

SEX VS GENDER

Rucha Sunil Mhaske*

ABSTRACT

Sex and gender should not be equalised as it leads to infringement of the rights of the LGBTQIA community. The constitutional bench headed by Chief Justice D.Y.Chandrachud talked about gender and sexuality with reference to the Special marriage act which does not contain same-sex marriage. A careful observation of the politico-legal landscape of progressive and developed countries, reveals that India still has a long way to go in ensuring the right to equality and the right to life and personal liberty of this community. Indian society lacks the education and awareness to develop a mindset of acceptance towards non-cis-gendered people.

KEYWORDS: Sex, gender, LGBTQI, special marriage act, intersex, cultural construct, etc.

INTRODUCTION

“Sex is a label; gender is a language”

- Jay Smooth

What is sex?  Journal of Legal Research and Juridical Sciences

Sex refers to a set of biological attributes in humans and animals. It is primarily associated with physical and physiological features including chromosomes, gene expression, hormone levels and function, and reproductive/sexual anatomy.

What is gender?

Gender refers to the socially constructed roles, behaviours, expressions and identities of girls, women, boys, men, and gender-diverse people. It influences how people perceive themselves and each other, how they act and interact, and the distribution of power and resources in society. Gender identity is not confined to a binary (girl/woman, boy/man) nor is it static; it exists along a continuum and can change over time. There is considerable diversity in how

*BA LLB, SECOND YEAR, ILS LAW COLLEGE, PUNE.

individuals and groups understand, experience and express gender through the roles they take on, the expectations placed on them, their relations with others and the complex ways that gender is institutionalized in society.

HISTORY

The concept of sex and gender has a long and complex history, with different cultures and societies having varying ideas about what it means to be male or female, and how these roles are constructed and performed. In ancient Greece, for example, there was a strong emphasis on masculinity and the virtues of manhood, with men being seen as the superior sex and women being relegated to subordinate roles. In contrast, in ancient Egypt, there was a more fluid understanding of gender, with some individuals being recognized as "third gender" or "intersex." During the medieval period in Europe, gender roles became more rigid, with women being confined to the domestic sphere and men occupying positions of power and authority. The rise of the Enlightenment in the 18th century brought new ideas about individual freedom and human rights, which challenged traditional gender norms and led to the emergence of feminist movements advocating for women's rights and gender equality.

In the 20th century, the distinction between sex and gender became more widely recognized, with the emergence of the field of sexology and the development of theories about the social and cultural construction of gender. The feminist movement of the 1960s and 70s brought attention to the ways in which gender inequality was embedded in social structures and institutions, leading to new forms of activism and advocacy for women's rights and gender equality. Today, there is growing recognition of the diversity of gender identities and expressions beyond the traditional binary categories of male and female, as well as increasing awareness of the ways in which gender intersects with other forms of identity and oppression, such as race, class, and sexuality. This has led to new movements and initiatives aimed at promoting gender equity and inclusion and challenging the gender stereotypes and discrimination that continue to shape our society.

SEX=GENDER..?

The terms Sex and gender are often used interchangeably in everyday language. But their meanings are different. Sex is a biological concept and Gender is a cultural construct.

When the term gender is replaced by sex the person's identity also gets replaced. If we equalise sex and gender that is, if we consider the scenario where sex= gender we limit our society to male and female only. A person born with one identity dies with that identity only. They have no scope for exploring their self-personality and even if they try exploring it there is no recognition as sex is considered as gender. Sex= gender is a very narrow view as it confines itself to only one approach and ignores all other possibilities. When the term "sex" is equalized to "gender," it can have negative implications for people who do not identify as male or female, such as those who identify as non-binary, genderqueer, or gender non-conforming. They may be erased or overlooked in discussions about gender and their rights may be disregarded. In many countries, legal documents and forms require individuals to select "male" or "female" as their sex or gender marker, which can be difficult or impossible for non-binary people. In some cases, non-binary people may face discrimination or barriers to accessing healthcare, education, employment, and other services due to their gender identity.

It's important to recognize and respect the diverse experiences and identities of all people, including those who do not fit into traditional binary categories of gender. Using inclusive language and creating policies that recognize and protect the rights of non-binary individuals can help ensure equal treatment and representation for all. As Raquel Willis said, "Sex is a physical characteristic, while gender is an expression of self." When sex is equalised to gender the person's self gets hammered. When sex is not equalised to gender. The LGBTQI community can feel equality, they also get to exercise their rights. Sex and gender cannot be equalised as there is a difference in both terms. Considering this difference. These terms cannot replace each other.

LGBTQI

The LGBTQAI+ acronym stands for Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, and Asexual and others. It has been 76 years since our country became independent, still, the LGBTQIA+ group is fighting for their societal independence and basic rights. During British rule in 1860, homosexual intercourse was considered unnatural and was declared a criminal offence under Chapter 16, Section 377 of the Indian Penal Code (IPC). After the right to equality, and pride walk, In August 2017, the Supreme Court upheld the right to privacy as a fundamental right under the Constitution in the landmark Puttaswamy judgement. This gave renewed hope to LGBT activists.

