

# BEYOND GENDER: THE SOUTH ASIAN EXPERIENCE

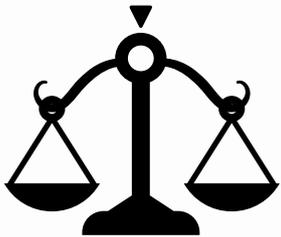


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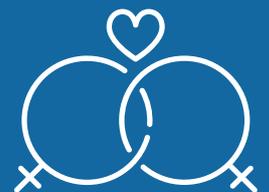
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# **INTRODUCTION - "WE ARE RIDING A WAVE OF PROGRESSIVE CHANGE"**



*Beyond Gender*, iProbono's first equality law publication features a collection of LGBT+ perspectives from across South Asia. Bringing together authors from our wider community in academia, legal practice and activism, we provide a dynamic space to share thoughts on issues spanning access to justice, socio-economic rights and citizenship. By providing a current focus on the rights of transgender communities in the region, we travel the road to innovative legislative change in Pakistan and similar shifts in government policy in India. At the same time, an exploration of suicide in Bangladesh, stories of grassroots activism and legal case summaries from Sri Lanka remind us of the lived realities that underline any change in the law.

As we all know, Covid lockdowns across the world this year shifted many in-person fora and conversations on to online platforms. To introduce our readers to *Beyond Gender* and iProbono's work across South Asia we share an old school telephone conversation between our team and Rehan Ansari, of iProbono's Storytelling Collective who joined us to edit the collection. By listening in, you, our readers gain a starting point from which to explore this publication against the backdrop of other key issues in the region including the decriminalisation of homosexuality and other movements for equality. We also encourage you to contact us with your comments and suggestions for future editions.



**MARIAM FARUQI**



**REHAN ANSARI**



**ARITHA  
WICKRAMASINGHE**



**MEENAKSHI MENON**

**Rehan: Could you give us some background on the Equality Law Program and the purpose, now, of *Beyond Gender*?**

**Mariam:** The formal purpose is to put in the public realm, the access to justice work iProbono is achieving in Sri Lanka around the Equality Law Program, share the variety of voices of the people involved in our programs and find new audiences for this work.

**Aritha:** This program is not just a forum for experts. It should function as a platform for the LGBT+ communities to share their stories. *Beyond Gender* will be available online and serve as that one place where people can access, and add to the stories of iProbono's Equality Law Program.

**Meenakshi:** Our efforts under the Equality Law Program include litigation support, diversity training, capacity building for CSOs, and providing high quality, pro bono legal advice to vulnerable communities. Through this publication, we share stories, key concerns from the community and our own learnings as a social justice organisation.

**Rehan: Is there timeliness to the publication? Or is it a response to a crisis?**

**Aritha:** In the last few years, judgments across the world have expanded the rights of LGBT+ people. In Sri Lanka, we are experiencing that wave of change at this moment, as the conversation around the

community's issues moves into the mainstream. iProbono has contributed a great deal to this discussion, especially in the political sphere. Last year, before the presidential elections, we were instrumental in bringing LGBT+ groups together and preparing a manifesto which was then sent to all the presidential candidates. We also ensured that all candidates were asked questions on LGBT+ rights. This year, we saw that in the general election, journalists asked political parties questions around LGBT+ rights without our prompting. A publication like this is timely because Sri Lanka remains one of the few Asian countries to criminalise same-sex relations and we need to ask the question -- what kind of society do we want to become? Colonial masters imposed these laws on us. We need to ask ourselves if these laws reflect our values.

**Mariam:** This publication is not responding to a crisis. It is more accurate to say that we are riding a wave of progressive change. Individuals that are part of the movement lead our Equality Law Program. For example, Aritha is part of the change and it's important for us that he leads our work for the LGBT+ communities we serve. Crises come and go, especially in South Asia; what is important is lasting, progressive change.

**Rehan: How does iProbono currently envision itself?**

**Mariam:** When iProbono began 10 years ago it was a platform for lawyers to do pro bono work. Over the years, iProbono has changed.

Pro bono work and providing access to legal justice is still a foundational element in our work but we also want to accelerate inclusive movements for broader social justice issues and explore the question: how do we inform the societies we are working with?

**Aritha:** iProbono wants to be involved in shaping society so that fewer people suffer injustice.

**Rehan: How does iProbono facilitate lawyers and activists from different parts of South Asia to learn from each other's experiences?**

**Aritha:** iProbono is at the forefront of bringing together our partner organisations from across the region to create a platform where they can share their resources and their knowledge.

**Mariam:** Aritha was working closely with the National Transgender Network on developing new legislation to enhance protection for transgender communities in Sri Lanka. For this exercise, we brought Pakistani experts on board and it has helped us understand the the implementation of the legislation in Pakistan with all its nuances. We also brought in partners from Bangladesh who are in the initial stages of developing legislation for the transgender community. It's a three-part model. It was clear that our work is relevant and has impact across South Asia. This is also a unique opportunity as cross-regional partnerships in South Asia are rare at the moment!

**Aritha:** iProbono works across a wide area of access to justice issues; we work with different types of organisations, not just LGBT+ focused. And that's the exciting aspect of our work, we can bring together and share a variety of experiences that organisations can learn from.

**Meenakshi:** Remote working had its limitations, but it certainly allowed for more cross border exchanges this year. This has helped surface common concerns and strategies for regional lobbying to support vulnerable communities.

**Rehan:** **Is there anything else the iProbono South Asia and Equality Law teams would like to highlight in introducing *Beyond Gender* to your readership?**

**Meenakshi:** Students, academics and activists are all contributing to the publication. We are able to feature diverse voices from the region which will open up the conversation around LGBT+ issues.

**Mariam:** We put out an open call and invited experts and activists including Dr. Chamindra Weerawardhana from Sri Lanka, Aisha Mughal from Pakistan, and activists from Bangladesh. Since it will be an online platform, we want to have many more people involved in future editions.

**Aritha:** One of the things that I'd like this venture to expand upon is the space for LGBT+ activists and allies to show their support. And perhaps this platform can become a centre for their conversation about advancing the rights of LGBT+ people of the region, especially for Sri Lanka.

# **BREAKING THE BRICK WALL: USING ANTI-DISCRIMINATION LEGISLATION AS A TOOL FOR TRANS-JUSTICE**





## APARNA ASOKAN

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### INTRODUCTION

In India, there is a constitutional safeguard against discrimination but no statutory protection against different kinds of discrimination. In 2017, Dr Shashi Tharoor introduced the Anti-discrimination and Equality Bill in Parliament. However, the Bill lapsed. No other law has been introduced in its place since. In this paper, I argue the need for anti-discrimination legislation in India. I also argue that such legislation will be a great tool to enhance LGBTQ+ rights movements and trans-justice in India.

In Section I, I explain the present structural framework of non-discrimination guarantees in India. In Section II, I discuss the need for legislation that focuses on non-discrimination and equality in addition to the existing laws. In Section III, I discuss the components of appropriate anti-discrimination legislation. In Section IV, I discuss how comprehensive anti-discrimination legislation can strengthen the LGBTQ+ rights movement in India.

## I. The framework of non-discrimination guarantee in India

The important sources of equality and anti-discrimination law in India are the Constitution, Statutes and International Laws.

The Indian Constitution recognises the Right to Equality under Article 14 and further elaborates the equality scheme through specific Articles 15, 16, 17 and 18. In addition to explicitly prohibiting discrimination on various grounds under Articles 15(1) and 16(1), the Indian Constitution also provides for affirmative action for disadvantaged groups.[1] Under the Directive Principles of State Policy (DPSP), there are specific provisions to do away with discrimination.[2] These provisions also encourage equal treatment of different groups. Some guarantees under DPSP include equal rights to adequate means of livelihood, equal pay for equal work for men and women and equal opportunities for securing justice.[3]

The non-discrimination and equality guarantee under the Constitution are, however, of limited application. Firstly, except Article 17 and Article 15(2)(a), there is a limited mandate on non-state entities against discriminatory practices. Article 17 of the Constitution abolishes the practice of untouchability and makes it an offence punishable by law. The operative provisions are found in the Protection of Civil Rights Act, 1955. Article 15(2)(a) also possesses a unique tool to address the problem of horizontal discrimination.[4] Article 15(2)(a) states as follows - “*No citizen*

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[1] INDIA CONST art.15(3); art. 15(4); art.16(4).

[2] INDIA CONST part IV.

[3] INDIA CONST art. 39(a); INDIA CONST art. 39(d); and INDIA CONST art. 39A respectively.

[4] Gautham Bhatia, Horizontal Discrimination and Article 15(2) of the Indian Constitution: A Transformative Approach Asian Journal of Comparative Law, 11 (2016), pp. 87-109 doi:10.1017/asjcl.2016.5.

*shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to...access to shops, public restaurants, hotels and places of public entertainment*". Over the years, the term 'shop' has been interpreted widely in light of the debates in the Constitutional Assembly. In *IMA v. Union of India*, an educational institution was brought within the ambit of 'shop' mentioned in Article 15 (2)(a).[5] However, the application of 15(2)(a) is limited to economic transactions of some nature and the prohibition is only binding on the State.[6] Non-state entities are largely left outside the purview of this mandate.

These articles are of limited application because the protection under Articles 15 and 16 can only be afforded by 'citizens' and 'non-citizens' are left outside the scope of such guarantees. Thirdly, with respect to the provisions of DPSP, although the State is required to take into consideration principles laid down under Part IV, the provisions are not per se enforceable in any court.[7]

Despite these limitations, Articles 14 to 18 of the Indian constitution are widely applied in many cases and lay down a strong foundation for anti-discrimination jurisprudence in India. The scope of Part III provisions on the State is viewed expansively. The State's failure to ensure equal treatment of individuals in the private realm has been brought under the

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[5] *Indian Medical Association v Union of India*, (2011) 7 SCC 179.

[6] *Supra* note 6, at p.101.

[7] INDIA CONST art.37.

purview of the law and there are innumerable cases where the courts accepted this horizontal effect of Articles 14 and 15, at least indirectly. In *Vishaka v. the State of Rajasthan*, employers in both public and private sectors were mandated to take appropriate steps to prevent sexual harassment as it was seen as a violation of Articles 14, 19(1)(g) and 21 and this rule was reiterated in cases like *Renuka Mukherjee v. Vodafone Essar Ltd.*[8]

The second source of equality and anti-discrimination law in India are the statutes. There are innumerable statutes in India that specifically prevent discrimination on various grounds. These legislations form the operative part of the rights protected under the Constitution. Scheduled Castes and Tribes (Prevention of Atrocities) Act, 1989, the Rights of Persons with Disabilities Act, 2016, the Transgender Persons (Protection of Rights) Act, 2019, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 are some examples of such legislation. In addition to identifying specific concerns of protected groups, some of these legislations penalise discriminatory behaviour towards protected groups and even provide compensation (as seen in Section 15 of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013). In the past, Section 153B of the Indian Penal Code was also invoked in India in cases of private discrimination although it is a provision intended to counter hate speech.[9]

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[8] *Vishaka & Ors. v. State of Rajasthan*, AIR 1997 SC 3011 and *Renuka Mukherjee v. Vodafone Essar Ltd*, 2017 SCCOnline Bom 8898.

[9] "Mumbai: Builder, staff booked for refusing home to Maharashtrian." *Hindustan Times* 3 Jun 2015, Available at <https://www.hindustantimes.com/mumbai/mumbai-builder-staff-booked-for-refusing-home-to-maharashtrian/story-Cq4XF9a9RC10xb4fxYgUcN.html>.

The problem with having numerous statutes is that they are not comprehensive. Separate statutes give rise to separate procedures for enforcement and that makes the entire process scattered. It also completely overlooks the issue of intersectionality. In this regard, the Bill introduced by Tharoor was all-comprehensive in terms of coverage as it identified a wide range of protections and also highlighted direct and indirect discrimination. It also focused on other forms of discriminatory practices including harassment, boycott and segregation. The Bill attempted to account for intersectionality. Unfortunately, the statute was not adopted by the legislature.

The third source of equality and anti-discrimination law in India is international law. India is a party to numerous international conventions condemning discriminatory acts including the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD).

Under the Indian Constitution, it is important to 'foster respect for international law and treaty obligations in the dealings of organised peoples with one another'.<sup>[10]</sup> However, international law also has limited application in India as they are not directly enforceable within the country.

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[10] INDIA CONST art.51(c).

## II. The need for anti-discrimination law in India

The existing legal framework has limited horizontal application. The framework is not all-inclusive as it does not cover all grounds of discrimination and does not indicate the scope of 'discrimination'. The framework completely ignores the issue of intersectionality.

### Limited Horizontal Application

Although the constitutional protection is often enabled in cases of discrimination by way of progressive interpretation of Articles 14 and 15, the Indian Supreme Court has also refused to entertain cases of horizontal application on multiple occasions.

In *Zoroastrian Co-operative* case, the Supreme Court refused to hold an exclusionary covenant in a housing society by-law as violative of Part III. [11] The by-laws noted that only Parsis were eligible to become members of the society and housing shares cannot be sold to non-Parsis. In this landmark decision, the court carved an exception to Part III scrutiny by noting that the housing by-laws are similar to a contract binding only between the parties affected by them and that "Part III of the Constitution has not interfered with the right of a citizen to enter into a contract for his own benefit." [12]



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[11] *Zoroastrian Co-operative Housing Society Ltd. v. District Registrar, Co-operative Societies (Urban)*, (2005) 5 SCC 632.

[12] *Id.* at para 16.

Part III of the Constitution is normally only enforced against the State or other authorities who may come within the purview of Article 12 of the Constitution. The constitutional case of discrimination would be found against other entities only where they would fit the description of an instrumentality of the State or in cases where it can be shown that such an entity is discharging a public function or there is some public law element involved therein.[13]

In other cases, there is no direct horizontal effect given to provisions under Articles 14 and 15 (1) and a remedy is available only in cases where there is a specific law prohibiting such discriminatory behaviour. For instance, if an individual A discriminates against another individual B, based on their sexual orientation, there would be no remedy to it under the current law as there is no specific legislation dealing with this issue of 'discrimination on grounds of sexual orientation'. At the same time if a Company A discriminates against individual B because B is disabled it would fall within the ambit of the Rights of Persons with Disabilities Act, 2016 and appropriate punishment as prescribed under the Act under Section 90 would be applicable. The application of anti-discrimination law is uneven and restricted.

### **Limited Grounds of Discrimination**

Article 15 (1) states that *"The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any*

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[13] The Praga Tools Corporation v. C. A. Imanual & Ord, AIR 1969 SC 1360.

of them.” Article 16(1) states “There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.” The Article also prohibits discrimination based on ‘descent’ and ‘residence’ in addition to those grounds mentioned in Article 15 in matters of employment under the State.[14] The protected grounds mentioned under Articles 15 and 16 are very limited and these provisions have excluded grounds such as disability, marital status, pregnancy, age and sexual orientation.

### **Issue of Intersectionality**

The term intersectionality was coined by Kimberlé Crenshaw in the year 1989. Intersectionality is a theory that suggests that overlap of multiple social identities such as gender, race, caste, etc. would have specific effects of discrimination on individuals. For example, while a woman may face sexism, a Dalit woman may be subjected to both casteism and sexism. A lesbian Dalit woman may be subjected to homophobia, casteism and sexism. As Sandra Fredman explains, “Multiple identities can intensify disadvantage for those who belong to more than one disadvantaged group.”[15]

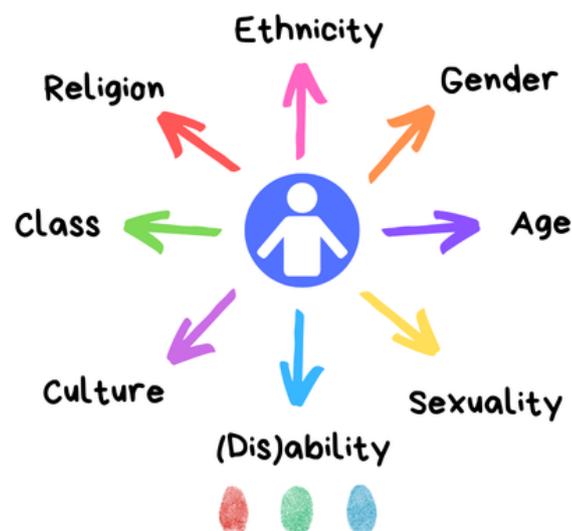
Imagine a hypothetical situation where a lodge refuses accommodation to a transgender person with HIV. A situation involving a transgender person with HIV could be different from the case of refusal of service to any other person. It could be the case that the lodge does not refuse

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[14] INDIA CONST art.16(2)

[15] Sandra Fredman, Comparative study of anti-discrimination and equality laws of the US, Canada, South Africa and India, European commission Directorate General for Justice, February 2012 at p.40.

service to others. They may even not discriminate against all transgender persons or all HIV patients but only against transgender persons with HIV. In such a scenario, unless there is a specific prohibition of discrimination on multiple grounds (gender identity and health status in this case), there will be no legal case.



