punishment for the preaching and practice of - “Untouchability” for the enforcement of any disability arising therefrom for matters connected therewith”. This preamble and the other provisions of the PCRA confirm the understanding of civil rights within a single axis framework of caste: ‘untouchability’. Likewise, The Sexual Harassment Act frames the legal understanding

of sexual harassment within a single axis framework of sex and the category 'women'. These single axes have resulted in the neglect of intersectional subjects like Dalit religious minorities and Dalit women.

## 2.2 *intersectional understanding of Dalit women*

Speaking as a panelist at The 2nd MenEngage Global Symposium 2014, feminist scholar and activist Chayanika Shah briefly commented on the intersectional understanding of Dalit women:

“[Y]ou cannot separate the categories of caste and gender as you know that somebody is Dalit and somebody is woman is not two distinct things. I can never say whether this violence is happening on me because I am a woman, or it's happening on me because I am a Dalit woman. That I am Dalit woman is not an addition of being Dalit and being a woman, but it is the way in which I am understanding gender. And I think this was one of the first, one of our biggest shifts in understanding gender.”

This essay shows an outcome of this single axis framework and applies the framework of intersectionality to show the legal erasure of a Dalit woman, Bhanwari Devi —in *Vishaka v. State of Rajasthan* (1997). Intersectionality enables us to see how this celebrated and landmark Supreme Court guidelines have erased the specificity of violence suffered by Bhanwari Devi:

Erasure 1: *Vishaka* describes Bhanwari Devi in the minimal —two sentences and even this minimal description is devoid of any reference to her caste: “[t]he immediate cause for the filing of this writ petition is an incident of alleged brutal gang rape of social worker in a village of Rajasthan. That incident is the subject matter of a separate criminal action and no further mention of it, by us, is necessary.” (*Vishaka* 1997).

*Vishaka* has made simplistic readings of the village as Bhanwari Devi's workplace. If the village was a workplace and the Government was Bhanwari Devi's employer, then the employer

should have ensured some kind of accountability of the rapist-perpetrators. *Vishaka* did not ascertain or clarify this obligation of the employer-government.

Erasure 2: *Vishaka* has not acknowledged or remedied the caste-based violence suffered by Bhawari Devi. Yes, she was gang-raped because of her work on prevention of child-marriages, but her work was almost incidental. She could have been doing this ‘work’ as an unemployed concerned citizen and the same consequences would have followed. Dominant-caste men punished Bhawari Devi for her temerity as a Dalit woman: she was gang-raped and her husband was made to watch while she was being raped. This was a spectacle of violence that is a characteristic of casteist reprimand; it is a combined operation of caste-based *Brahmanism* and gender-based patriarchy, together known as *Brahmanical patriarchy* (Chakravarti 2004). *Vishaka* failed to redress or acknowledge this combined operation of sexism and casteism. In an astonishing failure to address the very context from which it arose, and perhaps as a result of that, *Vishaka* was limited in its application to the formal sector, and it left the informal sector out of its purview.

The Sexual Harassment Act, 2013 has come into force sixteen years after *Vishaka*. In a significant departure from *Vishaka*, this Act of 2013 has expanded the reach of the law into ‘unorganized’ sector, including domestic work. But its remedial measures are still more likely to take place in the organized sector – because there is a greater likelihood of the ‘Internal Committees’ to be constituted there. Domestic workers will have to approach their ‘Local Complaints Committee’ – in short LCC. This would suffer red tape.

If this is too speculative, let us assume that the LCCs are constituted as planned, that the Government notifies District Magistrates (DM) and the DMs constitute the LCCs. Further, let us

assume that the LCCs are *prima facie* convinced of the merits of a case. Next, Section 11 (1) of the Act would require the LCC to forward the complaint to the police – for registering a case under Section 509, IPC i.e., insult to ‘modesty of a woman’. Where would that take a domestic worker complainant? To the police station. What would happen next? This complaint would suffer similar limitations of police investigation, public prosecution and judicial bias – as under The Scheduled Caste and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 – in short the PoA. The PoA had sought to redefine caste-based violence in a departure from its predecessor and less effective legislation, the PCRA. The PoA has explicit legal provisions on sexual violence, Section 3 (1) (xi) and (xii) but they are rarely used; instead the PoA Section 3 (1) (x) is applied and the prosecution fails as a result of this common misapplication of the law (CSSEIP, NLSIU forthcoming).

