

## MOVING TRANSGENDERED FORWARD : MAPPING THE EMERGENCE OF THIRD GENDER HUMAN RIGHTS

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### Abstract

*The study of transgender/laws relations represents a fairly recent development. The case concerns legal gender recognition of transgender people, and whether the lack of legal measures to cater for the needs of persons not identifying clearly as male or female contradicts the constitutional ideals of inclusive democracy. Until recently, Indian law only recognised the binary genders of male and female, and lacked any provision with regard to the rights of transgender people. Recently, the Indian Supreme Court has recognised transgender as “third gender”. However, in the absence of legislation protecting transgender people, the community faced discrimination and harassment in various areas of life. No transgender will actually be happier when recognising as a member of “third sex”. This paper advocates for a comprehensive legislation on a sound policy to meet the needs of the inter-sexed people.*

### I Introduction

Transgender persons are denied—either by law or practices—basic civil, political, social and economic rights. It is time to assert that there is no ‘wrong body’ and that all bodies are alright, whatever their shape or genital status. It is the power of the norm, and of medicine and law, which take the cultural meanings made of biology as ultimate truth, that sustains our deviant status, body regulation and discrimination. Transgender human rights issues have only entered the international discourse on human rights in the last 30 years, even though transgender people have suffered discrimination, persecution and injustice throughout the world since the beginning of the twentieth century.

This article introduces the transgender/law relation through an analysis of judicial approaches that have consistently refused to recognise the sex claims of transgender people at large. These approaches to transgender, through which law’s repressive legal power has been displayed, have been articulated in terms of biologic. While such approaches have been consistently articulated a sex is determined at birth narrative whereby sex precedes, and therefore provides, an apparent foundation for gender, the precise configuration of legally relevant factors to be considered at birth will be seen to vary. Recently, the Supreme Court has recognised the reform jurisprudence and gave a new identity to transgender people and opened channel for debates about the rights of transgender persons.

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The legal decision within, and indeed the decision that has become most associated with, a human rights approach is the Indian decision of *Legal Services Authority v. Union of India*.<sup>1</sup> It is important to consider—not only because of its considerable impact on judicial thinking, but because it provides a context in which to both understand and gauge subsequent reform jurisprudence. There is ample evidence for the transgender claim that identifications, practices and desires, which we might today call transgendered, have existed trans-historically. The discourses generated by sexual science have, in large measure, created the terms for corresponding transsexual desire and transgender identification in the legal present. That is to say, judicial reasoning, as well as contemporary law reform arguments, around transgender bodies operates within a frame established by the imprint of sexual science.<sup>2</sup> In India, the concept of third gender has emerged in the context of the practice and legitimisation of sex reassignment surgery in the West. Against this backdrop the claims of transgender people need to be articulated in the context of human rights.

The fundamental rights enshrined in our Constitution entail non-discrimination based on caste, creed, language and sex. The architects of the Constitution used the term ‘sex’ in the strict anatomical sense of being a man or woman. There was a deep silence on the existence of sexual minorities and their sufferings and discrimination faced from the mainstream heterosexual society. Even if it is assumed that homosexual people were not very visible during this period, the relatively large number of visible group of *hijras* who carried a socio-religious identity was denied adult franchise (till recently). In 1994, the Election Commission gave a directive that *hijras* shall be enrolled in the electoral rolls by mentioning their gender as either male or female. Recently, India's election commission for the first time allowed a third gender choice—“other”—on voter registration forms. The change was made in time for the national elections currently taken place. Some 28,000 voters registered themselves in that category. Overall, there are an estimated 3 million transgender people in India who are still living in dilemma.

This article aims to provide an account of the emergence of transgender jurisprudence as an object of scientific study from human rights perspective. In the process it will map the changing nature of scientific knowledge about transgender bodies as a prelude to understanding legal approaches to their legal claims. Before coming to various legal issues involved in and related to transgenderism, it is essential to define transgenderism which has gained legal recognition in the context of the recent Supreme Court judgment on transsexualism.

## **II Biological and psycho-social explanations of transgender bodies**

It is part of our anthropology, and of our human existence, that we recognize only men and women in our social system, which reflects the gender identity of persons on all

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<sup>1</sup> (2014) 5 SCC 438.

