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Arpita Das

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PAPERS PRESENTED AT THE CONFERENCE

A BIO-POLITICAL PERSPECTIVE ON INTERSEXUALITY AND DISABILITY IN DISCOURSES OF LAW

Arpita Das

Procedures and apparatuses of governmentality function by means of labelling certain people as 'normal' while rendering others of little value. This can be understood from the bio-political framework propounded by Foucault (1990, 2003). The rationale offered is often accorded not only to the idea of catering to the 'population' but also gearing towards creating a nation-state of healthy, non-disabled people capable of contributing effectively to the nations' worth. The paper looks at the manner in which inter-sex people who do not fit in within the linear logic of the sex binary, get signified within these normalisation processes and are constructed as 'abnormal' and in need of fixing through corrective surgeries and other alterations. People with disabilities are also similarly constructed as 'abnormal' and 'deviant'. The paper juxtaposes discourses of inter-sexuality and disability to analyse ways in which inter-sex people are mistakenly constructed as disabled within international and national laws, and thus stereotyped as non-productive. The objective is to understand the state logic of categorisation into the 'normals' and 'abnormals'.

I. INTRODUCTION

Intersexuality and disability are disparate identity categories. In mainstream social discourses, however, these two identities are often confused together which leads to inter-sexuality being problematically perceived as a form of disability. Inter-sex rights activists have resisted such constructions of inter-sexuality in order to maintain the conceptual distinction between inter-sexuality and disability, and

also to avoid the stigma associated with disability that could lead to ‘dual marginalisation’ for inter-sex people. One of the sites where inter-sexuality and disability can come together in complex and complicated ways is that of law and policy. While discussing people with disabilities, discourses of law may collate disability and inter-sexuality deliberately or fortuitously. Inspecting, analysing, and problematising such coming together of disability and inter-sexuality is the focus of this paper.

The attempt is not to compare inter-sex people with people with disabilities. The author is cognisant of the pitfalls of lumping inter-sexuality with disability considering decades of marginalization that both communities have faced and continue to face. The paper simply tries to draw attention to the processes often initiated at the state, community and the family levels to make the population adhere to the logic of the ‘normal’ and how it affects both groups. The author argues that there is a gradual enmeshing of inter-sexuality and disability within the state logic and enunciates this with several examples from laws and policies across a few countries using a bio-political lens for analysis.

The paper looks at some of the international and national laws and policies on disability that are in place to explore whether its definition includes inter-sex people and draws some examples from laws and policies in India and a few other countries. The author has chosen examples where the language of the laws and policies is evoking further debates and discussions. The listing of these laws and policies is by no means exhaustive and is instead a small piece of a work-in-progress. The idea is not to use certain examples to say whether they are good and therefore replicable (or not) but to look in-depth into the language of some of these laws to understand the state logic.

The idea for this paper germinated out of a fairly recent development when a committee constituted in India to suggest amendments to the national law on disability had proposed to include people with sex development disorder within the purview of the law. According to this proposal, inter-sex people would be included within the ambit of the national law on disability. Although this inclusion has been opposed by disability and sexuality activists alike and has not thus far been included in the law, it is nevertheless imperative to understand the mechanisms of such argumentation.

II. INTER-SEXUALITY

Inter-sex people have always been a part of the population. Although medical experts mention one in every fifteen hundred or two thousand births as inter-sex, it is contended that there are a far greater number of people who have subtler forms of anatomical variations (ISNA, 2011). Inter-sexuality has also been termed as hermaphroditism (Kessler, 1998). However, the term 'hermaphrodite' signifies the simultaneous presence of both male and female characteristics which is not the case for a large number of inter-sex people (ISNA, 2011). Organisations such as ISNA and Accord Alliance in the USA choose to address inter-sex people as people with 'disorders of sex development' (DSD) as they believe that in doing so, the focus is on the disorder itself and not on the people. However, Organisation Inter-sex International (OII-Australia), an organisation in Australia, chooses to use the terminology of 'inter-sex'. Irrespective of the terminology used, organisations working with inter-sex people and associations of inter-sex people are coming together to assert their rights in the international arena.