Section 3 (1)

(x) intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view;

(xi) assaults or uses force to any woman belonging to a Scheduled Caste or a Scheduled Tribe with intent to dishonour or outrage her modesty;

(xii) being in a position to dominate the will of a woman belonging to a Scheduled Caste or a Scheduled Tribe and uses that position to exploit her sexually to which she would not have otherwise agreed;

The existing legislations on caste are ineffective, and they are even more ineffective for Dalit women. The same inefficacy would prevail in the Sexual Harassment Act, and Dalit women would be deprived of legal remedy.

This intersectional scrutiny of caste and gender tells us something about the functioning of the law. Intersectional subjects like Dalit women slip the attention of remedial legal measures that are built upon single axes frames – of caste or gender. The sexual harassment Act of 2013 has something to learn from existing malaise of the PCRA 1955 and the PoA 1989. The Act of



2013 must look to its origin (*Vishaka*) and for greater efficacy, it must devote more attention to its intersectional subjects like Dalit women, Muslim women, Adivasi women, disabled women, transwomen and queer women.

### 2.3 *intersectional understanding of 'other'*

Following the framework of intersectionality in anti-discrimination law in the U.S., Crenshaw showed the ways in which race and gender intersect in shaping the understanding of violence against women of color (Crenshaw 1991). While explaining this in the context of domestic violence, Crenshaw showed the setting apart of white women from non-white women of color. Countless first-person stories that began with statements like, "I was not supposed to be a battered wife." Effectively, white women became the default victim of domestic violence and non-white women became the 'other' (Crenshaw 1991: 1258-61). This 'othering' was intended to show that battering was not only a problem of the poor or minority communities and it affected all races and classes equally. At the same time, the non-white 'other' women were silenced by a relegation to the margin (Crenshaw 1991: 1261).

This intersectional understanding of 'othering' can be seen in poor or minority communities. In steering its attention away from the context in which *Vishaka* arose, the gang rape of Bhanwari Devi was legally reformulated as 'sexual harassment at workplace' and this reformulation was devoid of any understanding of caste.

Another example of this 'othering' can also be seen in intersectional subjects like Dalit religious minorities: for example, Dalit Muslims and Dalit Christians. According to the Constitution (Scheduled Castes) Order, 1950, "no person who professes a religion different from the Hindu, the Sikh or the Buddhist religion shall be deemed to be a member of a Scheduled

Caste”. Dalits who profess the Hindu, the Sikh or the Buddhist religion are legal subjects of the Scheduled Caste (SC) category, while Dalit Muslims and Dalit Christians are ‘others’ who are denied the legal category of SC. While non-Hindu Dalits who profess Sikhism or Buddhism can avail the legal protection available to SC, this legal protection is denied to Dalits who profess Christianity or Islam. This is a form of discrimination based on religion and it remains unattended in the existing anti– discrimination law in India.

Intersectionality is thus helpful in tracing the invisibility of ‘other’ Dalits – and in uncovering the invisibilities and erasures of ‘intersectional subjects’ like Dalit women, Dalit Muslims, Dalit Christians, HIV+ Dalits, disabled Dalits and queer Dalits.

#### 2.4 *Essentialism*

Often essentialism is read into the interpretation of social identities. What does it mean to be Dalit, Black, white, woman, man, lesbian, queer, gay or hijra? Speaking at The 2nd MenEngage Global Symposium 2014, PhD scholar and transgender activist Reshma Prasad brought attention to essentialist connotations associated with hijra identity:

“[W]e are not typical hijras. We are teachers, we work in banks, we have technological jobs, so why not look beyond the typical brand of a hijra and respect me for what I really am, what I do, and who I choose to be. Sometimes people think that those who do not fall into the hijra identity and claim to be transgender, they are fake. People come to me for blessings, but if I [say to them] that I am not a hijra, they change their opinion about me. In Bihar, Chattisgarh and Jharkhand, people who are inter-sex queers are associated with only one thing – launda dancers is the term used to describe them. When I ask my community people, what are launda dancers? Do they have sexual rights, health rights, or human rights? They say that nothing of that sort happens. It’s just another term for transgender persons. They are sexually harassed very badly . . . Whatever identity my community has, it should not be related to just that we’re hijras.”

Consider an application of essentialism to gender and its fluidity. Speaking at the Symposium, Chayanika Shah said:

“[p]eople may shift from one gender to the other, people may move from one to the other, but it’s a very thought out choice. It’s not like I wear something today. I am one identity today and I am something else in the evening. It’s not like that. People are choosing. Even if it is seen as moving, it doesn’t necessarily have to be seen as fickle and I think that that’s important to recognize that people may shift from one gender to the other, people may move, but that’s a very, very choice that they make.”

