

# DISMISSING BINARIES: UNLOCKING INDIA'S POTENTIAL FOR EQUITY AND INCLUSIVITY VIA LEGISLATIVE REFORM FOCUSED ON LINGUISTICS

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## ABSTRACT

*India cannot become a true democracy that provides and protects individual liberties in the form of fundamental rights until it prioritises complete inclusivity, and, by extension, the dismissal of patriarchy as well as the eradication of any and every basis of distinction, especially one's gender and sexuality. There is need for equality and equity as forms of performative justice, thereby this paper seeks to explore the concept of gender, sex and sexuality in the Indian context, and seeks to highlight the shortcomings of the Transgender Persons (Protection of Rights) Act, 2019 in particular. Further, it seeks to establish that although many local languages in India are gendered and may not have gender-neutral options to use in those specific languages, active usage of gender-neutral verbiage and vocabulary at least in the English language- which is taught as first, second or third language in most educational institutions across the country- would be a huge step. In addition to using they/them pronouns to encourage gender neutrality in English, normalizing using phrases such as 'assigned male/female, etc. at birth', 'menstruating person', 'person with a uterus', etc. can be pivotal in dismissing patriarchy and stereotypical gender roles, discrimination and such, forcing people to view each other as humans first.*

**Keywords:** law, gender, transgender, reform, linguistics

## Introduction

Until very recently, human rights in India seemed to be reserved for upper-class, upper-caste, cisgendered, heterosexual and able persons, all the more if one was assigned male at birth. Gender, sex and sexuality- concepts that are so innate to all human beings- are shunned and shamed in the society under the guise of prudence and modesty, tradition and religion, all flimsy excuses in this regard. This paper seeks to explore the rich history of diverse gender identities recorded, some that seem to be exclusive to the Indian subcontinent, and the impact of various invasions, reigns and eras that India experienced on the same. Today, studies like gender justice often simply talk about women empowerment, women's justice, undoing patriarchy for the sake of women- all of which is truly wonderful, but the sphere of study fails to take cognisance of the vast diversity of people comprising the label 'woman'. Society and its laws have taken heteronormativity as the norm, and equate 'woman' to 'female'- two vastly different concepts. Now, if society and its laws both fail to make such an important distinction, one can't expect any progress or empowerment to be made- and this is merely the tip of the iceberg.

It is no secret that the LGBTQIA+ community has always existed in India, just as it did everywhere else on Earth; even has gender identities native to it. However, this community that once flourished and was, overall, revered, rapidly became the most despised, treated so poorly that many end up living on the streets having to fend for themselves- especially the trans community. A fair link has been drawn between the community's oppression and colonisation. But it cannot be denied that post-independence, the government of India- especially the judiciary- have, perhaps in prioritising other areas of development and progress in the wake of colonisation, failed to see to the upliftment of the community that has historically been one of the biggest marginalised sectors of Indian society.

It is undeniable that the laws governing the country are entirely by and targeted to cisgendered heterosexual persons. This much is amply clear to any person who reads through the *Transgender Persons (Protection of Rights) Act, 2019*<sup>1</sup>, or any personal laws in the country, for that matter. The very fact that the legislature saw it fitting to pass such an enactment shows their ignorance of the label 'transgender'- what it entails, the several gender identities it contains within it. The *Transgender Persons (Protection of Rights) Act, 2019* attempts to institutionalize gender

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<sup>1</sup> Transgender Persons (Protection of Rights) Act, 2019, No.40, Acts of Parliament, 2019 (India)

by legitimizing the need for registration of transpersons, an obvious form of discrimination with no basis.

The concepts of gender, sex and sexuality are highly policed in modern India, not just via customs and religions, but also legislations and the media. It was only very recently that the rights of the LGBTQ+ community in India were taken into consideration, and Section 377 of the *Indian Penal Code, 1860*<sup>2</sup> was struck down and the *Transgender Persons (Protection of Rights) Act, 2019* was enacted. However, the scope of positive impact of these judicial activities are limited, and the latter has faced severe backlash from the transgender community. The needs of the transgender community, and the LGBTQ+ community at large, need to be identified for a focused and effective legal reform.

In this regard, this paper seeks to establish that the usage of gendered verbiage in our *lex loci*- an overwhelming majority being male-associated he/him/his pronouns with a sprinkle of female-associated she/her/hers for variety and they/them/their strictly in plural- plays an active role in reinforcing stereotypes and normalising heteronormativity. It is argued that there can be no actual progress in terms of achieving equality in society if the society in question is limited by the narrow language it uses. Contrastingly, gender neutral usage of language can convey the same message, and can be used to interpret and apply the principles enshrined therein more generously, in accordance with principles of equality; allowing the society to view people as individual humans before their gender, sex or sexuality would play a pivotal role in reducing hate crimes and other related human rights issues. Therefore, the extent of a language's influence on laws to create barriers to inclusivity and equality of genders, sexualities and sexes in India, and whether gendered language is a requisite in legislature and policy making are explored in this paper.

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<sup>2</sup> Indian Penal Code, 1860, §377.

