

# **A critical analysis on sex - gender variation: a lex-loci determination**

**Author(s), DR. KRUSHNA CHANDRA DALAI**

---

**1**

**Euro Afro Studies International Journal®  
(EASIJ.COM)**

Email: [editor.easij@gmail.com](mailto:editor.easij@gmail.com) , [editor@easij.com](mailto:editor@easij.com) Website: [easij.com](http://easij.com)

Published By



**Abstract:**

The problem of sex determination can be treated as a form of sex discrimination and violation of human right. In spite of national and international protections, transsexuals have been a neglected community in this rem, Trans sexualism often speak of an experiencing this situation as an imprisonment in the wrong body.” Any discussion on the Third Gender must begin with the distinction between the much ignored or may be deliberately under-played difference between the concepts of “gender identity” and “sexual orientation hence the sexual differentiation from sex discrimination. Author tried his best to explore that the sexual orientation, which lies at the core of “private space”, is expressed through sexual relations and ought to be viewed as a core part of individual identity and as an inalienable component of the Right to Life. Trans-sexualize is an ancient phenomenon, which became more widely known to the court only in this 20th century because with the possibility of sex change surgery arising, the law typically has operated under the assumption that the terms male and female are fixed and

**EASIJ**Accepted 1 December 2019  
Published 7 December 2019  
DOI: 10.5281/zenodo.3566720

unambiguous despite medical literature demonstrating that these assumptions are not true especially in matters related to sex and gender variation. Apart from inter sex persons, many more variation exist like transgender, transsexual and transvestite, who constantly have challenged the socio-legal binary exemption as sex and gender. On this basis the Court rejected the biologically determined binary of male or female gender. It declared that India's centre and state governments should grant legal recognition of a transgender person's identity as male, female or third gender in accordance with that person's self-identification. It also declared that centre and state governments should take positive measures to fully realize the rights of transgender people includes as ensuring that transgender people benefit from reservations for educational institutions and public appointments; making available focused medical care and social welfare schemes; and conducting public awareness raising campaigns to reduce society's ostracisation of the represented groups. In a judgment which drew heavily from international human rights principles and standards, the Court found violations of a number of fundamental rights under the Indian Constitution.



Specifically, the Court stated that the right to choose one’s gender identity is integral to the right to a life with dignity and therefore falls within the scope of the right to life under the Indian Constitution (Article 21). The right to equality before the law under Article 14 of the Indian Constitution applies to all persons, including transgender persons, who are thereby entitled to equal protection of the law in all spheres including employment, health care, education and civil rights. The prohibition of sex discrimination under Articles 15 and 16 of the Constitution is a prohibition against all forms of gender bias and gender based discrimination including discrimination against transgender people. The state is obliged to take affirmative action to advance “socially and educationally backward classes” and this includes transgender people, who have faced centuries of injustice (Article 15(4)). Expressing one's identity through words, dress, action or behavior is included in the right to freedom of expression (Article 19). The values of privacy, self-identity, autonomy and personal integrity are also fundamental rights under Article 19 and these rights belong to transgender people as well as others, in this background, the current paper



makes an attempt to highlight the exploitation which the victims of injustice with alternative identities have been subjected to, both socio and legal complexity. The discourse of social justice, from distribution or redistribution to a dignified recognition, primarily with reference to the injustices associated with sexuality and gender, both of all are viewed by the author as socio-cultural and are seen to be rooted in social patterns of representation, interpretation, and communication. All legal consequence is concluding remarks of self-identification of self-determination for Gender, Sexual Orientation, Yogyakarta Principle and its social recognitions is an important part of the constitutional right to live with dignity as a mankind. The best analysis is explained with justification in this present core paper with full context at the last quarter of 21<sup>st</sup> century in the gracious interest justice.



