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**The Plight of Transgender Community: Rights of the 'Third Gender' in
India**

Manaswini Dube

ABSTRACT

“We declare that human rights are for all of us, all the time; whoever we are and wherever we are from; no matter our class, our opinions, our sexual orientation.” – Ban Ki-moon

The presence of human rights signifies the absence of fear. Fear of losing your life, losing a loved one, fear of justice being denied, fear of being discriminated against on the basis of caste creed or sex. Human rights tell us, humans that we don't deserve to live in this fear, that is what it aims for. Everyone has the right to freedom of expression and opinion, this is human rights. This right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers. Setting human rights for our diverse and varied population is a tough task.

The members of LGBTQ community were compelled to live a life full of fear of reprisal and persecution. Justice Indu Malhotra shared her opinion on the atrocities faced by the LGBTQ committee saying in reference to Navej Singh Johar v. Union of India that, “History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries.” But do they still get equal rights? Apparently not. In this already exploited community, the transgender community is even more exploited.

This research will further study the physical and mental torments suffered by the transgender community. The researcher will also discuss the effectiveness of The Transgender Persons (Protection of Rights) Bill, 2019, and the unacceptance of the transgenders in the Hindu Marriage Act, 1955.

If we promise ourselves to take a stand for justice and fight against injustice, we could make the world a so much better place to live in as Martin Luther King said, “Injustice anywhere is a threat to justice everywhere”.

Keywords: *sexual discrimination, transgender community, The Transgender Persons (Protection of Rights) Bill, 2019, Hindu Marriage Act, 1955*

HYPOTHESIS

The acts and statutes made to protect the transgenders fail to fulfil their purpose.

RESEARCH QUESTIONS

- Does The Transgender Persons (Protection of Rights) Bill, 2019 fulfil its purpose?
- Are there any flaws in the existing laws which protect transgenders?
- How can the flaws in the existing laws which protect the transgenders be rectified?
- What are the problems that the transgender community face?

OBJECTIVES

- To look into the problems faced by the members of the transgender community.
- To find the flaws in The Transgender Persons (Protection of Rights) Bill, 2019.
- To find and rectify the flaws in the laws that protect the transgender community.

RESEARCH METHODOLOGY

The Research Methodology will be Doctrinal. Data will be secondary. Information and data would be collected; analysis and recommendation will be made.

INTRODUCTION

We are all humans No sex is better, wiser, stronger, more intelligent, more creative, or more responsible than a the other. Likewise, no sex is ever less. Equality is a given. We are all humans.¹

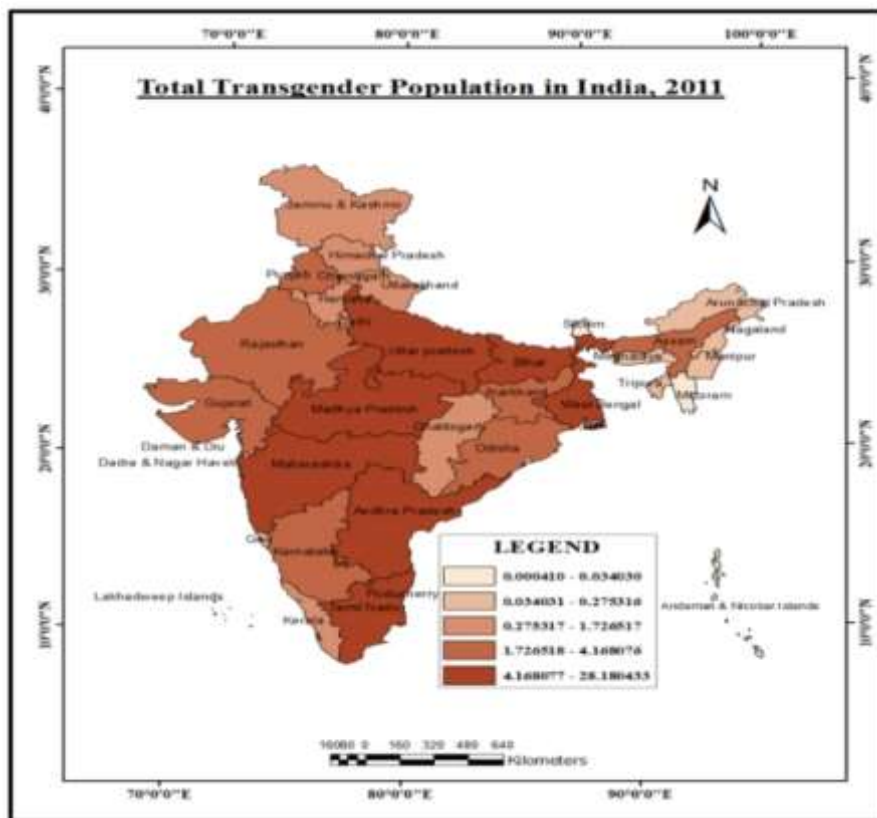
India is a diverse country. It has people of different sexes, religions, castes who have different customs and beliefs. This is what makes setting up human rights really hard in our country. But culture is not what makes people; people make culture. If the full humanity of any particular sex is not in the existing culture, then we must make it our culture. People being discriminated against on the basis of sex and sexual preferences is a very common scenario in recent times. This has also increased hate crimes, violent crimes, or sexual exploitation of the members of the Transgender

¹ V. Nazarian, The Perpetual Calendar of Inspiration (Spirit Publications, USA, 2010)

community. It is high time for people to understand that there are more than two sexes and that not everyone identifies themselves with the gender they were assigned at birth.

PROBLEMS FACED BY THE TRANSGENDER COMMUNITY

The people of the LGBTQ community severe discrimination in our country. According to the world acceptance index if 155 countries, which Iceland has topped with a high score of 7.37, India has a very low score of 2.99 and lies below countries such as Thailand, Vietnam, Hungary, Israel, and China. After analysis of the survey for a few years, it was known that 80 countries which amount to around 57% show growth in acceptance of the people from LGBTQ community, 46 countries which constitute to around 33% experienced a decline in the acceptance of people from LGBTQ community and 15 countries, which constituted to 11% of the total countries had no change in the acceptance of people from the LGBTQ community. This is the extent of injustice they face on daily basis.



(fig. 1)²

No cis-gender person is ever asked to strip naked to prove their sex, then why does a transgender person have to?² The center through the Ministry of Sanitation provided guidelines to the Swacha

² Neethu Naik, Transgenderism in India: Insights from current census

Bharat Mission which stated that transgender people are free to use any toilet, male or female, to avoid discrimination and embarrassment. Despite this statement, many transgenders were harassed, stripped naked, and beaten for using the washroom which didn't match with their birth sex.