### III. Components of an appropriate anti-discrimination law in India

Comprehensive Anti-discrimination and Equality legislation is seen in different jurisdictions like the US, UK and South Africa. According to Khaitan prohibition of discrimination, reasonable accommodation, affirmative action, the requirement of fault and possibility of justification are different tools employed in anti-discrimination law.[16] Learning from different jurisdictions and the limitations in the present law as observed above I suggest the following components be part of anti-discrimination law in India:

- the new law must define grounds of discrimination and define the scope of discrimination;
- it must explain which competing priorities can displace a finding of discrimination and;
- it must also provide for reasonable accommodation for affirmative action and impose a duty on different actors to foster ideas of diversity and inclusiveness.

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[16] Tarunabh Khaitan, A Theory of Discrimination Law 10 (2015).

## Grounds of Discrimination

Recently the Centre for Law and Policy Research published a draft Equality Bill 2020 which covered many grounds of discrimination. The draft suggests prohibition of *“all forms of discrimination against persons on the grounds of caste, race, ethnicity, descent, colour, sex, sexual orientation, gender identity, gender expression, tribe, nationality, disability, marital status, pregnancy, health (including HIV / AIDS status), occupation, political opinion and belief, linguistic identity, place of birth, age, migration, religion, refugee status, socioeconomic disadvantage, food preference or any combination of these characteristics”*[17] This needs to be incorporated in comprehensive anti-discrimination legislation.

## The Scope

One significant point of contention is the meaning of the term discrimination. There is a gap between the meaning of discrimination in a legal sense and discrimination as understood by a layperson. An act that appears prima facie discriminatory in law may not be discriminatory at all to a layperson. Khaitan explains this problem: *“in law, discrimination may be unintended, indirect, or non-comparative”* and *“it treats a much wider range of conduct as discriminatory than does ordinary language, although its regulation of such conduct is restricted to a limited range of contexts.”*[18] In most cases, the disagreement as to what amounts to discrimination comes in cases of indirect discrimination.

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[17] 'Equality Bill 2020: Takes a New Step in Addressing Discrimination, Recognising Intersectionality & Promoting Equality.' (17 Jan 2020) <<https://clpr.org.in/wp-content/uploads/2020/01/Equality-Bill-2020-17-Jan-2020-1.pdf>> accessed on 10 Feb 2020.

[18] Tarunabh Khaitan A Theory of Discrimination Law 2 (2015).

Direct discrimination can be detected easily. For example, if a person is turned away from a restaurant for the reason that they belonged to a particular religion it is a clear case of direct discrimination. Indirect discrimination, also called as a disparate impact claim, is more complex. In cases of indirect discrimination, practice or policy would apply to all persons equally but it could have a particular disadvantage to a particular group. For example, if an employer insists that all workers must be 5'5" in height this could be indirectly discriminatory against women (assuming there is no nexus between the minimum height requirement and the work assigned) as more women are likely to be excluded by this criterion than men.

Another important aspect is to identify the range of its application. Anti-discrimination laws are mostly found in cases of employment, housing and the like. It is not found in certain other private matters like the choice of partner, marriage etc. One can decide not to be friends with a transgender person based on gender identity, although morally reprehensible, such a case would not fall within the scope of anti-discrimination law. It is therefore important to determine what cases of private discrimination would fall under the ambit of the law. Gautham Bhatia argues that within the existing framework, under Article 15(2)(a), private discrimination is prohibited within the private economic realm, insofar as it operates to exclude persons from access to core economic, social, and physical infrastructure.[19]

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[19] Gautham Bhatia, Horizontal Discrimination and Article 15(2) of the Indian Constitution: A Transformative Approach *Asian Journal of Comparative Law*, 11 (2016), pp. 87-109 doi:10.1017/asjcl.2016.5 at p.109.

The present law does not delineate the extent to which right to autonomy in the private realm can defer from principles of non-discrimination. For instance, would it be okay for a person to refuse rental housing to ‘non-vegetarians’ because eating non-vegetarian food is against their religious beliefs? Such a criterion is likely to have an exclusionary effect on non-Brahmins or non-Hindus but the question is whether it would fall within the ambit of anti-discrimination law. One may argue that these are personal ‘preferences’ that may be respected, which are not discriminatory. Another person may argue that it falls within the ambit of ‘private economic realm’ and therefore discriminatory. Another argument may find the aspect of ‘exclusion’ itself discriminatory. It would therefore be beneficial to address such concerns in the new law. A clause similar to ‘private economic realm’ or ‘public accommodation’ must be introduced to define the extent of the right to autonomy in the private realm.[20]

### **Reasonable Accommodation**

A reasonable accommodation is also called reasonable adjustments or adaptations.[21] It is an expression of the concept of substantive equality and it is more often used in the context of disabilities law. Reasonable accommodation simply means making a change in any process or environment to accommodate persons at a disadvantage. For example, changing the physical infrastructure of a building by adding a ramp.

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[20] A term used under Title III of Americans with Disabilities Act of 1990.

[21] The Concept of Reasonable Accommodation in Selected National Disability Legislation, Background conference document prepared by the Department of Economic and Social Affairs. Available at <https://www.un.org/esa/socdev/enable/rights/ahc7bkgrndra.htm>.

In certain national legislation (like the Americans with Disabilities Act of 1990) failure to make reasonable accommodation amounts to discrimination unless it is demonstrated that it would impose undue hardship or disproportionate burden on the entity required to facilitate such accommodation. Reasonable accommodation allows people to perform essential functions efficiently and facilitates equal participation.

### **Affirmative Action**

In affirmative action, identities such as sex, gender, caste, religion and the like may be taken into account to extend opportunities from which those groups have been historically excluded. The Indian Constitution allows the State to make special provisions for women and children.[22]

### **Mandate to Foster the Idea of Diversity and Inclusiveness**

An overarching anti-discrimination law could also help in fostering diversity and the idea of pluralism in Indian society. This would be possible if a component of such a law would be to impose a positive duty, on different actors, to be more inclusive in their affairs in the public sphere. This can be further encouraged by linking additional incentives to an institution's diversity metrics.

Incentives can include governmental aid, tax benefits and can be explored in the areas of education, employment and housing to increase diversity in terms of caste, gender, sex, religion, disability and other identities.

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[22] INDIA CONST art.15(3).



#### **4. Conclusion: Using anti-discrimination legislation to enhance LGBTQ+ rights movement in India**

NHRC study on human rights of transgender persons based out of Delhi and Uttar Pradesh indicated that only 20% of transgender people in the area completed the primary level of school education.[23] The same study showed that only 6% of the transgender population in the area are employed, that too in the private or NGO sector, and the majority are engaged in informal engagements like begging or sex work.[24]

In 2017 the Kochi Metro Rail Limited (KRML) was widely applauded for its initiative to employ twenty-three transgender persons as ground staff. However, eleven out of the twenty-three people dropped out as they could not afford lodging in the city. Reports indicated that landlords refused to rent out apartments to people with transgender identities. Available lodging was as expensive as Rs.400-Rs.600 per day for a person whose salary is a little less than ten thousand rupees a month.[25] Yet another study exposed how transgender sex workers faced specific discrimination within the Indian health care system. From placing them in male patient wards to refusing reconstruction of the urethra in an eligible case, due to their HIV status, discrimination seems to be rampant due to their gender identity, sex worker status, HIV status or the combination.[26]

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[23] Study of Human Rights of Transgender as a third gender, February 2017; Id. at p.23

[24] Id. at p.28

[25] T.K. Devasia "Kochi Metro's transgender employees are quitting: Social stigma remains the overarching problem." Firstpost 25 Jun, 2017, Available at <https://www.firstpost.com/india/kochi-metros-transgender-employees-are-quitting-social-stigma-remains-the-overarching-problem-3743119.html>.

[26] Chakrapani et al. "Hijras in sex work face discrimination in the Indian health-care system." (2004).

With respect to workspaces in India, members of the LGBTQ+ community are only protected by individual workplace policies. According to the Indian LGBT Workplace Climate Survey 2016, only 48% of workplaces had anti-discrimination policies in place. 40% of LGBT employees reported that they are often subject to harassment in the workplace.[27]

There are several significant judgements given by the Hon'ble Supreme Court of India over the past two decades that favoured the LGBTQ+ rights movement. *National Legal Services Authority v. Union of India & Ors* is a landmark decision that recognised the right to gender identity as a fundamental right. The judgement noted that “*Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India.*”[28] In *KS Puttaswamy v. Union of India*, the Court determined one's sexual orientation as an element of privacy and dignity.[29] In *Navtej Singh Johar & Ors. v. Union of India & Ors.*, the draconian Section 377 of the IPC was struck down as unconstitutional to the extent it criminalised consensual homosexual acts.[30]

Courts have also dealt with the question of whether sex under Article 15 includes 'sexual orientation'. *Navtej Singh Johar* answered the same in affirmative and even referred to the JS Verma Committee report on

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[27] Indian LGBT Workplace Climate Survey 2016 conducted by MINGLE (Mission for Indian Gay and Lesbian Empowerment).

[28] *National Legal Services Authority v. Union of India & Ors*, AIR 2014 SC 1863; Id. at para 69.

[29] *KS Puttaswamy v. Union of India*, (2017) 10 SCC 1; Id. at para 128.

[30] *Navtej Singh Johar & Ors. v. Union of India & Ors*, AIR 2018 SC 4321.

amendments to Criminal Law, which also suggested that sex under Article 15 includes sexual orientation.[31] It noted that sexual orientation is a human right guaranteed by the fundamental principles of equality.[32] Through *Navtej Singh Johar*, discrimination based on sex stereotypes and sexual orientation was brought within the purview of Article 15.

The aforementioned judgements recognise various rights of minorities belonging to LGBTQ+ communities. However, the actualisation of these recognised rights would not happen in the absence of formal written law. Presently there is no statutory protection for discrimination against sexual minorities, except for transgender persons.



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[31] Report of the Committee on amendments to Criminal Law, January 2013, at para 65.

[32] *Id.* at para 75.

In the case of Transgender persons, the Parliament recently passed regressive legislation called the Transgender Persons (Protection of Rights) Act, 2019. The Act extends its application to individuals and non-state establishments and mandates prohibition against discrimination. Under the Act, there are specific provisions prohibiting discrimination in case of employment, occupation, education etc. But it does not clarify what amounts to discrimination. The Act is also widely criticised as violating the Supreme Court judgement in NALSA v. Union of India. The judgement had affirmed the right to self-determination of gender without a medical certificate or sex reassignment surgery. Provisions of the Act contradicts this right.

The terminology used in the Act is very vague. The Act seeks to prohibit 'unfair treatment' in educational institutions, employment and occupation, yet does not clarify what amounts to 'unfair treatment'. It is unclear if a failure to provide reasonable accommodation would amount to 'unfair treatment' of an employee. If an employer fails to provide a single-stall gender-neutral bathroom in the work-space it is a matter that would impede the functioning capacity of an employee who does not fit the gender-binary description.

A comprehensive anti-discrimination law would identify sexual minorities as protected groups, allow for wider horizontal application of the law against individuals and employees, identify situations of indirect discrimination and recognise multiple disadvantages- all of which are absent in the present legal framework.

**DILEMMA OF DECLASSIFYING  
'TRANSGENDER IDENTITY' AS A  
MENTAL ILLNESS**





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*“Sometimes people ask me when I knew I was transgender. They ask me if I feel like I was born in the wrong body. As if gender is that simple..I am not trapped in my body, I am trapped in other people's perceptions of my body.”*

*- Ollie Renee Schminkey*

## ABSTRACT

*The regressive notion of classifying human beings into ‘male-only’ and ‘female-only’ is a very superficial occurrence in modernity. The term ‘sex’ is used to identify the biological distinction between men and women whereas the term ‘gender’ is used to describe the cultural significance attached to the basic difference. Terms like “gender assigned at birth” and “experienced gender” principally float around when the transgender population is addressed. The transgender persons refer to those who experience a marked incongruence between the gender assigned at birth and the gender they identify themselves with.*

*In the 5th edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-V), the American Psychiatric Association replaced Gender Identity Disorder (GID) with “Gender Dysphoria” (GD), according to which persons who experience psychological distress concerning their gender identity may be recognised as Gender Dysphoric. The World Health Organisation in the year 2018 decided to revise its International Classification of Diseases (ICD-11), which is used as the international standard for collection of health information, to declassify transgender identity as a mental disorder. Their objective behind the same was to reduce victimisation of transgender people. They proposed that transgender identity does not satisfy the definitional requirements of mental disorders because a condition is designated as a mental illness if the very fact of its existence causes distress to a person. A study published in the Journal of Lancet Psychiatry claimed that being transgender does not have to equate with suffering as it is external factors such as societal stigma, violence and prejudices that cause distress and not the feeling of gender incongruence. The combined stigmatisation of being transgender and having a mental disorder create multiple disruptions impacting health. Although this is different from the DSM-V conceptualisation of GD, which requires distress and dysfunction as a requisite for the diagnosis, the WHO’s declassification may be attached to its risks. Ensuring their access to care requires diagnosis to obtain medical treatment and getting the insurers to include this in their covered services. This paper analyses the controversy of declassifying transgender identity as a disease and retaining it to make access to care available because medical treatment for any condition requires a narrative of pathology.*

*Keywords: Transgender, Gender Dysphoria, Mental illness, medical treatment.*

## INTRODUCTION

The origin of the word “Gender” comes from an old French term “Gendre” which means “kind, sort, genus.” The term “gender assigned at birth” refers to a gender that an infant is born with and is usually declared based on a newborn’s physical characteristics like genitalia. It also includes terms like “natal sex” and “birth sex” within its purview. On the other hand “experienced gender” or “gender identity” refers to an individual’s psychological sense and understanding of their gender.

The term Transgender includes in its wide ambit all individuals who experience some incongruence between the gender assigned at birth and their experienced gender. A transman is a transgender individual who identifies as male though assigned as female at birth and a transwoman is a transgender individual who identifies as female despite being assigned as male at birth.

A population-based data estimate of the exact number of transgender persons across the world is extremely challenging for factors which are discussed later. Research conducted by the Williams Institute in April 2011 estimated 0.3 per cent of adults of the U.S population identified as Transgender, or 700,000 adults in the United States. The New York Times in 2016 reported that about 1.4 million adults in the United States identified as transgender (0.6 per cent of the population).

Individuals with gender behaviours, expression and identities that depart from the cultural norms and expressions implied by their assigned sex at birth have been labelled “gender nonconforming”, “gender expansive”, and most commonly “transgender”. Gender Dysphoria refers to the ongoing distress that arises from the incongruity of assigned sex at birth and the internal experience of gender. It is defined in the fifth edition of The Diagnostic and Statistical Manual of Mental Disorders (DSM-V) as psychological distress experienced by persons in relation to their gender identity.

## **THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM)**

The Diagnostic and Statistical Manual of Mental Disorders is a handbook primarily used by healthcare professionals in the United States, and across the world, as an authoritative text. DSM consists of descriptions, symptoms, and other criteria for diagnosing mental disorders. It enables effective communication by providing a common language for clinicians to talk to their patients and establishes consistent and reliable diagnoses that can be used in research. It also provides a common language for researchers to study the criteria for potential future revisions and to aid in the development of medications and other interventions. The DSM is published by the American Psychiatric Association (APA). The American Psychiatric Association which was formed in 1844, is an organisation of psychiatrists who work together to ensure humane care and effective treatment for all persons with any kind of mental illness.

Gender Identity diagnoses first entered the DSM in its third edition (DSM-III) in 1980 with three entries: transsexualism, gender identity disorder of childhood, and atypical gender identity disorder. The fourth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) contained the clinical entity of “Gender Identity Disorder” (GID) as a diagnostic criterion instead of “Gender Dysphoria” (GD). GD replaced GID in 2013. DSM-V renamed GID “Gender Dysphoria” with the fundamental aim of decreasing social stigma which is associated with the diagnosis while maintaining a diagnosis to ensure access to care for those who needed it.