**Keywords:** sex-gender variation, Trans sexualism, problem of sex determination, third gender, violation of human right,

About Author

**Author(s), Hod,.Post Graduate Studies in Department of Law, Kalinga University, Naya-Raipur, Chattisgarh, India.**

(Corresponding Author) Email: [profpgstudieslaw@gmail.com](mailto:profpgstudieslaw@gmail.com)



## Introduction

Indian is a nation that provides Freedom of justice, dignity and equality for mankind, which was also an essential for nation building. For centuries, humans have been fascinated by the idea of psychological gender differences, many believing that these differences are both large and biologically determined. In this context, it has been argued that such differences are determined by genetic and hormonal influences affecting brain anatomy or brain function or both. Often, it has been speculated that these biological differences are a consequence of sex-gender-specific evolutionary processes that ultimately determine sex-/gender-specific roles in human societies. This research has also been strongly influenced by animal research, where it is much easier than it is in humans to study genetic differences in terms of sex/gender, including at the molecular, hormonal, and neurophysiologic levels. However, it is not a simple endeavor to transfer results and interpretations from animal research to explain human behavior and cognition, since there are still some substantial differences between humans and other animals. One major difference is that the brain of humans is different in many respects from the brain of most other animals, although the human brain comprises the same neurons as even simpler constructed animals. The human brain comprises the largest number of neurons compared with all other animals in absolute terms. In addition, it is characterized by extreme, and in the animal kingdom unprecedented, interconnectivity that provides the necessary basis for the computation and storage of information, which is



necessary for human learning and culture Tran's sexualize is a form of human diversity in sexual formation, reported since antiquity, in which an individual seeks to alter the individual's sexually differentiated body in order to bring it into sexual harmony with the individual's innate sexual identity or brain sex. For many decades, the medical and psychological communities have attempted to resolve the issue of how one's sex (whether an individual is male or female) should be determined for medical purposes. Until recently, however, legal authorities generally have been blind to the need to define the terms male and female for legal purposes. The law typically has operated under the assumption that the terms male and female are fixed and unambiguous despite medical literature demonstrating that these assumptions are not true especially in matters related to sex and gender variation. The law has largely ignored other medical conditions in which an individual's sex may be ambiguous. Recent medical literature indicates that approximately one to four percent of the world's population may be inter sex and have ambiguous or no congruent sex features. Access to public sanitation facilities and toilets in India is already problematic and discriminatory on the basis of gender for women and girls. This person has particular difficulties in accessing sanitation facilities in public spaces, including public transport. They are often denied access to toilets corresponding to their self-identified gender. These impacts of these persons' rights to water and to freedom of movement, which in turn adversely impacts so these persons' access to work, education and cultural spaces and public events and other functionalities, etc.





## Significance of Biological Perspectives

Today, in rapidly changing social economic environment, mankind are expressed to nontraditional tasks to share the burden members of male members in the family, The transsexuals are one who in some deeper sense believe that they are another gender than the sex they are born. Kuiper defines transsexuals as - "The phenomenon in which someone with the normal internal and external sexual organs of one sex has and incontestable conviction of belonging to another sex. With respect to understanding psychological gender differences, individual learning experiences, culture, gender stereotypes, gender equity, and biosocial interaction are of the utmost importance. In addition, recent brain plasticity research provides evidence that gender brain differences might also be shaped by experience, education, and culture or a combination of these. Thus, these new insights into the influences on behavior, brain anatomy, and brain function shed new light on the often-reported gender differences. In this mini-review, I summarize and discuss these new findings and ideas. Gender identity refers to a person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth. Sexual orientation, on the other hand, refers to the individual's enduring physical, romantic and/or emotional attraction to another person. Both of these are integral to one's personality and are aspects of self-determination, dignity and freedom. Unfortunately, by defining individual identity purely in biological terms, most of the literature before 1960s failed to distinguish sex from gender, and therefore the prohibition of certain private, consensual sexual relations under section



377 unreasonably abridges the right of privacy and dignity within the ambit of Right to Life and Liberty under Article 21 of the Indian constitution.

In a similar wave of thought lies the observation of Justice V.R. Krishna Iyer, in *Prem Shankar Shukla v. Delhi Administration*, it is as observed that human dignity is concerned with both physical and psychological integrity along with empowerment. He added that this dignity is enhanced by laws which are sensitive to the needs, capacities and merits of different individuals, taking into account, the context underlying their differences. In *Francis Cora lie Mullin v. Administrator, Union Territory of Delhi*, the Supreme Court argued that the “Right to dignity includes expressing oneself in diverse forms...all of which is essential for the complete development and evolution of persons”. In this background, the current paper makes an attempt to highlight the exploitation which the victims of injustice with alternative identities have been subjected to, both socially as well as legally. Postulating a repressed and homogenized identity, efforts have been made to discover, acknowledge and represent their fundamentally concealed identity. But the author is conscious of the fact that by claiming an independent identity, we can reverse or struggle with an oppressive gaze though we cannot back out of it and replace our muted or distorted identities with a real and authentic one. Further, fixing an autonomous identity always presumes a fixation of the “interpellation other”. There is also a “respond to a request, in which the moment of subjection necessarily implies oppression. The person-as-subject in such a situation is defined by the other and the person recognizes themselves as an image or reflection of the „other“. This includes unequal