In research done by the Civilian Welfare Foundation in collaboration with Stanford University, University of California, and the University of Berkley it was revealed that transphobia is widely spread in the Indian medical community. Transgenders are not allowed in many clinics and hospitals during rush hours and in some, not allowed at all. Many transgender patients are specifically asked to visit early in the morning, lunch hours, or late at night when there are not many patients to treat. The research also found that many doctors insist on examining the genitals of trans people, which they do not do to cisgender people, for trivial matters such as cold and fever. Through the survey, many stories on the discrimination faced by trans people came out. A trans woman who was gang-raped was interviewed for this research shared that the doctor asked her , How could she be raped?. The doctor also failed to prescribe her an emergency HIV prevention medication Post-Exposure Prophylaxis which is which needs to be given within 72 hours of sexual violence. Such a homophobic attitude of the medical community towards the transgender community is the reason that the transgender community is the core high-risk HIV group.³ Another trans woman shared an inhuman and humiliating incidence in which she faced discrimination in a skin clinic in Delhi where she went for a laser hair removal treatment. She was asked to hide in the toilet, mid-treatment when another patient walked in.⁴

On 22nd April 2019, a petition under the name of Arunkumar v. Inspector General of Registration was filed in Madras High Court. J. GR Swaminathan held that a marriage solemnized between a male and a trans woman, both professing Hindu religion, can legally marry in terms of Section 5 of the Hindu Marriage Act. Section 5 of the act states the conditions for a Hindu marriage. A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:

- (i) neither party has a spouse living at the time of the marriage;
- (ii) at the time of the marriage, neither party
 - (a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or
 - (b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

³ National AIDS Control Organization, <http://naco.gov.in/> , (Last visited on 21st June 2020)

⁴ Ankur Paliwal, A study on how India's transgender community faces bias from doctors, <https://scroll.in/pulse/856285/transphobia-among-indian-doctors>, (Last visited on 21st June 2020)

- (c) has been subject to recurrent attacks of insanity³ [***];]
- (iii) the bridegroom has completed the age of⁴ [twenty-one years] and the bride, the age of⁵ [eighteen years] at the time of the marriage;
- (iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;
- (v) the parties are not sapindas of each other unless the custom or usage governing each of them permits of a marriage between the two.⁵

The fact that they both should be of Hindu religion is important as per precedent *M. Vijayakumari v. K. Devabalan*.⁶ In this case, Arunkumar, a cisgender man and Srija, a transgender woman got married in a temple in Tuticorin as per Hindu customs, but the temple authorities thought it was a violation of Section 5 of Hindu Marriage Act as they thought that Srija, being a transgender, didn't fit perfectly in the definition of a bride according to the act. The Madras HC did not agree with this contention. Taking *National Legal Services Authority v The Union of India*⁷ as the precedent, where the supreme court held that no person has to go through ant medical procedure, hormonal therapy, etc. as a legal requirement for recognition if their gender identity, along with cases such as *K.S. Puttaswamy (Privacy-9 J.) v. Union of India*⁸ which held that 'right to privacy' is our fundamental right and *Navtej Singh Jauhar v. Union of India*⁹ which decriminalized homosexuality. It was also held that "Sex and Gender are not one and the same thing. A person's sex is biologically determined at the time of birth. Not so in the case of gender. The supreme court has held that Article 14 of the constitution of India, which affirms that the state shall not deny to any person, equality before the law or equal protection of the laws within the territory of India would apply to a transgender individual."¹⁰ "Discrimination on the ground of sexual orientation or gender identity, therefore, impairs equality before the law and equal protection of the law and violates Article 14 of the constitution of India."¹¹ A Hindu transgender woman could thus marry a Hindu cisgender man under the Hindu Marriage Act, 1955. The transgender community celebrated this victory but this was just a tiny step towards equality. The judgment was only applicable in the state of Tamil Nadu and still, many religious marriage instructors opposed it and stopped trans women from marrying. The judgment also didn't mention anything about the marriage rights of transgender men in the state of Tamil Nadu. Centrally, transgenders are denied

⁵ Section 5 of Hindu Marriage Act, 1955

⁶ *M. Vijayakumari v. K. Devabalan*, AIR 2003 Ker 363.

⁷ *National Legal Services Authority v. The Union of India*, (2014)5 SCC 438

⁸ *K.S. Puttaswamy (Privacy-9 J.) v. Union of India*, (2017) 10 SCC 1

⁹ *Navtej Singh Jauhar v. Union of India*, (2018) 10 SCC 1

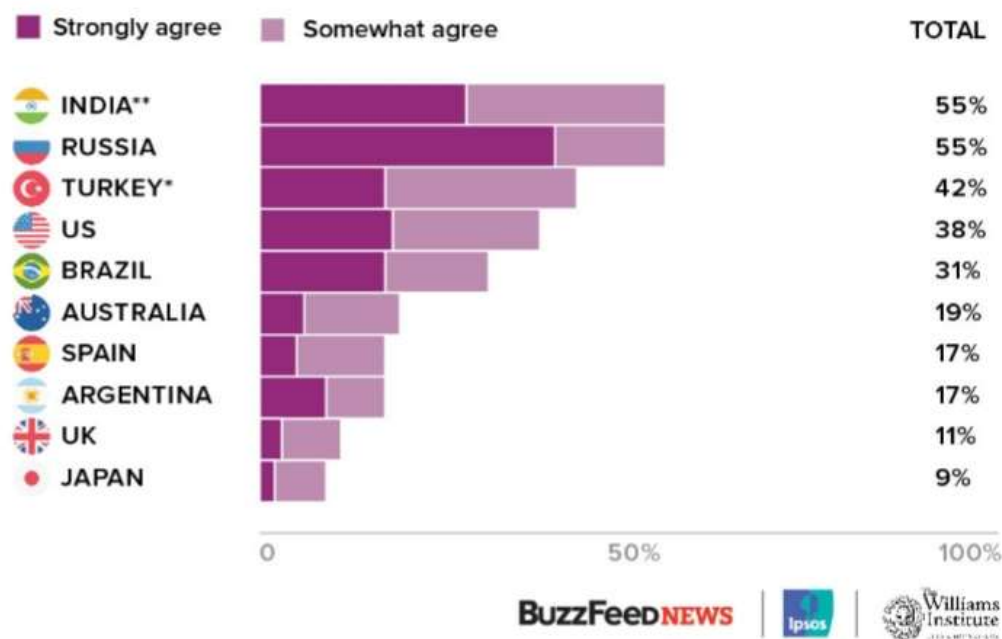
¹⁰ *J. GR Swaminathan in Arunkumar v. Inspector General of Registration*, WP(MD) No. 4125 of 2019

¹¹ *J. GR Swaminathan in Arunkumar v. Inspector General of Registration*, WP(MD) No. 4125 of 2019

many rights be that the right to marry or the right to adopt as a trans couple. They had only been recognized as a ‘third-gender’ in 2014 and only been allowed to have romantic partners (not husbands of wives) in 2018. India only had its 1st transgender police officer, K. Prithika Yashini in 2015. India only had its 1st transgender lawyer, Sathyasri Sharmila, in 2018. India only had its 1st transgender judge, Jyoti Mondal, in 2017. India only had its 1st transgender MLA in 1998. Transgenders were granted voting rights in India in the year 1994, decades after cisgender people. These facts prove the extent of inequality prevailing in our country.