On September 6, 2018, the Supreme Court ruled unanimously that Section 377 was unconstitutional "in so far as it criminalises consensual sexual conduct between adults of the same sex". The battle against Section 377 has ended but the bigger battle for equal rights for the LGBT community is still ongoing. They are not getting justice as their rights are not even recognised by other communities. importance of understanding that granting equal rights to marginalized communities, such as the LGBTQI community, does not take away from the rights of others. It challenges the notion that there is a limited amount of rights to go around and that granting rights to one group automatically means taking away from another group. Instead, it highlights the importance of recognizing that human rights should be available to everyone, regardless of their gender identity or sexual orientation.

BEYOND HE OR SHE

"Absolute concept of a man or an absolute concept of a woman" and that gender was 'far more complex' than one's genitals. "

- Chief Justice D.Y.Chandrachud

A Constitution Bench headed by CJI Chandrachud was responding to the Centre's argument that laws, including the Special Marriage Act, recognised only heterosexual marriages between a "biological man and a biological woman".

The special marriage act (SMA), 1954 is an Indian law that provides a legal framework for the marriage of people belonging to different religions or castes. Till date, the special marriage act does not include marriage between same-sex couples. This means that even today sex is equalised with gender especially when it comes to marriage. Options should be made inclusive rather than exclusive like he/she. Confining with only males and females violates the rights of the LGBTQIA community. It is clearly discrimination against them. If they are not even included in the process of law, how will they reach their destination of justice?

If the country wants to develop it has to move beyond he/she. This is not only limiting the option but also limiting the progress. By going beyond he/she, we are also crossing the impediments which were coming between the process of development of the country. Right to equality means every human being is equal before the law regardless of caste, class and **gender** and this is not just made for embedding it into the constitution. In real life. The right

to equality should show reflection in society. Every individual has the right to life, no one should infringe on others' rights.

LEGAL IMPLICATION OF SEX VS GENDER

Anti-discrimination laws: In many countries, anti-discrimination laws prohibit discrimination based on both sex and gender. This means that individuals cannot be discriminated against because they are male or female, or because they do not conform to traditional gender roles or stereotypes.

Legal recognition of gender identity: Many countries have laws that allow individuals to legally change their gender on identity documents, such as passports and driver's licenses. This is important for transgender individuals who do not identify with the gender assigned to them at birth.

Sexual orientation and gender identity protections: In some countries, laws protect individuals from discrimination based on their sexual orientation and gender identity. This is important for members of the LGBTQ+ community who may face discrimination and harassment.

Family and reproductive rights: Laws related to family and reproductive rights can be influenced by both sex and gender. For example, laws related to maternity leave may only apply to individuals who give birth, while laws related to access to fertility treatments may only apply to individuals who are biologically capable of reproducing.

Education law: In some countries, laws prohibit discrimination in education based on sex and gender. This includes protections for transgender students, such as the right to use the restroom and participate in sports activities that align with their gender identity.

Human rights law: International human rights law recognizes the right to equality and non-discrimination regardless of sex or gender identity. The United Nations has called for the recognition of gender identity as a fundamental human right, and some countries have enacted laws to protect the rights of transgender individuals.

Understanding the legal implications of sex and gender is important for promoting equality and protecting the rights of all individuals, regardless of their sex or gender identity. Legal

frameworks that recognize and protect gender diversity can contribute to a more just and inclusive society.

WHERE DOES INDIA PRESENTLY STAND?

protection based on sexual orientation has been provided by the constitutions of Mexico, New Zealand, Portugal, Sweden and South Africa. India still lacks a basic law that recognises the protection of rights of people belonging to the LGBTQIA+ community or criminalizes any harassment or discrimination against them. Besides allowing same-sex marriages, adoption and surrogacy, countries such as Bolivia, Ecuador, Fiji, Malta and the UK have gone steps ahead and enshrined the right to equality for citizens on the basis of sexual orientation and gender identity in their constitutions. India, however, has no legislation that would clarify the rights of people from the LGBTQ community with respect to marriage, adoption, surrogacy and health.

A careful observation of the politico-legal landscape of progressive and developed countries, reveals that India still has a long way to go in ensuring the right to equality and the right to life and personal liberty of this community. Indian society lacks the education and awareness to develop a mindset of acceptance towards non-cis-gendered people.

CONCLUSION

Sex and Gender should not be used interchangeably as both terms have different meanings. When one term is used for the other, the rights of people get infringed. Everyone should be treated equally irrespective of gender. When we go beyond he/she we will reach the destination of development. Sex and gender are complex and multifaceted, and it's important that we recognize and respect the diversity of experiences and identities that exist within them.