access to educational opportunities, discrimination during the recruitment process, discriminatory and gendered working conditions, and a lack of job security. “Pre-employment” for job performances are also a cause of sorrow in this universe.

Education is the teacher of teachers, education manifests the man and transforms as a human being but the Educational and training opportunities are often denied to these persons due to harassment, bullying, and violence. School uniforms, dress codes, limitations on participation in sports. They are often denied access to toilets corresponding to their self-identified gender. This impact in persons’ rights to water and to freedom of movement, which in turn adversely impacts these persons’ access to work, education and cultural spaces and public events at public transport. This is also not access to public transport is affected by discrimination based on real or perceived gender identity and expression.

### **Research Methodology**

In the scientific literature and the popular press, the terms sex and gender differences are often used interchangeably. However, they convey different meanings. The term sex is used mostly to group people into females and males on the basis of an individual’s reproductive system and of secondary sexual characteristics. Gender refers to the social roles based on the sex of the person or personal identification of a person’s own gender. Since it is not clear whether the brain and behavioral differences that I discuss in this mini-review are sex- or gender-based, I use the term sex/gender differences throughout the text. Difficulties in obtaining accurate gender identity documents, including school records, adversely affect



employment prospects. In recruitment, all at conditions of work, Public and private workspaces are often gendered within a binary of male-female with resulting discriminatory effects; including the imposition of restrictive and discriminatory dress codes and standards of appearance is complex.

The research methodology is primarily qualitative and draws from both primary and secondary sources. The author admits that it was extremely difficult to stand upright on the threshold of objectivity, for the victimized transgender lacked voices, as the social stage has been quite unwelcoming for the majority of them. Some of the key informants included transgender (primarily Male to Female), police officers, lawyers, media people, representatives from the civil society and the youth (primarily those between 18-20 years of age). The Socio-Legal Exploitation of the Third Gender rampant in India. This analysis focused on comparing the data collected and assessing the degree of the compliance with the international human rights. The focus has been framed through the (de)constructivist theories of sexual identity; taking its roots primarily secondary in nature further of little constrain also it is instead of superseding marginalization, actually work for reinforcing it.

### **Case Study Observations and Enlightenments**

The judiciary is the third pillar in a democratic form of our country; it is the corner stone and watch dog of the nation. The judicial activism plays a prominent role in every endeavor. There are some observations are adjudicated by Supreme Court analyzed with its core observations are that **in** 15<sup>th</sup> April 2014, in a judgment which has been widely praised by equal rights



activists around the world, the Supreme Court of India held that recognizing only two gender identities (male and female) violated constitutional rights. In *National Legal Services Authority v Union of India and others*, the Court found that the right to self-identify one's gender, including as "third gender", was an. Further, the state was required to take affirmative action measures in order to achieve equality for transgender people. The decision – its tone and approach in stark contrast to the Court's recent regressive decision in *Suresh Kumar Koushal and another v NAZ Foundation and others* – should offer inspiration to courts in the many countries which continue to recognize only a gender binary. Baring few countries, there is no recognition of their rights and are sometimes forced to lead animal survival life. Before Naz Foundation's case, humiliation, torture and cruelty with the sexual minorities were mostly unnoticed in Indian society. In the said case, some legal protections were recognized by the higher judiciary in India.