In research done by the BuzzFeed group on the acceptance of transgenders in the world, the following were the results-

“They are violating the traditions of my culture”

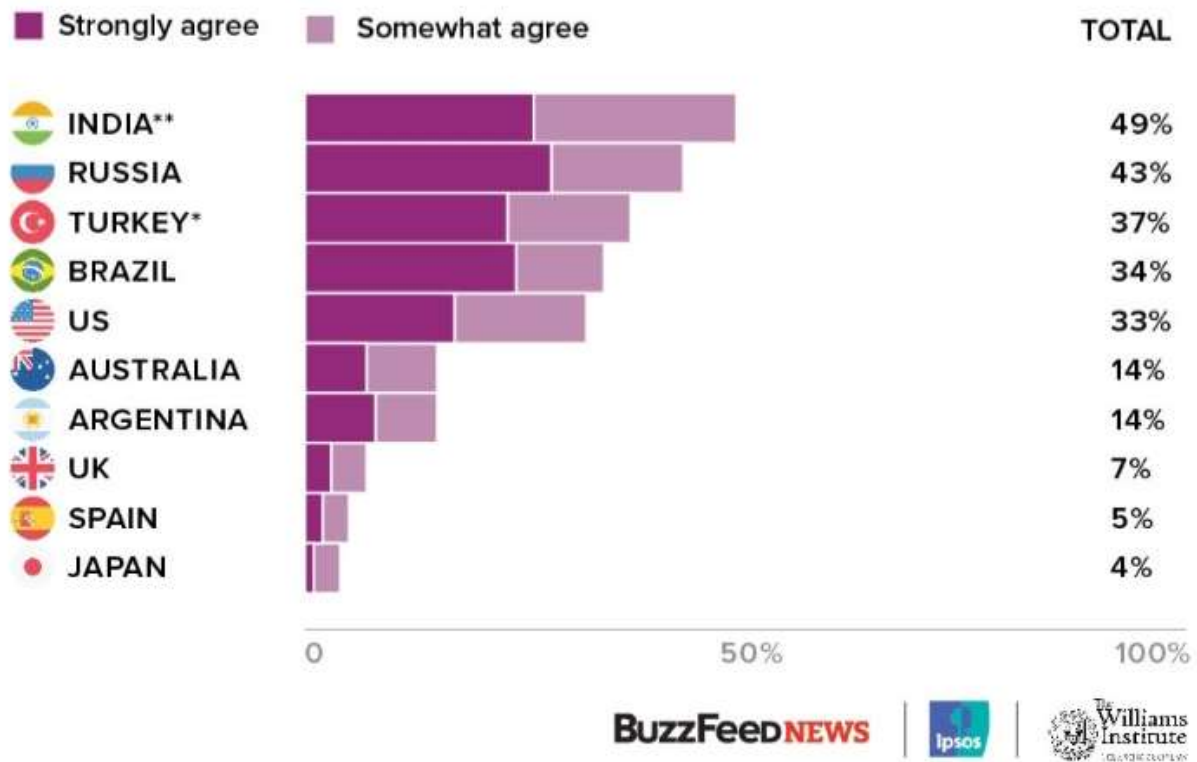


(fig. 2)¹²

¹² J. Lester Feder and Jeremy Singer, This is how 23 countries feel about transgender rights, <https://www.buzzfeednews.com/article/lesterfeder/this-is-how-23-countries-feel-about-transgender-rights>, (Last visited on 21st June 2020)

From fig. 2 we can see that more than half of the Indians surveyed, I,e 55 percent of them believe that transgenders violate their cultural values.

“They are committing a sin”

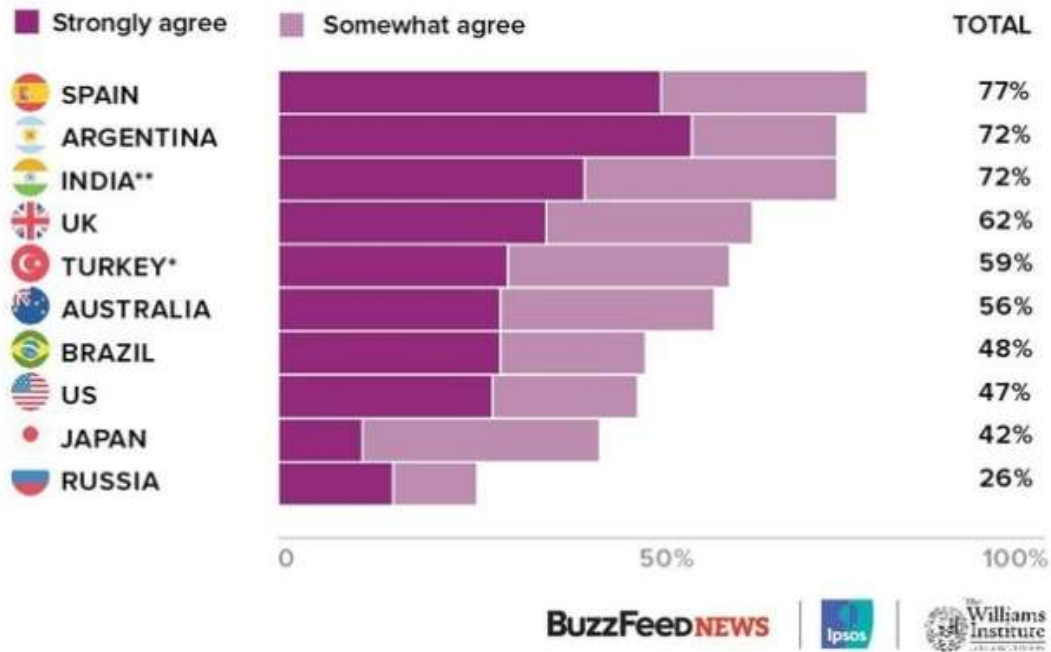


(fig. 3)¹³

From fig. 3 we can see that almost half of the Indians who were surveyed believe that transgenders are committing a sin, which is way more than the rest of the countries.

¹³ J. Lester Feder and Jeremy Singer, This is how 23 countries feel about transgender rights, <https://www.buzzfeednews.com/article/lesterfeder/this-is-how-23-countries-feel-about-transgender-rights>, (Last visited on 21st June 2020)

Transgender people “should be allowed to use the restroom of the sex they identify with.”