## **Literature Review**

The paper utilises the ‘Narrative Synthesis’ method of Literature Review- a review and synthesis of key narratives from multiple studies and literary sources, placing primary reliance on the use of words and text to summarise the same. Broadly, the review is organised thematically, highlighting recurring themes across the various literary sources cited.

### ***Impact of Patriarchy and Colonialization on Gender, Sex and Sexuality in India***

If one really sits and thinks about it, it would be easy to see that our society is placing far too much importance on genders, sexualities, identities and non-harmful non-malicious behaviour by trying to police the same via laws. Why are these concepts given so much importance that society has forgotten to consider and treat one another as human beings first, before all else? Why must labels be prioritised over freedoms and lives? The answer is as simple as it is complex- patriarchy. Not just any patriarchy- the patriarchy in the wake of colonialism is a far more toxic version of patriarchy than what India had before colonisation, for it sought such utter and seemingly irreversible segregation of society by any and every means possible that life has almost lost all joys.

To begin with, pre-colonial India was startlingly distinct from the Christian ideals and teachings prevalent in the West- what with Indian society’s openness and comfort with the hedonistic act of sex and the fluidity of sexuality and gender expression. Colonialism brought with it the Christian concepts of ‘taboo’, ‘vices’ and ‘sin’ in the 1800s- especially in relation to homosexuality, transgender communities like the Hijra community, and other non-binary-esque ideas. Indian culture never prohibited any form of sexuality or gender- there are no records of people being executed for the same- but instead celebrated it, as is evident from sculptures in places that are considered holy and pure like temples, and numerous scriptures, even parts of mythology. More accurately, non-rigid sexualities, fluidity of gender and gender roles, and the overall disregard of binaries was rampant in Ancient India. Like the Hijra community, India was home to various exclusively local gender identities such as the tritiya prakriti, the kinnara (kinnar), pedi, etc. However, these identities displayed an overlap between the concepts of biology, sexual attraction and activity and social performance and expression<sup>3</sup>.

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<sup>3</sup> Devdutt Pattanaik, *Gender studies in ancient India*, DEVDUTT, <https://devdutt.com/articles/gender-studies-in-ancient-india/>.

It was in the aftermath of the 1857 rebellion that there was a spike in colonial anxieties about their limited knowledge pertaining to Indian society, which was thought to be comprising criminal or deviant marginal groups. The British, throughout their reign in India, managed not only to divide the people, but also distanced them from their own culture, convincing them that concepts of homosexuality, homoeroticism, masturbation and other hedonistic acts were not native to the Indian subcontinent; that India originally held the same moral disapproval in such regards as the Christian West<sup>4</sup>, and that the existence of such concepts was probably imported as a result of some invasion or other.

As a result, with the enactment of the *Indian Penal Code, 1860*<sup>5</sup>- which was drafted referencing the British *Buggery Act, 1533*<sup>6</sup>- homosexuality was criminalized, and ‘conversion therapy’ was introduced- or, in case of religious extremism, it was the ‘exorcism’ of a spirit or the wrath of a god, whichever excuse they found more believable. The Hijra community, on the other hand, were considered ungovernable, for they were thought to embody some form of a sexual disorder. Similar to homosexuality, the Hijra community were also construed as being prostitutes and habitual sodomites- which, at this juncture in time, was used to refer to homosexual behaviour among men- thereby effectively misgendering the Hijra community, who have feminine gender expression. The Hijra gender expression conflicted with the Christian interpretation and conceptualization of a gender binary. Accordingly, the Hijra community were portrayed as being the ‘kidnappers, castrators and pimps’ of children assigned male at birth, and in 1871 the *Criminal Tribes Act [Repealed]*<sup>7</sup> was enacted, under which the very existence of the hijra community was rendered criminal, in what people were convinced to believe was a child saving measure. Soon thereafter, the *Andhra Pradesh (Telangana Area) Eunuchs Act 1329 F*<sup>8</sup> was enacted in 1919 for the ‘registration and control of Eunuchs’ in and around said state, which was just a modest way of saying ‘policing via harassment and torture of non-cisgendered person into behaving in accordance with heteronormativity’.

The British clubbed together all nonconforming persons under the category of ‘eunuch’, a term they defined to refer to a person who was assigned male at birth but has since been

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<sup>4</sup> Ruth Vanita, *Same Sex Love*, 192-197 (Penguin UK 2008)

<sup>5</sup> Indian Penal Code, 1860, No.45, Acts of Parliament, 1860 (India)

<sup>6</sup> Buggery Act, 1533, Acts of Parliament, 1533 (England)

<sup>7</sup> Criminal Tribes Act, 1871 [Repealed], No.27, Acts of Parliament, 1871 (India)

<sup>8</sup> Andhra Pradesh (Telangana Area) Eunuchs Act 1329 F, No.16, Acts of Andhra Pradesh State Legislature, 1919 (India)

emasculated or castrated. There have been several instances wherein intersex individuals who had vaguely male-like genitals at birth were construed to be eunuchs. While this term may be construed as a subcategory of ‘transgender’, to try and group all nonconforming identities and expressions under the term ‘eunuch’ was a gross instance of misgendering entire societies of people.