Inter-sex as a category is difficult to define. At the molar level, or the level of organs, it may consist of people who may be born with external genitalia that may not fit the stereotypes of being a male or a female. There may also be others who may be born with external genitalia of a male or a female but have internal reproductive organs that do not match the sex of the external genitalia. There are biological girls who may be born with a large clitoris and boys who may be born with a tiny penis. The notions of the perfect length of a clitoris or a penis differ across time, contexts, countries as well as doctors from different disciplines. The use of a phallometer by doctors to determine the sex of an infant has been documented by many (Fausto-Sterling, 2000; Kessler, 1998; Karkazis, 2008). There are girls who may be born without a vaginal opening and boys whose scrotum maybe divided like that of labia (ISNA, 2011). At the molecular level, people may be categorised as inter-sex depending on their hormonal levels or their chromosomal make-up. There may be individuals born with mosaic genetics so that some of their chromosomes are XX and the rest as XY (ISNA, 2011). Some of them may have been exposed to an unusual mix of hormones while in the womb. It is possible that many inter-sex people live through their lives without

being aware of their inter-sex state till they seek medical help for their infertility etc. They are often subjected to a plethora of medical procedures in order to be 'fixed' within the binary of male-female. For the purposes of this paper, the author considers inter-sex people as those who are either born with genitals that conform to neither being strictly male nor female or have a chromosomal and/or hormonal make-up that does not adhere to being strictly male or female, thereby challenging our ways of thinking in simplistic sex binaries.

III. DISABILITY

People with disabilities are not a homogenous group. There are many kinds of disabilities – physical and intellectual. Some people may be born with certain disabilities whereas many others acquire disabilities during their lifetime. Whereas some may acquire a disability through their genetic composition or through ageing, many others may acquire disabilities due to accidents or in wars. For example, after the World War II, there was a considerable increase in the number of people with disabilities. Still others acquire disabilities due to natural disasters, as well as environmental hazards. Definitions of disability vary across time as well as region. The experience of disability is unique to every individual. Also, the experience of disabilities varies across gender, race, caste, class, age, geographical location, sexuality and the presence of one or more disability.

People with disabilities are often subjected to corrective surgeries for prevention, cure or treatment. Activists with disabilities contend that it is very often the systemic and structural barriers that are disabling and not the disability in itself. They are often infantilised and made to feel invisible. People with certain disabilities face more stigma and discrimination than others. While the considerable social exclusion faced by people with intellectual disabilities is often often under-researched, this paper restricts itself to people with physical disabilities as the objective is to locate the debates and discussions on the 'normal' and 'able' body.

IV. BIO-POLITICS AS THE THEORETICAL FRAMEWORK

Procedures and apparatuses which function in terms of labelling certain people as normal and therefore worthy while rendering others of little value can be understood from a bio-political framework which has been espoused by Foucault (1990, 2003). Understanding the bio-political state and the processes of

governmentality which function through categorising populations into the ‘normal’ and those who are not, can enhance our ideas about how these procedures impact people such as inter-sex people and people with disabilities, among others who often do not fit into narrow compartments.

Foucault (2003) discusses the power of the sovereign to decide whether the subject has the right to be alive or dead. He argues that a transition took place in the 19th century from the right of the sovereign to “take life and make live” to “make live and let die” (Foucault, 2003, p.240). The difference between the two could be located in the sovereign actively taking lives of its citizens in the first case to actively not playing a role in protecting the lives of its citizens in the second one. In the latter, although the sovereign could not be held responsible for taking people’s lives, it was still responsible for not protecting them. The people who remained unprotected were those whose lives were not valued enough by the state and the sovereign as they did not fit the parameters of a normal and healthy population.

According to Foucault, during the 17th and particularly the 18th century, the right of the sovereign to take lives of people began to be debated. If the sovereign had been constituted to protect the lives of its citizens, how then could he have the right to take life? Foucault describes this transformation in the techniques of power during the two time-periods from the focus on the individual body to the focus on man-as-species. Disciplinary forms of power such as surveillance, inspections began to change to a regulatory power and applied not to man-as-body but man-as-species. Therefore, even if individual bodies were still accounted for in the regulatory forms of power, it was to the extent of catering to a whole population and therefore newer devices and strategies were necessary for purposes of surveillance of an entire population. Within the bio-political framework, the sovereign focussed on governing an entire population through bio-power, that is, by governing all aspects of people’s lives. The focus of the state was not just on the present population but also on what would count as the future population. The population was further looked at from the lens of healthy or not healthy, productive or not. It was important for the state to have a healthy and productive population and therefore to make do without the ones who proved a burden on the state.