Someone from the audience disagreed with this conceptualizing of gender and said:

“the way that you conceptualised ‘choice’, I think again further marginalises transexual and transgender identities because for me, and for most of the transgender individuals that I know, transition is not a choice. I am choosing between transition and death. It’s not between transition and not transition. Putting the choice language on it comes from a place of cis privilege. Being able to say that it’s a choice to participate in one way or another is something that is only allowed to cis individuals or to post transition individuals. But pre-transition there was no choice.”

Chayanika was quick to apologize and alter her choice of words:

“I am extremely sorry, I don’t ever use the word ‘choice’. What I mean is that it is critical. If somebody does not feel the body matches their gender, it is critical for them to get transition. I am not using the word ‘choice’. In fact, I stand by people who want to make the transition and who want to do the change in their body. I feel that every help, every possible care should be provided so that it is made feasible. I am definitely not speaking of it in the way that the language of choice has been used in feminism. I am not doing it like that.”

Crenshaw illustrates deployment of categories in other contexts and argues that,

“[the project of intersectionality] attempts to unveil the processes of subordination and the various ways those processes are experienced by people who are subordinated and people who are privileged by them. It is, then, a project that presumes that categories have meaning and consequences. And this project’s most pressing problem, in many if not most cases, is not the existence of the categories, but rather the particular values attached to them and the way those values foster and create social hierarchies. ... One need only think about the historical subversion of the category “Black” or the current transformation of “queer” to understand that categorization is not a one-way street. Clearly, there is unequal power, but there is nonetheless some degree of agency that people can and do exert in the politics of naming. And it is important to note that identity continues to be a site of resistance for members of different subordinated groups.” (Crenshaw 1991: 1296).

Making a case for the agency that people can and do exert in the politics of naming, queer activist and scholar Akshay Khanna said at Symposium 2014:

“However many categories there are, it seems necessary that they must, at the end of the day, fit in one of those categories, and name oneself in one of those categories. I think we need to take this apart as well and try and understand why that is necessary and how that relates to our engagement with the law, with the state.”

Crenshaw has reiterated that it is not about essentialism in feminist theory, it is the centrality of men’s experiences in race discourses that tells us that the subject is essentially male.

“The more important question for comparative purposes is why it is that many race discourses that might easily engender parallel critiques, namely that the subject is essentially male – are seldom targeted even though the centering of men’s experiences as a focal point of racism is fairly common.” (Crenshaw 2010: 162).

This might find agreement with Chayanika when she said at the Symposium 2014:

“saying man doesn’t include everybody. Saying gender doesn’t include all genders. You have to underline where the difference is, but you also don’t want to make a spectacle of the difference, so you also make the spectacle of the main stream.”

## **Conclusion**

In this essay applies intersectionality to a range of situations in India. For example, Kiran’s romantic relationship with a woman forced him to migrate from Andhra Pradesh and go to the neighboring state of Karnataka. This cost him his ST status and Kiran was caught between the legal categories of ST and SC. The Supreme Court judgment (in recognition of transgender persons as BC) created another legal category for Kiran to grapple with. This multiplicity of legal categories set the stage for this essay.

The two judicial decisions of *Naz* 2009 and *NLSA* 2014 are testament to the passing analogies of homosexual and transgender persons with tribal *Adivasis* and ‘untouchable’ Dalits. Yet these analogies have not yielded any legal understanding of ‘sameness and differences’ —that would advance the visibility and protection of LGBT persons who are SC or ST.

The lens of intersectionality is useful for visibilizing ‘other’ Dalits. In addition to the personal narrative of Kiran and the legal narratives of *Naz* 2009 and *NLSA* 2014, the lens of intersectionality has shown a legal erasure of Bhanwari Devi in *Vishaka* 1997. Further, the intersectional conceptualizing of ‘other’ is useful for extending the particularities of Dalit women and LGBT Dalits to other intersectional subjects like Dalit Muslims and Dalit Christians. This poses a broader challenge to the law and goes beyond the particularities of ‘identity politics’.

The value of intersectionality is in its ability to engage with law, antiracism, anti-casteism, feminism —and other \*isms —all at the same time. This essay has tried to do that with law, caste, sexual orientation and gender identity.

The prevailing contradiction between *Koushal* 2013 and *NLSA* 2014 is an opportunity for law reform. The Supreme Court of India must do so with an urgent hearing of the appeal pending in *Koushal* 2013 and the Government’s application for clarifications pending in *NLSA* 2014. In doing so, the court must develop laws based on an intersectional understanding. The legal protection of intersectional subjects —like Kiran —would result in robust legal protection for all.

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