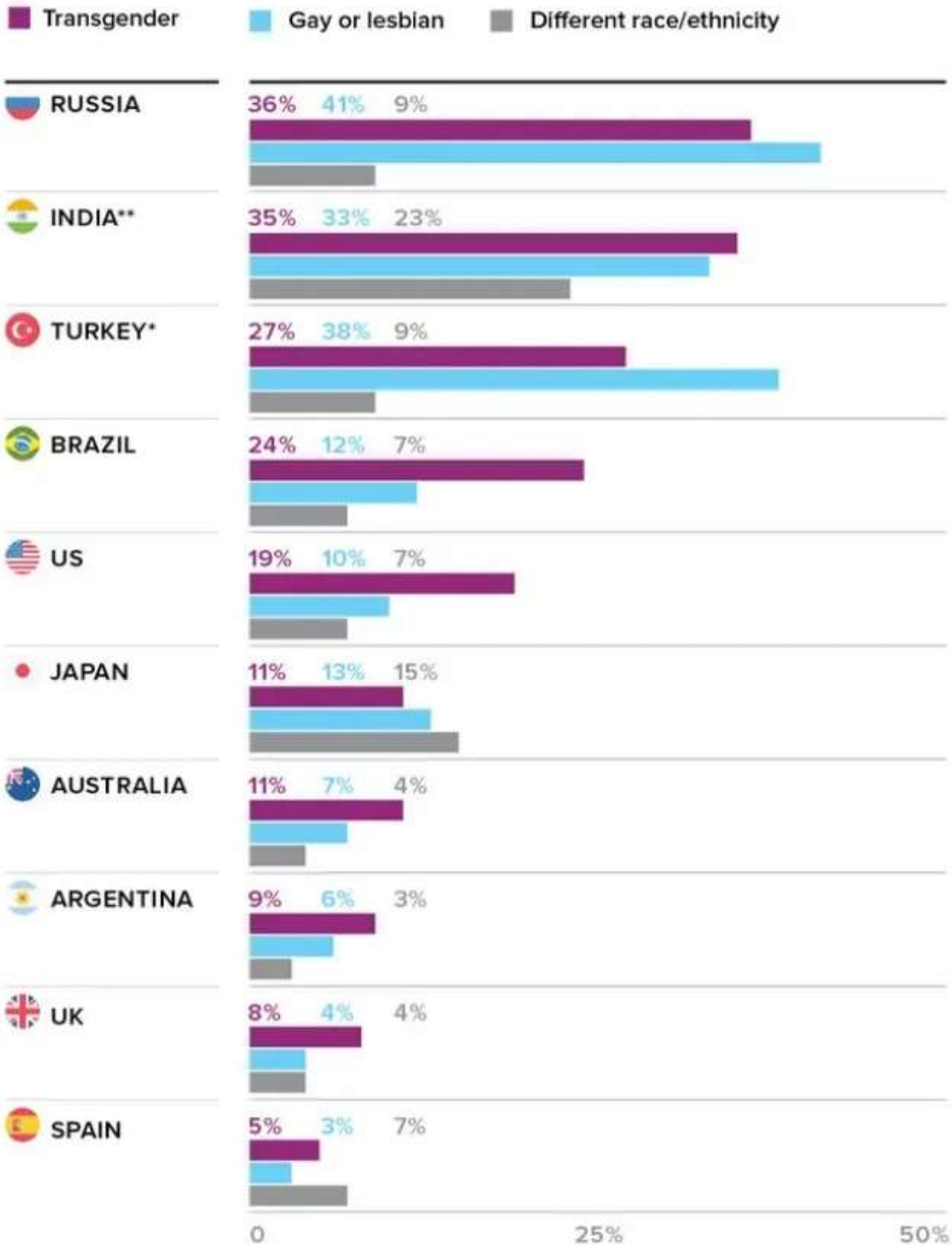


(fig. 4)¹⁴

The issue of transgenders and their choice of restroom has also been discussed above. The Ministry of Sanitation’s guideline to allow trans people to use the restroom of their preference was historic. The fact that 72 percent of people believe this is a great step towards equality.

¹⁴ J. Lester Feder and Jeremy Singer, This is how 23 countries feel about transgender rights, <https://www.buzzfeednews.com/article/lesterfeder/this-is-how-23-countries-feel-about-transgender-rights>, (Last visited on 21st June 2020)

“I would not like to have neighbors who are...”



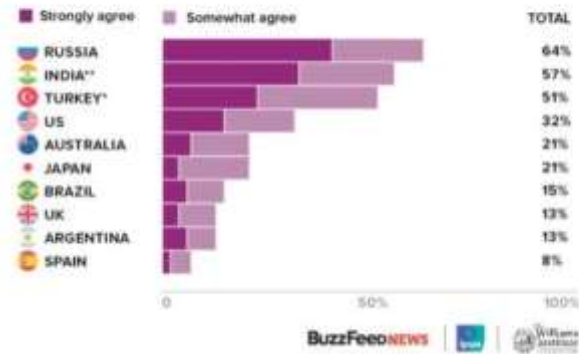
BuzzFeedNEWS



(fig. 5)¹⁵

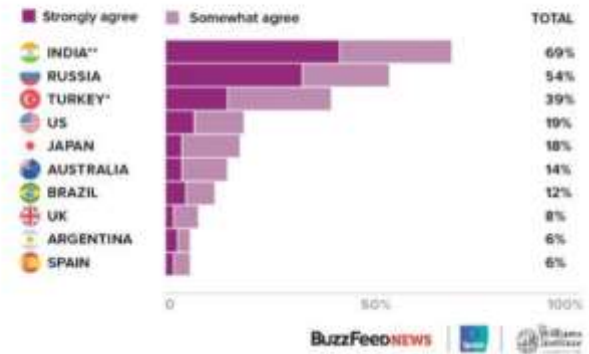
The fig. 5 shows the sexist and racist behavior of Indians and Russians towards sexual and ethnic minorities.

“They have a form of mental illness”



(fig. 6)

“They have a form of physical disability”

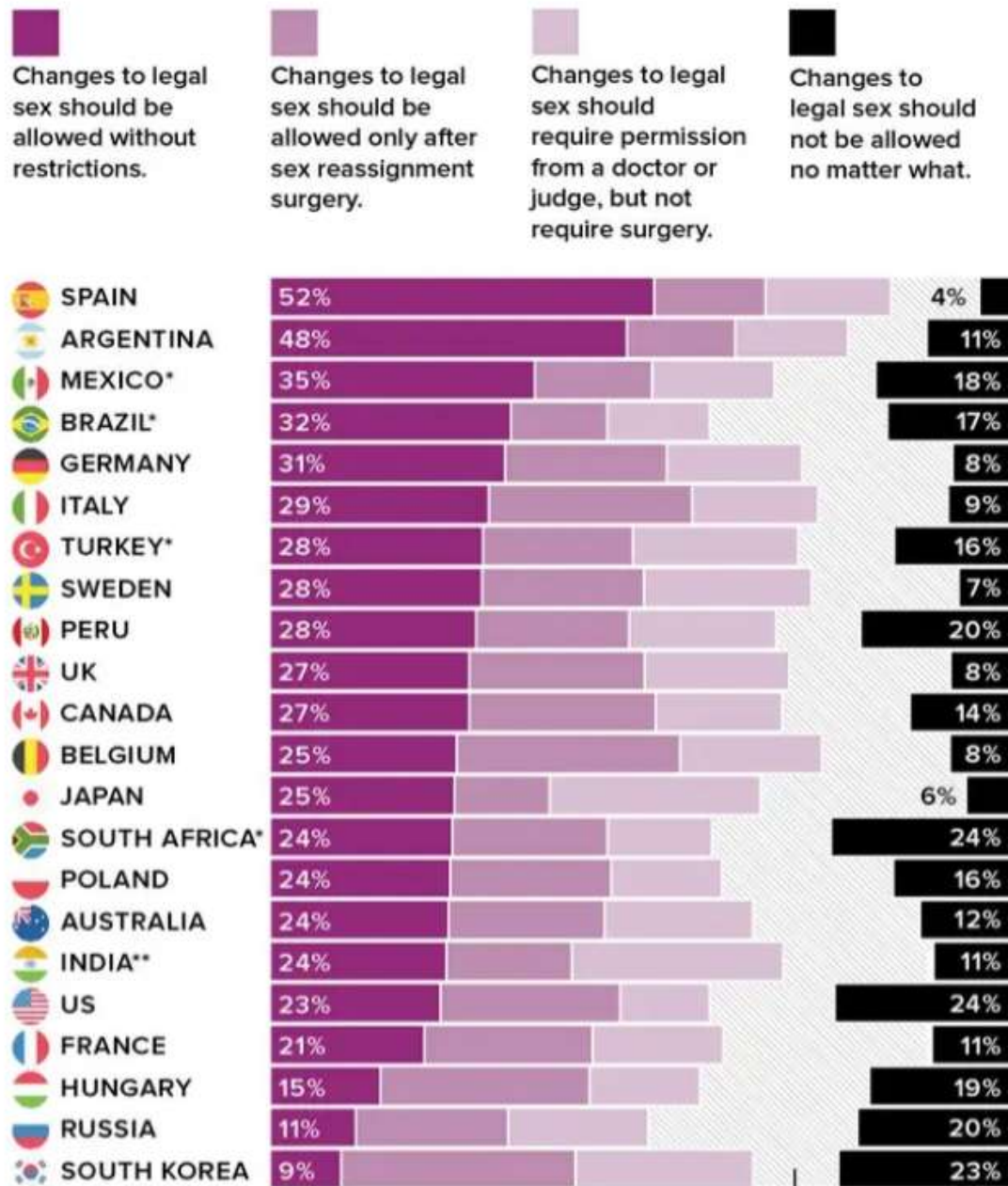


(fig. 7)

Fig. 6 and 7 depict the straight-laced mentality of the Indians as this proves that most of them believe in binary genders and don't see gender as a spectrum.

