

Social and Legal approach towards Transgender Community

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ABSTRACT

Transgender people have existed in every culture, race, and class since the story of human life has been recorded. The transgender community faces considerable stigma which is mentally ill, socially deviant and sexually predatory. While these views have faded in recent years for lesbians and gay men, transgender people are still a subject of mockery in society. This stigma plays out in a variety of contexts. Transgender people are all around the world. Most trans people around the world are closeted due to endemic discrimination. Around the world there are different cultures and different types of gender identity which are difficult to compare to each other. In India there are a lots of socio – cultural groups of transgender people like hijras/ kinnars, and other transgender identities like – shiv-shaktis, jogtas, jogappas, Aradhis, Sakhi, etc. However, these socio-cultural groups are not the only transgender people, but there may be those who do not belong to any of the groups but are transgender persons individually. The paper explores the violation of legal as well as basic rights of transgender people. It traces about the gross violation of the basic rights of transgender, such as right to freedom of speech and expression, right to peaceful assembly, right to move freely etc. The paper argues for protection of the rights of transgender people. Although transgender people are increasingly gaining legislative protections, laws can't always protect them from the social stigma and the risks they face. Preamble to the Constitution of India mandates Justice - social, economic, and political equality of status. The Constitution of India provides for the fundamental right to equality, and tolerates no discrimination on the grounds of sex, caste, creed or religion. The Constitution also guarantees political rights and other benefits to every citizen. But the third community (transgender) continues to be ostracized. The Constitution affirms equality in all spheres but the question is whether it is being applied.

1. Introduction

When a child is born, a doctor says, "It's a boy" or "It's a girl." Someone's sex is assigned on the basis of biological structure, chromosomes, anatomy, and hormones. But a person's gender identity, the inner sense of being male, female, or both -- doesn't always match with their biological structure. Many people have assumptions about what it means to be transgender, but it isn't about surgery, or sexual orientation, or even how someone dresses. It's how they feel inside. Some say they are the opposite sex of what they were assigned at birth. Some feel they are both male and female. When people make changes to match the way they feel inside, it's called transitioning. There may be some changes in their clothing, hair, and name. Some ask others to change the pronouns they use to identify them. They may choose "he," "she," "they," or even "ze." Some use hormones or surgery to alter how they look and feel. It varies a lot from person to person, and there's no set pattern. As per sexual orientation people can be categorized into three divisions, heterosexuals, homosexuals and bisexuals. Sexual orientation refers to an individual's pattern of physical and emotional response towards other person. Sexual orientation is the gender to which you're attracted.

The contemporary term 'transgender' arose in the mid-1990s from the grassroots community of gender-different people. In contemporary usage, transgender has become an 'umbrella' term that is used to describe a wide range of

identities and experiences, including but not limited to transsexual people; male and female cross-dressers (sometimes referred to as 'transvestites,' 'drag queens' or 'drag kings'); inter-sexed individuals; and men and women, regardless of sexual orientation, whose appearance or characteristics are perceived to be gender atypical. In its broadest sense, transgender encompasses anyone whose identity or behavior falls outside of stereotypical gender norms. That includes people who do not self-identify as transgender, but who are perceived as such by others and thus are subject to the same social oppressions and physical violence as those who actually identify with any of these categories. Other current synonyms for transgender include 'gender variant,' 'gender different,' and 'gender non-conforming.'

2. Sociological thought and social approach towards trans genders

In sociology, we make a distinction between sex and gender. **Sex** are the biological traits that societies use to assign people into the category of either male or female, whether it be through a focus on chromosomes, genitalia or some other physical ascription. When people talk about the differences between men and women they are often drawing on sex – on rigid ideas of biology – rather than gender, which is an understanding of how society shapes our understanding of those biological categories. **Gender** is more fluid – it may or may not depend upon biological traits. The **sociology of gender** examines how society influences our understandings

and perception of differences between **masculinity** and **femininity**. We examine how this, in turn, influences identity and social practices. Sex and gender do not always align. Transgender people will undergo a gender transition that may involve changing their dress and self-presentation. Transgender people may undergo hormone therapy to facilitate this process, but not all transgender people will undertake surgery. **Intersexuality** describes variations on sex definitions related to ambiguous genitalia, gonads, sex organs, chromosomes or hormones. Transgender and intersexuality are gender categories, not sexualities

Sex:

The definition of **sex** (the categories of man versus woman) as we know them today comes from the advent of modernity. With the rise of industrialisation came better technologies and more faster modes of travel and communication. This assisted the rapid diffusion of ideas across the medical world. **Sex roles** describes the tasks and functions perceived to be ideally suited to masculinity versus femininity. Sex roles have converged across many (though not all) cultures due to colonial practices and also due to industrialization. These roles were different prior to the industrial revolution, when men and women worked alongside one another on farms, doing similar tasks. Entrenched gender inequality is a product of modernity. It's not that inequality did not exist before, it's that inequality within the home in relation to family life was not as pronounced.