<sup>2</sup> Andrew Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (London: Cavendish Publishing Limited, 2002), p. 17.

state's documents. There is no scope for third sex in our legal and social systems. In other words, there is no room for intersexes—socially, legally or psychologically. But the medical experience teaches us that being intersex is not a voluntary act of the concerned person but a medical fact that must be recognised. In about 5 in every 1000 individuals the process of normal classification of sex as boy or girl, is liable to errors, and this error can be detected when the brain sex is developed at the age of 3 or 4 well after birth. Through sex reassignment surgery and hormone therapy the sex errors of the body can be corrected. In order to do justice to the individuals in whom sexual differentiation of the brain postnatally has not followed the path of external genitalia, the law must make provisions that such individuals can correct their body as per their brain sex. Studies indicate that genetic and biological variables interact with the psychic components and environment to determine gender identity. On the basis of clinical and anthropological studies, one may conclude that the major differentiation of gender identity takes place postnatally under the influence of life experiences dictated by the sex assignment and rearing. Psychic components have important implications for social roles as males or females.

While there is ample evidence for the claim that particular identifications, practices and desires, which we might today call transgendered, have existed historically, contemporary cultural understandings of this phenomenon can be traced to late 19<sup>th</sup> century sexological discourse. It is in the writings of early sexologists, men like Karl Heinrich Ulrichs (*third sex*), Henry Havelock Ellis (*sexual inversion*) and Magnus Hirschfeld (*transvestite*), that a vocabulary first emerged for describing transgender identities and desires. It was within the domain of sexology that transgender bodies were first given both some degree of visibility and subjected to intense institutional scrutiny.

According to biological approach a sex is determined at birth, whereby sex precedes, and therefore provides an apparent foundation for gender, the reform jurisprudence has so far generated two alternative legal tests for determining sex. The first test, which has been privileged, constructs sex as being premised on psychological and anatomical harmony. This test has its common law origins in the United States but has been pursued more consistently in Australia and New Zealand. The second test constructs sex as premised on psychological, social and cultural harmony. This approach, dispensing with anatomical considerations, as it does, has so far received only limited judicial support. The biological approach to the determination of sex is considered to have exclusionary and negative discursive effects on transgender persons. The recent Supreme Court decision on transgender has provided an apparent foundation for gender. In a number of countries, particularly in the United States, Australia and New Zealand, courts have abandoned chromosomes and birth as the governing moment in determining sex for legal purposes, preferring instead to articulate a test of psychological and

anatomical harmony whereby the fact of sex reassignment surgery assumes cardinal importance.<sup>3</sup>

### III Breaking legal fidelity to science in the determination of sex

There is no legal definition of sex. Judges therefore turn to doctors, whose positions are complex and may even be mutually contradictory. Judges place a high value on science in general and biology in particular. The accepted legal criterion of sex is biological, yet the law recognizes only two sexes, whereas biology acknowledges the existence of a polymorphous in-between state. At the European Law Colloquium on Transsexualism, Medicine and the Law held in Amsterdam in 1993 (Council of Europe, 1995), jurists put forward the idea of a continuum and of a third sex. Neither transsexuals nor intersexed would be satisfied by such a situation, since they wish to belong wholly to one of the two genders and not to be assigned a separate hybrid status. It is therefore essential which of the various components of sex is to be deemed most relevant—that is, to choose a sex. The doctor chooses, or contributes to the choice, in the case of intersex. The refusal to recognise the psychological and/or social sex shows the law's repressive power which has been displayed in terms of biology. Judge Van der Reijt, Chairman of the Dutch Gender Identity Foundation, made the following suggestion at the Council of Europe Colloquium: 'The best and easiest way of dealing with the legal problems of transsexual is simply to abolish the specification of sex in birth certificates'. The statement of a person's sex is virtually useless.

In *Corbett v. Corbett*,<sup>4</sup> a case concerning the validity of marriage between a biological male petitioner, Arthur Corbett, and a post-operative (male-to-female) transgender woman respondent, April Ashley, Ormrod J, after taking an opinion from medical expert witnesses, emphasised on chromosomal, gonadal and genital factors as crucial in sex determination. He dismissed the idea that transgender might have an organic or hormonal basis.<sup>5</sup> Therefore, according to biological criteria, sex can be determined only within the specific biological and temporal framework. It is clear from the *Corbett* decision that Ormrod, J ignored psychological, gonadal and genital factors, reducing the concept of sex to a congruence of chromosomal, gonadal and genital factors. Of more significance, perhaps, is the fact that Ormrod J. privileged the genital factor in the event of 'incongruence'.