¹⁵ J. Lester Feder and Jeremy Singer, This is how 23 countries feel about transgender rights, <https://www.buzzfeednews.com/article/lesterfeder/this-is-how-23-countries-feel-about-transgender-rights>, (Last visited on 21st June 2020)

What do you believe should be required before a transgender person can “legally change their sex on identity documents, such as government ID cards or driving licenses”?



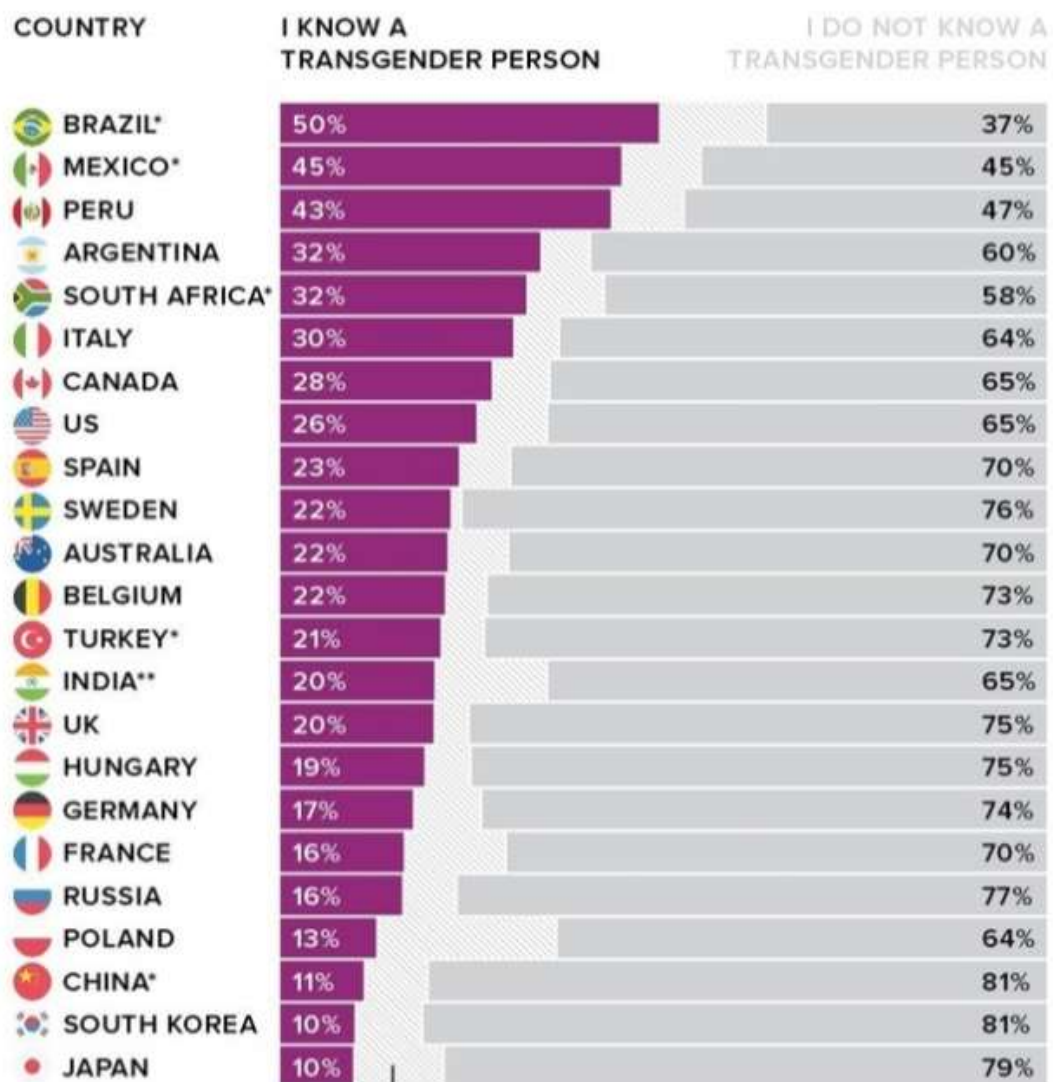
(fig. 8)¹⁶

¹⁶ J. Lester Feder and Jeremy Singer, This is how 23 countries feel about transgender rights, <https://www.buzzfeednews.com/article/lesterfeder/this-is-how-23-countries-feel-about-transgender-rights>, (Last visited on 21st June 2020)

¹⁶ RESHMA ELIZABETH THOMAS, Transgender Identity Issues And Public

Despite the NALSA judgment in 2014 which stated that a person has the right to identify themselves with their preferred gender, only 24 percent of the Indians surveyed believed so.

How familiar are you with a transgender person?