In the 19th Century, biomedical science largely converged around Western European practices and ideas. Biological definitions of the body arose where they did not exist before, drawing on Victorian values. The essentialist ideas that people attach to man and woman exist only because of this cultural history. This includes the erroneous ideas that sex:

- Is pre-determined in the womb;
- Defined by anatomy which in turn determines sexual identity and desire;
- Differences are all connected to reproductive functions;
- Identities are immutable; and that
- Deviations from dominant ideas of male/female must be "unnatural."

As I show further below, there is more variation across cultures when it comes to what is considered "normal" for men and women, thus highlighting the **ethnocentric** basis of sex categories. Ethnocentric ideas define and judge practices according to one's own culture, rather than understanding cultural practices vary and should be viewed by local standards.

Sexuality:

Sexuality is different again; it is about sexual attraction, sexual practices and identity. Just as sex and gender don't always align, neither does gender and sexuality. People can identify along a wide spectrum of sexualities from heterosexual, to gay or lesbian, to bisexual, to queer, and so on. Asexuality is a term used when individuals do not feel sexual attraction.

Some asexual people might still form romantic relationships without sexual contact. Regardless of sexual experience, sexual desire and behaviors can change over time, and sexual identities may or may not shift as a result. Gender and sexuality are not just personal identities; they are **social identities**. They arise from our relationships to other people, and they depend upon social interaction and social recognition. As such, they influence how we understand ourselves in relation to others.ⁱ

3. Best places in world for transgender people

Transgender people are all around the world. Most trans people around the world are closeted due to endemic discrimination. Around the world there are different cultures and different types of gender identity which are difficult to compare to each other. For example, Kathoey ('ladyboys') in Thailand are perceived as either female, male or a third gender similarly, hijras in South Asia are perceived as transgender, eunuchs or cross-dressers. United States and Brazil have the highest trans-gender population in the world followed by Philippines and Thailand. China with the biggest population also has the most transgender individuals and it has mathematical certainty. There are good number of trans-gender people in the cities of Rio De Janeiro and San Francisco. The Philippines have over-all more trans-gender people than Thailand, but they are spread all over the country while in Thailand they're concentrated in the capital Bangkok. The countries that carry out the largest number of sex reassignment surgery operations are apparently Thailand and Iran, though in the latter many trans straights and non-trans homosexuals are pressured into surgery since homosexuality (as defined by genitalia) is illegal and punishable by death.ⁱⁱ

There are few places in the world for trans to live with dignity. These are definitely stars when it comes to trans rights. First of all Illinois, is nestled in the Midwest and home to Chicago. The state has a broken legislative glass ceilings in providing trans folks with health care and health insurance protection state wide. Second one is Colorado, it is well known for all types of liberal law passing with its law on marijuana, gay rights. One of the most significant piece of legislation is the inclusion of transgender people in Colorado's antidiscrimination laws to protect them from discrimination in housing, public toilet, employment and accommodation. According to their law they can also avail to health insurance. Oregon is another one city having sound policy towards trans people. It is the most well known city of Portland. It is a very progressive state for trans people. Oregon health care system covered gender confirmation surgeries for trans people. The next state is Washington which offers an openness regarding education, employment of trans people. Washington, is the early proponent for passing anti-trans discrimination laws. The state has passed a regulation assuring trans gender people access to public toilet, rest rooms and lockers. Vermont is another state which offers a comprehensive legal protection to trans gender people. One of the best laws passed allows trans people born in Vermont to change their gender in their birth certificate. They will get a fresh birth certificate without mark of amendment. California is another state where trans people has a great access to health care. There are so many laws relating to anti-discrimination in Californiaⁱⁱⁱ.

International legal frame work

In the year 2010 The Secretary General of United Nation Organization in his speech in Human Rights Day expressed his concern on discrimination and violation of basic rights of transgender people. He said the discrimination should be rejected in general and more particularly discrimination on the basis of sexual orientation and gender identity should be rejected^{iv}. International Bill of Human Rights for the protection of the Human Rights of the individuals includes:

1. Universal Declaration of Human Rights
2. International Covenant on Civil and Political Rights
3. International Covenant on Economic, Social and Cultural Rights

Article 1 of the Universal Declaration of Human Rights, which reads simply: "All human beings are born free and equal in dignity and rights."