‘Transgender’ is a canopy term used to describe a vast range of individuals whose gender expression and or gender identity is different from the sex they were assigned at birth. Thus, it encompasses persons who are transsexual, who cross-dress, who are gender-variant, and so on. A transgender person may identify as one or the other gender binary- that is, as a transwoman or a transman, but may otherwise identify as any non-binary identity like agender, genderfluid, genderqueer, demigender, pangender, etc. Every gender non-conforming community has its own identifying characteristics, and experience different socio-legal barriers, thereby making the issue of legal recognition for every such group supremely complex<sup>9</sup>. It should also be noted that not every transperson undergoes gender reassignment surgery- less commonly known as sex reassignment surgery- which seems to be for those persons who experience extreme psychological discomfort- gender dysphoria and or body dysmorphia.

Of Persian origin, the word ‘Hijra’ is often loosely translated to ‘eunuch’ in English, but castration is not a requisite to identify as a Hijra. In *National Legal Services Authority v. Union of India*<sup>10</sup> (here forward ‘NALSA Judgement’), Hijras were described to be persons assigned male at birth but do not identify as men, identifying either as women, or ‘not-men’, or ‘in-between man and woman’ or ‘neither man nor woman’- admittedly quite similar to the umbrella term ‘transgender’. However, the key distinguishing characteristics of the Hijra community in India is that they’re a discipleship based community with their own rituals of initiation and other customs, traditions and practises, like the *badhai*, which the British construed to be performances of begging<sup>11</sup>.

This construction was very inaccurate, because the Hijras danced to celebrate joyous milestones like matrimony and childbirth, and it was only until recently that Hijras were often invited to birth ceremonies to bless children. The community also remarkably has its own linguistic

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<sup>9</sup> Jain, Dipika & Rhoten, Kimberly, *A Comparison of the legal rights of gender non-conforming persons in south Asia*, 48 ECONOMIC AND POLITICAL WEEKLY, 10-12 (2013).

<sup>10</sup> *National Legal Services Authority v. Union of India* AIR 2014 SC 1863

<sup>11</sup> Jessica Hinchy, *Governing Gender And Sexuality In Colonial India: The Hijra, C.1850–1900* 61 (Cambridge University Press, 2019)

branch, called Hijra Farsi, which is an amalgamation of Persian and Hindustani. Seeing as the Hijra community is native to India and found all across the sub-continent, it has subsects on the basis of locality and identity, like the ‘Kinnar’ community, who are Hijras of north India; ‘Aravani’- although more prefer the term ‘Thirunangi’- the hijras in Tamil Nadu who identify themselves as women trapped in male bodies.

The *Transgender Persons (Protection of Rights) Bill, 2016*<sup>12</sup>, and ultimately the *Transgender Persons (Protection of Rights) Act, 2019* also include within the term ‘transgender’ the ‘Kothi’ people, which the NALSA Judgement describes as a heterogeneous group comprising persons assigned males at birth who show varying degrees of effeminacy, going on to explain that many Kothis identify as bisexual, and prefer to ‘take the feminine role’ in same-sex relationships. It is to be noted that while some Hijras identify as Kothi as well, not all Kothis identify as Hijra or even transgender. Another common term associated with trans communities in India is ‘Shiv-shakti’- typical to Andhra Pradesh, these are persons assigned males at birth who are believed to be ‘possessed by,’ or ‘married to’ the gods, especially the icon of fluidity, Lord Shiva. They have a feminine gender expression and cross-dress as women during religious rituals and festivals. Further amalgamating devdasi practises to the transgender community are the ‘Jogti Hijra’, a community of exclusively male-to-female transgenders who devote themselves to the service of a particular god, most commonly in parts of Maharashtra and Karnataka.

In attempting to police behavior and expression of identity via enactment of legislations and placing emphasis on gender non-conforming expressions, identities and behaviours being so ‘immoral’ that even just speaking or writing about it were ‘taboo’- seeing as they thought of eunuchs to be humiliating evidence of emasculation- the British managed to foster so much misplaced humiliation and shame in India’s previously open culture that the society at large convinced itself that its openness never existed. Thus, it was ignorantly postulated that identities like ‘gay’ were inherently Western<sup>13</sup>, for it oversaw the fact that ‘gay’ may also be construed to be an umbrella term inclusive of all such identities found across the world that referenced attraction to people within a homogenous group of characteristics.

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<sup>12</sup> Transgender Persons (Protection of Rights) Bill, 2016, Bill no. 210 of 2016 (India)

<sup>13</sup> Paul Boyce, *Moral Ambivalence and Irregular Practices: Contextualizing Male-to-Male Sexualities in Calcutta/India*, 83 FEMINIST REVIEW, 79–98 (2006).

With the Britishers' persistence, heteronormativity became the standard, as did eurocentric beauty standards, Christian reinterpretations of Indian cultures and religions, etc. Resultantly, concepts such as gender, sex and sexuality were not just viewed as binaries, but were enforced through laws, and through formal and informal education, and socialization. Thus came about the institutionalization of the legal presumption of polarity in terms of gender, sex and sexuality, molding society to fit rigid norms. To do so, the community of gender non-conforming persons, non-binary persons, and everyone except the heterosexual persons were shamed, not just as individuals, but also the families of nonconforming individuals. This is in accordance with pre-colonial and colonial ideas of retributive justice, which was largely based upon honour and honour codes in society. When gender, sex and sexuality were forced to become part of these honor codes, and were then given institutional significance and legislations and enactments, people began altering their stance on openness and acceptance, instead adopting behaviors that called for less penalties, pains and humiliation. The society thus distanced itself from its own identity and ideologies for the sake of acceptance, basis 'purity' and 'normality'.