The psychological and anatomical harmony test formulated by Pecora J in *Re Anonymous*<sup>6</sup> which appears to be a convincing one in favour of gender identity, has

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<sup>3</sup> See *Re Anonymous* 2933 NYS 2d 834 (1968); *MT v. JT* 355 A 2d 204 (1976); *R v. Harris and McGuinness* (1989) 17 NSWLR 158; *Secretary, Department of Social Security v. HH* (1991) 13 AAR 314; *Secretary, Department of Social Security v. SRA* (1993) 118 ALR 467; *M v. M* (1991) NZFLR 337; *Attorney General v. Otahuhu Family Court* (1995) 1 NZLR 603.

<sup>4</sup> (1970) 2 All ER 33.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Re Anonymous*, 293 NYS 2d 834 (1968).

assumed a greater prominence in judicial discourse. In that case, which involved an application by a (male-to-female) transgender woman to have her birth certificate changed to reflect her post-operative status, Pecora J held the applicant to be female because her anatomy had been brought into conformity with her psychological sex.<sup>7</sup> Pecora J expressed the view that the question of a person's identity should not be limited to the biological analysis.<sup>8</sup> He has insisted that once surgical intervention has taken place, whereby—anatomical sex is made to conform to psychological sex the position is identical to that of the pseudo-hermaphrodites who has been surgically impaired.<sup>9</sup>

The famous case on the point of gender identity is *Van Oosterwijck v. Belgium*.<sup>10</sup> In this case, a petition was brought against the Kingdom of Belgium by an operated female-to-male transsexual (a lawyer, by the way, working with the Commission of the European Community in Brussels). In this case, the European Commission on Human Rights for the first time and unanimously, adopted the idea of a fundamental right of an individual to his “gender identity.” The Commission in 1979 reproached the Belgium State for having “...refused to recognise an essential element of his personality: his sexual identity resulting from his changed physical form, his physical make-up and his social role. In doing so, it treats him as an ambiguous being an “appearance”, disregarding in particular the effects of lawful medical treatment aimed at bringing the physical sex and the psychical sex into accord with each other.”

#### **IV Gender Identity as Human Rights Issue**

Gender identity is a human rights issue. The gender identity is about what individuals have in common with other people, and what differentiates one from others. At its most basic level, it gives one a sense of personal location in the society. In the modern world, these notions have become especially complicated and confusing.<sup>11</sup> Each individual lives with a variety of potentially contradictory identities, which battle within the body and mind as man or woman. Among the multiple identities that could be possessed by an individual, sexual identity is one. With sexual identity, it is generally those individuals who are considered sexual minorities, who define and declare their independent and separate identities.<sup>12</sup>

Gender identity refers to one's basic sense of self as a male or a female. It has both physical and psychic components. Biological sex and gender identity usually are congruent. In some cases, however, mild to severe discrepancies exist, causing feelings of cross-dressing or other forms of gender role behaviour. Transvestism and transsexualism

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<sup>7</sup> *Id.* at 838.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Id.* at 837.

<sup>10</sup> (1981) 3 EHRR 581.

<sup>11</sup> Sherry, J., *Social Work Practice and Men Who Have Sex With Men*, 30 (New Delhi: Sage Publications, 2005).

<sup>12</sup> *Ibid.*

are perhaps better described as an extreme form of gender dysphoria. In India, a common term used to describe transgender people, transsexuals, cross-dressers, eunuchs and transvestites is *hijra*.

### V International discourses on transgender human rights

Protection from abuse remained elusive for lesbians, gay men, bisexuals and transgender people, despite the reaffirmation in Article 1 of the Universal Declaration of Human Rights (1948) that “all people are born free and equal in dignity and rights...” In virtually, in every country in the world, people suffered from *de jure* and *de facto* discrimination based on their actual or perceived sexual orientation or gender identity. Some of the more visible controversies regarding the rights of sexual minorities at international forum have involved the legalisation of homosexuality and the same-sex marriages. In Western countries, some of the issues involved are the services of lesbians, gay men and transsexuals in the armed forces, local and statewide efforts to limit their civil rights and questions concerning rights to marriage, child custody and the change of sex.

International Covenant on Civil and Political Rights (ICCPR) (1966) is important because in 1994, in the case of *Toonen v. Australia*,<sup>13</sup> the UN Human Rights Committee of the United Nations held that the reference to “sex” in Articles 2 paragraph 1 (non-discrimination), and 26 (equality before the law) of the ICCPR should be taken to include sexual orientation. With this case, the Human Rights Committee created a precedent within the UN human rights system in addressing discrimination against transgender, gays and lesbians.