Article 6- Universal Declaration of Human Rights. Everyone has the right to recognition everywhere as a person before the law.

17. The Right to Your Own Things. Everyone has the right to own things or share them. Nobody should take our things from us without a good reason.

18. Freedom of Thought. We all have the right to believe in what we want to believe, to have a religion, or to change it if we want.

19. Freedom of Expression. We all have the right to make up our own minds, to think what we like, to say what we think, and to share our ideas with other people.

20. The Right to Public Assembly. We all have the right to meet our friends and to work together in peace to defend our rights. Nobody can make us join a group if we don't want to.

21. The Right to Democracy. We all have the right to take part in the government of our country. Every grown-up should be allowed to choose their own leaders.

22. Social Security. We all have the right to affordable housing, medicine, education, and childcare, enough money to live on and medical help if we are ill or old.

23. Workers' Rights. Every grown-up has the right to do a job, to a fair wage for their work, and to join a trade union.

24. The Right to Play. We all have the right to rest from work and to relax.

25. Food and Shelter for All. We all have the right to a good life. Mothers and children, people who are old, unemployed or disabled, and all people have the right to be cared for.

26. The Right to Education. Education is a right. Primary school should be free. We should learn about the United

Nations and how to get on with others. Our parents can choose what we learn.

27. Copyright. Copyright is a special law that protects one's own artistic creations and writings; others cannot make copies without permission. We all have the right to our own way of life and to enjoy the good things that art, science and learning bring.

28. A Fair and Free World. There must be proper order so we can all enjoy rights and freedoms in our own country and all over the world.

29. Responsibility. We have a duty to other people, and we should protect their rights and freedoms.

30. No One Can Take Away Your Human Rights. International Covenant on Civil and Political Rights

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

4. Regional Legal Frame Work

Sweden was the first country in Western Europe to adopt a procedure to allow people to change their legal gender marker in 1972, and its gender identity law became a model for other nations. Argentina sets a new gold standard with a "self-determination" gender identity law adopted in 2012: For the first time in the Western Hemisphere, individuals could change their legal gender by simply filling out a form — no surgery or doctor's permission required. Four countries in Europe have

since adopted self-declaration laws modeled on Argentina's, and at least 18 more countries are considering similar proposals, according to the advocacy group Transgender Europe. In fact, 34 countries in Europe still do not allow a trans person to change their name and registered gender without surgery or some sort of medical procedure.^v

In 2012, Argentina's Senate unanimously approved the Gender Identity Law making sex-change surgery a legal right. The procedure is even included in both public and private health care plans.^{vi}

Two years later, the Danish Parliament followed Argentina's lead and allowed legal gender recognition for transgender people over the age of 18, solely based on their self-determination -- without any medical intervention. Denmark is the only European country that does not require any psychiatric diagnoses or any certificate by a medical professional, according to Transgender Europe.^{vii}

In 2015, Malta's government adopted the Gender Identity, Gender Expression, and Sex Characteristics Act. The law is intended to provide a simplified procedure which respects the privacy of the person requesting that one's official documents be changed to reflect the person's gender" and acknowledges that "gender identity is considered to be an inherent part of a person which may or may not need surgical or hormonal treatment or therapy" and "sex characteristics of a person vary in nature and all persons must be empowered to make their decisions affecting their own bodily integrity and physical autonomy."^{viii}

Although transgender people are increasingly gaining legislative protections, laws can't always protect them from the social stigma and the risks they face. The human rights advocacy group Transgender Europe documented 2,264 reported killings of trans and gender-diverse people worldwide between January 1, 2008 and September 30, 2016.^{ix}

In 2016, GLAAD reported the deaths of 27 transgender people in the United States -- the deadliest year on record.^x

In the United States, the national debate on protections for transgender students in public schools continues to heat up as the Supreme Court prepares to hear the case of Gavin Grimm, a 17-year-old transgender student from Virginia who wants to use the bathroom that corresponds with his gender identity. And civil rights groups worry about the consequences of the Trump administration's recent reversal on Obama-era bathroom protections for transgender students.^{xi}

5. Position of Transgenders in India

In India there are a lots of socio – cultural groups of transgender people like hijras/ kinnars, and other transgender identities like – shiv-shaktis, jogtas, jogappas, Aradhis, Sakhi, etc. However, these socio-cultural groups are not the only transgender people, but there may be those who do not belong to any of the groups but are transgender persons individually.

Constitutional rights for Trans gender.

