



## BEYOND MAN AND WOMAN: PRELUDE TO A HUMAN OF THE FUTURE\*

### Abstract

Human beings are bifurcated into “he” or “she”. Sexual identity is conferred at the time of birth. Sexual organs immediately determine the sex of a being. Sex is then clothed with gender; a prescriptive creation of society. Society’s predetermination of a being’s sex obstructs that human being who does not conform to this binary understanding of sex.

This paper demonstrates that the binary classification of sexes into male and female as well as gender is a construct which is absolutely necessary to deconstruct. It discusses the relationship between feminism and “transgenderism” to show that these movements are complementary to each other.

The paper is divided into four parts. The first part discusses the meaning of the word “transgender”. It challenges the belief that sex is predetermined by nature and argues that it is in fact determined by society, which clothes it in prescriptive gender roles. The second part deals with how the social and the legal system view transgenders. The third part deals with the relationship between feminists and transgenders. It highlights that if feminism excludes transgenders, it neglects a subordinated section of society which thereby dilutes its fight against inequality. The last part concludes that it is necessary to challenge the common understanding of the words “sex”, “gender” and “transgender”.

### Introduction

*“Out beyond ideas of wrongdoing and right-doing, there is a field. I’ll meet you there.”<sup>1</sup>*

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The world is only understood in dichotomous binaries. Positive and negative, morality and immorality, rationality and irrationality, justice and injustice, right and wrong, good and evil, God and Satan, male and female and so on. Any understanding of the world contrary to these dichotomous binaries is intolerable. Grey areas are problematic. Everything must be classifiable into two clearly disparate categories. Existential hostilities emanate for those that cannot be understood.

This paper is an attempt to challenge these binary understandings particularly in the context of the binary of males and females.

The first part of the paper elucidates who are transgenders according to the authors. The second part of the paper explains who are transgenders and the third sex according to the law and the society. The third part of the paper asserts that the society's way of looking at transgenders is fallacious. It highlights that if transgenders are understood in a wider sense then the arbitrary imposition of sex and gender can be questioned constructively. It also argues that feminists need to understand that the cause of feminists and transgenders is the same and that they ought to work in tandem. This paper explicates that feminists are transgenders because they as well want to traverse gender and fight social stereotypes.

The fourth part is the conclusive portion of the paper which explores new perspectives beyond sex and gender, and implores the reader to disown archaic baggage which stifles human progress and its incessant move forward. We must abandon our practices of believing in dichotomous binaries as gospel truths and acknowledge that just because some persons are untypical they must not be mistreated for it.

## I. Who are Transgenders?

What is sex and what is gender? Traditionally sex was understood as biological and naturally occurring while gender was seen as society's construction. Simone de Beauvoir described it best as, "*One is not born, rather one becomes, a woman*".<sup>2</sup> However, this simplistic distinction was challenged by Judith Butler who argued that gender is not something that is inscribed on an already existing sex but that biological sex is produced through gender with the aid of a series of performances. She used the term "*heterosexual matrix*:" to describe a "*grid of cultural intelligibility through which bodies,*

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<sup>1</sup> Jalal al-Din Rumi, *The Essential Rumi* 36 (Coleman Barks Trans., Harper Collins, New Expanded Ed. 2004) (1995).

<sup>2</sup> See SIMONE DE BEAUVOIR, *THE SECOND SEX* 249 (H.M. Parshley trans., 1953).

*genders, and desires are naturalized*".<sup>3</sup> Sex binaries are not a natural axiom, pre determined and infallible gospel truth. Imagining them as impeccable hinders their deconstruction, which is necessary.<sup>4</sup> The need of the hour is to deconstruct and reformulate the meaning of sex to make it more inclusive and diverse. The basic premise of this paper is that the body can be understood in multiple ways and a fixation with the binary sex-difference model must be questioned.<sup>5</sup> Sex and gender are mutually dependent concepts and both need to be challenged, redefined and reconceptualised.