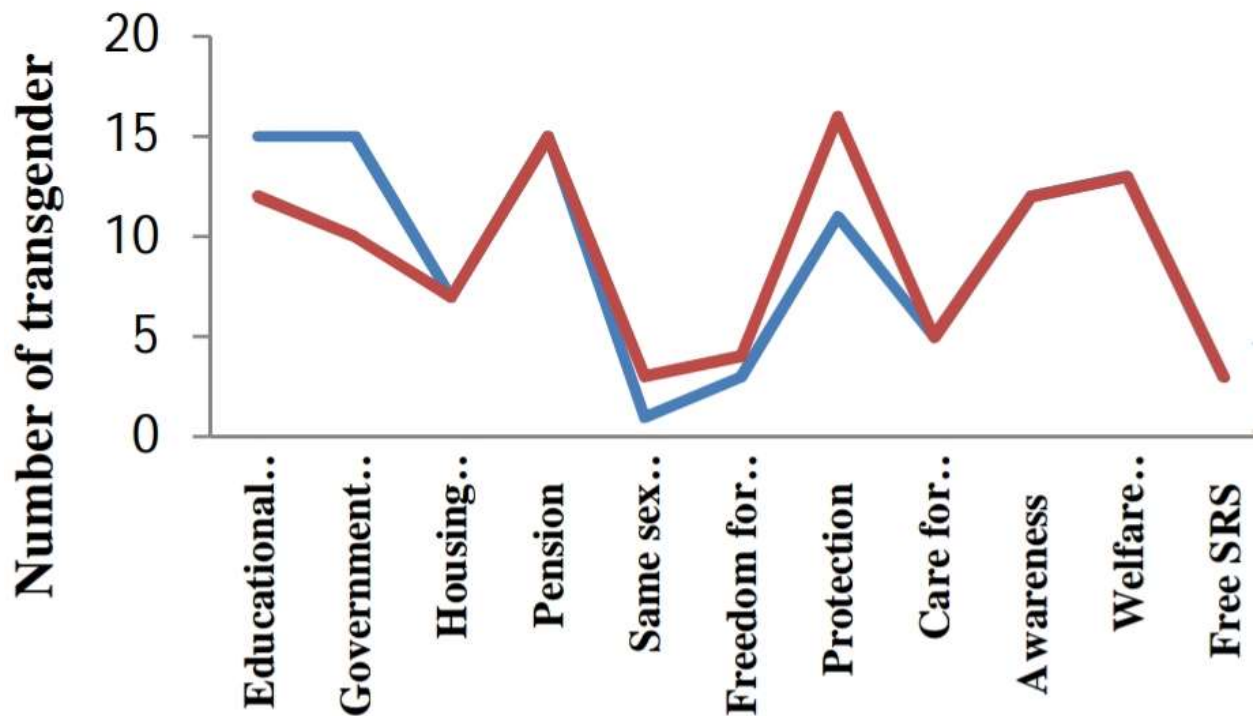


(fig. 9)¹⁷

Fig. 9 puts light on the loneliness and exclusion experienced by the transgender community which becomes even more evident from the fact that only 20 percent of the Indians surveyed know a transgender person.

¹⁷ J. Lester Feder and Jeremy Singer, This is how 23 countries feel about transgender rights, <https://www.buzzfeednews.com/article/lesterfeder/this-is-how-23-countries-feel-about-transgender-rights>. (Last visited on 21st June 2020)

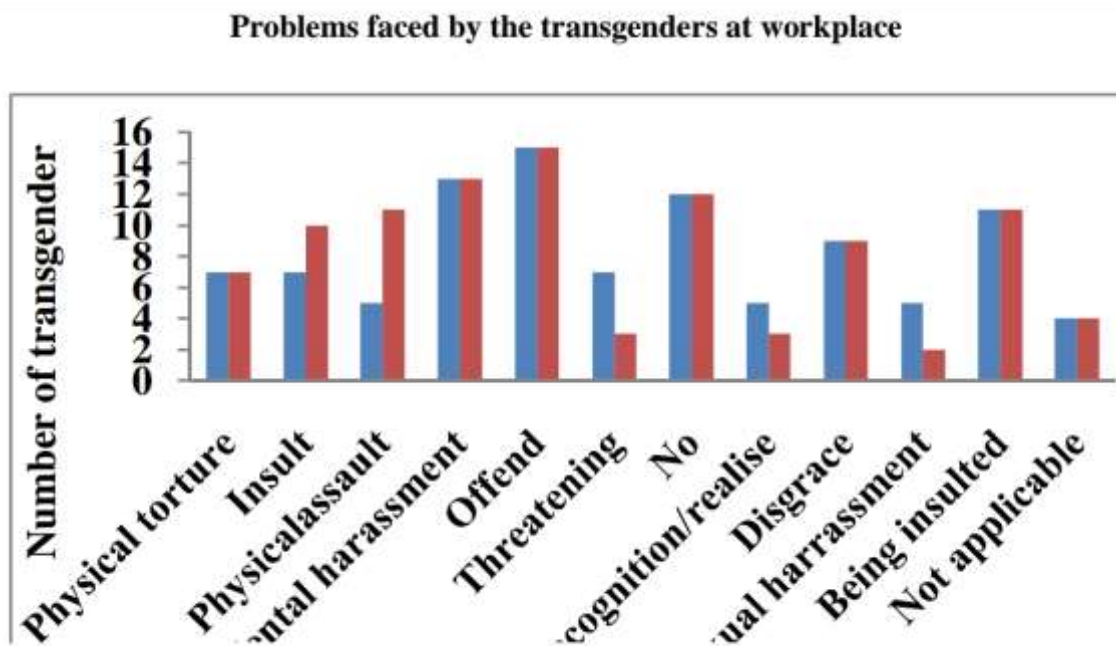
In another research analyzing the state of transgender people in the states of Kerala and Tamil Nadu in India, we can see the tragic and unjust life that they live there.



(fig. 10)¹⁸

Fig. 10 tells is about what the trans community demands from the government to stop the inequality that they face. The colour red signifies the transgenders in the state of Kerala and the blue colour signifies the transgenders living in the state of Tamil Nadu.

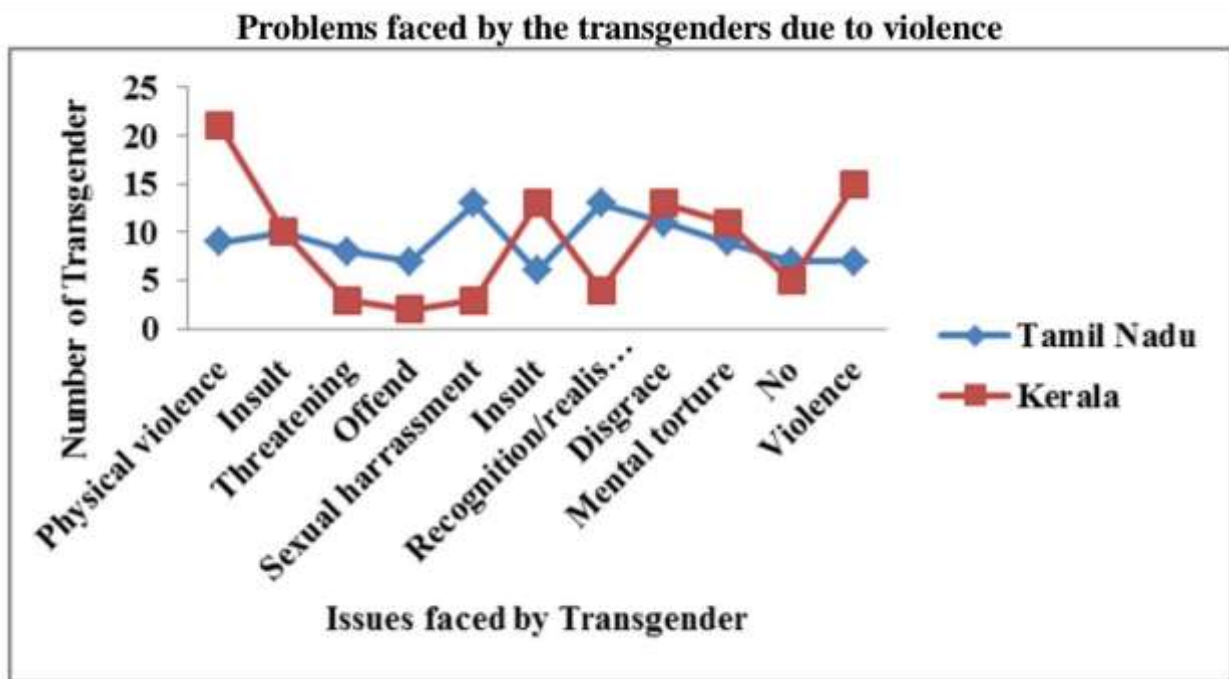
¹⁸ RESHMA ELIZABETH THOMAS, Transgender Identity Issues And Public Policy A Comparative Study Of Kerala And Tamil Nadu, <https://shodhganga.inflibnet.ac.in/handle/10603/24389>, (Last visited on 21st June 2020)