Preamble to the Constitution mandates Justice - social, economic, political and equality of status. Thus the first and foremost right that they are deserving of is the right to equality under Article 14. Article 15 speaks about the prohibition of discrimination on the ground of religion, race, caste, sex or place of birth. Article 21 ensures right to privacy and personal dignity to all the citizens. Article 23 prohibits trafficking in human beings as beggars and other similar forms of forced labor and any contravention of these provisions shall be an offence punishable in accordance with law. The Constitution provides for the fundamental right to equality, and tolerates no discrimination on the grounds of sex, caste, creed or religion. The Constitution also guarantees political rights and other benefits to every citizen. But the third community continues to be ostracized.

As per the Constitution most of the protections under the Fundamental Rights Chapter are available to all persons with some rights being restricted to only citizens. Beyond this categorization the Constitution makes no further distinction among rights holders.

But official identity papers provide civil personhood. Among the instruments by which the Indian state defines civil personhood, sexual (gender) identity is a crucial and unavoidable category. Identification on the basis of sex within male and female is a crucial component of civil identity as required by the Indian state. The Indian state's policy of recognizing only two sexes and refusing to recognize hijras as women, or as a third sex (if a hijra wants it), has deprived them at a stroke of several rights that Indian citizens take for granted. These rights include the right to vote, the right to own property, the right to marry, the right to claim a formal identity through a passport and a ration card, a driver's license, the right to education, employment, health so on. Such deprivation secludes hijras from the very fabric of Indian civil society.

States in India have taken various policies and welfare measures for the protection of transgender people. The state of Tamil Nadu and Kerala were the first Indian states to introduce a transgender welfare policy. According to the transgender welfare policy, transgender people can access free sex reassignment surgery (SRS) in government hospitals; free housing program; various citizenship documents; admission in government colleges with full scholarship for higher studies; alternative sources of livelihood through formation of self-help groups (for savings) and initiating income-generation programmes (IGP). Tamil Nadu was also the first state to form a transgender welfare board with representatives from the transgender community. In 2016, Kerala started implementing free SRS in government hospitals. In July 2016, the state of Odisha enacted welfare benefits for transgender people. In April 2017, the Ministry of Drinking Water and Sanitation instructed states to allow transgender people to use the public toilet of their choice. In October 2017, the Karnataka Government issued the "State Policy for Transgenders, 2017", with the aim of raising awareness of transgender people within all educational institutions in the state. Educational institutions will address issues of violence, abuse and discrimination against transgender people. It also

established a monitoring committee designed with investigating reports of discrimination. On 28 November 2017, N. Chandrababu Naidu, the Chief Minister of Andhra Pradesh, announced the enactment of pension plans for transgender people. On 16 December 2017, the Andhra Cabinet passed the policy. According to the policy, the State Government will provide an amount of ₹1,500 per month to each transgender person above the age of 18 for social security pensions. In addition, the Government will construct special toilets in public places, like malls and cinema halls, for transgender people.

The Supreme Court in *National Legal Service Authority vs. Union of India*^{xii} has recognized transgender as the third gender addressing a “human rights issue”. “Transgender are also citizens of India. The spirit of the constitution is to provide equal opportunity to every citizen to grow and attain their potential, irrespective of caste, religion or gender,” said justices K.S. Radhakrishnan and A.K. Sikri in their ruling. A person who is transgender does not identify with the gender identity assigned to them at birth. “Recognition of transgenders as a third gender is not a social or medical issue but a human rights issue,” the court said. The judges said rights such as the right to vote, own property, marry and to “claim a formal identity” would be made available “more meaningfully” to the transgender community as a result of the ruling.

The court ruling, which came after it heard a public interest litigation filed by National Legal Services Authority (Nalsa) demanding equal rights, is being seen as a major victory for human rights in India. The petitioners’ lawyers said the ruling would mean that all identity documents, including a birth certificate, passport and driving license would recognize the third gender, along with male and female. There is very limited data or information on the estimated size of the transgender population in India. A United Nations Development Programme study says the number could be more than 160,000 but anecdotal evidence puts it at between half a million and a million.

The judgements said that non-recognition of gender identity amounts to discrimination under Article 15, which prohibits discrimination on the basis of sex.

The judges directed the center and states to treat the transgender community as socially and educationally backward classes of citizens, and ensure that they are not discriminated against in healthcare, employment and education.

“We... conclude that discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution, and hence we are inclined to give various directions to safeguard the constitutional rights of the members of the TG (transgender) community,” said justice Radhakrishnan.