The need to reconceptualise sex and gender can be best understood with the help of an example. Generally, three sets of characteristics are held to determine sexual identity:

- a) Genetics, that is, the XX female and XY male chromosomal pattern
- b) Hormones – oestrogen (female), androgen/testosterone (male) and
- c) Genitalia, that is, the visible physical characteristics of penis/vagina.<sup>6</sup>

But in several cases, these three characteristics do not coincide. Sometimes, the sexual organs are truncated and cannot be classified into male or female. So how is it possible to assign a particular sex to these people who are then considered as biological deviants? Is it alright to arbitrarily assign one sex to these people according to the whims and fancies of the doctors or the parents just because those are the normalized constructions of society? Further, is it justified to pronounce them as deviants when they find it difficult to associate themselves with the sex or rather gender which had been arbitrarily assigned to them? It is here where the difference between gender and sex begins to blur as after all both are imposed on the individual by the society, and the non-believer and the non-conformist is spurned as a deviant.

The term “transgender” of course includes biologically deviant people but it also includes people who refuse to be associated with either of the sexes, even when they are classifiable as males or females according to all the three tests, and also includes people who are attracted sexually towards the same sex, different sex, or towards both sexes. Transgenders are not merely transsexuals, bisexuals, cross dressers, homosexuals and eunuchs/hijras but are people who traverse traditional gender roles, who go beyond gender as understood by society. The term “transgender” signifies

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<sup>3</sup> See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 194 (Taylor & Francis e-Library ed. 2002) (1990).

<sup>4</sup> Andrew Gilden, *Toward a More Transformative Approach: The Limits of Transgender Formal Equality* 23 *BERKELEY J. GENDER L. & JUST.* 83 2008.

<sup>5</sup> See generally NIVEDITA MENON, *SEEING LIKE A FEMINIST* (2012).

<sup>6</sup> *Id.*

empowerment and not disempowerment. In fact this paper is a call to all people to move beyond arbitrary binaries and to classify themselves as transgenders and to confront baseless autocratic impositions on people.

## II. Transgenders as understood and dealt with by the social and legal system

In India, the Third Gender is a legally sanctioned classification by virtue of the landmark 2014 Supreme Court decision in the *National Legal Services Authority v. Union of India (UOI) and Ors*<sup>7</sup> case (hereinafter referred to as the NALSA). The most significant part of the verdict is the court's assertion that transgenders possess the right to decide their own gender, i.e. the gender they themselves identify with. This gives transgenders the right to choose to be male, female or even the third gender. Indeed a remarkable decision. The Supreme Court has also affirmed the right of transgenders to lead a life of dignity and has upheld their right to vote, the right to own property, the right to marry, the right to claim a formal identity through a passport, a ration card, a driver's license, the right to education, employment, health and has also guaranteed all other constitutional protections and fundamental rights, such as the right to privacy and freedom of expression, right to empowerment, right against violence, right against exploitation and the right against discrimination.<sup>8</sup>

Recognition of the Third Gender by the Supreme Court is a momentous shift from the obsolete binary understanding of human sexes. The binary understanding had long classified transgenders as deviants and stigmatized their existence as abnormal. The state in the 19<sup>th</sup> century started ostracizing deviance. This has been well documented by Michel Foucault.<sup>9</sup> Foucault states that the rise of the prison as a disciplining institution in the 19<sup>th</sup> century replacing the 18<sup>th</sup> century scaffold was not an attempt to humanize punishment. Industrial revolution and modern capitalism required that the society be made more efficient for the market. The market required a carceral archipelago which disciplined and punished deviance. Any semblance of abnormality was viewed as an affront. Deviants came to be regarded as parasites and roadblocks to development. They were ostracized by the state through its legal system.<sup>10</sup>

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<sup>7</sup> AIR 2014 SC 1863.

<sup>8</sup> *Id.*

<sup>9</sup> MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., Vintage Books ed. 1995) (1977).

<sup>10</sup> *Id.* at 108-112.

