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Exploring Gender and Sexuality through A Legal Lens

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INTRODUCTION

Since childhood only, we are presented with a complex array of social information and are taught how to interpret the world around us and sex distinctions are an integral part of that world also by learning how to recognise someone as male or female allow us to associate the various attributes of gender stereotypes and this -conditions our immediate behaviour patterns in ways that are suitable for our and their gender.

When individual adults are handed the same baby, having been told specifically that it is a girl or a boy, their handling of, communication etc. differs as per their perception of its sex, which shows that babies of different sexes are likely to be treated differently because of different sexes

We generally believe that there are genders that are male and female, Many individuals have gender identities that are fully congruent with their sex, so most women and men who are physically male and female have strong identities but a few individuals may feel that their identities are totally at variance with genital sex, such persons described as being trans-sexual. Trans-sexual men and women provide us with perhaps the strongest justification for making the distinction between sex and gender. There is sufficient historical and mythological evidence that India has always been home for the transgender community, the hijras trace their origins to myths in The Mahabharata and The Ramayana.¹

The interplay between gender, sexuality and law is complex and multifaceted, Laws shape societal norms, influencing how individuals express their gender and sexuality.

This paper examines key aspects of this intersection, highlighting challenges and opportunities for progress.

1. Gender Identity and Legal Recognition

¹ Narrain,S (2003), Being Eunuch. The Frontline.

Gender identity is a fundamental aspect of a person's identity and legal recognition is essential for accessing rights and services. It is foundational to equitable treatment. It is a human rights issue at the intersection of law, identity and inclusion.

Institutions must consider the legal, emotional and practical significance of allowing Individuals to have their gender legally acknowledged.

There should be completely inclusive environment wherein every person is seen, heard and respected.

- **Human Rights:** Recognising and protecting the rights of transgender and non-binary individuals.
- **Reducing stigma:** Promoting social acceptance and reducing stigma around gender identity.
- **Access to services:** Ensuring access to healthcare, education and employment opportunities.

2.National Legal Frameworks

In India, the recognition of a third gender is supported by both legal frameworks and policy measures aimed at ensuring the right and dignity of transgender and non- binary individuals. The Indian constitution provides a foundation for the protection of rights of all citizens, including transgenders

The fundamental right guaranteed under:

Article-14: Right to equality, ensuring that all individuals are treated equally before the law.

Article-15: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth, which has been interpreted to include sexual orientation and gender identity.

Article-19: Right to freedom of speech and expression, allowing transgender individuals to articulate their identities and rights.

Article-21: Right to life and personal liberty, which extends to the right to live with dignity.²

² Challenges to legal protection of third gender individuals, SEEPJH Volume XXVI, 2025, ISSN: 2197-5248

The transgender Persons (protection of rights) Acts, 2019 and its rules, 2020, ensure legal recognition, welfare measures and protection against discrimination.

The SMILE initiative supports livelihood, healthcare, education, and rehabilitation of Marginalised individuals through Garima Greh shelters and skill development programs,

The National Portal for Transgenders Persons enables hassle-free certification, scheme, access and transparency through multilingual digital services.

3. Landmark Judgments

In the case of *National Legal Services Authority v. Union of India*³, the Supreme Court recognised transgender people as third gender. The ruling affirmed that the fundamental rights of the Indian Constitution apply equally to the transgender people and gave them the right to self-identify their gender.

This judgment mandated the government to treat transgender people as socially and economically backward classes, providing them with reservation in educational institution and public employment.

In the case of *Navtej Singh Johar v. Union of India*⁴, the Supreme Court emphasized the need for inclusivity and the protection of LGBTQ+ rights, influencing the discourse around transgender rights.

The Supreme Court in, *K.S. Puttaswamy v. Union of India*,⁵ confirmed that the right to privacy was a fundamental right under Article-21 of Constitution of India

In *Supriyo @ Supriya Chakraborty v. Union of India*⁶, 5judge bench of the Supreme Court held that queer individuals have the right to form relationships and choose their partners, but this does not extend to a right to marry as the decision to recognise same-sex marriage lies with the legislature not the judiciary.

4. Criminalization of sexual acts

³ (2014) 5 SCC 438

⁴ (2018) 10 SCC1

⁵ (2017) 10 SCC 1

⁶(2023)

Section -377 of the Indian Penal Code was a section introduction in 1961 during the British rule of India. It made sexual activities “against the order of the nature” illegal. but in the case of *Navtej Singh Johar v. Union of India*, the Supreme Court ruled that the application of Section-377 to consensual homosexual sex between adults was unconstitutional, “irrational, indefensible and manifestly arbitrary” but this section remained in force relating to sex with minors, non- consensual sexual acts, and bestiality⁷. However, this section was fully replaced along with the rest of the Indian Penal Code by the Bharatiya Nyaya Sanhita on 1 July 2024.

5. Challenges in enforcing anti-discrimination laws

The establishment of anti- discrimination laws has been pivotal in the fight against inequality. But the effectiveness of these laws depends upon their enforcement and the societal attitudes that underpin discrimination.

Their establishment faces numerous challenges, predominantly due to ambiguities in legal language, insufficient enforcement mechanisms, and the prevailing societal attitudes that hinder progress.

To enhance the efficacy of these laws, it is essential to simplify legal processes, increase recourse allocation for enforcement and promote education and awareness. By working collectively to foster inclusivity, we can create a world where discrimination is not only illegal but also socially unacceptable.