Apart from the violation of human rights enshrined in ICCPR, there are also provisions related to the protection, ensuring and safeguarding of human rights in the other equally important international instrument, namely, the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966). Many of these provisions which relate to the inherent dignity of the human body, to pursue economic, social and cultural development can be taken help of in support of same-sex couples' right to marriage and family life. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979) can be relevant in cases of discrimination against gays and lesbians if they denied the equal benefits of law or the equal treatment of law.

In the United Nations arena, as noted above, there has been one quasi-judicial decision concerning the right to privacy for gay men, i.e. *Toonen*.<sup>14</sup> Although *Mr. Toonen* and the Tasmanian Gay and Lesbian Rights Lobby succeeded in that case, in other areas the UN has not been particularly receptive to lesbian, gay and transgender issues (for example, at the Fourth World Conference on Women in Beijing, all references to sexual orientation were ultimately removed from the Platform for Action.<sup>15</sup> More recently,

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<sup>13</sup> United Nations Human Rights Committee, *Report of the Human Rights Committee*, Communication No. 488/1992, UN Doc CCPR/C 50/D 488 (4 April 1994) before the UN Human Rights Committee.

<sup>14</sup> *Ibid.*

<sup>15</sup> See Dianne Otto, ‘Lesbians ? Not in My Country’ (1995) 20 *Alternative Law Journal*, 288.

during the negotiations for the International Criminal Court in Rome, the term 'gender' was the subject of sustained debate as some states believed that the term might bring lesbians, gay men and transgender people within the protection of the Court's Statute.<sup>16</sup> Indeed in some instances, the UN has been hostile to such issues, as demonstrated by the suspension of the International Lesbian and Gay Association ('ILGA') from Consultative status with the Economic and Social Council.

One of the first human rights groups that came forward to take up the issues of sexual minorities in India was the *Aids Bhedbhav Virodhi Andolan* (ABVS). The ABVS, with the help of some gay people, published a citizen's report on the status of homosexuality in India titled, 'Less than Gay' in 1991. This report became a comprehensive record of the historical data on same-sex behaviour in India and the attitudes of the various social institutions towards homosexuality. The demand of the sexual minorities for freedom and equality in India was put forth in an organised way in a charter of demands. The significant elements in the 19-point charter were repeal of all discriminatory legislation including Section 377, IPC and the relevant sections of the Army and Air Force Acts; enactment of civil rights legislations; amendment of the Constitution to include equality before law on the basis of sex and sexual orientations; establishing of a commission to deal with the human rights abuses faced by homosexual people; and amendment of the Special Marriage Act to allow same-sex marriages.<sup>17</sup>

#### **VI Transgender rights in European law and policy**

In Europe, transgender people have had even less success than lesbians and gay men. However, in the past few years there have been a series of significant decisions that suggest that European Court of Human Rights may take a more positive view of transgender claims. It is to be mentioned here that almost all claims by transgender arose out of sex reassignment surgery by which the transgenders claimed for the recognition of their new sex.

#### **Privacy**

The right to privacy under the ECHR has produced very little for transgender people. Of particular concern to transgenders is the fact that their new sex is not recognised for basic state documents, such as birth certificates, passports and so on. Several cases have challenged states' failures to recognise fully a transgender person's new sex, but most of these cases have failed. In two early cases, *Rees v. United Kingdom*<sup>18</sup> and *Cossey v. United Kingdom*,<sup>19</sup> the European Court of Human Rights took the view that a state does not have to change a person's birth certificate upon sex reassignment. However, in *B v.*

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<sup>16</sup> See Cate Steains, Gender Issues, in Roy Lee (ed.), *The International Criminal Court: The Making of the Rome Statute—Issues, Negotiations, Results* (1999) 357, 372-74.

<sup>17</sup> ABVA, *Less than Gay—A Citizens Report on the Status of Homosexuality* (New Delhi: AIDS Bhedbhav Virodhi Andolan, 1991), pp. 92-93.

<sup>18</sup> (1987) 9 EHRR 56.

<sup>19</sup> (1990) 13 EHRR 622.