In India's long history, the eunuch/hijras and transgender community had not been subjected to punitive sanction by its ancient and medieval legal systems. Biological and sexual deviance was excused, even celebrated till the 13<sup>th</sup> century<sup>11</sup> and was not criminalized even during the Mughal period. However, this position changed with the onset of British rule in India, more specifically the liquidation of the East India Company in 1858 and the urgent enactment of the Indian Penal Code (hereinafter referred to as IPC) in 1860. The IPC ushered in Victorian morality at the behest of Lord Macaulay. Macaulay considered penal law as benevolence to India. Through the IPC, the British were discharging the white man's burden of civilizing savages and building their moral character. The IPC incorporated Victorian social mores and criminalized sexual activities of homosexuals, eunuch/hijras and transgender community. Section 377 of the IPC criminalized all penetrative non-procreative sexual acts irrespective of the consent of the participants.

The eunuch/hijras and transgender communities were further targeted by the Criminal Tribes Act, 1871. The Criminal Tribes Act deemed the entire eunuch/hijras and transgender community as innately criminal and addicted to the systematic commission of non-bailable offences.<sup>12</sup> This Act provided for the registration, surveillance and control of certain criminal tribes and eunuchs and penalized eunuchs and transgenders who were registered and appeared to be dressed or ornamented like a woman, in a public street or place, as well as those who danced or played music in a public place. Such persons also could be arrested without warrant and sentenced to imprisonment up to two years or fine or both. Under the Act, the local government registered the names and residence of all eunuchs residing in its area as well as of their properties, those who were reasonably suspected of kidnapping or castrating children, or of committing offences under Section 377 of the Indian Penal Code, or of abetting the commission of any of the said offences. Under the Act, the act of keeping a boy under 16 years in the charge of a registered eunuch was made an offence punishable with imprisonment up to two years or fine and the Act also denuded the registered eunuchs of their civil rights by prohibiting them from acting as guardians to minors, from making a gift deed or a will, or from adopting a son.<sup>13</sup> The Act was however repealed in August, 1949.

However, the 78 years of Criminal Tribes Act socially ostracized the eunuch/hijra and transgender community by permanently hampering societal attitudes and making it impossible for them to exercise their civil rights even after its repeal. This is because the society could not accept

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<sup>11</sup> As evidenced by erotic carvings on the 11<sup>th</sup>-13<sup>th</sup> century Khajuraho temples celebrating sexual acts now punishable under the Indian Penal Code.

<sup>12</sup> See *NALSA Supra* note 7, at 7.

<sup>13</sup> *Id.*

transgenders as normal human beings and regarded them as deviants also by virtue of Section 377, which continues as a tool to legally and socially isolate and harass them.

The Delhi High Court in the 2009, *Naz Foundation v. Govt. of NCT of Delhi*<sup>14</sup> judgment decriminalized 'consensual' penetrative non-procreative sexual acts among homosexuals, eunuch/hijras and transgender community from the purview of Section 377 of IPC. This decision was however challenged and unfortunately overturned in *Suresh Kumar Koushal v. Naz Foundation*<sup>15</sup> (hereinafter referred to as Koushal Judgment) by the Supreme Court. The Supreme Court unnervingly did not address the issue as to how consensual sexual activity between homosexuals, eunuch/hijras and transgender community was mischievous or harmful to the society. This disappointing straw-man decision was fallacious more so since penetrative non-procreative sexual activity between consenting married couples had already been decriminalized 90 years ago.<sup>16</sup>

The Supreme Court snubbed the issue as to how criminalization of consensual sex did not violate the Fundamental Right to Equality<sup>17</sup> and the Fundamental Right to Life and Personal Liberty<sup>18</sup> of homosexuals, eunuch/hijras and transgender community. The decision also elucidated the prudishness of the Supreme Court in upholding the rights of homosexuals, eunuch/hijras and transgender community because their sexual acts are considered deviant and the court is easily shocked by deviant matters. The moral climate of 1860 continues to pervade our hallowed Supreme Court.