## **THE INTERNATIONAL CLASSIFICATION OF DISEASES (ICD)**

The ICD is the foundation for the identification of health trends and statistics globally and maintained by the WHO. It was created as a health care classification system and provided criteria to classify diseases including a variety of signs, symptoms, abnormal findings, complaints, external causes of diseases etc. In many countries, ICD is used as a part of their national framework for helping governments ascertain their obligations towards their populations. It is also used by private health care providers like insurance companies to define eligibility for coverage and to determine the premium.

WHO was entrusted with the ICD at its creation in 1948 and published the 6th version, ICD-6, that incorporated morbidity for the first time. The WHO Nomenclature Regulations, adopted in 1967, stipulated that

Member States use the most current ICD revision for mortality and morbidity statistics. The ICD was revised and published in a series of editions to reflect advances in health and medical science over time. The most recent version of the International Classification of Diseases is the ICD-11 which was released on 18 June 2018 and will come into effect on 1 January 2022.

## **DECLASSIFICATION OF TRANSGENDER IDENTITY FROM THE LIST OF “MENTAL DISORDERS”**

The United Nations’ Health Agency approved a resolution to remove transgender identity from the list of “Mental Disorders” and it is being reframed as “Gender Incongruence” to be included under the chapter on Sexual Health. This is a monumental change for the lives of every transgender person as their identity is no longer considered a mental illness. The WHO has given effect to this resolution by way of proposing changes in the ICD-11 which was released in 2018 but is set to come into effect in 2022. The reasoning behind this change is that for any condition to be designated as a mental illness that condition must cause some distress and dysfunction to the person. It has been observed that identifying as Transgender doesn’t per se cause any distress to the person as most find it liberating and it is the stigma that associated with the identity that causes distress. The proposed diagnostic guidelines note that gender incongruence can be associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning, particularly in disapproving social environments, but neither distress nor functional impairment is a

diagnostic requirement. In 2011 a unanimous resolution was passed by the European Parliament calling upon the WHO to withdraw gender identity disorders from the list of mental disorders and to ensure that it has been non-pathologised.

## PROBLEMS ASSOCIATED WITH THE DECLASSIFICATION

One of the major risks of de-pathologising transgender identity is limiting the access of care available to them. Transgender persons require various treatments throughout different phases of their lives. They may approach their primary care providers, endocrinologists or mental health workers. Private or public health care providers rely on the ICD to determine the eligibility of a patient to receive insurance and other forms of coverage. Removing transgender identity from the list of mental disorders discourages insurance providers to give coverage to transgender persons. The following are a few treatments that transgender persons may seek:

- **Psychotherapy:** In a recent study of transgender persons, about 48.3 per cent of the study population was found to have suicidal ideation and 23.8 per cent had attempted suicide at least once in their lifetime. Anxiety, depression, personality disorders, substance abuse disorders are a few common psychological problems faced by them. A study was conducted in New York City's Metropolitan area with a sample size of 571 Male-to-Female transgender persons to ascertain the psychiatric impact of interpersonal abuse associated with an atypical presentation of gender. Diagnostic and Statistical Manual of Mental

Disorders-IV were retrospectively measured across five stages of their lives. It was observed that among younger respondents the impact of both physical and psychological abuse on major depression was extremely strong during adolescence and then markedly declined during later stages of life. The study concluded that gender-related abuse is a major mental health problem among male to female transgender persons, particularly during adolescence.

Similarly, another three-year prospective study from 2004 to 2007 among a sample size of 230 transgender women between the age of 19 to 59 years, who were also from the New York City Metropolitan Area, concluded as follows. *“Psychological and physical gender abuse is endemic in this population and may result from occupational success and attempts to affirm gender identity. Both types of abuse have serious mental health consequences in the form of major depression. The association of psychological abuse with depression was stronger among younger than among older transgender women.”*

Mental health professionals play a very significant role in helping transgender individuals in the process of ‘coming out’. A referral from a mental health professional is very significant under the standards of care protocols for those seeking breast/chest or genital surgeries. The latter also requires confirmation from an independent mental health provider.

- **Hormone Therapy:** The primary purpose of hormonal therapy is to reduce naturally occurring hormones to minimise secondary sex characteristics and maximise desired feminisation/masculinisation using the principles and medications used for hormone replacement in non-transgender patients who do not produce enough hormones. There is a high demand to start hormonal therapy in patients before they hit puberty, but it is still under research and is not widely practised as certain ethical issues surround the topic. However, the criteria for starting hormonal therapy is as follows –

1. Persistent and well-documented gender dysphoria;
2. Capacity to consent for the treatment; and
3. Mental or medical underlying issues are in control.

Female to male transitioning hormone therapy will result in the following consequences – deepened voice, clitoral enlargement, growth in facial and body hair, cessation of menses, atrophy of breast tissue, increased libido and increased percentage of body fat.

In male to female transitioning, hormone therapy will lead to the following results – breast growth, decreased libido and erections, decreased testicular size and increased percentage of body fat.

The timeline for this therapy depends on the individual. The expected onset is within months and the maximum expected effect will be felt within three or more years.

- **Surgical Therapy:** This is also commonly known as “gender transition-related surgery” or “sex reassignment surgery” or “gender-confirming surgery”. This is generally the last step of the treatment process. As mentioned, an earlier referral from a mental health professional is necessary for this surgery. The preferred way of proceeding with surgical therapy is to ensure that the individual seeking surgery is on one year of continuous hormone therapy and living under the desired gender identity. These surgeries are generally categorised as “top” surgery and “bottom” surgery. For “top” surgery it is recommended that patients be on hormone therapy for 12-24 months. For “bottom” surgery it is recommended that the patient is on hormone therapy for 12 continuous months. Bottom surgeries also include:

1. Metoidioplasty - surgical relocation of an enlarged clitoris
2. Phalloplasty - surgical creation of a penis
3. Vaginoplasty - surgical creation of a vagina.



Photo Credit: Aysha Samrin for The Tempest

## PROBLEMS WITH RETAINING THE CLASSIFICATION

- **Prerequisites to be classified as a mental illness**

Mental illness refers to *“a clinically recognisable set of symptoms or behaviours associated in most cases with distress and with interference with personal functions.”* This definition is very broad as it includes grief reactions to everyday problems which also constitutes syndromes that were not initially intended to be included under the list of mental illnesses.

Many of the recommendations for removal involved conditions related to gender identity and sexuality, specifically gender identity disorders, sexual dysfunction, and paraphilias. It should be emphasised that clinicians’ recommendations to remove these categories from mental disorders classifications do not necessarily suggest that they question the validity of the categories themselves but rather their placement in the classification of mental disorders.

In a recent study, many recommendations were made to remove gender identity disorders from the list of mental disorders. Some of the clinicians who were the subjects of the study used the following rationale to justify their recommendations: *“It should be emphasised that clinicians’ recommendations to remove these categories from mental disorders classifications do not necessarily suggest that they question the validity of the categories themselves but rather their placement in the classification of mental disorders. According to 15 to*

*32 per cent of clinicians from eight different countries, at least some of these disorders should be removed from mental disorders classifications, mainly because of problems related to stigma and unclear boundaries between normal behaviour and psychopathology.”*

The reasoning adopted above is that expressing one’s gender identity is considered as normal behaviour and should not be pathologised. Considering transgender identity as a mental illness only indicates that differences are being classified as mental disorders.

Many have argued that the view of classifying transgender identity as a mental illness is an accident of history. We now have scientific evidence that expressing gender identity is not merely a choice but rather sets all of these individuals on a self-liberating path seeking to satisfy an inner truth.

According to the DSM-V definition, gender dysphoria requires distress and dysfunction as key elements to constitute a mental illness. The challenge to this classification is to identify whether the distress caused to the transgender population is because of their gender incongruence or because of the stigma associated with it and the trauma they face because of it. More often than not the latter is the reason for distress. The incongruence between gender identity and assigned gender doesn’t interfere with all trans people’s lives. They are content living the way they are or may desire some forms of medical intervention. It is only for a subset of individuals that incongruence results in gender dysphoria.

- **Stigma**

Transgender persons experience 'minority stress' which in turn leads to poor health, discrimination and well-being. Across the world, transgender people experience stigma daily. When they face discrimination in all aspects of life, including alienation from family and friends, they tend to drop out of school and run away from homes. They also encounter discrimination and abuse in the workplace which might result in unemployment or underemployment. As a result, they are drawn to unsafe sexual practices which result in serious health issues.

In 2003, 1093 transgender people were recruited online to participate in a study assessing the association between minority stress, mental health, and potential ameliorating factors in a large, community-based, geographically diverse sample of the US transgender population. The study concluded that in comparison with norms for non-transgender men and women, the transgender sample of the study had disproportionately high rates of depression, anxiety, somatisation, and overall psychological distress. These mental health outcomes were not merely a manifestation of gender dysphoria. Instead, the reported distress was associated with enacted and felt stigma.

Stigma results in financial instability, intentional self-harm, discrimination and abuse. They are denied access to basic health care, housing, fundamental goods and services.

- **Victimisation**

Factors that result in victimisation of transgender populations include physical, verbal and emotional abuse, discrimination in the workplace, lack of social support from friends and family, improper or no access to healthcare, and sexual violence perpetrated because of their gender expression.

Many transgender populations across the world are victims of abuse by law enforcement. When arrested and detained they are often placed in gender-inappropriate facilities that put them at risk of assault. 70 per cent of victims of physical violence did not report the assaults to the police. In the most recent incidents, only 26 per cent reported the assaults to the police.

Transgender people are also under the constant threat of violence. International research documented a total of 1731 killings of transgender people between January 2008 and December 2014. Several killings either go unreported or misreported.

In summary, studies conducted since 1999 have shown that transgender people are victims of sexual violence, specifically sexual assault, attempted sexual assault, rape, and attempted rape. Also, this violence is often perpetrated specifically because of their gender identity or expression.

They are victims of physical violence, sexual violence, assault, verbal and emotional abuse and discrimination not only from society but also within their own homes.

- **Double Trauma**

While the label of mental disorder is by itself stigmatising the combined stigmatisation of identifying as transgender and having a mental illness creates double trauma.



## CONCLUSION

Geena Rocero, a transgender rights advocate and also the founder of 'Gender Proud'- a media production that enables transgender individuals to tell their stories, in her TED Talk titled *"Why I must come out"* explains why being transgender isn't a choice: *"We are all assigned a gender at birth. Sometimes that assignment doesn't match our inner truth, and there needs to be a new place -- a place for self-identification."*

Being transgender doesn't equate with suffering or distress. The external factors such as stigma, discrimination, victimisation, violence and trauma cause distress and suffering. If the transgender population is liberated from these external factors there won't be any distress but only a feeling of 'gender incongruence'.

There exists a dilemma around removing transgender identity from the list of mental disorders to reduce stigma and retaining it to provide easy access to health care. The problems associated with retaining it outweighs the problems of declassifying it.

# LOSING BANGLADESHI QUEERS TO SUICIDE



BY I SAYED

This article is a collaboration with Rasel Ahmed, a community-based filmmaker and queer archivist. As queer community organisers we often encounter people who have previously struggled or presently struggle with suicide, or who have lost their queer friends to suicide. We are writing this article based on our memories, community members' detailed accounts of their close friends, as well as published materials. We are not certified social workers, nor mental health experts. We only speak to the experiences we know about. Our observations are in no way comprehensive. We write in hope to open a wider conversation about the many ways in which we are losing our queer kins to suicide in Bangladesh.

***TRIGGER WARNING: This article contains descriptions and details of suicides which may be upsetting to some people.***

***NOTE: The names in the article have been changed in cases requiring anonymity. I Sayed is a queer poet and writer from the Bengal delta.***

In one of the last calls to his friend Shan said, *"I think I won't live too long. There's something tragic ahead of me."* In late 2019 we lost Shan to suicide when he was 23 years old. Two years prior we lost Sajjad to suicide when he was forced to undergo a heterosexual wedding. Beside these two we witnessed many of our Bangladeshi queer friends struggling with depression, anxiety, and suicidal thoughts. Around the world, LGBTQ+ people, particularly youth, are at higher risk of suicide. In Bangladesh, where homosexuality remains criminalised under section 377 of the Bangladeshi penal code, a colonial remnant, the government does not officially track suicide in the LGBTQ+ community. The non-governmental estimates are irregular. In 2015 Roopbaan and Boys of Bangladesh completed a 571-participants survey of LGB individuals.

They found that over 20 percent of the respondents, who reported feeling mentally stressed due to their sexual orientation, admitted “to harbouring self-hatred and suicidal thoughts.” Human Rights Watch’s interview with six trans men from different parts of the country revealed that all of them “had attempted suicide at least once and, in some cases, a few times in their lives.”

According to Bangladesh police data, there were over 11,000 suicides across the country in 2018. But news of queer suicides continue to be rare and unreported. Often families hide suicides in order to avoid social stigma, media scrutiny, and police investigations. It is worth noting that attempting and abetting suicide is criminalised in the country’s current penal code, and the media is not sensitised to report suicide with empathy. There isn’t much information or research available online.



Photo Credit: Reuters

Grief and loss through queer suicides continues to be deeply felt in the Bangladeshi queer community. Most times LGBTQ+ suicides are reported and remembered through informal community conversations. Some stories are shared in secret online groups. Oral histories and first-person accounts are primary sources of queer suicide stories in Bangladesh. When queer organisers drafted a submission for the UN's Universal Periodic Review 2017 they reported at least 5 queer suicides since 2016. Gay suicides are relatively more visible, indicating the greater access to voice their struggles and higher social value placed on men's lives. Suicides among hijras, kothis, trans, lesbians, and others almost routinely fall out of the media and community radar. Several of our lesbian friends attempted suicide, yet no public conversation exists on the topic. Dhee, a lesbian comic strip, was an exception as the comic told the story of a girl who contemplates committing suicide. At the time of this writing, our friends in the hijra community are still mourning Shima, who was lost to suicide last month.

What drives suicides in the Bangladeshi queer community? One broad answer could be homophobia. From the stories we encounter we see a pattern of homophobic abuse and mistreatment within families and wider social circles leading eventually to suicide. Upon coming out queer individuals face family abuse and pressure to conform to heterosexual roles, as well as rejection and exclusion from friends and family. For instance Sajjad's family forced him into a wedding in order to "fix" his homosexuality. Srabon attempted suicide last year during a visit to his family when his siblings and relatives excluded him from his

inheritance. Among queer men kothis (effeminate men) and trans men are more susceptible to homelessness and financial insecurity. Younger queers are prone to facing more stigmatisation and abuse. Sakib, a 23-year old gay college student, faced online and offline homophobic verbal abuse for his feminine appearance. He attempted suicide two months ago. In workplaces queers face bullying, harassment, and exclusion. Asad, a 32-year old gay man, working a white-collar job was outed in his workplace, started to face homophobic slurs and harassment, and eventually lost his job in 2018. He attempted suicide.

The queer community is not a safe space for all queers. LGBTQ+ community members engage in exclusionary practices along lines of skin color, beauty, class, regionality, language, and effeminacy. A recent conversation in a closed group is a case in point. Group members were sharing their romantic and sexual preferences. They explicitly stated that they are not attracted to effeminate men and crossdressers. When this internalised sexual hierarchy was called several community members responded in a tone of compromise: *“We can tolerate such people, but are not sexually attracted to them.”* Alongside toxic attitudes such as preference for fairer skin, anti-blackness, and body shaming are common in the social and dating scene. Trans men have pointed out that when community members talk about their attraction to men it does not include trans men. Summing up these exclusions one trans member stated, *“people in the community are often more cruel and intolerant than the people outside our community.”*

But toxic behavioural patterns are not sufficient to explain everything that leads to queer suicides. Individual fear and rejection of queerness alone cannot produce the conditions under which queer people commit suicide. Much like in other contexts there is something deeper and more pervasive at work in Bangladesh. We need to look at the complex set of cultural, social, economic and political arrangements positioned to discriminate against Bangladeshi queer people. This heterosexist system takes heterosexuality as the norm and considers everything outside heterosexuality as deviant, punishable, unworthy of life and dignity. Through a wilful absence of laws, policies, programs to support queer lives, the Bangladeshi state backs heterosexism's prevalence in society and turns a blind eye to heterosexist damage across homes, workplaces, public spaces, and institutions.