Through this bio-political framework we can see the trajectory of how the state diverted its attention from individual bodies to that of the population. However, in order to have a control over this population, the gaze of the state had to be still fixed on individual bodies. Individual bodies were thus subjected to processes of normalisation in which people were evaluated in terms of their value or worth. Bodies of individuals were therefore considered the spaces where the politics of the state was located. Thus individuals ceased to be natural bodies alone but came to be considered as bodies of the state and the government. Within the bio-political framework certain bodies are therefore considered normal if they fit into parameters of being healthy, able-bodied, and fit in the male/female binary. People who do not fit into these parameters of normalcy are thus subjected to processes of marginalization and discrimination and are considered as the lesser citizens who therefore do not enjoy rights equal to other citizens.

V. INTERSEXUALITY AND DISABILITY

Both groups- inter-sex people and people with physical disabilities are subjected to processes of medicalization, medical classifications and are subjected to silence and shame (Colligan, 2004). A number of studies contend that these processes of medicalization often lead to their categorizations as ‘inter-sex’ or ‘disabled’ in the first place. Both people with physical disabilities and inter-sex people do not fit in the standards that society sets for the ‘normative’ body. As such, they are both considered anomalies of nature. For example, inter-sex people are considered neither male nor female¹ and often have to undergo multiple surgeries, many a times without their consent, to conform to being ‘proper’ males or females. People with physical disabilities² also make tangible their differences in terms of body size, shape, and ability. Both inter-sexuality and disability are medicalized as ‘conditions’ in need of treatment and cure and therefore to be ‘fixed’. In addition, there are also a number of assumptions with regard to sexuality for both these groups. People with disabilities are often labelled as being either

1 The terms male and female and not men and women have been used very consciously as the objective is to bring attention to their sexual identities and not their gender identities. The terms men and women have been used wherever it was required to have a discussion about their gender identities.

2 Politically, the author prefers using the term people/persons with disability and not ‘disabled people’ as the latter accords more importance to the disability rather than the people themselves.

asexual or 'hypersexual' (TARSHI, 2010). Intersex people in turn are also subjected to negative images and stereotypes about their sexuality (Colligan, 2004).

Inter-sex people and people with disabilities are also different in certain ways. For example, for inter-sex people their sex identity is under the scanner, whereas for people with disabilities their sex identity need not necessarily be under scrutiny; for inter-sex people, their inter-sexuality is situated in their bodies, whereas for some people with disabilities, the disability may also be located in their minds giving rise to people with intellectual disabilities etc. Both groups when analysed under the bio-political scanner, may be considered the 'abnormals' within the regime of normalization which deems some people as normal and worthy and the others as abnormals. Also, increasingly there is trend towards looking at inter-sexuality as a disability in itself.

In the next section, the author discusses some ways in which discourses on inter-sex people overlap and find resonance with discourses of people with disabilities within law. Some of the questions addressed include, how do inter-sex issues get framed within international and national laws? Do inter-sex people get accounted for in laws of disability? This paper looks at the discursive power of language used to define and manage intersex people. Is the language used disabling for intersex people?

VI. DISCURSIVE CONSTRUCTIONS OF DISABILITY AND INTERSEXUALITY IN LAW

Laws and policies are significant ways in which governmentality is enforced on populations. They form the basis upon which all administrative procedures of the government are enforced and implemented. These kinds of administrative procedures require people to be categorised in neat boundaries of disabled/non-disabled or male/female. Categorizations could be made on the basis of people's ability, their capacity to contribute to the nation's productivity or their contribution to the nation by procreating normal, healthy and able children. These categorisations are usually watertight with minimal slippages and become more obvious and visible through the laws and policies of any state.

Intersections between disability and inter-sexuality became apparent with the changes that were being proposed to a draft law on disability in India. There was an impetus to improve upon the national law on disability to incorporate the

clauses of the United Nations Convention on the Rights of People with Disabilities (UNCRPD, 2006). The UNCRPD (2006) is an international convention which was signed by 81 member states and the European Community in March 2007. India was among the first seven countries to ratify the convention which showed its intention to abide by the clauses of the international convention. At the national level, India has in place the Persons with Disabilities (Equal Opportunities, Protection of Rights & Full Participation) Act, enacted in 1995. However, a committee had been constituted in 2009-2010 to suggest amendments to the Act proposed to be renamed as 'The Rights of Dignity, Effective Participation and Inclusion of Persons with Disabilities Act, 2010'.