The second case that needs to be examined is Justice KS Puttaswamy (RETD) versus Union of India and Ors^{xiii} also popularly known as the Right to Privacy case. While this case did not directly address the rights of LGBT people, it did take a

stand on the right to privacy and in doing so touched on the rights of LGBT people and ended up discussing Kaushal's case.

The critical thing though is the Right to Privacy case was a determination by a nine-judge bench of the Supreme Court and it has read the sexual orientation into the right to privacy. Further it has said that discrimination on the grounds of sexual orientation is a violation of Article 14 and 21 of the Constitution.

This would mean, in a purely academic sense, if Section 377 would have to survive the test of constitutionality, it would have to be found non-discriminatory on the grounds of sexual orientation. Such a finding seems as fanciful as it seems unlikely. LGBT persons and their supporters in India have a lot to be hopeful for. If the Supreme Court applies its own recent jurisprudence, hopefully this is the last we see of this woeful provision of India's penal code.

Timeline of Section 377:

The legal fight against Section 377 of the Indian Penal Code has been a long and tedious one.

1994: Aids Bhedbhav Virodhi Andolan files petition against Section 377.

A 1996 article in *Economic and Political Weekly* by Vimal Balasubrahmanyam titled ‘Gay Rights in India’ chronicles this early history.

1998: Women’s groups protest after right-wing organizations force cinemas to stop screening *Fire*, a film that depicted a lesbian relationship

2001: Naz Foundation files petition challenging the constitutionality of Section 377

2004: Delhi high court dismisses the case

2006: Supreme Court direct Delhi high court to hear the case; *Voices Against 377*, a coalition of human rights groups joins petition; Several LGBT persons file affidavits

2009: Delhi HC says .. 009: Delhi HC says Section 377 does not apply to consenting adults; Astrologer Suresh Kumar Koushal, and 15 others challenge this order in SC; Parents, academicians, and mental health professionals intervene in favour of LGBT persons

2013: Supreme Court strikes down Delhi high court judgment

2013: Global Day of Rage demonstrations organised in over 30 cities worldwide to protest against Section 377

2014: Curative petitions listed; SC delivers NALSA judgement

2016: Curative petitions referred to Constitution Bench; Two fresh petitions from LGBT persons, including NavtejJohar and Others vs Union of India challenging Section 377 filed

2018: NavtejJohar petition assigned to Constitution Bench; fresh petitions filed by NGOs, IIT students and alumni, and activists. Hearings begin in front of a five-judge bench.

On July 17,2018:, Supreme Court reserved its verdict on Whether to decriminalize Section 377 of Indian Penal Code, a controversial and archaic provision in Indian Penal Code (IPC) that makes gay sex a punishable offence.

The top court said the social stigma and discrimination attached to the transgender community would go if criminality of consensual gay sex is done away with, even as it maintained that could scrutinize the legal validity of section 377 of Indian Penal Code in all its aspects.^{xiv}

6. Conclusion

The transgender community in India has a long history in India and in Hindu mythology. The transgender community still faces considerable stigma which is mentally ill, socially deviant and sexually predatory. While these views have faded in recent years for lesbians and gay men, transgender people are still a subject of mockery in society . This stigma plays out in a variety of contexts i.e., there is lack of legal protections, lack of social and economic security . The entire circumstances is unable to provide social and economic justice as enshrined in our Constitution. Non-recognition of the identity of Hijras/transgender persons denies them equal protection of law, thereby leaving them extremely vulnerable to harassment, violence and sexual assault in public spaces, at home and in jail, also by the police. Sexual assault, including molestation,

rape, forced anal and oral sex, gang rape and stripping is being committed with impunity and there are reliable statistics and materials to support such activities. Further, non-recognition of identity of Hijras /transgender persons results in them facing extreme discrimination in all spheres of society, especially in the field of employment, education, healthcare etc.

Hijras/transgender persons face huge discrimination in access to public spaces like restaurants, cinemas, shops, malls etc. Further, access to public toilets is also a serious problem they face quite often. Since, there are no separate toilet facilities for Hijras/transgender persons, they have to use male toilets where they are prone to sexual assault and harassment. Discrimination on the ground of sexual orientation or gender identity, therefore, impairs equality before law and equal protection of law and violates Article 14 of the Constitution of India.

The Supreme Court has declared transgender as third gender and the community has got gender identity ,still there is lack of constitutional and legal protection towards the community. They should be protected from all kinds of discriminations .They should be allowed to have surgery so their body matches with their identity. They should be allowed to marry a person of their birth sex. They should be allowed to conceive or give birth to a child. They should be allowed to adopt a child. They should have legal rights to determine their sexual orientation.

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