(fig. 11)¹⁹

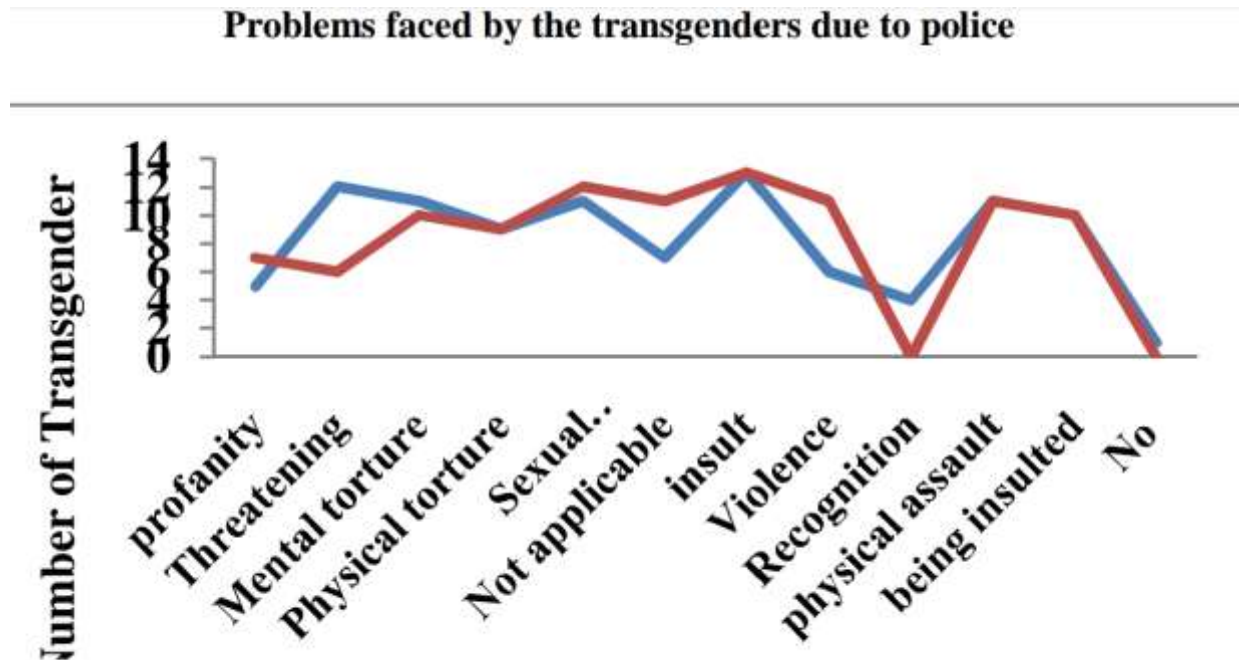
Figure 11 gives us insight into the problems faced by the transgender community in the workplace. The color red signifies the transgenders in the state of Kerala and the blue color signifies the transgenders living in the state of Tamil Nadu.

¹⁹ RESHMA ELIZABETH THOMAS, Transgender Identity Issues And Public Policy A Comparative Study Of Kerala And Tamil Nadu, <https://shodhganga.inflibnet.ac.in/handle/10603/24389>, (Last visited on 21st June 2020)



(fig. 12)²⁰

Unacceptance often leads to violence and hostility. Fig. 12 tells us about the problems faced by trans people due to violence. The color red signifies the transgenders in the state of Kerala and the blue color signifies the transgenders living in the state of Tamil Nadu.



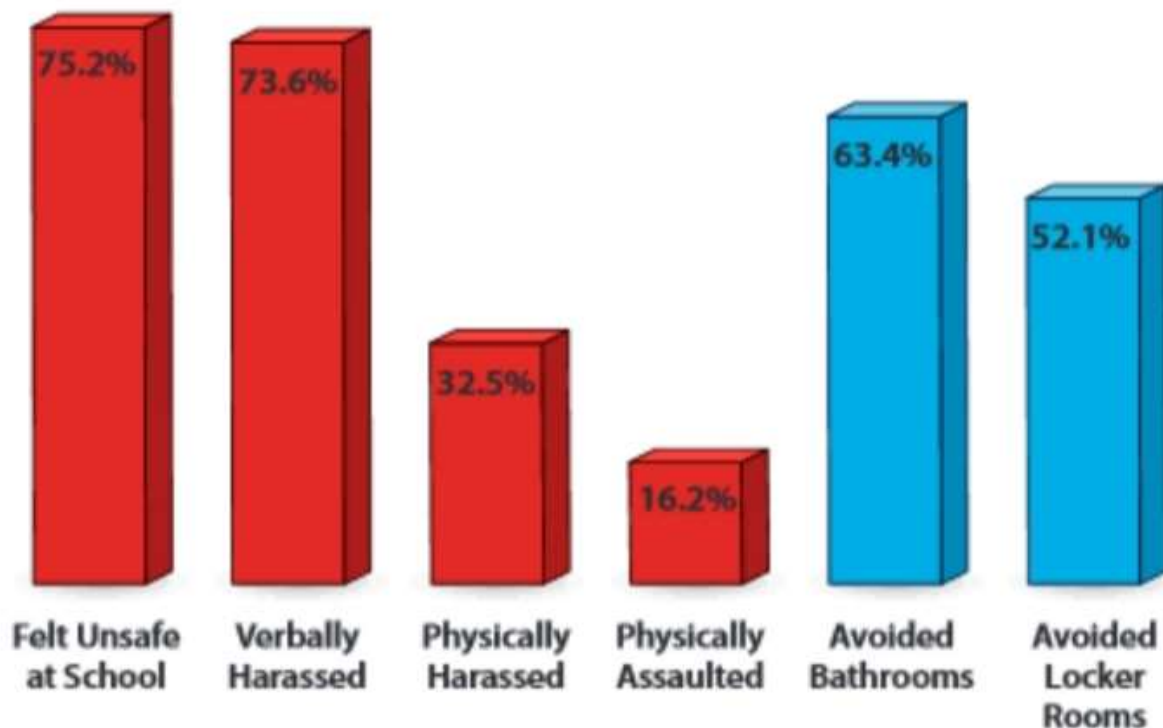
²⁰ RESHMA ELIZABETH THOMAS, Transgender Identity Issues And Public Policy A Comparative Study Of Kerala And Tamil Nadu, <https://shodhganga.inflibnet.ac.in/handle/10603/24389>, (Last visited on 21st June 2020)

(fig. 13)²¹

Police are meant to protect the citizens. Imagine being so outcasted that even the police don't help you. Fig. 13 tells us how the people who exist to protect the citizens, harm the transgender community. The color red signifies the transgenders in the state of Kerala and the blue color signifies the transgenders living in the state of Tamil Nadu.

EFFECT OF THE SOCIAL STIGMA ON THE HEALTH OF THE TRANSGENDERS

According to the minority stress model, developed by psychologist Ilan Meyer, we can say that the stigma and prejudice experienced by sexual and gender minorities, especially the transgenders, produces stress and anxiety that is different than the types of stress faced by most people in their everyday life²².