The law presently in use in India, that is, the Persons with Disabilities Act of 1995 does not allow for any inclusion of inter-sex people within the purview of its law. It clearly includes conditions such as "blindness, low-vision, leprosy-cured, hearing impairment, locomotor disability, mental retardation and mental illness" (Disability India Network, n.d). Within the specificities of this definition, there does not appear to be any space for inclusion of inter-sex people.

According to the changes proposed in the draft law for people with disabilities, disability had been defined to include "all such individuals who have long-term physical, mental, intellectual or sensory impairments, which in interaction with various barriers may prevent their full and effective participation in society on an equal basis with others" (Karna, 2010). Conditions and impairments included under the ambit of 'disability' include "Disorders of Sexual Development (Hizras/ hermaphrodite/ Intersexual/ Transsexual)" (*sic*) which had further been defined in the proposed law as "abnormalities in the development of the gonads, the genital tracts, the external genitalia and gender-specific behavior" (Karna, 2010). A *hijra* or hermaphrodite had therefore been defined as "a person having sexual development disorder" (Karna, 2010) and "intersexuals" according to this law have been defined as "individuals born with the physical sexual organs of both genders, although they may not be fully formed" (Karna, 2010).

The proposed inclusion of persons with 'sexual development disorder' under this law highlights the interconnections between disabilities with inter-sexuality. It draws attention to the ways in which inter-sexuality, which according to this law has been defined as 'abnormalities' of the development of gonads, genital

tracts and the external genitalia, is seen as or constructed as a disability. The framing of the ‘conditions’ as ‘abnormalities’ also highlights the binary ways of looking at organs and bodies as being either normal or abnormal. What is defined as normal or abnormal is however not made clear and therefore left to varying interpretations. The definition of persons with sexual development disorder under this law also includes a gamut of people including “*hijras/ hermaphrodite/ inter-sexual/ trans-sexual*” and assumes that all these categories as belonging to the same group. Although this bringing together of these groups of individuals may help in forming alignments and support networks, it also portrays the ways in which these groups may often be confused with one another which could potentially lead to dilution of specific needs and claims of particular communities. The language of the law clearly ascribes them as being ‘abnormal’ and ‘disabled’. The definition of the sex development disorder spells out ‘abnormalities’ in the gonads and external genitalia but does not mention the chromosomal levels which are also considered an important factor in the determination of the intersex status of a person. It is unclear whether excluding the chromosomal level from the definition was a lapse or if there was an adequate argument for its exclusion. The inclusion of people with sex development disorders met with certain debates and discussions by advocates who are part of the law-formulation process. Advocates emphasized that any such inclusion must be debated and included only with due consultation with inter-sex and transgender activists and organisations. The draft law has undergone several revisions and in its current state does not include ‘disorders of sex development’ as one of the categories defined under disability. Whether it gets included in the final version of the law is unclear at the moment. However, the fact that a national committee on disability law felt the need to include ‘persons with disorders of sex development’ within the ambit of disability highlights the ways in which these discourses intersect and these intersections therefore become significant loci for debates and discussions.

At the international level, the UNCRPD (2006) discusses persons with disabilities as “those who have long-term physical, mental, intellectual or sensory impairments, which in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others”. Although there is no clear definition of disability in this convention, it recognises disability as an “evolving concept” and therefore not fixed (UNCRPD, 2006), allowing for

the definition of disability to vary with country, context and time. Further, it does not treat disability as something in need of fixing but highlights the negative attitudes and environmental barriers in society that make for a disabling environment rather than the disability in itself. In addition, it does not limit the definition of disability to a few people (UNCRC, 2006). Through the definition of people with disabilities, we can see that the convention aims at defining disability broadly so as to include a wide spectrum of people and conditions.

Does the language under this convention include inter-sex people as well? This is not clear as the term inter-sex or other terms associated with inter-sex people such as hermaphrodites or persons with disorders of sex development are not expressly mentioned as part of the convention. However, the language of the convention mentions long-term physical, mental and sensory impairments. According to the Merriam-Webster Dictionary, the meaning of the word 'impair' is "to damage or make worse by or as if by diminishing in some material respect" and the word 'impaired' means "being in a less than perfect or whole condition". With binary alignments in society of people and also their external genitalia (or because of it) as male/female, those that do not fit in could also be construed as 'impaired' and their condition therefore as an impairment.