The conventional notion of being 'straight' is understood to be one's adherence to the gender schema<sup>14</sup> wherein, firstly, a person assigned male at birth necessarily is masculine in their social outlook, while someone assigned female at birth is feminine in theirs, and, secondly, and they tend to get 'attracted' towards their counterpart. Herein, the heteronormativity is seen to be 'natural'- not only 'normal', but also 'legal', for it is sanctioned by the society and its laws that seek to discipline desire<sup>15</sup>. Conveniently, a 'normal' individual is now synonymous to being a 'law-abiding citizen'. Srivastava has argued that “the state is “straight”, as its legal framework supports and legalises heterosexuality and it “disciplines” the alternative forms of sexuality - that is, LGBT - through its legal framework.”<sup>16</sup>

Given that the pre-colonial Hindu society was already quite patriarchal and vastly dependent on its intricate caste system, the British could not fathom how such an otherwise patriarchal society was so tolerant of the non-binary. Through various social and legal reforms, the British, while successfully associating one's gender expression to their sex assigned at birth, also

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<sup>14</sup> Sumit Saurabh Srivastava, *Disciplining the 'Desire': 'Straight' State and LGBT Activism in India*, SOCIOLOGICAL BULLETIN, 63, 368–385 (2014).

<sup>15</sup> Kalpana Kannabiran, *The Law, Gender and Women*, 44 ECONOMIC AND POLITICAL WEEKLY 33–35 (2009).

<sup>16</sup> *Supra* note 14.



amplified the concept of masculinity, made femininity seem ‘incomplete’ and reliant on their counterparts, and dismissed the idea of any identity existing outside of the binary. The intersection of colonial law with the patriarchal Hindu joint family can only ever result in an uber-patriarchal society<sup>17</sup>- which India did, indeed, become. However, this intersection resulted in the dismissal of the fact that women were generally granted greater property rights traditionally, and as a result, we still see, today, staunch supporters of the revamped Brahmanical patriarchal family vehemently defending colonial laws, especially with regards to ownership of property<sup>18</sup>. Soon enough, ‘gender’ was so closely associated to ‘sex’ that people could not- or refused to- make a distinction at all.

### ***Passive Stance of the Judiciary Post-Independence***

In the aftermath of colonialization, India was left worse for the wear, especially its now precarious stance on gender, sex and sexuality- which really just applied to everyone that was not a cisgendered, heterosexual man of a high socio-economic standing, preferably belonging to an upper caste. Given that a ‘man’ was- as a result of uber-patriarchy that existed at this point- considered ‘naturally’ superior to ‘women’, leaving no room in the discourse for nonconforming individuals especially dismissing transpersons, any attempts at reform were seen as unnecessary, and also somehow- ironically- ‘against the Indian culture’. This form of patriarchy was seen as the ‘right of the male’<sup>19</sup>, and it became socially acceptable for it to be enforced through domestic violence including rape and marital rape, socio-economic sanctions. It soon gained rapid acceptance legally as well- the reason why the judiciary, even today, refuse to criminalize marital rape in India.

But ‘women’ and other gender and sexual minorities required their freedom, and feminism cropped up in various places across India, especially post-independence. In fear of humiliation, repercussion by law, wrath of gods, and other bad things, people had begun to either forcefully marry lesbian, gay, asexual, aromantic, etc. persons to marry, and then went on to demand children as proof of a successful marriage. Throughout history, India has seen a higher male-to-female transition rate than female-to-male, so although laws and the society refused to associate the word

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<sup>17</sup> Flavia Agnes, *Patriarchy, Sexuality, and Property: The Impact of Colonial State Policies on Gender Relations in India*, FAMILY, GENDER, AND LAW IN A GLOBALIZING MIDDLE EAST AND SOUTH ASIA, Syracuse University Press 29–40 (2009).

<sup>18</sup> Mytheli Sreenivas, *Conjugality and Capital: Gender, Families, and Property under Colonial Law in India*, 63 THE JOURNAL OF ASIAN STUDIES 937–960 (2004).

<sup>19</sup> M. P Singh, *Gender, Law and Sexual Assault*, 32 ECONOMIC AND POLITICAL WEEKLY 543–550 (1997).

‘women’ with transwomen, they were not much bothered about it- after all they identified as mere ‘women’. As a result, transpersons- especially transwomen, because ‘choosing’ to ‘become’ a ‘woman’ seemed very irrational to the society- were harassed into either conforming to binaries per their sex assigned at birth, or were disowned and left to fend for themselves, often ending up begging or involved in prostitution to make ends meet, since other daily wage professions also refused to associate with them. Thereafter, with the rise of feminism in the late 1900s, the concept of ‘gender’ fused with that of ‘women’<sup>20</sup>.