*France*,<sup>20</sup> the Court held that a state does have to allow a transgender's new sex to be recognised on everyday documents, such as identity cards, driver's licenses and social security numbers. The Court distinguished *Rees* and *Cossey* on the basis that a refusal to alter documents in everyday use involved a much greater intrusion into a transgender person's life than did a refusal to alter a birth certificate, which was infrequently shown to others.

The right to privacy is denied by the existence of sodomy laws applicable to transgenders in many countries, even if the relation is in private between consenting adults. However, the European Court of Human Rights jurisprudence on privacy for lesbians and gay men has been positive for many years. In 1980s the Court was the first international body to hold that laws criminalising consensual, private sexual activity between adults violated the right to privacy protected by Article 8 of the ECHR.<sup>21</sup> Article 8 of the ECHR provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of his right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

However the European Court of Human Rights had held that laws criminalising sex between men where more than two men were present<sup>22</sup> and laws setting an unequal age of consent by sexual activity<sup>23</sup> did not violate human right to privacy guaranteed by Article 8. In *Sutherland v. United Kingdom*,<sup>24</sup> however, the European Commission of Human Rights extended the privacy jurisprudence to cover discriminatory age of consent laws in the United Kingdom. The Commission held that a law which set an age of consent for sex between men at 18, while the age of consent for sex between a man and woman was 16, violated the right to privacy together with the non-discrimination clause in Article 14 of the ECHR.

Most recently, the European Court of Human Rights decided in *ADT v. United Kingdom*,<sup>25</sup> that the criminalisation of sexual activities between men when more than two men are present also violates the right to privacy. During a search of ADT's home,

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<sup>20</sup> (1993) 16 EHRR 167.

<sup>21</sup> *Dudgeon v. United Kingdom* (1981) 45 ECHR (Ser A) 1; *Norris v. Ireland* (1988) 142 ECHR (Ser A) 1; *Modinos v. Cyprus* (1993) 259 ECHR (Ser A) 1.

<sup>22</sup> *Johnson v. United Kingdom* (1987) 9 EHRR 386.

<sup>23</sup> *Ibid.*

<sup>24</sup> Unreported, European Commission of Human Rights, 1 July 1997, App. No. 25186/94.

<sup>25</sup> Unreported, European Court of Human Rights, 31 July 2000, App. No. 35765/97.

various video tapes and photographs showing ADT engaging in sexual conduct with four other men were seized by police. ADT was arrested, charged and convicted of the offence of gross indecency between men. This offence related solely to the sexual conduct which had taken place in his home. He was not charged with any offence relating to the making of the videos, which had not been distributed to any other person (until they were seized and viewed by the police and the Magistrates' Court). He took his case to the European Commission of Human Rights, claiming a violation of his right to privacy under Article 8 of the ECHR. The Court rejected the Government's submission that the activity in question was not 'private' because there were several men present and because the activities were videotaped.

### **Equality and Non-Discrimination**

Non-discrimination aspect of human rights requires equality before the law or general non-discrimination by States. Article 14 of the ECHR requires that States Parties to the ECHR not discriminate in the protection and application of the rights protected by the ECHR. The European Court of Human Rights held in *Rees, Cossey and Sheffield and Horsham* that there was no violation of art 14 in refusing to alter a transgender person's birth certificate. In the Court's view, not every difference in treatment constitutes discrimination and the refusal to recognise a person's new sex on their birth certificate represented a reasonable balance between the rights of the individual and the needs of the community.

In *Lustig-Prean and Beckett v. United Kingdom*<sup>26</sup> and *Smith and Grady v. United Kingdom*<sup>27</sup> the applicants were members of the armed forces who had been accused of homosexuality. The military authorities had responded to these allegations with invasive investigations of the applicants, including, detailed questioning about their sexual activity and searches of their homes. One applicant was asked not only about her sex life with her partner, but also whether she had sex with her teenage foster daughter. Each of the applicants ultimately admitted to being lesbian or gay and was, as a result discharged from the military. The Court held that the invasive investigations by the military police into the allegations of homosexuality constituted a direct interference with the applicants' right to respect for their private lives, and that their discharge because of their sexual orientation also constituted an interference with privacy. Furthermore, the individuals here were discharged not because of their conduct but because of their 'innate personal characteristics', namely their sexual identity. The Court held that homophobic prejudices of other soldiers alone cannot justify the British policy of investigating and discharging homosexuals from the military, any more than racist attitudes could justify discharging black service members. As a result of these cases, the British Government has altered its policy on transgenders, lesbians and gay men in the military and instituted instead a code

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<sup>26</sup> (2000) 29 EHRR 548.