Photo Credit: Getty Images

There are no social services such as homeless shelters, healthcare, education, employment support and so on for LGBTQ+ people. On the mental health front there are no targeted suicide prevention programs and there's no mention of LGBTQ+ people in the mental health policies of the Bangladeshi state. Even NGOs that work on mental health fail to address the silent multiplication of suicides in the LGBTQ+ community. More available are counseling and therapies that attempt to “cure” queer people. Raihan, a gay teenager, came out to his mother and was taken to multiple doctors who promised his mother that they could “cure” his homosexual “disease”. Raihan has been struggling with suicidal feeling since last year and attempted suicide twice under the multiplied burden of family abuse, economic hardship, and a breakup with his boyfriend. In the absence of any adequate state response towards the murder of two gay activists in 2016 the atmosphere of fear has deepened. This has led some families putting more pressure on their queer members to lead a “normal” life.

Under prevalent heterosexist conditions, queer people survive interconnected chains of depression, anxiety, and traumas daily. Given these circumstances, intimate partner violence and failure in romantic relationships also at times trigger suicidal attempts. Diya, a hijra NGO worker, committed suicide by hanging, following a fight with her boyfriend in 2006. Such stories are not uncommon, as was also documented in the Bangladeshi LGBT publication, Roopbaan magazine's article titled “*Suicide!*” in the second issue.

## THE WAY WE LOST SHAN

Shan's life story exemplifies several important conditions that lead to queer suicides in Bangladesh. We chose to tell this story as a way to honour Shan's struggles and to not allow his memory to disappear into a heterosexist amnesia.

Shan came from a family of five. From childhood through his teenage years Shan's stepmother and sister bullied him for his "feminine behaviours." They scolded him and pejoratively called him "*hijra*", which is a gender-based community that identifies as neither male nor female. Since Shan's father disliked Shan's gender expression he turned a blind eye to the domestic abuse for years. At school teachers and friends bullied Shan for wearing makeup. Leaving his family home did not bring a better future. After high school Shan moved out, continued his education in a private college and lived with his uncle in Dhaka. Here he faced abuse at the hands of his uncle and his cousin for his feminine gender expression and had to move once more. Leaving home was not simply a physical act for Shan. It was an immensely taxing mental maneuver. From the time Shan left home he would call his close friend to talk about his depression and suicidal tendencies. He talked about feeling distant from his father and resenting his biological mother for having left him as a child.

Leaving his family home also meant losing monetary security. When Shan moved out of his home his father decided to discontinue funding his education and living expenses. In the absence of any social services

for homeless youth Shan was forced to move into a shared living situation in a low-income neighbourhood. He lived in a tiny “*jhupri*” room with his roommate (also a young gay man). They shared two bathrooms and a kitchen in a cluster of 25 other rooms each with multiple tenants. Without any family support Shan relied on his roommate for food and clothes while he paid for rent and education by taking on odd jobs and sex work in the upper class circles of Dhaka’s urban society.

Surviving alone exposed Shan to social risks. Once Shan got involved in sex work, his friends recounted, Shan also got involved with drugs. At one point the police arrested Shan with one of his clients. Shan then got embroiled in a court case where his client was charged with violation of Article 377 and faced jail for three years. After leaving home between 2014 to 2019 Shan struggled to find a place where he could live with dignity and acceptance. He returned to his family home in 2019. The old abuse restarted. His brother-in-law beat him and his sister refused to give him food regularly. Shan would call his friends on the phone saying, “*I haven’t eaten in two days. They are buying food, but they are not giving me any.*”

Later in 2019 Shan used his sister’s orna, a type of long scarf, to hang himself. The exact circumstances leading to the suicide remain obscure as Shan’s family did not allow a post-mortem and buried him soon after. The series of domestic, economic, educational, and housing struggles that led to the moment of Shan’s suicide could have been avoided.

## A FAILED HEALTHCARE SYSTEM

The ongoing COVID-19 pandemic is showing once more how Bangladesh's healthcare system is unreliable, inequitable, and inaccessible. When it comes to mental health Bangladesh's healthcare system lacks resources. In 2017, the World Health Organisation reported that there are 0.13 psychiatrists per 100,000 people in Bangladesh, an alarming situation reflected across the entire mental health workforce. The Bangladeshi government spends a miniscule 0.44% of health care expenditure on mental health. There exists no social insurance for mental health services which makes accessing mental health service a luxury. Bangladesh lacks any robust and inclusive mental health policy that recognises the unique experiences of queer people. A handful of pro-LGBT+ counseling and therapy services exist in the country but their knowledge is not common within the queer community and not everyone can afford them. General phone-based support services, such as Kaan Pete Roi, help only to a certain extent and then refer queer people to doctors in public hospitals. In the present political climate queer people rarely trust these government avenues.

## ORGANISING QUEER RAGE

In the meantime queer community organisers are working with scarce resources to save queer lives. One group raised donations to support private counseling services for members who couldn't afford those services. Another collective of queer organisers are training themselves and practicing community counseling to support each other.

Standing between roadside teastalls in north Dhaka Asad told me one evening, *“I wish to kill myself, not because I do not love myself. I do. But I hate this world... so cruel, inhospitable, hurtful.”* Queer suicide, for him, is an act militating against the injustices of the heterosexist world. That is to say, as Joon Oluchi Lee suggests, suicides are *“not necessarily an act of fear or escape.”* Queer subjects are enraged about the world’s unfairness and have no outlet to direct that anger. So they redirect that rage, in Lee’s poignant words, *“against the very flesh that encloses the heart that feels hurt.”* Aside from demanding inclusive policy, laws etc., the foremost and pressing responsibility for queer community organisers is to care for and make space for those hurting hearts; to rechannel that rage away from turning inwards among our queer kins, and more justifiably towards dismantling those institutions and processes that multiply hurts in the world around us, against us. Recognising our individual and collective struggles with suicide as vast reservoirs of agency that can transform our present could take us towards queer horizons of mental health liberation.



Credit: Governor Tom Wolf/Flickr

# LEGAL AND SOCIAL REFORMS TO PROTECT TRANSGENDER PERSONS IN PAKISTAN

## A REVIEW OF PAKISTAN'S TRANSGENDER PERSONS ACT





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## EXECUTIVE SUMMARY

Pakistan is one of the few countries in the world to recognise the self-perceived gender identity of transgender individuals and has passed a landmark legislation in this accord. In 2018, Pakistan's parliament passed the Transgender Persons (Protection of Rights) Act (TPA 2018), a law that guarantees basic rights for all transgender people and outlawed discrimination in the workplace. This historic law enshrines the right of every Pakistani citizen to self-identify themselves as male, female, or a blend of both genders. The law, a revolutionary move, is a model in terms of construction, detail, nuance, and clarity, placing Pakistan leagues ahead of her neighbours across South Asia on this issue. It recognises and asserts the fundamental rights of trans people in all spheres of life including matters of inheritance, employment, education, holding public office and voting. It upholds their right to be who they are, affirming that what matters is an individual's sense of identity whether or not it corresponds to the sex assigned at birth. iProbono, in partnership with VISION, Islamabad, and the National Transgender Network (NTN) in Sri Lanka, conducted a review of the impact and efficacy of Pakistan's TPA 2018. The objective of this paper is to guide the NTN and work with them to draft suitable legislation that will enable Sri Lanka to protect transgender rights.

This brief report (a) analyses the strengths and weaknesses of the TPA 2018 as well as other legal provisions and policies that touch upon the rights of transgender persons in Pakistan and (b) provides recommendations to improve the existing protection framework. It covers the following:

- Recommendations
- The historical context and the development of the transgender movement in Pakistan leading to the enactment of TPA 2018;
- Review of the existing legal framework including the constitutional provisions, criminal law provisions and the TPA 2018;
- Implementation challenges and practical difficulties in enforcing the law;
- The social context and current situation of the transgender community in Pakistan;
- Key successes stories of implementation and enforcement of Pakistan's TPA 2018; and
- Conclusion

## RECOMMENDATIONS

- The real challenge is to initiate campaigns to sensitise people and build the capacity of government officials, law enforcement agencies, lawyers, judges, and policemen to protect the rights of transgender persons in tune with the provisions of the TPA 2018. The government should focus on awareness programmes that will generate social support and consequently remove barriers in policy making and its implementation. This also requires collaborating and engaging with the transgender community and civil society from the different provinces on a large-scale, continuing basis to develop and implement measures that will help in the integration and inclusion of transgender persons in mainstream society.
- A striking gap in the TPA 2018 is the lack of provisions for penalty and punishment that imposes fines and/or penalises anyone engaged in harassing, abusing and violating the rights of transgender persons. This hinders the overall aim, efficacy and implementation of the law. The laws and policies must be reviewed regularly and be adopted at a provincial level to ensure uniformity in implementation and enforcement. This will also aid in developing policies in the future that allow transgender persons to have free access to workplaces, offices, schools, and the health sector without the fear of harassment or stigma.
- Due to a disconnect between the State and the community, there is inadequate data about transgender persons, and their population size,

and geographical spread in Pakistan. As a result, the national and provincial budgets earmarked for the community is misallocated. Despite the inclusion of the category of 'third gender' under the National Database & Registration Authority (NADRA), their registration in the population census remains low because of the disparities in resource allocation and the lack of a strategic approach to identify transgender persons in the country. The Pakistan National Bureau of Statistics needs to streamline the collection of data and develop a strategy to effectively include transgender persons so that evidence-based policymaking can be conducted. An accurate statistical representation of the community will aid their integration in society and ensure access to resources for the community.



## HISTORICAL BACKGROUND OF TRANSGENDER PERSONS IN PAKISTAN

To map the current socio-legal position of the transgender community in Pakistan, one must consider the context of a colonial legacy, religious extremism, key case law since 2009 and a long-standing rights-based advocacy movement from within the community itself. The enactment of the highly progressive TPA 2018, was the culmination of a concerted national advocacy effort bolstered by political will and judicial activism.

The transgender community of Pakistan, also referred to as *khawaja siras* or *hijras* trace their history to the courts of Mughal emperors that ruled the Indian subcontinent for almost two centuries. They thrived and served as authority figures in charge of collecting taxes and duties in the Delhi Sultanate and Mughal courts.[1] They also played a prominent role in the royal courts of the Islamic world in Medieval India.[2] They were integral in politics and society, with some members of the community rising to occupy key positions as political advisors, administrators, generals, and guardians of the harems. Historians have also noted that hijras were considered clever, trustworthy and fiercely loyal.[3]

The imposition of British colonial rule in India marks an identifiable shift in perception from about 1864. However, it was the Criminal Tribes Act of

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[1] Hijraism: Jostling for the Third Space in Pakistani Politics Claire Pamment TDR (1988-), Vol. 54, No. 2 (Summer 2010), pp. 29-50 - The MIT Press <https://www.jstor.org/stable/40650610>

[2] Anjali Arondekar, "For the Record: On Sexuality and the Colonial Archive in India (Next Wave: New Directions in Women's Studies), Duke University Press Books (15 Sept. 2009

[3] M. Michelraj, "Historical Evolution of Transgender Community in India, (2015):" *The Research Publication Vol. 4 No. 1* pp. 17-19 URL: <http://www.trp.org.in/wp-content/uploads/2015/10/ARSS-Vol.4-No.1-Jan-June-2015-pp.17-19.pdf>

1871, which classified the transgender community as a 'criminal tribe', resulting in their social isolation and economic exclusion.[4] They were then treated as a separate caste or tribe that had to be 'civilised'.[5] The British colonial administration vigorously sought to criminalise the community, denying them their civil rights, and making them vulnerable to economic and social exploitation. This pre-partition history of criminalisation and marginalisation of the hijras in the Indian subcontinent has significantly influenced the discrimination they face in Pakistan and other South Asian countries today.



"Senior Wives Playing Chaupar in the Court Zenana with Eunuchs" (James Ivory Collection)

[4] British Library. 1871. Criminal Tribes' Act. Act XXVII. V/8/

[5] Khan, Liaquat, "Transgender Dignity In Islam", Huffpost. 6 December 2017.

## TRANSGENDER RIGHTS MOVEMENT IN PAKISTAN

In Pakistan, the transgender rights movement gained momentum in 2009 when policemen reportedly assaulted and raped a group of transgender dancers in Taxila, a city near Islamabad.[6] Following this incident, in December that year, transgender activist Almas Bobby filed a petition for protection against violence for the transgender community in *Khaki v. Rawalpindi, Supreme Court of Pakistan*. In this case, the court held that the term hijra refers to individuals who are born male but who adopt female gender identities, typically through the choice of dress and social roles. They may or may not have had male genitals removed surgically. The Court did not focus its analysis on the surgical question when it ordered that trans persons should be permitted to register as a 'third sex'.<sup>[7]</sup> The Court stated that transgender persons are entitled to all the rights provided in the constitution including the right to live with dignity, right to inheritance, right to education, right to seek jobs and the right to vote.<sup>[8]</sup> The Court held that the transgender community is “...citizen of this country and subject to the Constitution of the Islamic Republic of Pakistan, 1973, their rights, obligations including the right to life and dignity are equally protected. Thus no discrimination, for any reason, is possible against them as far as their rights and obligations are concerned. The Government functionaries both at Federal and Provincial levels are bound to provide them with the protection of life and property and secure their dignity as well, as is done in case of other citizens.”<sup>[9]</sup>

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[6] Declan Walsh, “Harassed, intimidated, abused: but now Pakistan’s hijra transgender minority finds its voice,” *The Guardian*, 29 January 2010.

[7] *Dr. Mohammad Aslam Khaki & another vs Senior Superintendent Rawalpindi & another* (CP. 43 of 2009)

[8] *Ibid* – order dated 20th November 2009

[9] *Dr. Mohammad Aslam Khaki & another vs Senior Superintendent Rawalpindi & another* (CP. 43 of 2009)

Here, the Court further noted that the provinces had done nothing to protect the community from harassment or prevent others from using the status falsely to commit crimes. The Court directed the provinces to submit detailed reports on the status of their transgender populations and to draft an implementation policy for their welfare. The Court ordered law enforcement institutions to create mechanisms to prevent these problems from occurring. The reasoning of the Supreme Court was interesting because it did not require the individual seeking gender recognition as a third gender to undergo a reassignment surgery as compared to courts in other parts of the world.[10] The Supreme Court's decision and analysis was also likely influenced by the socio-cultural ethos in Pakistani society that accepts *hijras* (including those who may or may not have had male genitals removed surgically) in some clearly defined social positions.

Apart from having an active judiciary spearheaded by the then Chief Justice Iftikhar Chaudhry, who was known for taking suo moto actions on human rights violations, it was the commitment of the legislature, civil society and media that played key roles in amplifying the transgender rights movement in Pakistan. The atrocities committed against the community were extensively highlighted by the media, which then became a catalyst for change to ensure protection for the transgender community and their rights. Demonstrations and protests between 2010 and 2012, led by Karachi-based transgender activist Bindiya Rana, brought to attention the injustice of subjecting transgender persons to medical

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[10] *Van Kück v. Germany*, European Court of Human Rights, Judgment of 12 June 2003, Application No. 35968/97, paras. 65 and 86.

tests to verify their genital status to attribute a gender identity; that it is humiliating and should not be mandatory. Ultimately, sustained advocacy efforts led to striking down this requirement and more importantly, paved the way for self-perceived gender identity.

By 2012, the Court in its final order in the Almas Bobby case gave legal recognition to the 'third gender' by directing NADRA to issue national identity cards. But it was only in June 2018 that suo moto notice was taken by the Supreme Court on fully resolving the issue of securing national identity cards for transgender persons. A Provincial Monitoring Committee was established that ensured prompt and proper registration of all transgender persons residing in the country. The community, however, still had to overcome opposition from religious clerics as well those who perceived their very existence as against the values of Islam.[11] Reaching consensus with the Council of Islamic Ideology (CII), a constitutional body responsible for advising the government and parliament on Islamic issues helped reinstate the Khwaja Siras as a religiously and culturally recognised community in the public consciousness.

## **LEGAL FRAMEWORK FOR PROTECTION OF TRANSGENDER PERSONS IN PAKISTAN**

In this section, the report analyses Pakistani law concerning the protection and participation of transgender persons. It also discusses the State's obligations arising out of international treaties and conventions that call for the protection of human rights.

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[11] Pakistan takes steps to protect the rights of the transgender community, Gulf News, <https://gulfnews.com/world/asia/pakistan/pakistan-takes-steps-to-protect-the-rights-of-transgender-community-1.63071900>, accessed on 2 April, 2019

## I. CONSTITUTION OF PAKISTAN 1973

The Constitution of Pakistan guarantees the fundamental rights of all citizens to be treated equally, and legislatures must ensure all laws are in line with the fundamental rights provisions. The following articles ensure equality before the law without discrimination based on sex, however, they do not mention sexual orientation or gender identity.

