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# **LGBTQIA++RIGHTS IN THE ERA OF GLOBALIZATION: A CRITICAL ANALYSIS OF GENDER DEFINITIONS IN THE INDIAN PENAL CODE**

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## **ABSTRACT**

‘Sexual minorities have faced atrocities and discrimination from cultures and communities around the world for time immemorial. What can be done to protect them and ensure human rights for them is to make available to them, statutory protections that would safeguard them like it would safeguard any other citizen of India. Gender definitions around the world are evolving, and as a result of globalization several of these definitions and concepts have been adopted into laws of various countries. It is only in the year 2014, 68 years after India got her independence that ‘transgenders found a high degree of recognition under the law, vide the NALSA judgment’. And yet it was not until 2018 when the ‘Hon’ble Supreme Court of India decriminalized consensual sex under Section 377 of the Indian Penal Code’. Yet, it was only in the year 2019 that the ‘Transgender (Protection of Rights) Act, 2019’<sup>1</sup> came to be enacted. It is in this context, wherein it can reasonably be understood that rights of sexual minorities are still a question mark on the civil front, it becomes so imperative to look at the primary penal statute in India. Herein, Indian Penal Code is critically analysed with specific reference to gender definitions to understand whether it is effectively and inclusively protecting sexual/gender minorities from crimes.

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

## **Introduction**

‘Sexual minorities have faced atrocities and discrimination from cultures and communities around the world for time immemorial. They have faced bullying and harassment for as long as humanity can remember.’<sup>2</sup> These are things they continue to endure day in and day out. However, what can be done to protect them and ensure human rights for them is to make available to them, statutory protections that would safeguard them like it would safeguard any other citizen of India.

Gender definitions around the world are evolving, and as a result of globalization several of these definitions and concepts have been adopted into laws of various countries. ‘Indian Penal Code’<sup>3</sup> came into existence on 06.11.1860 which is about 160 years ago. The primary penal statute has gone through several changes and amendments over the course of these years to integrate into it problems arising in a dynamic and rapidly changing world. Other legal systems have influenced it too. Two of the major changes that came about happened with the decriminalization of adultery and consensual homosexuality which was historic. It can be said that these changes occurred owing to globalization. These are liberal ideas from progressive societies that have valued sexual autonomy of the individual.

However, even in this rapidly changing and globalized world certain things continue to evolve in a sluggish pace in India; i.e. gender definitions. This is more serious in the penal law context, since it is those statutes that protect citizens from violent crimes. The very laws that may to a certain degree prevent likely perpetrators to back off before they act or contribute to their likely reform.

Herein, a critical analysis is made of the Indian Penal Code and the gender definitions contained therein together with the effect it has on countering crime and human rights violation. The question that would be addressed herein is whether the gender definitions in the Indian Penal Code provides equal protection to sexual/gender minorities as it does to other citizens.

## **Background**

It is only in the year 2014, 68 years after India got her independence that ‘transgenders found

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<sup>2</sup> UNITED NATIONS FREE AND EQUAL, <https://www.unfe.org/wp-content/uploads/2017/05/Homophobic-and-Transphobic-Violence.pdf>. (last visited Feb.13, 2022).

<sup>3</sup> Pen.Code, 1860

a high degree of recognition under the law, vide the NALSA judgment'<sup>4</sup>. Hon'ble Justice K.S. Radhakrishnan had opined:

“Our Constitution inheres liberal and substantive democracy with rule of law as an important fundamental pillar. It has its own internal morality based on dignity and equality of all human beings. Rule of Law demands protection of individual human rights. Such rights are to be guaranteed to each and every human being. These TGs, even though insignificant in numbers, are still human beings and therefore they have every right to enjoy their human rights.”<sup>5</sup>

And yet it was not until 2018 when the ‘Hon’ble Supreme Court of India decriminalized consensual sex under Section 377 of the Indian Penal Code’<sup>6</sup> that the mere act of their sexual intercourse, basic to all humans, became a normal act that did not attract jail term. Yet, it was only in the year 2019 that the ‘Transgender (Protection of Rights) Act, 2019’<sup>7</sup> came to be enacted which while being protective to a certain degree continues to be criticized heavily on the basis of discrimination by the transgender community. And to this day, their marriage remains questionable under civil laws, except maybe in Tamil Nadu wherein ‘the Hon’ble High Court of Madras had held that a transgender can be a ‘bride’ within the Hindu Marriage Act.’<sup>8</sup>

It is in this context, wherein it can reasonably be understood that rights of sexual minorities are still a question mark on the civil front, it becomes so imperative to look at the primary penal statute in India; the Indian Penal Code is protective of sexual minorities without discrimination; and to understand whether the gender definitions contained within it is inclusive. Since, protecting citizens from human rights violations and crimes is basic to any civilize society and any modern nation. Herein, Indian Penal Code is critically analysed with specific reference to gender definitions to understand whether it is effectively and inclusively protecting sexual/gender minorities from crimes.