<sup>27</sup> (2000) 29 EHRR 593.

of conduct concerning sexual behaviour applicable to all military personnel regardless of sexual orientation.<sup>28</sup>

European Community (EC) law, however, has equality provisions that are separate from those of the ECHR. Essentially, under the EC law it is unlawful to discriminate on the basis of sex in the area of employment.<sup>29</sup> In *P. v. S*,<sup>30</sup> a transgender plaintiff, who had been dismissed from her job because of her transgender identify, succeeded before the European Court of Justice (ECJ) on the basis of sex discrimination. The UK authorities had found that discrimination against P, because she had undergone gender reassignment from male to female, did not constitute sex discrimination. If P had been a woman who became a man she would have been treated in the same way. The matter was referred to the ECJ to determine whether the EC's directive on sex discrimination covered the dismissal of transgender person. The ECJ held that:

Such discrimination is based, essentially, if not exclusively, on the sex of the person concerned... Where a person is dismissed (because of) gender reassignment, he or she is treated unfavorably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.<sup>31</sup> Accordingly, the dismissal of P after she underwent sex assignment surgery constituted impermissible discrimination on the basis of sex.

Recently, the European Commission of Human Rights view that same-sex relationships are less deserving of protection than are heterosexual relation was confirmed by the ECJ in *Grant v. South West Trains*.<sup>32</sup> The case was concerned with a lesbian women employed by South West Trains (SWT) in the United Kingdom. Heterosexual employees of SWT, whether married or unmarried, were provided with travel benefits for their partners. Ms. Grant applied for, but was denied, such travel benefits for the female partner. She argued that this was sex discrimination within the meaning of Article 119 of the Treaty Establishing the European Economic Community requiring equal pay for men and women, and also contrary to an EC directive on sex discrimination.<sup>33</sup> The ECJ did not accept this argument. It held that the requirement that a person live in a relationship with a person of the opposite sex was applied regardless of the sex of the person concerned.<sup>34</sup>

The ECJ's decision in *Grant* ignores the HRC's views in *Toonen*, where the HRC held that sex discrimination includes sexual orientation discrimination. Indeed, the ECJ

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<sup>28</sup> See Rhona Smith, International Decisions: Lustig-Prean and Beckett v. United Kingdom, Smith and Grady v. United Kingdom (2002) 94 *American Journal of International Law* 382, 386.

<sup>29</sup> The Council of the European Communities, Directive, 76/207/EEC (1976).

<sup>30</sup> (1996) 76 CMLR 247.

<sup>31</sup> *Ibid.*

<sup>32</sup> (1998) 81 CMLR 993.

<sup>33</sup> The Council of the European Communities, Directive, 75/117/EEC of (1975).

<sup>34</sup> (1998), 81 CMLR 993.

expressly declined to follow the Toonen approach noting that the HRC is not a guideline institution, its findings are not binding, and the HRC had simply observed that sex discrimination included sexual orientation discrimination, without providing specific reasons.<sup>35</sup>

### **Marriage and Family**

Transgender people are subjected to a variety of legally sanctioned and covert forms of discrimination to give one example, since the family law structure is based entirely on a heterosexual basis and marriages can only be between persons of opposite sex, succession and property rights, and entitlements to assets are not legally sanctioned in relations to transgender persons. Article 12 of the ECHR provides that “men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”

In *Rees*, *Cossey* and *Sheffield and Horsham* the European Court of Human Rights held that marriage, as protected under article 12 of the ECHR, is the Union of two persons of the ‘opposite biological sex’, thus restricting transgenders’ right to marry. To date, only one European state permits the registration of same-sex relationships in systems akin to, but not the same as or equal to, marriage, and many states offer no legal recognition of same-sex relationships.

In relation to the protection of family life, transgender people have fared slightly better in Europe than lesbians and gay men. The main case in this area, *X, Y and Z v. United Kingdom*,<sup>36</sup> involved a female-to-male transgender (X), his partner (Y) and their child (Z), born to them via assisted reproduction. X sought to be recognized on the birth certificate as a parent of Z, although he was not the sperm donor. A ‘biological man’ in his position would have been so recognized under British law. However, the British authorities refused to recognise X as a parent or as the father of Z on the birth certificate. However, the European Court of Human Rights held that X, Y and Z constitute a family for the purposes of article 8 of the ECHR. The Court held that the failure to recognise X as a parent did not amount to an interference with family life in violation of article 8. This was because, in light of the absence of European consensus on the question, there was no duty on member states to recognize as parents persons not biologically related to a child. The Court adopted a narrow view of what the duty to respect family life required of the state. Thus although an important principle was established by X, Y and Z—that X, Y, and Z are a family—the application of the principle did not result in a beneficial outcome for the people in question.