Given that India still majorly relies on colonial laws for the regulation and governance of the country, it comes as no surprise that all that the laws truly are achieving is the reinforcement of colonial ideas of morality- which, we must remember, had not resonated with the Indian society then, and were not reflective of pre-colonial India’s standards of morality. The clash of rigid Western lifestyle with a far more fluid Indian one resulted in the dominance of the Indian society by the stringent rules that seemed to benefit only the niche section of the Indian society. In order to enable law reforms and progressive social movements, and to identify which parts of the system needs a thorough revamping, a study of the laws, legislations and enactments at present is crucial.

The problem with the whole revamping option, however, is that no colonial law has ever been inclusive in any form. To say that we need a complete restructuring of our legal system and the laws would not be a lie, but it would be incredibly difficult to put into practice- not just with restructuring, amending and abolishing several laws, but also to expect the entirety of the Indian society to wade along agreeably to such fast paced change would be too idealistic, wishful even. Several scholars and jurists have realised this, and have sought to find a starting point for such change for the sake of increasing inclusiveness. The fundamental rights enshrined in the *Constitution of India*<sup>21</sup> are a logical place to begin<sup>22</sup>. The problem now lies in undoing more than a century’s worth of societal damage, and of bringing about a shift in the mindset of the people at large.

There is barely any queer jurisprudence in India, since there has only been a handful notable interactions between the LGBTQIA+ community and the judiciary- if only the ones that

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<sup>20</sup> Nivedita Menon, *Sexuality, caste, governmentality: contests over 'gender' in India*, 91 FEMINIST REVIEW 94-112 (2009).

<sup>21</sup> The Constitution of India, 1950

<sup>22</sup> Flavia Agnes, *Law, Ideology and Female Sexuality: Gender Neutrality in Rape Law*, 37 ECONOMIC AND POLITICAL WEEKLY 844-847 (2002).

have yielded positive results. And even the ones that have done the community some justice, have almost always been negated by a judgement that takes matters back to square one. Judgements pertaining to the transgender community and also homosexuality are prime examples of this. It is also notable that every judgement with a small scope of positive impact is done very reluctantly, with several loopholes in the same, and with several judgements contradicting each other<sup>23</sup>, like the judgement in *Suresh Kumar Koushal v. Naz Foundation*<sup>24</sup> juxtaposed with the NALSA judgement. The LGBTQ+ community celebrates every good judgement, simply because any step is a step ahead, a step better than being stagnant in a toxic, patriarchal society.

Similarly, while the *Transgender Persons (Protection of Rights) Act, 2019* does criminalize discrimination against persons identifying as transgender and other related non-binary ideations of gender, it requires transpersons to ‘validate’ their identity by visiting a Magistrate to become registered as transgender. Why is such registration a requisite when cisgendered individuals are not required to do the same? Why does a person have to ‘behave’ a certain gender? This paper maintains that transpersons do not owe anyone any expression of femininity, masculinity or neutrality, castration or gender reassignment surgery, or even a Hijra performance to ‘prove’ their existence and their identity. The *Transgender Persons (Protection of Rights) Act, 2019* is a prime example of non-application of the principles of justice and equality enshrined in the *Constitution of India* to gender non-conforming individuals.

To this end, it is reiterated that a socio-legal reform would only work if the very framework and foundations the system lies on is modified to better suit the needs of the current times. There needs to be a more inclusive employment regime across all sectors so that the public becomes sensitised to the LGBTQ+ community’s existence, and feels it in such a tangible way that proves that they’re not merely a faraway imported concept, but a reality of perhaps one of the biggest minorities in India. The inclusion of the community in the workspace would also facilitate informal education of everyone involved, and when employed in educational institutions, would also reflect in formal education- a huge step forward in terms of progress. It would help if reforms were made keeping in mind the concepts of sex, sexuality and gender. A recent study<sup>25</sup> directly tackled the

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<sup>23</sup> Arvind Narrain, *Envisioning Global Lgbt Human Rights: (Neo)Colonialism, Neoliberalism, Resistance And Hope* 43-62 (University of London Press 2018)

<sup>24</sup> *Suresh Kumar Koushal v. Naz Foundation* (2014) 1 SCC 1

<sup>25</sup> Sonia K. Katyal, *The ‘Numerus Clausus’ of Sex*, 84 THE UNIVERSITY OF CHICAGO LAW REVIEW 389–494 (2017).

problem of placing too much emphasis on heteronormativity, the problem of prioritising it even above humanity and life. It offers a feasible means of altering a failing system to better encompass the people of the country while keeping in mind their welfare.

## Findings

The Indian society has come to view the world through a heteronormative lens, and the same is done in such a systematic manner ingrained in the society that it serves as a vicious circle that is difficult to break out of. There exists an active suppression of gender-identity and expression alike- and sexuality in the country. Herein, the ironic juxtaposition of prudence and asexuality<sup>26</sup> in India makes a great example- the country's narrative by citing religion, culture, traditions, all place high importance in the concept of purity and, sexually speaking, prudence. However, the burden of this prudence is only placed on people assigned female at birth. Those assigned male at birth do not hold any such expectations per se. But every person is expected to engage in sexual activities after marriage, for the purpose of procreation, thereby effectively dismissing the idea of asexuality, among others. While some asexual people do involve themselves in sexual activity, most are repulsed by the same. The fact that forcing them to engage in the same after matrimony despite their discomfort cannot even be called rape, considering marital rape is yet to be criminalized in India<sup>27</sup>. It is noteworthy, however, that presently the Amicus Curiae of the Delhi High Court are in the midst of challenging<sup>28</sup> this exception to Section 375 of the *Indian Penal Code*<sup>29</sup>.