6. LGBTQ+ rights and protection in employment, housing and public services

The idea of human rights rests on the central premise that all humans are equal and all humans have dignity and all humans should be treated as equal.

The term LGBTQ+ denotes the following:

Lesbian- it means a woman who is sexually attracted to a woman.

Gay- it means a man who is sexually attracted to the man.

Bisexual- a person who is sexually attracted people of both sexes.

⁷ Pundir, Pallavi (6 September 2018) “ I Am What I Am. Take Me as I Am”

Transgender- it means a people, whose gender identity and gender expression, differs from that usually associated with their birth sex.

Queer- it means sexual and gender identities who are neither heterosexual nor cisgender (opposite of transgender).

The “+” in ‘LGBTQ+’ signifies that the above list is not exhaustive and includes other categories as well like Pansexual, Asexual, Intersex etc.

The main activists during the mass LGBT movement belonged to the transgender community as they have been the worst sufferer of exploitation amongst the whole LGBTQ+ community in India due to their degraded social, educational and economical status. These people have never been considered as part of society and have always been subjected to exploitation, ostracization but after the above stated decisions by the Apex Court their situation is improving.

Transgender Persons (Protection of Rights) Act,2019 recognises the right to self -perceived gender identity, and new identification documents confirming the change of gender can be issued by government agencies once a certificate is provided by a relevant medical official.

Also, transgender citizens have a constitutional-rights to register themselves under a third gender. Also, this prohibits discrimination against transgender people in nine field, such as education, employment and healthcare.

Acceptance towards LGBTQ people is reportedly far higher in top universities, such as the Indian Institute of Technology and Indian Institute of Science, Delhi University and the Indian Institute of Management. Many institutes have their own LGBTQ clubs, namely Saathi, Indradhanu, Amber etc.

A survey in 2019 revealed that over 69% of Indian respondents want same sex marriage to be legalised.

7. Global approaches to LGBTQ+ Protections

The global campaign to secure protections for LGBTQ+ community has made significant progress in recent decades, especially in realm of marriage equality. Yet in many countries they still face repression, imprisonment, and even the threat of death. Given the severity and ubiquity of such abuses, laws and safeguards protecting them from legal discrimination and

political, social and economic marginalization have become a priority for activists and a growing number of governments.

Civil society organizations have lobbied the UNITED NATIONS for recognition of human rights on the basis of sexual orientation and gender identity since the body's founding in 1945.

In 2011, US Secretary of State Hillary Clinton marshalled support in the UN Human Rights Council, the successor to the Human Rights Committee, for the resolution on human rights, sexual orientation and gender identity, famously proclaiming that gay rights are human rights.

In 2016, the council adopted another resolution that called on member states to protect against violence and discrimination based on sexual orientation and gender identity and established the office of an independent expert to assess implementation of these protections worldwide.

Yet, such protections are unevenly enshrined in law throughout the world, and anti-LGBTQ+ discrimination persists. Around seventy countries continue to criminalize homosexual activity, and in twelve countries adults who engage in consensual same sex acts can still face the death penalty.

In countries such as Afghanistan, Pakistan and Qatar, these measures tend not to be enforced even if they are legally permissible, but Iran still regularly executes LGBTQ+ individuals. Additionally, in geographic areas beyond the reach of governments, terrorist organizations such as the self-proclaimed Islamic State perpetrate anti-LGBTQ+ violence.

A mere twenty-nine countries legally recognise marriage equality today, including Switzerland most recently with its December 2020 passage of marriage equality legislation. And even among countries where same-sex marriage is legal, some still lag behind in protecting LGBTQ+ people from discrimination in access to social and commercial services, education, health, employment.

Only eleven countries mention sexual orientation in constitutional non-discrimination clauses. European countries stand out for extending protection under Article 21 of the European Union Charter of Fundamental Rights and Article 19 of the Treaty on the functioning of the EU, but LGBTQ+ rights are increasingly under assault on the continent.

Against this difficult panorama, the United States in recent years has become a leading advocate for LGBTQ+ rights internationally. U.S. credibility on the issue, though is intrinsically tied to the country's own fight for equality and representation in government.

LGBTQ+ Americans historically faced legal and social discrimination, including regarding the right to serve in the military, work in civil service and represent the country abroad.⁸

CONCLUSION

The relationship between gender, sexuality and law is dynamic. Law can perpetuate inequalities but also drive social change. Ongoing advocacy and reforms are crucial for equality and ensure that all individuals, regardless of gender or sexuality can live authentically and with dignity.

This relationship underscores the evolving nature of societal norms and the quest for equal treatment. As laws adapt to reflect and protect diverse identities, they pave the way for a more inclusive society. Ultimately this interplay highlights the need for continued dialogue and reform. And as societies evolve law must adapt to protect and recognise the rights of marginalized communities. By embracing diversity and promoting equality an inclusive society can be created wherein there is no fear of discrimination.

However, the journey towards equality is ongoing and legal frameworks play a pivotal role in shaping a more just and inclusive future, and the path ahead requires sustained efforts to address systematic barriers and ensure equal opportunities for all regardless of gender or sexuality.

Recommendation

1. Anti- discrimination laws should be strengthened
2. Enhance legal recognition for gender identities
3. Promote education on gender and sexuality

⁸ The changing landscape of global LGBTQ+ Rights "Council on foreign relation"