Transgender persons all over the world are fighting for equal protection under the law, including legal same-sex marriage. Some may think granting civil registered or domestic partnerships is enough—seeing to preserve the legal definition of marriage as between a man and a woman. But, most civil, domestic and registered partnership laws

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<sup>35</sup> *Ibid.*

<sup>36</sup> (1997) 24 EHRR 143.

around the world provide fewer benefits than full marriage. So in many cases, life-long partners are denied some or all of the rights of marriage simply based on their sexual orientation.

National laws of almost all countries protect the family from state interference as well as protecting an individual's private life. However, lesbian and gay relationships have never been considered to constitute a family. Articles 8 and 12 of ECHR are of relevant here for the purposes of present discussion. Article 8 of the ECHR protects the family from state interference as well as protecting an individual's private life. However, gay and lesbian relationships have never been considered to constitute a family for the purposes of Article 8 of the ECHR. Many cases have been brought before the Commission, but none of these has succeeded. Rather, the Commission has held repeatedly that a same-sex relationship is not equivalent to the heterosexual relationships. Furthermore, the Commission has held that discriminatory treatment of same-sex couples is objectively and reasonably justified and this does not constitute discrimination under Article 14.

Article 12 of the ECHR provides that men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right. In a number of cases the European Court of Human Rights held that marriage as protected under Article 12 of the ECHR, is the union of two persons of the opposite biological sex, thus restricting lesbian gay-transgender people's right to marry and found a family.

### **VII Ruling against Discrimination in India**

Issues regarding the rights of transgender people have been at the forefront of public discourse in recent years. These issues have given a broad variety of contexts. Some of the more visible controversies have involved the identity issues, national and international efforts to limit civil rights for transgender people, and the question concerning rights to marriage, adoption, child custody and non-discrimination on the ground of sexual orientation. Recently, the Supreme Court in the case of *Legal Services Authority v. Union of India*,<sup>37</sup> recognised transgender as a third gender. "Recognition of transgenders as a third gender is not a social or medical issue but a human rights issue," Justice KS Radhakrishnan, who headed the two-judge Supreme Court bench, said in his ruling on transgenderism. "Transgenders are also citizens of India" and they must be "provided equal opportunity to grow", the court said. "The spirit of the Constitution is to provide equal opportunity to every citizen to grow and attain their potential, irrespective of caste, religion or gender." The judges asked the government to treat them in line with other minorities officially categorised as "socially and economically backward", to enable them to get quotas in jobs and education. "The spirit of the [Indian] constitution is to provide equal opportunity to every citizen to grow and attain their potential, irrespective of caste, religion or gender," the court said in its order. The Court directed

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<sup>37</sup> (2014) 5 SCC 438.

the central and state governments to include transgendered people in all welfare programmes for the poor, including education, healthcare and jobs to help them overcome social and economic challenges. The court noted that it was the right of every human being to choose their gender while granting rights to those who identify themselves as neither male nor female. All documents will now have a third category marked transgender. This verdict has come as a great relief for all transgender people.

The world is slowly, but painfully, moving towards the formal recognition of the existence of a third gender besides male and female. The rights of transgender people—to their own identity and to access to health, education, work, housing and other rights—are being increasingly widely recognised. Recently, the Supreme Court of India legally upheld the rights of transgender people across the country. The decision officially recognises a third gender in law and confirms that discrimination on grounds of gender identity is impermissible under the Indian Constitution.

It should pave the way for reforms that make it easier for transgender persons in India to obtain legal recognition of their gender identity, as well as access to employment and public services. According to unofficial figures, India is estimated to have about two million transgender people, out of a total population of over 1.3 billion. The court ruling could improve the lives of millions of transgender people in India—people who have suffered oppression for years. The ruling reaffirms constitutional values of inclusion and equality. However, as long as Section 377 of the Indian Penal Code stays on the books, discrimination and violence based on sexual orientation and gender identity will remain a threat. As we know, Section 377, upheld by the same Supreme Court in a ruling, criminalises consensual same-sex conduct between adults. This law ought to be repealed. As we know transgender and homosexuality are synonymous in some way.