On the other hand, conversion therapies are still widely<sup>30</sup> made available, despite the fact that they're illegal and unconstitutional. But no action gets taken against them most of the time, because the country's general attitude is still to 'fix' the ones who have dared to 'stray'. This is a blatant dismissal of a person's individuality and individual expression; torture and humiliating. But it is a common attempt to reinforce the stigma that anything other than heterosexuality is

<sup>26</sup> Paola Bacchetta, *When the (Hindu) Nation Exiles Its Queers*, 61 DUKE UNIVERSITY PRESS 141–66 (1999).

<sup>27</sup> Amit Anand, Preethi Lolaksha Nagaveni, and Tripti Bhushan, *Marital rape in India: a socio-legal analysis*, 7.4 INTERNATIONAL JOURNAL OF PUBLIC LAW AND POLICY 351-363 (2021).

<sup>28</sup> Rit Foundation v. Union Of India, and other connected matters Writ Petitions (C) no. 284/2015 and 024/2017

<sup>29</sup> Indian Penal Code, 1860, §375.

<sup>30</sup> Braxton Morrison, Sanjay Vashishtha, and Bhuchitra Singh, *A Critical Medico-Legal Analysis Of Conversion Therapy In India*, 116.3 FERTILITY AND STERILITY e260 (2021).

morally or religiously incorrect. This plays into the psychology of shame<sup>31</sup>, starting with taunts, comments, ragging and bullying within the home, to encouraging outsiders to behave in the same manner to a person who presents differently. Similarly, persons with intersex variations are made to undergo non-consensual medical surgery at birth<sup>32</sup>- non-consensual as in, their parents consent on their behalf, sealing their fate before they can come of age and decide for themselves if they'd like to undergo such a surgery. Parents volunteer for it on behalf of new born children in order to avoid humiliation, and doctors readily agree for ease of 'categorization' of the child as either assigned male at birth or assigned female at birth, a clear move to erase intersex identity. There is a distinct lack of laws to regulate this, and most people who are subject to such surgeries go their entire lives without being informed about the occurrence of such a surgery.

The aspect that this paper is most interested in- linguistics- is of profound importance in the reinforcement of stigmas and stereotypes, specifically by the ways of gendered verbiage denoting grammatical and societal gender. Language is generally thought of as being a tool of communication. Less often acknowledged is that it actually teaches people how to think by providing a broad or narrow worldview. Afterall, a language is a way for a community of people to associate arbitrary meanings to sounds that a human may be capable of producing, verbally, gesturally, in sign, or through body language. Thereby, this association depends entirely on what a given community or culture values, what its experiences have been and how it prioritises different aspects of life. Because linguistics is a vast topic, this paper restricts the discussion to simply one broad sub-topic- gender. More specifically, the concept of grammatical gender<sup>33</sup>. Gender can be understood as a sociological term, a constant across cultures and time; yet still a variable. Gender entails self expression of an individual within the society, but somehow, over time, this self expression has started being ascribed at birth, taken out of the scope of self-expression entirely. Thus, today, gender often is taken to mean the roles one prefers, or, more commonly, the ones which they are forced to adapt, etc. There exist multiple theories<sup>34</sup> debating how languages shape

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<sup>31</sup> Richard A Shweder, *Toward a deep cultural psychology of shame*, 70.4 SOCIAL RESEARCH: AN INTERNATIONAL QUARTERLY 1100-1129 (2003).

<sup>32</sup> Sarah Creighton, *Surgery for intersex*, 94.5 JOURNAL OF THE ROYAL SOCIETY OF MEDICINE 218-20 (2001).

<sup>33</sup> Sera, M.D., Elieff, C., Forbes, J., Burch, M.C., Rodríguez, W. and Dubois, D.P, *When language affects cognition and when it does not: An analysis of grammatical gender and classification*, 131.3 JOURNAL OF EXPERIMENTAL PSYCHOLOGY: GENERAL, 377 (2002).

<sup>34</sup> Bucholtz, M, *Theories of discourse as theories of gender: Discourse analysis in language and gender studies*, THE HANDBOOK OF LANGUAGE AND GENDER, 43-68 (2003).

gender. In studying the same in the Indian context<sup>35</sup>, it is comprehended that there are languages like Hindi, Rajasthani, Punjabi, and Haryanvi that segregate the world into two- masculine and feminine. Languages Marathi and Gujarati subjectively use three instead of two such categories, whereas Tamil and Kannada- which also have said three categories- use an objective manner of categorization. Languages such as Malayalam and Assamese only use gender in allocating pronouns, whereas Bengali and Odia lack the concept of grammatical gender altogether. The Mundari language is quite unique in its worldview- instead of masculine and feminine, it segregates the world into human and non human. It is thus seen that, there exist as many worldviews as perhaps languages themselves, and each considers the concept of grammatical gender to hold differing intensity of priority, and to connote different meanings to it. Therefore, it is maintained that language impacts and, in the present context, hinders equality.