In this core aspect of this paper, I have tried to recognize and suggest a mechanism to protect the rights of transsexuals (including sexual minorities). There are two possible remedies. The rights of transsexuals should be recognized as they are born in the name of third gender or under other nomenclature, as in Albania, or their rights mentioned under the constitution or in other statutes be protected under state mechanism. To protect the rights of transsexuals, I am suggesting to establish an Intensive Research and Educational Center for conducting research on the cause of trans-sexuality and to cure it by all possible treatments like psychological, hormonal, biological or surgical. The Judicial system should also be ready to



protect and enforce the rights of sexual minorities which is new emerging field of law. The case was brought on behalf of a number of groups who do not identify clearly as male or female when a biologically determined binary approach to gender is applied. These groups include Hijiras, Kothis, Aravanis and other transgender people (“the represented groups”). The Court was asked to consider whether the recognition of only the binary genders of male and female under Indian law and the lack of legal measures to cater for the needs of the represented groups contradicted a number of constitutional rights including the rights to a dignified life, equality before the law, non-discrimination and freedom of expression. In arguing that these rights were being violated, the petitioners noted that the gender a person is assigned at birth determines his or her rights in relation to marriage, adoption, inheritance, succession, taxation and welfare and that the absence of legislation protecting transgender people means they face discrimination in various areas of life. Some observations are given below: -

- The right to choose one’s gender identity is integral to the right to a life with dignity and therefore falls within the scope of the right to life under the Indian Constitution (Article 21).
- The right to equality before the law under Article 14 of the Indian Constitution applies to all persons, including transgender persons, who are thereby entitled to equal protection of the law in all spheres including employment, health care, education and civil rights.
- The prohibition of sex discrimination under Articles 15 and 16 of the Constitution is a prohibition against all forms of gender bias and gender based discrimination including



discrimination against transgender people.

- The state is obliged to take affirmative action to advance “socially and educationally backward classes” and this includes transgender people, who have faced centuries of injustice (Article 15(4)).
- Expressing one's identity through words, dress, action or behavior is included in the right to freedom of expression (Article 19). The values of privacy, self-identity, autonomy and personal integrity are also fundamental rights under Article 19 and these rights belong to transgender people as well as others. The Court finally ruled that the determination of the gender to which a person belonged “is to be decided by the person concerned.” The Court rejected any biological test and instead decided to “follow the psyche of the person in determining sex and gender.” The India Supreme Court thus recognized a “third gender” and the right of transgender persons to self-identify their gender.

Considering the sources cited by the India Supreme Court from nations as diverse as Argentina, Germany, and Nepal, it should be clear that the issues of transgender rights are wide and varied. This groundbreaking decision gives legal recognition to a third sex without requiring prior medical treatment as a condition of receiving those legal rights. Employers, educational institutions, prisons, and government units at all levels have much to consider about changes that will be necessary, not only in India but around the world.

The civic society strongly welcomes the judgment of the Court as an important step in the advancement of the equal rights of transgender and intersex persons. ERT urges the Indian



central and state governments to act swiftly to implement the decision. Furthermore, this is hopeful that other states may draw inspiration from the judgment and act to ensure that the right of every person to legal recognition of their self-identified gender is respected. The core aspect is to throw light on the status of transgender in India, in the background of the courts having acknowledged the travesty of their being, and despite being sympathetic to them to the extent of even affording recognition, have been unable to ensure a dignified existence to them. Elaborate a comprehensive Transgender Persons (Protection of Rights) Act that guarantees equal rights and non-discrimination to transgender persons, in accordance with international law and standards, based on consultation with the community, consistent with India's international human rights obligations, and in line with ***National Legal Services Authority. v. Union of India***. This is a notable observation adjudicated in the time of need for welfare of mankind.

## Conclusion

This paper is an incomplete without any concluding remarks, so attempt is to shift the focus of the discourse of social justice, from distribution or redistribution to a dignified recognition, primarily with reference to the injustices associated with sexuality and gender, both of which are viewed by the author as socio-cultural and are seen to be rooted in social patterns of representation, interpretation, and communication. The main objective has been to throw light on the status of transgender in India, in the background of the courts having acknowledged the travesty of their being, and despite being sympathetic to them to the extent