### III. Relationship between Feminists and Transgenders

The first part of the paper elucidated the authors' meaning of the word "transgender". Whereas the second part gave a historical trajectory as to how society and law have dealt with transgenders. This part argues in favour of understanding "transgenders" as a wider encompassing term with the potential to re-evaluate our imperfect notions of sex and gender. Once the term is understood in such a way, it shall be imperative that feminists embrace the cause of transgenders and join their struggle for equality, opportunity and liberation. The foremost reason as to why feminism should

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<sup>14</sup> 160 DLT 277.

<sup>15</sup> (2014) 1 SCC 1.

<sup>16</sup> Heterosexual non-procreative sexual activity between married couples was decriminalized by *Khanu v. Emperor* AIR 1925 Sind 286 which was cited as an authority in subsequent judicial decisions.

<sup>17</sup> Art. 14, THE CONSTITUTION OF INDIA.

<sup>18</sup> Art. 21, THE CONSTITUTION OF INDIA.

support the cause of transgenders is that their fight is for the same cause, viz. against subordination, discrimination and alienation solely on the basis of sex and gender. Feminism is not about women, it is about doing away with stereotyping and typecasting behaviour into “masculine” and “feminine” binaries and using this normalized arbitrary construction as a tool of isolation and subjugation. Two essential characteristics of any feminist legal theory must be: an anti essentialist approach which accommodates diversity and the ability to see identity as contextual and relational.<sup>19</sup>

Gone are the days when feminism saw “woman” as a category per se which needed to be emancipated. No longer should a new category of gender be intimidating to women and to the cause of feminism. In fact it should be empowering and welcoming. But unfortunately, some feminists have maintained distance from the transgender movement, declaring that transgender issues are entirely separate and unconnected. There could be several reasons for this isolation:

1. Male to female transsexuals should be excluded because they are not true women and they continue to exercise the power associated with their male privileged upbringing.<sup>20</sup>
2. Female-to-male transsexuals should be excluded because they have rejected their womanhood to gain the advantages awarded to men in our patriarchal system.<sup>21</sup>
3. Feminists feel threatened by a new contender in their fight against discrimination. They are afraid that the limelight would no longer be on them, and the feminist movement shall be in disarray.
4. Transsexuals buy into essentialist notions of sex and gender and inappropriately seek to cross the gender divide and become a part of it rather than deconstruct it.<sup>22</sup>

The first three arguments are shallow and fallacious as they assume that there are only binary sexes where one dominates over the other. It takes us back to the days when “woman” was one universal category who was under subjugation.

The last reason is indeed correct but it must be dealt with meticulously. It is logical to argue that when a person gets a sex reassignment surgery or when a eunuch decides to walk around as a female, or when a cross dresser dresses up as the opposite sex, they are buying into essentialist notions of sex and gender. But it is necessary to understand that these are categories of people

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<sup>19</sup> See generally, Graham Mayeda, *Re-imagining Feminist Theory: Transgender Identity, Feminism, and the Law*; 17 CAN. J. WOMEN & L. 423 2005.

<sup>20</sup> Julie Greenberg, *Beyond The Binary: What Can Feminists Learn From Intersex And Transgender Jurisprudence?* 17 MICH. J. GENDER & L. 13 2010-2011.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

who are ostracised, subordinated, neglected and discriminated against because of their biological deviance. They have no support system. They want to feel that they belong within the society which ostracizes them. They are possessed by the false consciousness of binary sex and gender. The solution is not to further isolate and abandon them but to instead take up their cause. Those people need to be made to believe that it is alright to be who they are, and that they are not to blame for anything. That they may behave femininely even when they are males and vice versa, and this tolerance for them must be advocated by feminists.

Feminists cannot wash their hands off from the widespread subordination and subjugation of transgenders on the basis of their supposedly deviant sex and gender. Feminism is against discrimination on the basis of class, sex, race, caste and gender. The objective of feminism is to demolish the dehumanization of human beings based on such arbitrary man-made constructs. Therefore, feminism cannot stay indifferent to the cause of transgender rights and equality. Writing for liberal feminism in 1869, John Stuart Mill wrote in the “The Subjection of Women” that, “*the legal subordination of one sex of the other — is wrong in itself, and is now one of the chief hindrances to human improvement; and that it ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other.*”<sup>23</sup> His words can be extrapolated to mean that the subordination of transgenders is also a hindrance to human progress and development and feminists must align themselves with their cause.