The question thus arises whether it could be linguistics that shapes political ideologies. The terms ‘masculine’ and ‘feminine’ are universal in nature, every culture talks about them in some form. However, it is slowly being overlooked that masculinity and femininity are fluid, not rigid, in the context of an individual and their expression of gender, and should not be restricted by gender roles, pronouns or verbiage. Additionally, neutrality is very commonly overlooked as a universally present concept. It therefore is propounded that to define a certain way to be a ‘man’ or a ‘woman’, and to overlook the identities on the spectrum such as nonbinary, agender, genderfluid, transgender, etc. is to create a political tool of control. It needs to be realised, as discussed above, that gender is a subjective perspective, with every culture providing a difference in its opinion. For example, when the British arrived in India, their Victorian mindset was unable to comprehend India's then existing gender norms in all its plurality. In Bengal, for example, there exists a cultural androgyny that comes from the traditions of Shri Chaitanya Mahaprabhu<sup>36</sup> where male devotees would become Radha to Krishna, or the tradition of Sufi Islam<sup>37</sup> where devotees would become lovers of the almighty. The British couldn't- and refused to- understand this. They thought the Bengali ‘man’ to be effeminate<sup>38</sup>, and after the First War of Independence, they

<sup>35</sup> India in Pixels, *How language shapes gender*, YouTube (Oct. 27, 2021), <https://youtu.be/CGM3wwioVmo>.

<sup>36</sup> Nilanjan Chakraborty, *Myth Formation in the Fiction of Chinua Achebe and Amitav Ghosh*, CAMBRIDGE SCHOLARS PUBLISHER 182-183 (2020).

<sup>37</sup> James Delaney, *RUMI: The Homoerotic Sufi Saint*, 69.4 Crosscurrents, UNIVERSITY OF NORTH CAROLINA PRESS 365–83 (2019).

<sup>38</sup> Mrinalini Sinha, *Colonial masculinity: The ‘manly Englishman’ And The ‘effeminate Bengali’ In The Late Nineteenth Century*, 11-22 MANCHESTER UNIVERSITY PRESS (1995)

declared the Rajputs, the Jats, the Punjabis, and the Marathas as martial races, simultaneously establishing thereby that Bengali people cannot fight as effectively as the rest as a result of their effeminacy. This was the Britishers projecting their idea of masculinity on to our culture, and it unfortunately still holds true till this day.

Today, the media is an agent in reinforcing this bigotry is commonly discussed and debated, but no fruitful application of such discourse has been recorded thus far in India. Movies and films in India have always looked to serve only their primary audience- the heteronormative society. Including gendered marketing and advertisements, these means of visual media play a predominant role in reinforcing stereotypes. This is not to say that there has been an absence of queer media, but the movies that managed to reach the cinema halls, or advertisements the televisions, have always met with public outcry<sup>39</sup> from the political far right, who claim every reason from their homophobic conservative books that such media simply should not exist. Sub-section 2 of Section 5B of the *Cinematograph Act, 1952*<sup>40</sup> enables the Central Board of Film Certification, commonly referred to as the Censorship Board, to filter out visual media deemed unfit for public viewing. It is interesting, then, that most visual media containing queer plotlines or characters are banned by the Censor Board, generally reasoning vulgarity, violence or unsuitable for family viewing. In contrast, it is common to most other Bollywood blockbusters to contain graphic violent or sexual scenes, sexism and the objectification of women, racism, homophobia, etc. and the Censorship Board does not seem to find it faulty in the same regard as queer visual media do. Such ban on queer media serves as an obstacle in representation, and has a two-fold impact- the society at large remains unaware and unwelcoming of the diversity that exists in terms of identity, because of which heteronormativity continues to be championed while queer identities are alienized and, directly or otherwise, condemned. As informal education, or, at least, an informal source of information, such attitudes only foster toxic heteronormativity. Similar is the impact of systematically heteronormative education, formally imparted via educational institutions in the society. Thereby, it is argued that an inaccuracy or omission of information in the due provision of education- such as neglecting the introduction of concepts such as gender and sexuality, as well as the non-inclusion of intersex individuals in school curriculums is a harmful political tool

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<sup>39</sup> Dipanita Nath, *Keeping the flame alive: What made Deepa Mehta's Fire such a pathbreaking film*, INDIAN EXPRESS, March 20, 2016, <https://indianexpress.com/article/entertainment/bollywood/keeping-the-flame-alive-what-made-deepa-mehtas-fire-such-a-pathbreaking-film/>.

<sup>40</sup> Cinematograph Act, 1952, §5b(2).

exercised to ensure prevalence of ignorance in the society. Furthermore, it is maintained that such purposeful negligence is the primary cause of violence in educational institutions in the form of ragging and bullying, and also a contributor in the rate of suicides committed by school and undergraduate students in India.