## Methodology

A qualitative method has been selected to write this paper due to paucity of time. Primary and

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<sup>4</sup> Jayna Kothari, *A Law that Defeats its Purpose*, THE HINDU (Dec.29, 2018, 12:00 AM), <https://www.thehindu.com/opinion/op-ed/a-law-that-defeats-its-purpose/article25854190.ece>

<sup>5</sup> National Legal Services Authority vs. Union of India, (2014) 5 SCC 438

<sup>6</sup> Krishnadas Rajagopal, *SC Decriminalizes Homosexuality, Says History Owes LGBTQ Community An Apology*, THE HINDU (Sept.06, 2018, 04:42 PM).

<sup>7</sup> Transgender (Protection of Rights) Act, 2019, No.40, Acts of Parliament, 2019 (India).

<sup>8</sup> Arunkumar v. Inspector General of Registration, WP(MD) No. 4125 of 2019 dated 22.04.2019

secondary material have been relied on, such as statutes like the Indian Penal Code, Transgender Persons (Protection of Rights Act), 2019 and articles on the internet.

### **Evolving Definitions of Gender and Sexuality in the Globalized World**

The terms ‘gender’ and ‘sex’ for many years would have remained pretty simple to understand. Human beings with male genitalia were male and men; and with female genitalia were female and women. Over time, the modern world began to understand the finer nuances of the terms and the variations that can exist, to a more liberal position today wherein, it can reasonably be said that sex means the various physiological characteristics such as chromosomes, hormones or even reproductive organs of an individual while gender refers to socially constructed characteristics which determines to a large degree, the said individual’s role in the society. Laws may follow a heteronormative narrative; i.e. heterosexuality is the only normal sexual orientation and that there are only two genders; man and woman.

‘The United Kingdom recognizes sex and gender as different concepts. Sex is used to denote the biological aspects such as chromosomes and the like; generally as male or female and understands that it is something that is assigned at birth. It recognizes gender as a social construct and recognizes gender identity to be a fluid concept that can exist in the spectrum between man and woman.’<sup>9</sup>

‘In the year 2019, the United States Supreme Court held that Title VII of the Civil Rights Act of 1964 includes discrimination on a sexual orientation and gender identity basis under prohibition of discrimination. Certain states in the United States also explicitly prohibit discrimination based on gender identity. Oregon recognizes genderqueer people that includes non-binary and gender fluid individuals.’<sup>10</sup> ‘There is a gender neutral option available.’<sup>11</sup>

‘Similarly, in Europe; Germany became the first country to permit a category “indeterminate sex” for intersex infants.’<sup>12</sup> Move across to a different continent, ‘Australia

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<sup>9</sup> OFFICE FOR NATIONAL STATISTICS, <https://www.ons.gov.uk/economy/environmentalaccounts/articles/whatisthedifferencebetweensexandgender/2019-02-21>, (Last Visited Feb.13, 2022)

<sup>10</sup> CORNELL LAW SCHOOL, [https://www.law.cornell.edu/wex/gender\\_identity](https://www.law.cornell.edu/wex/gender_identity), (Last Visited: Feb.13, 2022).

<sup>11</sup> NEW YORK POST, <https://nypost.com/2017/06/16/oregon-will-offer-gender-neutral-option-on-drivers-license/>, (Last Visited: Feb.13, 2022).

<sup>12</sup> BRITISH BROADCASTING CORPORATION, <https://www.bbc.com/news/world-europe-24767225>, (Last Visited: Feb.13, 2022).

permits selection of “x” as gender referring to indeterminate, unspecified or intersex’<sup>13</sup> for over a decade.

‘Canada went a step further in 2016 when it introduced legislation that protects transgenders and other gender identities from discrimination and hate crimes.’<sup>14</sup>

‘This year, in the fiscal year budget, the US Government chose to replace the word ‘mothers’ with ‘birthing people’ in a certain section so that people outside the gender binary feels included, represented and recognized. It is an understanding that it is not only women that can give birth, but transmen too and genderqueer people.’<sup>15</sup>

## Result

### Gender and Sexuality in the Indian Penal Code: Definitions and Discriminations

Indian Penal Code is worded in such a way that certain crimes can only be committed by a man against a woman. And the definitions are contained within the code, under Section 10 which specifies that “man” denotes a male human being of any age and “woman” denotes a female human being of any age. This means that an individual that does not fit into the binary is left unprotected by those crimes that necessitate an identity of “man” or “woman”.

The Indian Penal Code is divided into Chapters, and below they are critically analysed to find gender and sex based discrimination that under protects gender/sexual minorities.

#### 1. Offences Affecting Life – Section 304B – Dowry Death

This provision of the Indian Penal Code makes dowry death punishable by imprisonment for a term not less than seven years and which may extend to imprisonment for life. However, dowry death can only be that of a woman and the language of the Indian Penal Code, without necessary amendment would make it impossible to punish a perpetrator if dowry death occurs in case of a transgender person using this provision.