Feminism shall be going against its own ideals if it abandons or ignores the transgender movement. Feminists and transgenders ought to join hands and become one and fight the concept of sex and gender, as only then can subordination and exploitation come to an end. Humanity and society would become more advanced when it learns to accept that hitherto which has been considered deviance is actually normal and acceptable. Richard Rorty writes that progress entails “*an increase in our ability to see more and more differences among people as morally irrelevant.*”<sup>24</sup>

As Beth Plotner said, “*Generally I'm fighting for the gender variant community, which includes mostly the transgender community. But also anybody who would be perceived as stepping outside societies boundary lines of gender in a strict bi-gender society of male and female. And as most informed people know, gender is a very wide spectrum in how people choose to express it.*”<sup>25</sup>

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<sup>23</sup> JOHN STUART MILL, THE SUBJECTION OF WOMEN, 1 (1869).

<sup>24</sup> RICHARD RORTY, TRUTH AND MORAL PROGRESS, 11 (Cambridge) (1998).

<sup>25</sup> Paisley Currah, *Gender Pluralisms: Under the Transgender Umbrella* 1 FEMINIST AND QUEER LEGAL THEORY CONVERGENCES AND- AN UNCOMFORTABLE CONVERSATION 18 2005.

#### **IV. Transgenders i.e., a Perspective beyond Sex and Gender: A Conclusion**

The binary classification of sex and gender needs re-evaluation. This arbitrary construction of human sexes has been normalized in the society. The male and female categories cast existential aspersions on biological deviance. The binary classification perpetuates the treatment of transgenders as sub-humans.

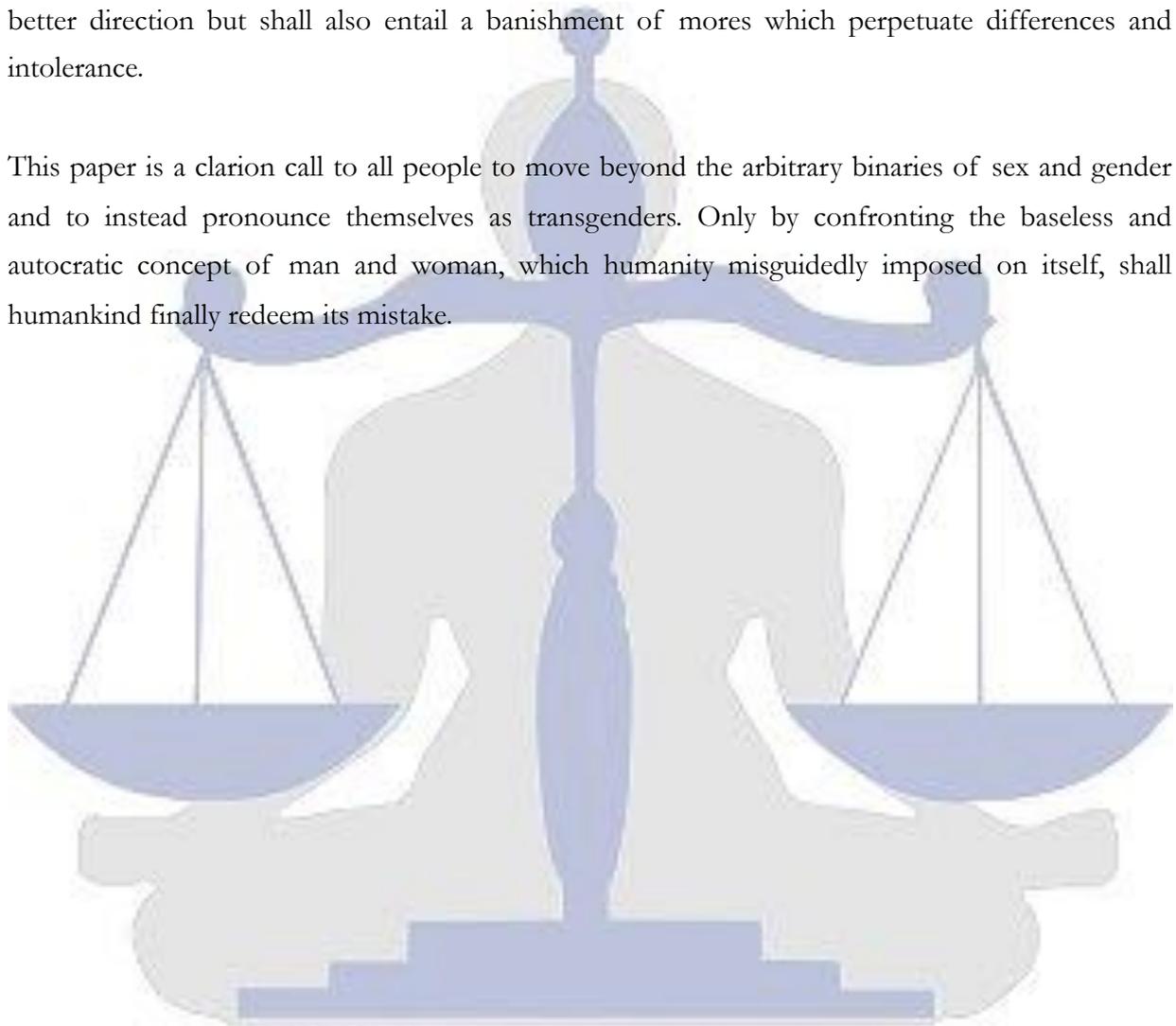
Transgenders are in fact vilified humans who transcend social mores and traditional notions of sex and gender. They refuse to be cowed down by an antagonistic society which classifies them in arbitrarily assigned sexes and expects them to perform gender prescriptive roles. This understanding of the term “Transgender” surpasses the traditional meaning given in the NALSA judgment, as it not only includes transsexuals, bisexuals, cross dressers, homosexuals and eunuchs/hijras but also people who traverse traditional gender roles and who go beyond gender as understood by society. The authors believe that the term “transgender” should signify empowerment and not disempowerment and transgenders must not be considered a deviant aberration. They should not be stigmatized by society. But rather accepted as natural human beings. Social stigmatization of transgenders must give way to their tolerance and acceptance.