## **Conclusion**

The laws of the country make the people of the country, and thus far, our statutes modelled after colonial laws are gender critical in nature- that is, they vastly exclude transgender people. Enacting the *Transgender Persons (Protection of Rights) Act, 2019* seems progressive and considerate, but if the very reason transpersons exist is because they do not identify as the gender assigned to them at birth, and many of them seek to transition physically into the gender they identify with, limiting their identity to 'transgender' seems confining. In other words, if a person were 'born as' a 'boy' but identifies as a 'girl', to deny them of their right to be called a 'girl' or a 'woman', for their identity as a woman seems to get overshadowed by their trans identity, in an exclusionary manner. To better explain this, we take the problem of creating transgender restrooms. Transwomen are women, transmen are men, transgendered nonbinary folks are nonbinary, so why are they not allowed to access the restrooms they feel comfortable using? In creating separate restrooms for transgender people- forcing trans men, women and nonbinary people alike to use the same restroom- the society tries to segregate between cisgendered people, and transgender people because it is still unaccepting of their personhood, and their self-identity, and it is obvious that transpersons are still viewed as threats to safety and privacy- transpeople as a community are perceived as sexual predators because of the prejudices and stereotypes surrounding their identity in India. They are expected to express their gender in a certain way- such as a Hijra performance- that is thought to not fit heteronormativity, or to be below it. This is made worse with the fact that transpersons are expected to at least try to 'pass' as their gender identity- a transwoman is expected to show at least some resemblance to a ciswoman in order to satisfy the society of their womanhood. Thereby any transperson not altering their gender expression to 'better suit' their internal experience of gender is, unfortunately, seen as belonging to the gender they seem to express- like a transwoman nor shaving their body hair, or not dressing 'like a woman' is still viewed as a 'man', insultingly.



Sub-section 2 of Section 4 of the *Transgender Persons (Protection of Rights) Act, 2019* specifies that “A person recognised as transgender under sub-section (1) shall have a right to self-perceived gender identity.”<sup>41</sup> Thereby, it implies that the recognition of an individual as a transperson as defined under the same Act- marked by the possession of a certificate of identity as prescribed by the same Act- is a requisite, and that, in accordance with the scope of the Act, specifically people who are transgender have a right to their self-perceived gender identity. In this instance, the Act is *not* differentiating between the person’s transgender identity and their self-perceived gender identity- be it man, woman, agender, genderfluid, bigender, non-binary, etc. Despite the wording of the section, it merely limits a transperson to their transgender identity- it seems to assume their self-perceived gender identity to *be* ‘transgender’. It is argued so because the aforementioned certificate of identity would only certify the person’s transgender identity, not any of the other possible self-perceived gender identities. The need for the certificate in and of itself is baseless, not to mention unconstitutional, and is proof of the lack of knowledge of the Centre about the transgender community, for if it wasn’t, it would have either made such a certificate necessary for all citizens of the country, or would not propose it in the first place. The very notion that a transperson may be denied their identity by a Magistrate in denying them a certificate of identity is laughable, but still is a political tool of control. It is thus postulated that the *Transgender Persons (Protection of Rights) Act, 2019* more so hinders constitutional equality than it encourages it.

Apart from the *Transgender Persons (Protection of Rights) Act, 2019*, the gender critical approach can be seen across statutes. One such instance is the personal laws in India pertaining to marital and nonmarital relationships, parent-child relationships, etc. Despite Utopian ideal being enshrined in the *Constitution of India*, whereby it is required that every person be treated equally and without any discrimination, as a human before any label attached to them, the reality is rather disheartening in its cruelty and irrationality. The reality of several transpersons in India is that they’re often disowned and shunned, left to fend for themselves. They are forced to find solace in their own community, which, as a whole, still suffers, in desperate need of support.

There, therefore, is an urgent need to make a sincere effort to dispel sex and gender-based discrimination. To do so, it is hereby maintained that the country needs legislation that considers sex as a spectrum with an unspecified number of identities contained therein. The LGBTQIA+

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<sup>41</sup> Transgender Persons (Protection of Rights) Act, 2019, §4(2).

community is one of India's largest minorities, but unlike other sectors that comprise the term 'minority', the LGBTQIA+ community is vastly underrepresented, and has nary any government support. In this regard, the country could, firstly, create inclusive syllabi and course material, like inclusion of revolutionary LGBTQIA+ persons in textbooks, and also in more 'casual' forms, like in Math problems. Secondly, a practically feasible method would be the creation and proper implementation of government funds for the support of the community, as well as sensitization of police force for increased safety for persons belonging to the transgender community, as they often are victims of violence and harassment. Lastly, although many local languages in India are gendered and may not have gender-neutral options to use in those specific languages, active usage of gender-neutral verbiage and vocabulary at least in English would be a huge step. Using non-gendered verbiage would encourage effective segregation of the very natural concepts of sex, gender and sexuality from one another, and would allow the society to realize that each such label has its own connotation, but none make the person any less of a human, and that they deserve to be treated as such. Normalizing using phrases such as 'assigned female/male/intersex at birth', '\_ to \_ transitioning person', 'menstruating person', 'person able to birth', etc. can be pivotal in dismissing patriarchy and stereotypical gender roles, discrimination and such, forcing people to view each other as humans first. It is further posited that such shift in linguistics can allow for a decrease in gender, sex and sexuality based crime rates in India. Thereby, there is a need for a linguistics focused legal reform in India to effectively tackle pressing social problems.