Here it may be noted that the members of the third gender played a prominent role in Indian culture and were once treated with great respect. They find mention in the ancient Hindu scriptures and were written about in the greatest epics Ramayana and Mahabharata. In medieval India too, they played a prominent role in the royal courts of the Mughal emperors and some Hindu rulers. Many of them rose to powerful positions. But now they have been sidelined and many transgendered people in India earn a living by singing and dancing at weddings and births, but others must resort to begging or prostitution.

### **VIII The problem with new legal category**

To give a better protection to transgender people, the Supreme Court has devised a new category between male and female to classify the new sexual phenomenon, which according to the traditional criteria, does not fit into classification of sex. Though we have recognised a third category, it does not resolve a major problem posed by transgender persons, that of marriage and family. How can this be resolved for people who fall into one or other of the traditional sexual categories? The historic assumption in the application of common law and statutory strictures relating to marriage is that only

persons who are ‘man and woman’ in biological terms have the capacity to enter into marriage contract. The pertinent statutes relating to marriages and married persons do not contain any explicit references to a requirement that marriage must be in between a man and a woman. Nevertheless it is so strongly and firmly implied from a full reading of the statutes that a different legislative intent, one which would sanction a marriage between persons of the same sex, cannot be fathomed.

Some lawyers continue to maintain that sex is ascertainable and that the law does not need to define the sex. Perhaps this is true, but what criteria are used to establish sex? This is where the problem arises. It is clear that the recognition of transgender as a third gender have raised a great many questions. There may be several alternatives regarding transgenderism, the foremost among them being maintaining the traditional classification of sex, but making it easier for dysphoric persons to change their sex. It is now clear that the law will never recognise claims of third gender persons for many purposes, including marriage, adoption, child custody and other family issues. In other words, interpretation of sex for many purposes may be confined to biological account, so denying the claims of transgender people.

Many of the aforesaid problems still remain with the transgender people. Many transgender people never like to be categorised as a third gender but they want recognition of their new sex what they have chosen either by their sex reassignment surgery or by lifestyle. In contrast to reform jurisprudence that seeks to accommodate transgender through the expansive interpretation of sex, the recent Supreme Court decision has introduced transgender as an independent legal category. In considering the entry of transgender into the lexicon of protected category with rights it is necessary to reexamine the implications of this new category.

Despite legal recognition of transgender as a third gender in law sex continues to function as ‘a regulatory ideal’. Thus, we will see that the re-categorisation of sex on gender basis may serve to reproduce, as well as disrupt, gender roles and sexual hierarchies. In other words, reform jurisprudence will never solve the basic problems faced by transgender persons. Here, it may be noted that equality and fundamental freedoms can well be granted more effectively through recognition of sex claims either as male or female than the creation of separate category. In other words, it may be that the reproduction of gender polarity is better achieved through giving legal effect to the medical incorporation, that is, normalisation of sexed ‘ambiguity’

### **IX Conclusion**

In sum, though transgender gained legal recognition, it has not achieved a significant measure of success in rights claims brought under the protection of human rights and fundamental freedoms. In fact, it is another form of sexuality which is practiced by a fraction of our population whose bodies are intersexed. The legal system should be very liberal in changing one’s biological sex to bring it with full conformity with his/her brain sex (that is, gender). A social construction of sex—is what inter-sexed people want. Their

main aspiration is seemingly to have the ‘normality’ of their ‘sexual choice acknowledged’ by the law. They all want an end to discrimination and harassment. They want no longer to be marginalised. They want to enjoy full citizenship rights including the right to marriage and form a family. A certain amount of research and legal attention have been given in the Western countries to this group. If a child is born with genitals that are not clearly male or female, surgeons tend to adjust the child to the sex of assignment.

Indubitably, the judgment is a significant one opening up possibilities both for greater protection of transgender people against discrimination as well as perhaps encouraging a retreat from identity-based politics in favour of the adoption of shared political strategies with other minority groups. In particular, the reform jurisprudence seeks to accommodate transgender through an expansive interpretation of sex in terms of brain sex.

The lesson from the European experience and, indeed, for continued reform in Europe and Australia, is that it is insufficient to pursue only a litigation-based strategies. While the courts are important allies in the fight for transgender rights, they will not generally lead the way in the absence of some degree of wider social support. We thus need to pursue long term legislative and policy reform as well as judicial avenues in order to move forward in the protection and promotion of transgender rights.