of even affording recognition, have been unable to ensure a dignified existence to them. This observation on Gender, Sexual Orientation, Yogyakarta Principle, Tran phobia, there is also discriminatory eligibility requirements place gender restrictions on some jobs, which effectively exclude transgender and gender non-binary persons. Invasive medical tests are sometimes imposed during recruitment processes leading to further discrimination, including the “outing” of these persons without their consent. This discrimination is further compounded by the difficulty of obtaining required identity documents that are consistent with and match into their gender identity. Documents are often refused to these individuals by State institutions such as universities. Due to the difficulties in accessing work in the formal sector, transgender and gender non-binary persons often take up work in precarious employment spaces in the informal sector, or work as sex workers and resort to begging thereby further exposing themselves to human rights abuses. Public Spaces these persons were face discrimination, including harassment and physical and verbal assault, when seeking to access public spaces that are essential to the enjoyment of human rights living a fulfilling and dignified life. This is purely violation of human right and violation of constitutional right of mankind. All such incidents are made the union territory and UNO ashamed. So there should be rigorous provision by international bodies and NGOs too, dealing with betterment of mankind in the side this global scenario. There is also a need of support from every corners of the society. They are also the citizens of this nation; they are having all such rights and duties as embodies in part-iii of the Indian constitution and international conventions in the gracious interests of justice.



## References

Atken, M., Steensma, T. D., Blanchard, R., VanderLaan, D. P., Wood, H., Fuentes, A., ... Zucker, K. J. (2015). Evidence for an Altered Sex Ratio in Clinic-Referred Adolescents with Gender Dysphoria. *The Journal of Sexual Medicine*, 12(3), 756–763.

A.I.R.2016.SC.

Barron, C., & Capous-Desyllas, M. (2017). Transgressing the Gendered Norms in Childhood: Understanding Transgender Children and Their Families. *Journal of GLBT Family Studies*, 13(5), 407–438.

Butler, G., De Graaf, N., Wren, B., & Carmichael, P. (2018). Assessment and support of children and adolescents with gender dysphoria. *Archives of Disease in Childhood*, 103(7), 631–636.

Deutsch, M. B. (2016). Making it count: Improving estimates of the size of transgender and gender nonconforming populations. *LGBT Health*, 3(3), 181–185.

Gartner, R. E., & Sterzing, P. R. (2018). Social Ecological Correlates of Family-Level Interpersonal and Environmental Microaggressions toward Sexual and Gender Minority Adolescents. *Journal of Family Violence*, 33(1), 1–16

Potoczniak, D., Crosbie-Burnett, M., & Saltzburg, N. (2009). Experiences regarding coming out to parents among African American, Hispanic, and White gay, lesbian,

bisexual, transgender, and questioning adolescents. *Journal of Gay & Lesbian Social Services*, 21(2-3), 189–205.

Katz-Wise, S. L., Ehrensaft, D., Veters, R., Forcier, M., & Austin, S. B. (2018). Family Functioning and Mental Health of Transgender and Gender-Nonconforming Youth in the Trans Teen and Family Narratives Project. *The Journal of Sex Research*, 55(4-5), 582–590.

The New Indian Express, Sunday, decemeber-11.1999.

Iley, E. A., Clemson, L., Sitharthan, G., & Diamond, M. (2013). Surviving a gender-variant childhood: The views of transgender adults on the needs of gender-variant children and their parents. *Journal of Sex & Marital Therapy*, 39(3), 241–263.

Schimmel-Bristow, A., Haley, S. G., Crouch, J. M., Evans, Y. N., Ahrens, K. R., McCarty, C. A., & Inwards-Breland, D. J. (2018). Youth and caregiver experiences of gender identity transition: A qualitative study. *Psychology of Sexual Orientation and Gender Diversity*, 5(2), 273–281.

Tz-Wise, S. L., Budge, S. L., Fugate, E., Flanagan, K., Touloumtzis, C., Rood, B., ... Leibowitz, S. (2017). Transactional pathways of transgender identity development in transgender and gender-nonconforming youth and caregiver perspectives from the Trans Youth Family Study. *International Journal of Transgenderism*, 18(3), 243–263.



### Cite this article:

**Author(s)**, Dr. Krushna Chandra Dalai (2019). "A critical analysis on sex - gender variation: a lex-loci determination". Name of the Journal: Euro Afro Studies International Journal, ([EASIJ.COM](http://EASIJ.COM)), P, 61 - 80. DOI: 10.5281/zenodo.3566720, Issue: 1, Vol.: 1, Article: 4, Month: December, Year: 2019. Retrieved from <https://www.easij.com/all-issues/>

### Published by



0

**Euro Afro Studies International Journal®  
(EASIJ.COM)**

Email: [editor.easij@gmail.com](mailto:editor.easij@gmail.com) , [editor@easij.com](mailto:editor@easij.com) Website: [easij.com](http://easij.com)

Published By