The legal system which is a mirror of the unequal society is a culprit for perpetuating the segregation of transgenders from the mainstream and denying them their civil rights. Transgenders are unable to function in a society which does not appreciate them as normal human beings, while the laws, which on one hand are silent about their rights, also persecute them and criminalize their sexual activities. They are unable to marry because of the law and society. The NALSA judgment may have declared the right of transgenders to marry, however it does not mean much when the legal and social machinery is ineffectual and non-existent. The laws which are speechless about the existence of transgenders in our society and hostile to their sexual activities also make no provision for their marriage, adoption, inheritance, succession and welfare. This kind of discrimination is unprecedented and is a form of apartheid on the basis of sex and gender. This legal and social apartheid on the basis of sex and gender is despicable and urgent steps are needed to eradicate this injustice.

Concerning the relationship between feminists and transgenders, this paper has pointed out that some feminists disclaim support to the transgender movement. This is however fallacious because the ultimate ambition of the feminist and transgender movement is alike i.e., to move beyond the traditional understanding of sex and gender which dehumanises certain human beings and denies them equality of opportunity and status.

The paper may be viewed as too radical and revolutionary but that is what we need today. We require a radical instigation for social change and moral development. We cannot continue to be suffocated by immutable social mores and unquestioningly declare allegiance to norms which perpetuate gender injustice and social harassment. A new perspective is needed which enables the creation of superior social norms and practices. Not only would these new social norms give us better direction but shall also entail a banishment of mores which perpetuate differences and intolerance.

This paper is a clarion call to all people to move beyond the arbitrary binaries of sex and gender and to instead pronounce themselves as transgenders. Only by confronting the baseless and autocratic concept of man and woman, which humanity misguidedly imposed on itself, shall humankind finally redeem its mistake.



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