- Article 22(4) states that *'nothing in this Article shall prevent any public authority from making provision for the advancement of any socially or educationally backward class of citizens'*.
- Article 25 of the Constitution states that *'all citizens are equal before the law and are entitled to equal protection of the law and that there shall be no discrimination based on sex'*.
- Similarly, Article 26 guarantees non-discrimination *'on the ground only of race, religion, caste, sex, residence or place of birth'*, in respect of access to public spaces *'of public entertainment or resort not intended for religious purposes only'*.
- Article 27 ensures *'that no citizen otherwise qualified for appointment in the service of Pakistan shall be discriminated against in respect of any such appointment on the ground only of race, religion, caste, sex, residence or place of birth'*.

According to Article 26(1) and Article 27(1), no one should be subject to discrimination based on sex. Despite these constitutional guarantees, transgender persons have historically faced discrimination and mistreatment in Pakistan.

## II. INTERNATIONAL LAW & TREATIES

International declarations and treaties, ratified by Pakistan, strive to ensure equality for all persons irrespective of sexual orientation and gender identity. As a member of the United Nations, Pakistan is obligated to uphold the rights and principles enshrined in the Universal Declaration of Human Rights (UDHR), including the right to not be tortured or subject to cruel or inhuman punishment or degrading treatment, and the right to be free of discrimination based on gender.

Article 2 of the UDHR provides that *'everyone is entitled to all the rights and freedom set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'*.

As of April 2008, Pakistan is also a signatory to the International Covenant on Civil Political Rights (ICCPR), which contains many provisions advocating for the rights of transgender persons. Article 2(1) provides that each State Party:

*'...undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'*.

Moreover, Article 26 provides:

*'...all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'*

On protection from violence resulting from transphobia, the ICCPR provides under Article 6 that:

*'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'*

Article 9 provides that 'Everyone has the right to liberty and security of person'.

### **III. PAKISTAN PENAL CODE 1860**

The Pakistan Penal Code (PPC) does not specifically refer to homosexuality, however, it criminalises carnal intercourse that goes against nature or 'the natural order'.

Section 377, dealing with unnatural offences, states, *'Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with*

*imprisonment of either description for a term which shall not be less than two years nor more than ten years, and shall also be liable to fine’.*

Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

Further, Section 294 of the PPC that deals with obscene acts and songs, is occasionally used against transgender persons and male sex workers.[12]

Section 294 states, *‘Whoever to the annoyance of others – a) does any obscene act in any public place, or b) sings, recites or utters any obscene songs, ballad or words, in or near any public place, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.’*

#### **IV. THE ELECTIONS ACT**

The Elections Act, 2017, is the first major electoral reform effort since Pakistan’s first direct election in 1970. The Act intends to:

- Empower the Election Commission of Pakistan,
- Have improved accountability and transparency, and
- Ensure participation of vulnerable and marginalised groups including transgenders, women, and people with disabilities.

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[12] Immigration and Refugee Board of Canada (IRB), ‘Pakistan: Situation of sexual minorities in Islamabad ...’, 13 January 2014,

'Concerning the participation of transgender persons, the Act makes clear under Section 48 that:

*(1) The Commission shall take special measures for registration of non-Muslims, persons with disabilities and transgender citizens in the electoral rolls as voters.*

*(2) The measures under sub-section (1) shall include coordinated action with the National Database & Registration Authority to expedite the issuance of National Identity Cards for non-Muslims, persons with disabilities and transgender citizens.*

*(3) No activity undertaken in connection with an election by the Commission or National Database and Registration Authority, as the case may be, shall be delayed, postponed or otherwise affected in any manner whatsoever, merely on the ground of any measure being taken under this section or section 47."*

## **V. TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2018**

Pakistan's Transgender Persons (Protection of Rights) Act, 2018, is considered the most progressive legislation for transgender persons in the South Asian region.[13] It ensures the protection of transgender persons from sexual and physical assault and harassment and guarantees their gender identity and political rights.

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[13] Transgender Persons (Protection of Rights) Act, 2018. No. F. 23(20)/18. (2018)

Under the Act three categories fall under the definition of Transgender–.

- Intersex also referred to as khusra, which is a mixture of male and female genital features or congenital ambiguities
- Eunuch, which is defined as someone who is assigned male at birth, but undergoes genital excision or castration
- Transgender man or transgender woman or any person, also called 'Khawajasara', whose gender identity or gender expression differs from the social norms and cultural expectations based on the sex they were assigned at the time of their birth.[14]



Photo Credit: AP

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[14] Transgender Persons (Protection of Rights) Act, 2018. section 2(n)

This definition is quite broad and uniquely innovative in terms of locating gender norms. It emphasises one's self-perceived gender expression or gender identity. This is explained further in the section titled 'Recognition of the Identity of Transgender Person' where an individual's self-perceived gender is the only identity that matters in the eyes of law.[15] While the definition is nuanced, there remains the question about how it will be implemented.

TPA 2018 is laudable to the extent that it recognises the transgender community's right to live with dignity as respectable citizens of the state. The Act prohibits discrimination and harassment and requires the government to establish protection centres, provide adequate medical facilities, establish mechanisms to create awareness, and support livelihoods. The Act grants transgender persons the right to vote, own and inherit property; right to education, healthcare and employment; right to hold public office, right to assembly, and access to public places.[16] According to the Act, kidnapping, abducting or inducing to have illicit intercourse shall be punished with life imprisonment and a fine. The Act also protects transgender persons from being deprived of inheriting property. Section 16 of the Act ensures that transgender persons shall enjoy all rights as contained in Part II of Chapter I of the Constitution.[17]

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[15] Transgender Persons (Protection of Rights) Act, 2018, s 3.

[16] Transgender Persons (Protection of Rights) Act, 2018. No. F. 23(20)/18. (2018)

[17] Constitution of Pakistan 1973; Section 16. *Guarantee of fundamental rights. (1) In addition to rights mentioned in this Chapter, fundamental rights mentioned in Part II of Chapter I of the Constitution of the Islamic Republic of Pakistan shall be available unequivocally for every transgender person.*

*(2) It shall be the duty of the Government to ensure that the fundamental rights mentioned in sub-section (1) are protected and there shall be no discrimination for any person on the basis of sex, gender identity or gender expression."*

Across the board, it is not uncommon for members of the transgender community to be denied or face impediments in accessing health care services. Section 12 of the TPA 2018, ensures the right to safe and effective health care. In September 2018, the Lahore High Court held that public hospitals in Punjab must provide separate facilities for transgender patients to safeguard their right to privacy and protect them from discrimination and prejudice.[18] Unfortunately, social stigma still impedes access to health care for sexual minorities in Pakistan. Even after the court ruled and the Act was passed, provincial governments are yet to make separate wards to ensure the privacy of transgender persons. The Act also ensures the right to employment of transgender persons to earn a safe and dignified living. In one such positive example, transgender activist Aisha Mughal became the first transgender person to be employed by the Ministry of Human Rights.

A striking flaw of the TPA 2018 is that no penalties or fines are stipulated for violation of its provisions and/or the abuse or discrimination of transgender persons. The prohibitions against harassment are mentioned but not supported by adequate penal provisions. Penalties stipulated within the TPA 2018 only cover persons forcing a transgender person to beg, with imprisonment up to six months. This is the only penalty mentioned. The Act also falls short of recognising other forms of harassment suffered by the transgender community, thus creating a disparity in its enforcement.

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[18] International Lesbian, Gay, Bisexual, Transgender and Intersex Association (ILGA), 'State-sponsored Homophobia', (page 462), 2019.

Secondly, TPA 2018 remains silent on a transgender person's right to have a family. The law also evades the issue of abandonment of transgender children by their parents. To provide comprehensive protection, the law must ensure protection and rehabilitation of abandoned transgender children and assist gurus – leaders of eunuchs groups who take abandoned transgender persons into their care – to seek aid from the government. The Act must provide clarity on this aspect.

Most importantly, all rights contained in the TPA are contingent on transgender persons officially registering themselves with NADRA.

The TPA 2018 attempts to ensure that transgender persons in Pakistan are guaranteed their fundamental rights. However, it remains to be seen how thorough the enforcement will be given the inadequate penal provisions, lack of awareness or sensitisation among law enforcement agencies and prevalent social stigma. Ironically, during the national elections held soon after the TPA 2018 was passed, the transgender community faced problems and suspicion over the authenticity of their national identity cards and were not allowed inside the polling stations to cast their vote.[19]

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[19] See Roli Srivastava & Meka Beresford, *Pakistan's transgender community says faced pushback at the general election*, REUTERS, 27 July, 2018, available at <https://www.reuters.com/article/us-pakistan-lgbt-transgender/pakistans-transgender-community-says-faced-pushback-at-general-election-idUSKBN1KG2OT>.

## IMPLEMENTATION CHALLENGES AND CURRENT STATUS

While the letter of the law is strong and beneficial to the community, transgender activists and experts explain that the lack of penal provisions and social sensitisation will hinder effective implementation of the law. This section examines the concerns, ambiguities and hurdles in implementing TPA 2018, across the different provinces in Pakistan.

Under TPA 2018, for the first time, a Commissioner for Transgender Persons will join the Federal Ombudsman Secretariat. The Secretariat is a grievance redressal body before which transgender persons are allowed to file their complaints. The mandate is to identify and investigate complaints, and provide redress. The three organisations mentioned in the legislation responsible for the implementation of the law include the National Commission of Human Rights, the National Commission on Status of Women and the Federal Ombudsman. However, these institutions are not in a position to enforce the law as they are merely monitoring bodies, and both commissions have been defunct for over a year. So far, only the Ministry of Human Rights has developed guidelines for the police and is now in the process of having these notified by the Government. Similarly, the Ministry is also working closely with the Ministry of Health on policies for doctors to follow and introduce a *Sehat Sahoolat* (health benefit) card for the transgender community; it has proved rather beneficial for the community.[20]

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[20] Speaking at a roundtable discussion held in Islamabad by VISION and iProbono on 25 January 2020.

According to Aisha Mughal [UNDP Expert Consultant to the Ministry of Human Rights, Government of Pakistan], the TPA 2018 has not reached some of the major stakeholders including the police and she deems this as an alarming situation. In her view, there is a duty to expedite the process of raising awareness within the Government institutions.

Official records show that there are approximately 10,000 transgender people living across Pakistan. The transgender community, however, has contested this figure as incorrect. The Commissioner for Transgender Persons at the Federal Ombudsperson assigned to validate and streamline outreach for the community has criticised Pakistan's National Bureau of Statistics. The official highlighted gaps in data collection and asserted that over 10,000 transgender persons were residing in the twin cities of Rawalpindi and Islamabad alone.[21] The recently concluded population census of 2019, which includes the third gender, recorded 10,400 transgender persons, which is again incorrect.[22] Besides individual registrations, *gurus* and their *chailas* are also being registered against each other for capturing information on their social structures. As of August 25, 2018, the number of transgender persons recognised and registered with the Social Welfare Department Punjab has exceeded 3200.[23] Of these, NADRA has issued computerised national identity cards (CNIC) to a majority of the people and the remaining cases are

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[21] Pakistan Today, Call for engaging 'Gurus' to develop a transgender database, <https://www.pakistantoday.com.pk/2019/03/20/call-for-engaging-gurus-to-develop-transgender-database/> accessed in November 2019

[22] Advocacy group Trans Action has estimated that at least 500,000 of the country's 207 million population identifies as transgender.

[23] Transgender Welfare Policy pg 11 - "Transgender Persons Welfare Policy, [http://www.supremecourt.gov.pk/web/user\\_files/File/Transgender\\_Persons\\_Welfare\\_Policy.pdf](http://www.supremecourt.gov.pk/web/user_files/File/Transgender_Persons_Welfare_Policy.pdf) Ibid

under process and expected to be completed shortly. It is important to note that the lack of data adversely affects evidence-based policymaking for the transgender community and hampers the efficacy and implementation of the Act, and therefore, needs to be addressed immediately.

Lack of awareness about the TPA 2018 amongst the enforcement agencies, including the police, remains a challenge. In October 2019, a grassroots NGO in Punjab conducted legal awareness training on the Act for the police constables stationed in various parts of Lahore.[24] Tahir Khilji, a leading human rights activist notes, *“After the passing of TPA, we need to ensure consistent capacity building of bureaucratic institutions and the enforcement agencies so a collective change can lead to transformative change for this community.”*[25] Violence, harassment, extortion, rape and murder of transgender persons continue across the country, despite the law. The police do not file complaints and are often complicit in the extortion, harassment and sexual violence against transgender persons.[26]

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[24] Legal Rights awareness training for police constables held at District Commissioner office in Lahore, Punjab, 12 October 2019

[25] Key Informant Interview held on 12 November 2019

[26] Human Rights Commission of Pakistan (HRCP), ‘State of Human Rights in 2018’, 2018, (page 181)

## MEASURES ADOPTED BY THE PROVINCES



The Punjab government enacted the Transgender Person's Welfare Policy in August 2018 to identify the factors that enable oppression and adopt measures to empower and protect the community.[27] The policy aims to lay down the guiding principles and identify priority areas to implement various programmes for the empowerment of the transgender community. The Sindh Government reserved a five per cent quota for the community in the police service in 2019, while the Khyber Pakhtunkhwa (KPK) government formed a special committee to notify and uplift the community with proper approval and mobilisation of the budget.[28]

The TPA 2018 is still in its early days and it will take time for jurisprudence to develop, and for all the provinces in the country to adopt the law into their frameworks. While it is evident that the State has taken concerted and unprecedented legal, policy, and institutional steps concerning protecting the legal and political rights of transgender persons, it is perhaps premature to judge the efficacy of these measures.

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[27] Punjab Social Protection Authority,(2018). Transgender Persons Welfare Policy. Transgender Persons Welfare Policy. Government of Punjab, Pakistan.

[28] Law, Parliamentary Affairs and Human Rights Department. (2018). Khyber Pakhtunkhwa Human Rights Policy. Government of Khyber Pakhtunkhwa, Pakistan.

## SOCIAL REALITY FOR THE TRANSGENDER COMMUNITY

Social stigma and discrimination against trans and gender-diverse people is real and embedded deep in the systemic cycle of oppression against sexual minorities. Historically, transgender persons are accepted in certain stereotyped roles, performing at weddings or begging and engaging in sex work, but they remain excluded from mainstream society.

Between 2007 and 2014, other South Asian countries including Nepal, Bangladesh, and India officially recognised transgender as a third gender, which benefitted the transgender rights movement in Pakistan as well. Furthermore, the media and popular culture have played an important role in raising awareness about transgender issues. Movies like Shoaib Mansoor's *Bol* and Sharmeen Obaid-Chinoy's *Transgender: Pakistan's Open Secret* have kindled a conversation around these issues. In 2019, the Pakistani movie *Darling* starred a transgender person in the leading role and has been influential in increasing visibility and acceptance of the transgender community in the public sphere.

Many transgender persons, especially those living in KPK and Balochistan province of Pakistan, are an easy target for violations. Extreme social stigma is another reason to conceal their gender identity, choose not to apply for identification cards, and avoid registering their names with NADRA.; Many who self-identify are also disowned by their families.

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[27] Punjab Social Protection Authority,(2018). Transgender Persons Welfare Policy. Transgender Persons Welfare Policy. Government of Punjab, Pakistan.

[28] Law, Parliamentary Affairs and Human Rights Department. (2018). Khyber Pakhtunkhwa Human Rights Policy. Government of Khyber Pakhtunkhwa, Pakistan.

Mehlab Jameel, a transgender activist said, “Families need to be accepting of their transgender child first so that the rest of the society does not shun them.”[29] Some of the older transgender activists, like Almas Bobby, also argue that the new law will encourage gay men to claim to be transgender to receive benefits. She believes that only those born with both female and male genitalia truly qualify.[30]

It is imperative to engage the leaders or *gurus*, to develop a comprehensive national-level database to ensure the socio-economic welfare of the community. The fact that the TPA 2018 makes no provisions to engage with gurus, makes it difficult to extend the protection of the laws to transgender persons placed under their care. The Act must be amended to consider this and place certain obligations on the gurus to ensure that those who are under their care have been registered and that their rights are protected.

## **KEY SUCCESS STORIES IN THE ENFORCEMENT AND IMPLEMENTATION OF TPA 2018**

The Government in Pakistan has appointed members from the transgender community in supervisory positions for a series of programmes. The focus is on providing training to other transgender persons, as the change will need to be led by the people from the community. The government consulted the transgender community in

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[29] Speaking at a session on transgender law and beyond at the Asma Jehangir Conference held on 19 October 2019.