Therefore, though the convention does not expressly spell it out, inter-sexuality could be construed as a physical impairment. Inter-sex people could be included within the definition of this convention. It however remains to be explored if inter-sex people would like to be included within the ambit of disability. Although the definition of disability within the UNCRC (2006) is broad and may consist of inter-sexuality as well, the UN conventions are not legally binding on the member countries and therefore member states are not legally required to incorporate the UN conventions and declarations in their laws and policies. However, as the UN is an organization at the global level that includes a number of countries as its member states, the definitions under the conventions are usually kept broad to be inclusive of all or most states. Further, UN documents such as the UNCRC (2006) also serve as guidelines for member states and could be influential in the process of formulation of laws and policies. I use the example of the UNCRC (2006) not to present it to be enforceable as an international document but to highlight that it serves as a guideline that member states could follow in enacting their laws and policies.

Although there is no standard acceptable international definition for disability, the approach followed by the Standard Rules of the Equalization of Opportunities for Persons with Disabilities in 1993, which was adopted as an outcome of the Decade of Disabled Persons by UN General Assembly, is followed by many states. According to the Standard Rules, “the term ‘disability’ summarizes a great number of different functional limitations occurring in any population [...] People may be disabled by physical, intellectual or sensory impairment, medical conditions or mental illness. Such impairments, conditions or illnesses may be permanent or transitory in nature” (Schulze, 2006, p.29).

According to the International Disability Caucus (IDC), the global network of national and international organizations and individuals working with people with disabilities, a person with a disability is “an individual whose ability to lead an inclusive life in the community of his/her own choice is limited by the separate or concomitant impact of physical, economic, social and cultural environments and/or personal factors that interact with physical, sensory, psychosocial, neurological, medical, intellectual or other conditions that may be permanent, temporary, intermittent or imputed” (Schulze, 2006, p.31). Because this definition is considered quite inclusive and broad, it has been recommended that this definition of disability be used to expand the existing definitions of disability in countries or to use this definition in courts of law where no definition of disability may currently exist.

At the national level, the laws on disability in Australia and the USA also appear quite broad-based and inclusive. According to the Disability Discrimination Act, 1992 in Australia, the definition of disability includes “the total or partial loss of person’s bodily or mental functions”, or “the malfunction, malformation or disfigurement of a part of the person’s body” (DREDF, n.d). If we carefully look at the language of this law, we can see that inter-sex people could perhaps be included under the ambit of this law. If the external genitalia of a person do not conform to being either male or female, it may often be considered ‘malformed’ and not functioning properly. The reproductive functions of some inter-sex people may also be curtailed thus manifesting in another ‘malfunction’ or ‘malformation’. Whether the law has actually been used in favour of inter-sex people could be a topic of further research. However, the language of the Australian law sounds broad enough to include certain conditions of inter-sexuality as well.

As per the Americans with Disabilities Act of 1990 which was amended in 2008, the definition of disability includes “a physical or mental impairment that substantially limits one or more major life activities of the individual” (p.7). The discourse of this law is broad and could be interpreted to include inter-sex people as well, in certain cases. The major bodily functions as defined by this law comprises among others, “endocrine” and “reproductive functions” (p.7). The law further mentions that the impairment which restricts one major life activity does not have to affect any other to be considered a disability. Whether this law is used to make claims for inter-sex people under these laws is not clear and beyond the scope of this paper. The author is more interested in the language of the laws of disability and whether it may allow for inclusion of inter-sex people. It would be interesting to explore whether inter-sex people are advocating for inclusion in these laws or making claims against these laws.

VII. CONCLUSION

Because definitions of disability in several international and national laws on disability tend to be broad-based, they could either directly include inter-sexuality within the ambits of their definitions or they could be construed to include it. Countries such as India have also gone through a process of consciously debating whether intersexuality should be included (or not) in the disability law. In enunciating examples of intersections with discourses of inter-sexuality and disability within the law, my aim is not to argue for the inclusion of inter-sexuality within disability (or not) but to cite instances wherein these complex intersections are taking place. These complex intersections also point towards the machinations of a bio-political state and how it works towards categorising people using laws and policies as its tool and the need for debates and discussions for the need of such inclusion. Debates for such inclusion would factor in instances such as the levels of marginalisation and stigma from adopting the identity of a person with disability and the (dis)advantages from adoption of such identity. Whether these laws have actually been used by any intersex person to claim disability status and its associated benefits is also an important area of further study.

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