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<sup>13</sup> AUSTRALIAN GOVERNMENT, <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/australian-government-guidelines-recognition-sex-and-gender>, (Last Visited: Feb.13, 2022).

<sup>14</sup> GOVERNMENT OF CANADA, <https://www.justice.gc.ca/eng/esj-sjc/pl/identity-identite/index.html#:~:text=On%20May%2017%2C%202016%20the,hate%20propaganda%20and%20hate%20crimes>, (Last visited: Feb.13, 2022).

<sup>15</sup> Yashee, *Explained: The History of, and Row Around, US Budget Using ‘Birthing People’ Instead of ‘Mothers’*, THE HINDU, (Jun.2021, 11:56 AM).

This is because it uses the term “woman” which only denotes a female human being of any age and not a transwoman. The legislature and judicial interpretations are unclear on this aspect; i.e. at what point can a transwoman gain protection accorded to women under the law.

The Hon’ble High Court of Madras had recognized a transwoman as a ‘bride’ within the meaning of Section 5 of the Hindu Marriage Act, 1956 and had upheld the validity of a marriage between a transwoman and a man under the Hindu Marriage Act.

However, it remains unclear whether if dowry death of a transgender woman may be covered under Section 304B of the Indian Penal Code.

## **2. Of the causing of Miscarriage, of Injuries to unborn Children, of the Exposure of Infants, and of the concealment of Births – Sections 312, 313 and 314**

Section 312 deals with causing miscarriage; Section 313 with causing miscarriage without woman’s consent; and 314 with death caused by act done with intent to cause miscarriage.

A transgender may be able to conceive, but the language of these sections would indicate that only a woman within the definition of the Indian Penal Code may be protected by these provisions. A miscarriage caused to a transgender capable of conceiving; a miscarriage caused to a transgender capable of conceiving without her consent; and a death caused to a transgender by act done with intent to cause miscarriage may not be punished until necessary amendments are made to the Indian Penal Code or unless its provisions are interpreted to cover such scenarios and accord protection to transgenders.

## **3. Of Criminal Force and Assault – Sections 354, 354A, 354B, 354C 354D**

Section 354 deals with assault or criminal force to a woman with intent to outrage her modesty. In the current scheme of things, it is unclear; at what point a person becomes a woman, especially in case of transgenders and at what point they would or if at all they would acquire modesty ordinarily attributed to a woman that makes it susceptible to outraging. A transwoman who identifies as a woman may be susceptible to feeling the same emotional trauma of that of a woman and the language of this provision may prevent their protection.

Section 354A is a little better in terms of protecting transgenders since it does not identify the victim based on gender in most scenarios except under 354A(iii) wherein only a man showing pornography against the will of a woman would be punishable.

Similarly, Section 354B only makes it punishable to assault or use criminal force with intent to disrobe a woman, not a transwoman who is equally susceptible to disrobement.

Transgenders have long complained of being the object of fetishism. However, 354C only makes voyeurism against a woman punishable.

Similarly, transwomen may face stalking just as a woman would, however only stalking against women by men would be a punishable offence under Section 354D of the Indian Penal Code.

4. **Of Kidnapping, Abduction, Slavery and Forced Labour – Sections 366, Sections 366A, Sections 366B** deal with kidnapping, abducting or inducing a woman to compel her marriage etc; procurement of minor girl; importation of girl from foreign country respectively. However, these provisions do not offer protection to persons who do not fall within the definition of “woman” under the Indian Penal Code while they may be equally susceptible to these offences.

5. **Sexual Offences – Sections 375 to 376DB**

This is perhaps the most dangerous of all exclusions. Sections 375 to 376DB deal with rape but would only cover a “woman” defined under the Indian Penal Code. A transwoman would remain susceptible and vulnerable to being raped and the perpetrator may only be punished with lesser jail term.

6. **Of Unnatural Offences – Section 377**

Until the pronouncement of the judgment in Navtej Singh Johar vs Union of India in 2018, the mere act of engaging in sexual intercourse was punishable for homosexuals and certain transgenders. While the last portion of the judgment made it clear that only consensual acts were being decriminalized, the language of Section 377 continues to be unamended to deal with consent, which would leave homosexual rape and transgender rape in a grey area.

## **Conclusion**

It can effectively be concluded that Indian Penal Code follows a heteronormative narrative that is injurious to sexual and gender minorities. It leaves them vulnerable to certain crimes and has too many grey areas which need to be filled. It appears that it would be useful to adopt the gender/sex inclusive narrative of statutes from around the world and amending Section 10 would be a first of many steps.

Much more research would be necessary at a governmental level to understand the problems and difficulties faced by sexual and gender minorities. Amendments to existing

statutes, inclusive interpretations of existing laws and new enactments would be necessary to bring up oppressed sexual and gender minorities into the same status of cisgender citizens.