[30] Memphis Barker, Once ostracised, now Pakistani transgender people are running for parliament, The Guardian, <https://www.theguardian.com/world/2018/jul/23/pakistani-transgender-people-office-election>, 23 July 2018

their decision-making process during the drafting of TPA 2018, and this meant the development of a more nuanced law. In January 2020, for the first time in the history of Pakistan, there was an event arranged for transgender persons in the Prime Minister's house where he spoke in detail about the protection of transgender rights. The Sehat Card (health card) for the community was also officially introduced at this event.

Additionally, the Ministry of Human Rights is also working with the relevant departments to ensure proper implementation of TPA 2018, and the introduction of other policies where required. Tahir Khiliji, a senior human rights activist, who has been conducting sensitisation training for trans people for the last two decades, mentioned that it is heartening and encouraging to see how far civil society has come in ensuring that marginalised voices are heard. He emphasised that different levels of sensitisation still need to take place as the journey has just begun and that the effective implementation of the Act will unveil new challenges.[31]

## CONCLUSION

Pakistan has come a long way in upholding its human rights obligations by enacting this highly progressive legislation despite facing opposition from among the more orthodox sections of society. Members of the transgender community did not believe that their generation would witness the enactment of favourable legislation that includes economic, social and cultural rights along with civil and political rights.

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[31] Speaking at a roundtable discussion held in Islamabad by VISION and iProbono on 25 January 2020.

However, there are many challenges yet to be addressed to ensure that the law is effectively implemented to protect and empower the transgender community in Pakistan. While in theory, transgender people enjoy better rights in Pakistan, in practice, they are marginalised and face extreme discrimination and prejudice that alienates them from mainstream society. The lawyers, human rights and transgender rights activists and politicians who have aggressively advocated for transgender rights over the last decade have welcomed the legislation while simultaneously reminding the community that the battle is only half won. Enforcement will take time and for the law to be enforced in its true spirit, it may take another decade or two.[32]

## ABOUT

iProbono's mission is to enable people to access their rights in pursuit of a just society.

By promoting active citizenship and engaging a holistic model we:

- Advance justice for all by representing people in need
- Strengthen the impact of civil society
- Advocate for policies that promote social equity and end discrimination

We believe in holistic counsel, representing clients and providing wraparound legal support, capacity building, storytelling, research, and policy advocacy to support social change.

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[32] Sheikh, Sughra, Tunio, Pakistan transgender rights law- a battle half won, Reuters, May 21, 2018, <https://www.reuters.com/article/us-pakistan-transgender-rights/pakistans-transgender-rights-law-a-battle-half-won-idUSKCN1I1MITC> accessed on December 2019

**VISION Pakistan** is an NGO based in Islamabad which has been working in the area of Child Rights and Transgender rights in Pakistan since 2001. In addition to lending our voice to the larger debate in Pakistan on the implementation of the Covenant on the Rights of the Child, VISION has a special focus on the sexual and commercial exploitation of children and the illegal trafficking of children and transgenders for these purposes. In the 15-year experience, VISION has seen us successfully execute projects dealing with the rehabilitation and support of street children in various parts of the country, including Swat, Murree, Abbottabad and Lahore. All of VISION's rehabilitation work through its drop-in centers, shelters and education centers has also amassed a considerable repository of research and behavioral study.

**Wajood** is an NGO that works to promote transgender rights. It is a registered community-based organization made for the transgender community in Pakistan. Bubbli Malik is the executive director of 'Wajood'. Their mission is to fight for the rights of Transgenders (trans men and trans women). It started in 2001 as a non-registered Civil Based Organisation and then Wajood Society was registered on 1 January 2015.

# "I AM A TRANSGENDER ACTIVIST AND A NORMAL HUMAN BEING"



## REHAN ANSARI



is a Brooklyn-based writer, playwright, and artist who also works as a political pollster and measures impact in the field of art and social justice. In 2016 his play *Unburdened* was staged at Meet Factory, Prague. *Unburdened* is based on Partition narratives he collected. He contributed an essay for *Revolution From Without...*, the first in a two-year series of exhibitions on resistance and revolutionary gesture at The 8th Floor, the Shelley and Donald Rubin Foundation's (SDRF) exhibition and event space. For two years for SDRF he has done a series of interviews on making art in a time of crisis.

## AISHA MUGHAL



is a UNDP Expert Consultant to the Ministry of Human Rights, Government of Pakistan, She is the first transgender woman lecturer in Pakistan and the world's first transgender woman to represent her government as part of a national delegation at the UN (CEDAW Committee) in Geneva, Switzerland. She was a member of the National Task Force on Transgender Bill and has played an important role in the enactment of Transgender Persons (protection of rights) Act 2018. She has also served as a focal person for transgender rights at the National Commission for Human Rights (NCHR), Government of Pakistan.

## Rehan Ansari talks to Aisha Mughal about activism, Transgender Persons Act of 2018 in Pakistan, and its implementation.

**Rehan: What do you consider your landmark achievements in your career as an activist?**

**Aisha:** I am proud of being able to get a trans person appointed to the National College of Art in 2014. That was a first in the history of Pakistan. That helped us break a negative stereotype about the community. That person ran the cafeteria and interacted with everybody at the college. Also, it was a job and jobs are what the community lacks. Then I would say my participation in lobbying efforts with the government for trans rights. That led to me becoming part of the national task force responsible for drafting the transgender rights law.

**Rehan: How did the law come about?**

**Aisha:** It was a two-year-long process with many meetings with government stakeholders, the bill had to go to the committees, and through both Houses of Parliament. We were able to convince everybody, including the religious authorities, about the importance of the transgender law. It was passed in May 2018.

## **Rehan: What is your next objective?**

**Aisha:** My job description at the Ministry of Human Rights and as UNDP consultant is to ensure the implementation of every chapter and section of this law. We have framed policies for different government departments. Guidelines for the police on how to treat transgender prisoners and for doctors on how they must deal with transgender citizens. The Act gives a wide range of rights. The right to identity, to property, and all rest of the rights given to men and women with the exception of the right to marriage.

## **Rehan: Are things moving in the right direction?**

**Aisha:** Yes. The government and international organisations are organising awareness campaigns. Documentaries are being made, seminars and workshops developed. It's a huge change that the federal government is accepting transgender employees. One other success we have had is that we have space at the table when there is any draft of any guideline being developed for transgender people. The government is also working with NGOs that are led by transgender people. Parliamentarians raise questions about the safety of transgender people. We are also seeing progress in society. Back in 2015 when I was doing my MA thesis I was the only student in my university who was working on trans rights. But now I see many students in many departments doing research on trans subjects.

**Rehan:** Thank you for informing us from your vantage point about these changes in institutions as well as in society. You seem to have an interesting position of being both an activist and in government.

**Aisha:** Yes. I represent the trans community in the government and I represent the government to the trans community. I work at sensitising government institutions to trans realities and on the other hand, I reach out to the grassroots of which I am part. I am part of the hijra community. All this means I do things beyond my job description. The activist in me is always awake receiving calls 24/7 about problems of community members.



Photo Credit: Tribune.pk

**Rehan: How did this begin for you? Were you always aware that you would play this role?**

**Aisha:** As a teenager, I was driven to study gender identity and the law and volunteer with a non-profit. I never thought I would work with the government. What I knew I had was something about my own identity and my rights and I was vocal. As part of this NGO, we would meet different stakeholders and it would broaden my knowledge, say about Islam and gender. This activity gave me confidence. My livelihood was working at something else altogether. I used to teach in college. I have taught at Quaid-e-Azam University in Islamabad. But then my activism got me to travel and got me on boards of international organisations. In 2018, I managed to get funding for my own organisation and then I began to work on transgender law and developed contacts in the government. I joined the government because I thought that doing so can help implement the transgender law. I am UNDP's consultant to the government and am not on the government payroll. I work on other consultancies and I also still work with my own organisation.

**Rehan: Thank you for laying out the story of your journey so clearly. Your pursuit of knowledge and then influence becomes one of wanting the community to progress and then the society at large. Was the feeling of helping others always with you?**



**Aisha:** It was always a passion. As a teenager, I spent loads of time with my hijra culture. I loved them. I lived at home because I needed to continue my education. This was a dilemma of becoming a visible trans person. If you become visible you have to leave home, and if you leave your family you lose financial support. I knew that if I had to bring the change I had to be powerful which meant I needed to complete my education. I lived as a male while at home, though always feminine. This was my strategy: first, get an education. Education was a stepping-stone to getting respect. Respect is what I wanted. I got jobs as a financial manager and in teaching and I started my own non-profit and hired trans people. My NGO helps trans people get jobs in government and the private sector. I always hope that I can be an example to follow.

### **Rehan: Did you have mentors?**

**Aisha:** Many. When I was young I was lucky to have Bubbli Malik as my guru, who was a leader with a very strong vision. She played a very important role in my activism. When I was studying at COMSATS Islamabad I had a number of very helpful professors. I have been lucky. My current boss Rabia Jhaveri Agha, the Federal Secretary for Human Rights, provided me with this opportunity with the government that helped me gain international attention. Pakistan became the first country in the world which had a transgender person as an official delegate to a United Nations body.

**Rehan: Are there people or organisations outside Pakistan and in the region that have been inspirational to you? For example activists in Sri Lanka and Bangladesh have been very intrigued by the transgender law that was passed in Pakistan and the activism around it.**

**Aisha:** Definitely. I have been part of the international transgender movement since 2015 and have travelled and met a lot of amazing transgender leaders and activists from every country in the world! If I had to name someone it would be Mariam Molkara who brought about this change in Iran. She convinced Imam Khomeini on transgender issues so that he issued the fatwa to allow gender reassignment surgery. I admire her for bringing about tangible change.

**Rehan: Thank you for your time. Any note you would like to end on?**

**Aisha:** I'd like to say that it's all about wanting to be treated as a human being. That I not be boxed in and judged and always have to justify myself. That even as a transgender activist, I am a normal human being.

# BEYOND THE PRIDE PARADE: AN INTERSECTIONAL FEMINIST PERSPECTIVE ON SOGIESC FUTURES IN SOUTH ASIA <sup>[1]</sup>





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[1] SOGIESC refers to sexual orientation, gender identity, gender expression and sex characteristics.

## ABSTRACT

*In the second decade of the 21st century several countries in South Asia witnessed considerable progress in LGBT+ rights. This was achieved in legal developments, increased visibility, and stronger acknowledgement of LGBT+ people and communities in public life. A number of structural realities continue to impede progress. This short essay highlights three such issues, (a) shortfalls in a holistic understanding of the problems, (b) challenges in building feminist movements with a consistent approach on LGBT+ rights, and (c) the challenge in connecting LGBT+ rights to other rights, equality and justice issues in SAARC countries.*

*These issues are vital for the future of LGBT+ rights in the region as they are directly connected to the consolidation of the rights of different demographics of the LGBT+, the formulation and development of more inclusive and feminist jurisprudence, and developing consistent, and intersectionally-inclusive approaches to fundamental rights at the national and regional (SAARC) level.*

*This analysis is developed from the standpoint of my praxis as a Sri Lankan non-cis and queer woman and intersectional feminist internationalist who is committed to locally grounded rights advocacy that is interested in robust international. partnerships. The South Asian region has known extremely divisive ethno-national and ethno-religious conflict, violence, and division. Holistically advocating for citizens' rights is a key mechanism through which we could envisage a more peaceful next century.*

## INTRODUCTION: DECONSTRUCTING A COMPLEX BODY OF RIGHTS?

The sector of LGBT+ rights advocacy in South Asia is considerably vibrant. Until recently it was a fringe issue, shrouded in a conceit that LGBTQI+ rights are a set of issues foreign to the sociocultural traditions of the region. While the monumentally erroneous nature of such assumptions has been widely exposed, LGBT+ rights continue to be given low importance by regional governments. LGBT+ activism also tends to be perceived separately from activist and advocacy priorities such as ‘women’s rights’, ‘gender equality’ and the rights of ethnic, religious and sociocultural minorities. As an intersectional feminist activist whose activism especially includes the specific area of trans rights, and as someone with a post-doctoral level of specialisation in the study of politics of deeply divided places and international relations, I often experience an inclination among many institutions, funding bodies and individuals to perceive me only as a ‘trans rights activist’. This is the result of an inclination to see issues of governance, conflict resolution, foreign policy, defence policy or any other area of expertise as the exclusive confine of heteronormative and cisnormative people.[2] While these challenges exist across the world, they are especially so in the South Asian region as they impose glass ceilings on the advancement of LGBT+ people, blocking us from consolidating our potential. I will focus on three major challenges that help reinforce the ‘fringe’ positionality of LGBT+ rights advocacy. This dialogue is deemed essential

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[2] The term ‘cisgender’ or ‘cis’ refers to people whose gender identity is not in conflict with their gender assigned at birth. The term ‘transgender’ generally refers to people whose gender assigned at birth does not correspond to their true gender identity. In this essay, ‘cisnormative’ implies individuals, systems and structures that have cisgender people, lifestyles and viewpoints at the centre, with pride of place for the cis male-cis female gender binary. ‘Non-cisnormative’ people include not only transgender people, but also indigenous non-cis gender peoples, non-binary people and gender-non-conforming people.

because the existing forms of limited, if not restrictive, understanding/s of what it means to be an LGBT+ rights activist and what it means to advocate for LGBT+ rights, are such that they prevent policymaking platforms, legislatures, judiciaries and supranational bodies from making sense of a vital idea – that the body of rights that ‘LGBT+ rights’ encompasses is inextricably connected to many policy areas.

## I. The LGBT+ abbreviation: Making Sense of a Broad Scope

<b>L</b>	<b>G</b>	<b>B</b>	<b>T</b>	<b>T</b>	<b>Q</b>	<b>Q</b>	<b>I</b>	<b>A</b>	<b>A</b>	<b>P</b>
<b>Lesbian</b> A woman who is primarily attracted to women.	<b>Gay</b> A man who is primarily attracted to men; sometimes a broad term for individuals primarily attracted to the same sex.	<b>Bisexual</b> An individual attracted to people of their own and opposite gender.	<b>Trans-gender</b> A person whose gender identity differs from their assigned sex at birth.	<b>Transexual</b> An outdated term that originated in the medical and psychological communities for people who have permanently changed their gender identity through surgery and hormones.	<b>Queer</b> An umbrella term to be more inclusive of the many identities and variations that make up the LGBTQ+ community.	<b>Questioning</b> The process of exploring and discovering one's own sexual orientation, gender identity and/or gender expression.	<b>Intersex</b> An individual whose sexual anatomy or chromosomes do not fit with the traditional markers of "female" and "male."	<b>Ally</b> Typically a non-queer person who supports and advocates for the queer community; an individual within the LGBTQ+ community can be an ally for another member that identifies differently than them.	<b>Asexual</b> An individual who generally does not feel sexual desire or attraction to any group of people. It is not the same as celibacy and has many sub-groups.	<b>Pansexual</b> A person who experiences sexual, romantic, physical and/or spiritual attraction to members of all gender identities/expressions, not just people who fit into the standard gender binary.

The abbreviation ‘LGBT+’ is one that keeps getting lengthier for all the right reasons. From an activist standpoint it is crucial to admit that the lengthier it gets the better because of the opportunity this ever-growing abbreviation offers to put at the centre people, lived experiences, rights, challenges and stories that have been marginalised. In some cases the abbreviation includes

elements that are specific to certain countries. In the northern territories of Turtle Island, Canada as we know it, '2S' is often actively used in the abbreviation to denote two-spirited indigenous people and all other gender-plural indigenous peoples of the land. Most often we see a tendency of grouping LGBTQI+ rights into one set of rights. This routinely results in a great deal of misunderstandings, misreading and confusion. Hence the worth of the United Nations terminology: Sexual Orientation, Gender Identity/Expression and Sex Characteristics [SOGIESC]. It helps us zoom in on the different issues and rights concerns involved. British colonisers' aversion to non-heteronormative sexualities has been institutionalised in the penal codes of the majority of countries in the SAARC region. As legal experts have repeatedly argued the existing 19th century laws are marked by substantial inadequacies, issues of interpretation, and provisions that can be deployed to infringe upon the fundamental rights of non-heteronormative citizens.[3] In challenging these legal restrictions, and bringing forth anti-discrimination legislation that protects the rights of citizens, there is a clear need for stronger sensitisation of the public and policymaking lobbies on what it means to engage in meaningful legislative innovation in this area.

Gender identity/expression-related rights issues are often conflated with sexual orientation-related rights concerns. When it comes to the former the focus is largely on gender recognition legislation that does not pathologise non-cisnormative citizens and anti-discrimination provisions that make it illegal to discriminate against a citizen on grounds of their gender

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[3] In the case of Sri Lanka Articles 355 and 365A of the Penal Code are extremely vague and ambiguous in terms of interpretation. For an expert explanation see 32:02 of this televised interview: <https://www.youtube.com/watch?v=CKHfbdfmpdo>.

identity/expression.[4] Besides these two issues there is also the necessity of legal reforms, awareness-raising initiatives and rights campaigns on issues such as the reproductive rights of non-cis people. Trans people have a long history (herstory) of being summarily deprived of their reproductive rights. Compulsory sterilisation was a prerequisite for gender-affirmation in many western countries until recently, a legal restriction described as 'state-sanctioned transphobia'.[5] Denmark did away with this requirement only in 2014.[6] Sweden scrapped its forced sterilisation law only in 2012, and Norway followed suit in 2016.[7] Compulsory sterilisation of trans people is still in force in Finland.[8] While there are no explicit legal restrictions in place in the SAARC region the stigma associated with trans identities and social conservatisms make it extremely challenging for a trans person to avail of their reproductive rights. The fact that this topic seldom makes it to the table in trans rights activist spheres is exemplary of a bigger problem – of trans people being conceptualised only within a narrowly defined understanding of gender identity. Even when reproductive rights are raised

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[4] A recent legislative innovation on this front in the South Asian region is the Transgender Persons (Protection of Rights) Act of May 2018 ratified by the parliament of Pakistan. For an analytical reading of the Act's pros and cons, see Redding 2019. Full text of the Act is available at: [http://www.na.gov.pk/uploads/documents/1526547582\\_234.pdf](http://www.na.gov.pk/uploads/documents/1526547582_234.pdf). Gender identity-related post-2007 legislative developments in Nepal are widely documented (Bochenek and Knight 2012, Young 2016). In Sri Lanka the Gender Recognition Circular of 2015 has had a strongly positive effect on trans rights, despite being unratified as a law of parliament.

Full Circular: <http://www.aidscontrol.gov.lk/images/pdfs/circulars/Issuing-of-Gender-Recognition-certificate-for-TG-community-1.pdf>. All of these legislative developments in the region, however, carry many shortcomings and inconsistencies and are marked by highly cis-normative and restrictive approaches to jurisprudence. The work of deconstructing existing legal provisions and developing inclusive trans-competent laws are tasks yet to be accomplished.

[5] Amnesty International. 2014. The State Decides Who I Am: Lack of Recognition for Transgender People. Index No: EUR 01/001/2014. [https://www.es.amnesty.org/uploads/media/The\\_state\\_decide\\_who\\_i\\_am\\_Febrero\\_2014.pdf](https://www.es.amnesty.org/uploads/media/The_state_decide_who_i_am_Febrero_2014.pdf)

[6] Saner, Emine. 2014. Europe's terrible trans rights record: will Denmark's new law spark change? The Guardian, 1st September. <https://www.theguardian.com/society/shortcuts/2014/sep/01/europe-terrible-trans-rights-record-denmark-new-law>

[7] Hartline, France Rose. 2019. Examining Trans Narratives in the Wake of Norway's Gender Recognition Law, a/b: Auto/Biography Studies, 34:1, 67-87, DOI: 10.1080/08989575.2019.1542822.

[8] Sweden drops law forcing sterilisation of trans people'. Centre for Reproductive Rights, 29 February 2012. <http://www.reproductiverights.org/press-room/sweden-drops-law-forcing-sterilization-of-trans-people>; See, for example, Bill to change Finland's transgender sterilisation requirement comes up short, YLE, 7 October 2017, [https://yle.fi/uutiset/osasto/news/bill\\_to\\_change\\_finlands\\_transgender\\_sterilization\\_requirement\\_comes\\_up\\_short/9871492](https://yle.fi/uutiset/osasto/news/bill_to_change_finlands_transgender_sterilization_requirement_comes_up_short/9871492).

in LGBTQI+ activist circles, the general tendency is to drift towards biopolitics and cisnormativity.[9]

To drive home the point, take the sphere of LGBTQ rights or rights that concern sexual orientation. Very often terms such as 'gay men' and 'lesbian women' exclusively imply cisgender gay men and cisgender lesbian women. From a gender politics perspective, the term 'bisexual' verges on the problematic if it is interpreted as reinforcing the gender binary.[10] There is a strong tendency to interpret trans people's sexualities from a heavily cisnormative standpoint. To follow this flawed assumption a trans woman is widely considered to be sexually attracted to men – which imperatively means cis men. Similarly a trans man is seen as being attracted to women – meaning, cis women. Trans people's sexualities are subjected to categorical erasure, even in supposedly inclusive and affirming LGBTQI+ activist spaces. In the South Asian region there is very little dialogue on trans people who are non-heteronormative, and on the importance of including non-het trans people in rights campaigns that centre on sexual orientation issues. What we often see is tokenism, where heteronormative trans people are often called to platforms advocating for sexual orientation-related rights. Acknowledging the presence of non-heteronormative trans people is crucial for engaging in meaningful LGBTQI+ rights advocacy in the South Asian region.

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[9] It is not uncommon for LGBTQI+ rights related specialist publications specific to South Asia to include terminology such as 'reproductive healthcare needs of lesbians and transgender men' (UNDP 2014 50). The extremely problematic nature of such appellations is seldom taken up in South Asian LGBTQI+ activist circles. In this specific case, the underlying implication of including transgender men and 'lesbians' together is a) a view of trans men as 'woman-lite', and b) even more appallingly, 'lesbian' as a sexual orientation exclusively restricted to cisgender women. Convolutions of this type make it extremely challenging to develop policy that specifically focuses on the precise needs, requirements and concerns of trans men when it comes to them availing their reproductive rights. Trans women are often categorically left out of conversations on reproductive rights.

[10] Several Bisexual rights activists have contributed to expand popular definitions of the term 'bisexual'. In today's queer feminist circles, it is often used as implying "attracted romantically and/or sexually to people of more than one sex and/or gender, not necessarily at the same time, in the same way, or to the same degree" (Brabow 2018).

A key area of rights that receive scant attention involves sex characteristics. There is very little knowledge on intersex rights issues in the South Asian context. As the western world has witnessed increased intersex visibility, and intersex people strongly affirming their agency, similar developments are yet to be substantively witnessed in the South Asian region.[11] Advocacy priorities include raising awareness on intersex issues in the medical sector in an effort to promote reforms that focus on the agency of intersex people based on self-determination – thereby prohibiting non-consensual surgical interventions on intersex babies and minors. A considerable part of the responsibility of supporting the development of inclusive, modern and self-determination-based intersex movements falls upon legal experts working in the area of SOGIESC rights in the South Asian region.



Image created by Tarmed

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[11] Intersex advocates of intersex rights generate cutting-edge knowledge of intersex issues. See Pidgeon (@pidgeon) and Mx Anunnaki Ray Marquez (@anunnakyray).

## II. Feminist Movements and LGBTQI+ Rights: From Barriers to Bridges?

In terms of advocating for gender and social justice, feminist movements are of vital importance. In many parts of the world they have been the catalysts of innovation in terms of the promotion of equality and justice. In equal measure feminist movements (especially in the global South) also tend to be heavily cisnormative, ableist, and focused on theoretical perspectives and activist praxes that share more in common with white feminism.[12] Throughout South Asia there is a clear need to centre women at marginalised intersections in feminist work. Building feminist movements



Photo Credit: History of Feminism

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[12] In this essay, 'white feminism' is used to refer to the brand of feminism that centres white (mostly upper middle and upper class) cis womanhood, with next to no considerations of the multiple forms of marginalisation non-cis-white women undergo. It is also a form of feminism that strongly revolves around the cis male-cis female gender binary. Most white feminist circles categorically reject trans women, and adopt an uptight and defensive attitude when their lack of intersectional inclusion is called out. For a critical perspective on the functional dynamics of white feminism see Cargle 2018 and Meltzer 2019.

that fully recognise the agency of Dalit women, trans women, indigenous women, disabled women, and women at many other multiple intersections is an absolute priority if inclusive gender and social justice are to be envisaged. Reflecting on ways in which feminist work in the South Asian region can be made well and truly inclusive of non-cis and non-het peoples, the most incisive comparative insights can be gleaned from Black feminist discourses developed in Turtle Island.

The very term intersectionality is part of the wealth of knowledge created by black feminists in Turtle Island. While Professor Kimberlé Crenshaw, a legal expert, is credited for coining the term 'intersectionality', the principle it encompasses – of black women living and experiencing multiple intersections of identity between race, class, gender, workplace marginalisation, pay discrimination and more, is one that has long-standing historical ('herstorical') antecedents in Black feminist work.[13] The idea of black women working above and beyond their differences to challenge systemic forms of marginalisation – identifying and working towards dismantling oppressive structures – has been central to the work of all leading black feminist thinkers. Black cis lesbian feminist Audre Lorde's words "I am not free while any other woman is unfree even if her shackles are very different from my own", strongly encompass the fundamental Black feminist principle of women working together to challenge multiple forms of marginalisation, erasure and discrimination.[14] In Black feminist circles of Turtle Island, cis and trans women, and indeed non-heteronormative black women, have a long herstory of solidifying sisterhoods, working together,

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[13] Crenshaw, Kimberlé. 1989. Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics. University of Chicago Legal Forum, issue 01, 1989, pp. 139-167.

[14] Lorde, Audre. 2017 [1984]. *The Master's Tools Will Never Dismantle the Master's House* (Kindle edition). New York: Penguin; Weerawardhana, Chamindra. 2020. "Erasure at the 'Tipping Point'? Transfeminist Politics and Challenges for Representation: From Turtle Island to the Global South/s.", in: Fiona MacDonald and Alexandra Dobrowsky [Eds] *Turbulent Times: Transformational Possibilities? Gender and Politics Today and Tomorrow*. Toronto: University of Toronto Press, pp. 304-325.

taking care of and advocating for each other. From Angela Davis to Robyn Maynard, black cis women who campaign against police brutality and the extremely biased incarceration system in the USA have systematically prioritised fighting for the rights of black trans women.[15]

Other western feminist movements have been deeply divisive on many issues failing to sustainably include trans women, indigenous [cis and trans] women, working class [cis and trans] women, disabled women and women from other diverse backgrounds. The ongoing crisis in white feminist movements that are trans-exclusionary reactionary exemplifies the exclusiveness that has been in-built to white feminism. In the South Asian region, feminist movements have strong foundations in colonial history. Many feminist collectives can be described as urban, English-speaking, very highly cisnormative, and far from intersectional in their understanding of feminist advocacy. Delivering a lecture at University College Dublin in 2018, I described this form of South Asian feminism as ‘Loretto Convent feminism’, implying the elitist nature of such circles, mostly composed of educated, upper-middle and upperclass cis women who, in the majority of cases, are past pupils of gender-segregated mission schools created under British rule which, in the majority, continue to function along heavily Victorian conservatisms. To draw from personal experience, these circles may uphold terms such as ‘intersectionality’ and ‘inclusivity’ to suit their agendas with no meaningful commitment to such principles.[16] In many South Asian feminist circles, trans women are unwelcome. Peculiarly some feminist circles do include trans men in their work. This can be explained in their inclination to deny trans people any semblance of agency viewing trans women as ‘man-lite’ and

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[15] Maynard, Robyn. 2017. Policing Black Lives. Halifax: Fernwood Publishing; Weerawardhana, Chamindra. 2020. pp 311-314

[16] Weerawardhana, Chamindra. 2018. Power to the People: On Transfeminist Solidarities beyond the Ivory Tower. Guest lecture delivered at University College Dublin, 6 March 2018: <https://soundcloud.com/real-smart-media/chamindra-weerawardhana-power-to-the-people-on-transfeminist-solidarities-beyond-the-ivory-tower>

trans men as 'woman-lite', with an exclusive focus on someone's gender assigned at birth. This kind of biopolitics results in a toxic context making it extremely challenging for intersectional feminist solidarities in the South Asian region.

In most cases, South Asian cis feminists share a great deal in common with white feminist circles in the west. When their exclusionary practices are called out, reactions include voicing a feminist-saviour complex, defensive postures, and an inclination to perceive their critics (especially non-cisnormative women) as arrogant, and as people hindering the feminist cause. It is not inaccurate to note that in South Asia, developing truly inclusive intersectional feminist movements is harder than challenging white feminist circles in the west. The situation is not all bleak as positive changes have also been in motion for quite some time with younger generations of feminist activists advocating for meaningful change. Nonetheless, it remains quite challenging for trans women (especially non-heteronormative trans women) and intersex women, irrespective of their sexuality, to claim space in feminist circles. Challenging these functional dynamics, if not developing trans feminist and queer feminist discourses in South Asia, and making the region's feminist movements well and truly intersectional are tremendous challenges that have been taken up by a younger generation of intersectional feminist activists. Strengthening feminist movements by enhancing better education and knowledge sharing on intersectionality, women-of-colour feminist thought, trans feminist thought, and indigenous feminist perspectives from Turtle Island to the Pacific Islands are of vital importance. Strong and truly inclusive feminist movements possess tremendous potential to challenge institutionalised forms of discrimination and push for positive legislative and policy changes.

### III. No longer at the fringes: SOGIESC Front and Centre

The development of stronger and intersectionally-empowered trans and queer-led feminist movements has a strong effect in positively impacting policy. The power of intersectional feminist activism as a vector for global movement-building is best exemplified in Black feminist innovations such as the global Black Lives Matter movement.[17]

This point is of crucial importance to the third and final section of the present discussion. The sphere of LGBTQI+ rights advocacy, as noted earlier in this essay, is often easily relegated to the fringes. If someone's activist work focuses on any aspect of LGBTQI+ or SOGIESC work, they are seen only as a specialist in that specific area of rights. As non-het and non-cis people, activists and allies, it is crucial that we challenge these assumptions to move towards holistically consolidating the rights of non-cis and non-het citizens. In the case of Sri Lanka's ethnonational contentions those who advocate for a durable political settlement to the political concerns of ethnonational minorities, justice for relatives of missing persons (who, in most cases, went missing during the civil war years), and those who advocate for inter-religious coexistence are almost always cisgender and heteronormative. The handful of activists who are non-cis and non-het tend to avoid, consciously or otherwise, clearly articulating the overlaps between SOGIESC rights and conflict transformation, reconciliation and transitional justice-related work. Certain political parties may on occasion voice their support to LGBTQI+ rights come an election their electoral lists are replete with cis and het people. Similar trends can be observed in India and all other countries in South Asia. In challenging such practices, the most promising approach is that of 'grounding' LGBTQI+ rights in the broader contexts of human rights

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[17] Khan-Cullors, Patrisse, and Asha Bandele, 2018. *When They Call You a Terrorist: A Black Lives Matter Memoir*. Edinburgh: Cannongate Books.

advocacy, and in the socio-political and economic realities of one's local context. The keyword here is the Black feminist concept of intersectionality. If an intersectionality-informed approach to LGBTQI+ rights advocacy is pursued, it facilitates the task of identifying links and overlaps between LGBTQI+ rights and other specific areas of rights. When it comes to what is termed 'women's rights' for example there is a clear need to highlight the rights and agency of non-heteronormative cisgender women, non-cisnormative women (of all sexual orientations), indigenous women, women from multiple ethnonational minority backgrounds, and many more diverse intersections. An activist and advocacy praxis of this nature facilitates the development of a holistic and consistent rights discourse where rights advocacy is kept sharp, wide-ranging, and most importantly, critical. It also enables rights activists to reach out to a larger cross-section of people.

Intersectionality-inclusive rights advocacy facilitates the task of zooming in on issues that often go unmentioned and unattended. If such an approach were to be applied to the area of women's health it would lead to a rounded and cohesive conversation on reproductive violence and how discriminatory practices affect women from diverse backgrounds with varying levels of adversity. Engaging in processes of unlearning to include trans women-specific healthcare issues under the broader 'women's health' umbrella would further facilitate the task of zooming in on the importance of developing healthcare principles, policies and practices along a logic of self-determination, consent and bodily autonomy. This enables a stronger and sharper focus on issues such as the performance of non-consensual surgical interventions on underprivileged cis women, reproductive rights-related restrictions that adversely target queer cis women, malign forms of inconsistent attention to women's health policy that adversely affect both



cis and trans women, and continuing shortcomings in a bodily-autonomy and personal-choice focused approach to medical care, to name but a few.

In terms of jurisprudence, an intersectionality-inclusive focus would facilitate the development of legal innovations based on a holistic and incisive understanding of rights issues. LGBTQI+ rights, or for that matter any other rights concern, is not a monolith. Challenging ethno-religious contentions in the South Asian region, promoting inclusive gender justice, avoiding tendencies to 'other' gender, sexual, indigenous, ethnonational and other minorities, are all best achieved by an approach to law reform that conceptualises the work as a constant 'process' that imperatively requires many [un]learning curves. In South Asia today, there is a clear need to challenge archaic notions such as the understanding of LGBTQI+ rights as an area of rights that has next to no bearing on many other rights issues, and the conceptualising of 'women's rights' exclusively around cisgender and mostly able-bodied women. In LGBTQI+ rights work there is a clear need to constructively address the relative erasure of people from socioeconomically underprivileged backgrounds and lower echelons of draconian caste strictures, indigenous peoples, and people from ethnic and religious communities that have suffered systemic marginalisation.

## CONCLUDING REMARKS: PURSUING THE ROAD LESS TRAVELLED

This essay attempts a transversal reading of what it means to engage in LGBTQI+ rights work in South Asia as the third decade of the 21st century unfolds with a devastating pandemic. This reflection began with a discussion of several basic yet often side-lined realities that underpin the 'LGBTQI+' abbreviation, which at times prevent rights activists from clearly conceptualising our rights advocacy priorities. It moved to the necessity of feminist movements adopting a consistent focus on LGBTQI+ rights based on an outlook influenced and inspired by the Black feminist legacy of intersectional advocacy. This led to a discussion of the importance of bringing SOGIESC to the centre of human rights work in South Asia, pushing for intersectionality-informed, inclusive and meaningful change in the ways in which we look at policy issues, develop strategies and mobilise policymaking bodies of our respective countries. Despite considerable progress made over the last decade, the sector of LGBTQI+ rights in South Asia continues to be marked by major problems and challenges. From the routine dehumanisation of trans people in the English language press that uses 'transgender' as a noun (something that often goes unnoticed and ignored due to the lack of a consistent approach of acknowledging, documenting and supporting indigenous traditions of SOGIESC in the region), and a heavily cisnormative understanding of 'women's rights', the issues at hand are extremely divisive and problematic.

A critical perspective on SOGIESC work, especially if it were to be armed with a concept such as the Black feminist focus on intersectionality, cannot be developed in the absence of a 'decolonial' focus – one that strongly challenges the cisnormative and gender-segregated Victorian educational

structures we continue to embrace so dearly, the continuity of colonial forms of oppression such as the routine dehumanisation of indigenous non-cis people, and in terms of broader issues of governance, our relentless focus on national and territorial borders originally drawn to serve colonialist interests. No meaningful SOGIESC rights can be consolidated in the long-term without critically addressing such systemic issues and taking steps to transform, if not dismantle, systems such as gender-segregated primary and secondary education that no longer serve their purpose. Hence the need for a decolonial form of intersectionally informed, and intersectional feminist, advocacy for SOGIESC rights in South Asia.



As indigenous people across the world teach us, decolonising involves challenging, changing and dismantling systems in place, to give way for more equitable and just systems and policies. To many rights activists this work can indeed be unsettling, and can turn out to be more uncomfortable than a narrowly-defined focus on LGBTQI+ rights. Jurists in South Asia working in what I may term critical SOGIESC rights work – pursuing the kind of approaches outlined in this essay – would strongly benefit from partnerships with their counterparts in other parts of the world specialising in indigenous rights, racial justice and environmental justice issues.[18]

Strengthening human rights jurisprudence in South Asia in the third decade of the 21st century calls for a commitment to feminist and decolonial priorities, ‘locally grounded’ yet essentially global approaches, productive exchanges and knowledge-sharing with progressive movements for racial, gender and indigenous justice elsewhere, and an acute understanding of challenging and dismantling highly cisnormative and heteronormative structures and strictures in our region, in spheres local, national, regional, personal, public and political.

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[18] Developments in indigenous law with special relevance to South Asia include work accomplished by indigenous legal professionals who are also members of the LGBTQI+ community. One example is the body of work of Advocate Natalie Coates (Ngāti Awa and Ngāti Hine whakapapa) whose jurisprudence has contributed to the building of locally-rooted and international approaches to the practice of indigenous law (see Matata-Sipu 2018).

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# **PROGRESSING EQUALITY IN SRI LANKA: A CASE REVIEW**





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*“When iProbono's Equality Law Program was established in Sri Lanka, there was a general assumption in the island and the wider world that prosecutions against LGBT people were almost non-existent here and that sections 365 and 365A of the penal code (which criminalised same-sex sexual relations) was a benign piece of legislation. I was guilty of assuming that myself.*

*However, since we established the Program in Sri Lanka, it has become abundantly clear that discrimination and prosecutions against LGBT people are not only common but that the violation of our bodies (through forced anal and vaginal examinations by Judicial Medical Officers and Court ordered sexual health screenings) was systematic and entrenched in Sri Lanka's justice system.*

*Through our strategic case interventions and advocacy, our work has not only given hope to LGBT Sri Lankans that one day we may see justice but has also helped redefine the national narrative and discourse on LGBT issues. Our partnership with the media and relationship with the Government has directed more focus on the injustices faced by the LGBT community. I am confident that if we continue in our path of pushing the boundaries of justice, one day all Sri Lankans may live in a more just and equitable country.”*

**- Aritha Wickramasinghe**

Sri Lanka continues to follow archaic colonial laws that discriminate those deemed to be going against “nature’s order” through its Penal Code and other legislations. The stories that come to light through this case summary highlight the lives of diverse individuals who are discriminated against in various aspects of their lives but are tied together singularly by the fact that they were targeted based on their sexual orientation. With ambiguous laws that do not offer equal protection as they should, and provide leeway for authorities to use the loopholes in the justice system to victimise persons in the LGBT+ community, the country faces a long struggle towards decriminalisation of non-heterosexual relations. Religion, tradition and culture remain strong opposers.

As we strive for equal rights in Sri Lanka, we uncover stories of violence, invasion of bodies and minds, and dehumanisation of vulnerable people who merely seek human dignity and acceptance. The cases included in this review range from workplace discrimination and cyberbullying to the criminalisation of consensual sexual relations. Some of the cases recorded are still ongoing, others have already brought about positive change for the community. iProbono hopes to garner support towards building societies across South Asia that treat all its people equally, regardless of their gender identity or sexual orientation. We will continue to work towards creating safe spaces that do not discriminate against people for being themselves and loving who they love.

# SEXUAL HARASSMENT BASED ON SEXUAL ORIENTATION

*AUGUST 2018*

**Background:** A cello player (hereinafter “SC”), was unfairly dismissed from his position based on his sexual orientation as a gay man. SC met one of the employees of a reputable Hotel in Colombo on a gay dating app and they arranged to meet at the hotel a few hours after his contracted playing hours. When SC returned to play at the hotel, he was invited by the F&B Manager (RS) for a coffee. He was taken to the security room of the hotel and subjected to degrading treatment. The hotel’s security officer/ RS asked him to confess his sexual orientation and sexual preferences and recorded SC on camera without his consent. SC’s statements were written down and he was coerced to sign the paper. He was dismissed from his position.

**Intervention by iProbono:** SC approached iProbono and the team wrote to the General Manager and Public Relations Officer of the relevant hotel stating that SC’s treatment was unlawful, violated his fundamental rights, breached employment law, and that his confinement in the security room amounted to criminal detention. iProbono’s lawyers arranged a meeting with the General Manager of the hotel to seek a settlement of the matter as desired by SC. Outcomes: The case was settled with the reinstatement of SC’s contract with the hotel. iProbono lawyers reviewed and helped draft the new contract for SC.

## HARASSMENT OF A TRANSGENDER MAN

*JULY 2019*

**Background:** An FTM transgender man (hereinafter “D”) who had completed his legal transition and has a gender recognition certificate, was subjected to police harassment.

D was in a relationship with a cis woman. Following his transition, they got legally married in April 2019. His wife’s parents were against their relationship and filed a police complaint against him. D was arrested and verbally abused. The police challenged his gender transition and the judicial medical officer subjected him to a virginity test. The police later commenced a prosecution against D charging him for impersonation and unnatural sex.

**Intervention by iProbono:** iProbono lawyers represented D at the Magistrates Court and challenged the police case. The Magistrate recognised D’s gender recognition certificate and the validity of his marriage. It was also accepted that no surgical interventions are required to legally recognise someone’s gender identity under Sri Lankan law. The case was dismissed.

**Outcome:** Although this case was at a lower court level, it was groundbreaking in several ways:

1. The court recognised the gender transition of a person and their gender recognition certificate.
2. Judicial acknowledgement that surgical interventions are not necessary to change one's gender and that biological sex at birth can be different from a person's gender identity.
3. A marriage between a transgender man and a cisgender woman is considered legally valid.

## **WRONGFUL ARREST OF TWO GAY MEN FOR PRIVATE SEXUAL CONDUCT**

**MAY 2019**

**Background:** Two gay men were wrongfully detained on the charges of sexual harassment and gross indecency by the police. Two men (hereinafter “S” and “D”), recorded themselves engaging in same-sex sexual relations inside their home on the mobile phone of one of the accused. D was 16 at the time of the recording, whereas S was 17. D’s uncle came across the video and reported it to the police. The police arrested S as he was now above 18 years. The police also arrested another man (hereinafter “T”) for allegedly having sexual relations with D. S and T were both charged under sections 365A which prohibits gross indecency and section 345 of the Penal Code that penalises sexual harassment. The accused were kept in police custody for five days.

**Intervention by iProbono:** The lawyer representing the accused at the time had requested the Magistrate to issue an order to settle the matter out of court. Considering that the offence is primarily a victimless crime. The Magistrate denied the request but released the accused on bail. iProbono was then consulted by the parents of S to represent S in the matter. A subsequent hearing was held in October 2019. In addition to the trial, iProbono prepared a letter to the Attorney General and Former Deputy Solicitor General to request intervention in this matter since the AG's Office had made statements that sections 365 and 365A cannot be used in a manner that targets the LGBT+ community and discriminated against them. iProbono did not receive a response to their letter.

**Outcome:** The case was postponed but is ongoing in courts.



Photo Credit: AP/Paul Sancya

# DISCRIMINATION OF A MAN BASED ON HIS SEXUAL ORIENTATION

*SEPTEMBER 2019*

**Background:** A Major in the Volunteer Force of the Sri Lankan Army (hereinafter “RK”) was wrongfully dismissed from service based on his sexual orientation.

RK was not open about his sexuality during his service and that did not affect his duties in any way. In 2011, he visited the “Doctor B Cosmetic Skin Clinic” where he met Dr B. He was given an appointment at Dr B’s home clinic to undergo a minor out-patient procedure where he was drugged by Dr B. While he was in a near-comatose state, Dr B performed fellatio on him without his consent. Dr B’s assistant purportedly video recorded the incident. After regaining consciousness, RK confronted Dr B and a minor altercation took place. He then made a formal complaint to the police based on which Dr B was arrested.

RK was placed under investigation by the Army when the police commenced their enquiry. He was subsequently dishonourably discharged from service because he admitted to being homosexual. He was not given his pension and the Army had also withheld a medal he received for bravery. The Army also maliciously spread false rumours about him to potential employers in the public sector advising them not to employ him as he was gay.



Photo Credit: AP

RK filed a case against his dismissal by the army several years ago. However, as the President has signed his dismissal it is immune from litigation. The court also held that RK took an unreasonably long time to challenge his dismissal.

**Intervention by iProbono:** In September 2019, RK and iProbono appeared before the Public Petitions Committee in Parliament and presented his grievances to the Committee. Representatives of the Army were present. At the hearing, it also came to light that the Army

had miscalculated the Major's service days making him ineligible for his pension. However, the Committee held that since the Court of Appeal had dismissed the case, they must analyse whether the Committee had the power to make new decisions regarding the same suit.

**Outcome:** It was highlighted out that the case was dismissed only on technical grounds. The hearing is postponed and ongoing.

## **ABUSE FACED BY A WOMAN BASED ON HER SEXUAL ORIENTATION**

**DECEMBER 2019**

**Background:** A 17-year-old woman (hereinafter "R") was physically, verbally, emotionally, and sexually assaulted by her father for being a lesbian. She was subjected to regular physical abuse including being hit on the head with a spanner. She also states that her father sexually abused her by lifting his sarong to expose his genitals. The police advised our lawyers and R that they will be compelled to arrest both her parents due to the gravity of the matter if the report was filed. As R has two younger siblings, she decided to not press charges provided that her parents respect her decision to live away from home. Her parents earlier filed a kidnapping complaint against Women in Need. This complaint was withdrawn after the police notification of the matter.

**Intervention by iProbono:** iProbono lawyers supported R with advice until she turned 18. After that our lawyers facilitated her removal from the premises, prepared a police report, undertook a medical checkup, and then took her to a safe house run by the NGO Women in Need. As R is now 18, she lives away from her parents' home with her female partner. She does not want to live with her parents again. iProbono also looked at how they can support R's education going forward as she was due to sit for her Advanced Levels exams in 2019. Since R's parents are lawyers, iProbono filed an official complaint with the Bar Association.

**Outcome:** The President of the Bar Association reprimanded R's parents and threatened action against them should they continue to harass her. However, no formal enquiry could take place against R's parents as no official police complaint was filed against them.



Photo Credit: Telegraph UK

## HATE CAMPAIGN AGAINST LGBT+ COMMUNITY CENTRED AROUND A GAY MALE MODEL

**MAY 2020**

**Background:** An openly gay male model (hereinafter “RD”), faced threats to his physical safety and life from an organised hate group led by a Youtuber named Heshitha Bulathsinhala (HB). The hate group was compiling a list of LGBT+ persons and planning concerted attacks on the LGBT+ community. This group sent several threatening messages to RD and uploaded videos demonising RD on HB’s YouTube channel. HB falsely accused RD and other LGBT+ persons of paedophilia claiming that they are promoting homosexuality among children. RD’s address was shared amongst members of this group, compromising his and his family’s safety.

**Intervention by iProbono:** iProbono rallied other activist groups to draft the necessary letters and collect evidence to assist RD. On 13 May 2020, with the assistance of iProbono lawyers, RD attempted to file an official complaint with the Cyber Crimes Unit of the Criminal Investigations Department against the group. The CID refused to accept the complaint based on his sexual orientation, stating that supporting LGBT+ victims might come across to the public as the police supporting homosexuality. iProbono also assisted in filing a complaint with the Human Rights Commission of Sri Lanka against the relevant CID officers for gross discrimination.

**Outcome:** We are awaiting developments on the HRC complaint. The advocacy group proved to be particularly useful for organising support, connections, and information from seasoned activists to handle such emergencies. This network will continue to collaborate with us.

## **PROSECUTION AGAINST A SWEDISH NATIONAL AND TWO SRI LANKANS FOR SAME-SEX SEXUAL RELATIONS**

***JULY 2020***

**Background:** A Swedish male (hereinafter “MH”) and two Sri Lankan nationals were arrested by the police for consensual same-sex relations. The police had raided the hotel room the three accused had met up in and arrested them for homosexuality. The Sri Lankan nationals were allegedly whipped by wires by the police. All the accused were also subjected to forced anal examinations by the Judicial Medical Officers and a Court ordered sexual health screening. One of the accused was revealed to be HIV+ in court.

**Intervention by iProbono:** We are currently assisting the lawyer of the accused. iProbono has provided useful legal documents, auxiliary case decisions and other statements that can be used to gain a fair decision for the accused. The case has been consistently postponed as the police have no evidence of the alleged sexual relations.

iProbono also supported an investigation by the media on forced anal and vaginal examinations by Judicial Medical Officers and the Police against LGBT people. Following the outcry following the iProbono supported investigation, Sri Lanka's Minister of Justice issued a statement condemning anal and vaginal examination of LGBT people and any form of discrimination against LGBT people. The Justice Ministry statement was following several calls by the Justice Ministry with iProbono on the allegations. iProbono provided details of the cases to the Justice Ministry. Following the Justice Ministry statement, iProbono lawyers are assisting the accused in the case to file a complaint with the Human Rights Commission of Sri Lanka.



Photo Credit: istock

iProbono's mission is to enable people to access their rights in pursuit of a just society.

By promoting active citizenship and engaging a holistic model we:

- Advance justice for all by representing people in need
  - Strengthen the impact of civil society
  - Advocate for policies that promote social equity and end discrimination
- 

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To find out more about our work, visit [www.i-probono.com](http://www.i-probono.com)

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