²¹ RESHMA ELIZABETH THOMAS, Transgender Identity Issues And Public Policy A Comparative Study Of Kerala And Tamil Nadu, <https://shodhganga.inflibnet.ac.in/handle/10603/24389>, (Last visited on 21st June 2020)

²² David M. Frost and Meyer, I.H., "Internationalized Homophobia and Relationship Quality Among Lesbians, Gay Men, and Bisexuals," Journal of Counselling Psychology

(fig. 14)²³

This social stigma is implanted in people's minds since childhood. This can be proved from fig. 14 which depicts the problems faced by transgender students in educational institutes.

In response to events of prejudice in their life, sexual and gender minorities frequently develop fear and expectation that such events will happen again. This expectation leads to hypervigilance in one's surroundings, relationships, and interactions with others, even when stigma and prejudice may not be in operation²⁴. The individual begins to develop additional coping mechanisms, such as identity concealment or other strategies to mitigate the negative consequences of stigma and prejudice. These processes can lead to internalization of social stigma, in the form of internalized homophobia or transphobia, where individuals begin to devalue themselves in a manner consistent with the prejudice being directed at them by others. The impact of minority stress on transgender people is reflected in poor health outcomes. A systematic review of 199 studies in the Global North and South showed that sexual minorities were at increased risk for depression, anxiety, suicide attempts, or suicides²⁵. However, such global reviews are rare. Though the connection between stigma and health outcomes is well established, there is still a great need to understand how stigma impacts specific populations at the national level.

There are many people who live in the delusion that gender is binary and torment and harass transgenders assuming that their gender choice is due to some mental illness. Such assumptions that are in no way backed by science make the already miserable life of transgenders even worse. Due to the inequality, they face in society, despite having the skills to excel in their chosen fields, they have to resort to petty jobs. Some are left with no choice but to beg or to turn to prostitution. This casual discrimination takes a huge toll on the mental and physical health and the economic condition of the members of the transgender community.

RIGHTS OF THE TRANSGENDER COMMUNITY ACCORDING TO OUR CONSTITUTION.

The constitution to our country ensures and guides us to a society where there is no discrimination on the basis of sex and all sexes are thought to be equal. Article 14 of our constitution ensures

²³ JG Koschiw, 2013 National School Climate Survey: The experience of LGBT youth in our nation, www.glsen.org/nscls. (Last visited on 21st June 2020)

²⁴ Jennifer Crocker. "Social Stigma and Self-Esteem: Situational Construction of Self-Worth." *Journal of Experimental Social Psychology*

²⁵ The study included 199 studies which had a heterosexual comparison group. 26 studies had nationally representative studies using clinical interviews. Martin Ploderl and Pierre Tremblay, "Mental Health of Sexual Minorities. A Systematic Review," *International Review of Psychiatry*

equality among all sexes²⁶. It says, “Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth”²⁷. Many clauses of article 15 also talk about gender equality and women empowerment. Article 15 (1) says, “ The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them”²⁸. Article 15(2) prevents people from stopping people of any particular sex from using wells, bathing ghats, roads, shops, public restaurants, or resorts maintained partly or wholly by the government of our country. Article 15 (3) states that “Nothing in this article shall prevent the State from making any special provision for women and children”²⁹ women here should also include transgender women who identify themselves as women. Article 16 (2) of our constitution prevents denying employment or any office under the state to a particular sex. This prevents the glass ceiling and also lead to opportunities to the deprived sex such as Joyita Mondal became the first transgender judge in West Bengal Lok Adalat. Article 39 (a) says that “The citizens, men and women equally have the right to adequate means of livelihood.” This article should include the LGBTQ+ community to post the recognition of genders apart from men and women in cases National Legal Services Authority v. The Union of India³⁰ and Navtej Singh Jauhar v. Union of India³¹. Article 39 (d) ensure equal pay for equal work done by any sex. Article 46 of our constitution promotes the educational and economical development of weaker sections of our society. This also includes promoting the interests of the deprived sexes. Article 51 A (e) states that it is the fundamental duty of every citizen of our country to renounce practices derogatory to the dignity of women which must also include violence or derogatory practices against trans women. Article 243 D (3), 243 D (4), and 243 T (3) suggest that at least one-third of members of the panchayat of different constituencies, chairpersons of panchayats, and members of municipalities of different constituencies respectively should be women. Similarly, opportunities should be given to transgenders.

²⁶ The word ‘sexes’ here refers to all genders, women, men and the members of the LGBTQ+ community.

²⁷ The Constitution of India, art. 15

²⁸ The Constitution of India, art. 15 (1)

²⁹ The Constitution of India, art. 15 (3)

³⁰ National Legal Services Authority v. The Union of India, (2014)5 SCC 438

³¹ Navtej Singh Jauhar v. Union of India, (2018) 10 SCC 1

RIGHTS AND PROTECTION OF THE TRANSGENDER COMMUNITY ACCORDING TO THE INDIAN PENAL CODE (IPC)

There are not many provisions for the protection of transgenders in the Indian penal code (IPC). Section 375 of the Indian Penal Code deals with rape. The word ‘rape’ is derived from Latin *terno rapio* which means ‘seize’ as forcible seizure without consent is an essential characteristic of rape. This was initially thought of only as a crime against women. Now it also includes trans women but the punishment of this crime against cisgender women and transgender women is very different. This will be discussed in detail while talking about the Transgender Persons (Protection of Rights) Act, 2019. Section 354C of IPC deals with the offence of voyeurism. It is a non-compoundable offence and a person is liable for conviction if the woman’s picture is taken in a private space or while the complainant is engaged in a private activity which is not usually done in a public space or even if the woman consented for pictures to be clicked but not to show it to some third party. The crime of voyeurism is not a crime against trans people and therefore, they don’t have any protection against it. Under section 372 of Indian Penal Code states that if any person sells or disposes of any person under the age of eighteen years with the intent that such person shall at any age be employed or used for prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be employed or used for any such purpose, will face imprisonment for a term which may extend to ten years, and shall also be liable to pay fine. As prostitution is a very important problem in the transgender community, this section helps in their protection. The transgender community is also at high risk of contracting HIV which is reduced by this section to some extent. There are also many sections to protect women from cruelty after marriage as women have been subjected to it for centuries. Section 498A of IPC prevents the husband or his relatives from subjecting the woman to cruelty. The consequences of such actions could lead to a punishment of imprisonment which could be extended to three years and fine. Section 304B of the Indian Penal Code mentions the offence of dowry death. If the cause of death of the woman is burns, injuries, or by any other unnatural reason within seven years of her marriage and the woman was treated with cruelty before the death, connects her husband and his relatives to dowry death. Even though it is legal for a Hindu transgender woman to marry under the Hindu Marriage Act, 1955 according to the Madras High Court, there is no such law existing to protecting transgender women post marriage from violence and cruelty.

Shakespeare through one of his characters in a play says —What’s in a name? That which we call a rose by any other name would smell as sweet. The said phrase, in its basic sense, conveys that what really matters is the essential qualities of the substance and the fundamental characteristics

of an entity but not the name by which it or a person is called. Getting further deeper into the meaning, it is understood that the name may be a convenient concept for identification but the essence behind the same is the core of identity. Sans identity, the name only remains a denotative term. Therefore, identity is pivotal to one's being. Life bestows honor on it and freedom of living, as a facet of life, expresses a genuine desire to have it. The said desire, one is inclined to think, is satisfied by the conception of constitutional recognition, and hence, the emphasis is laid on the identity of an individual which is conceived under the Constitution. And the sustenance of identity is the filament of life. It is equivalent to authoring one's own life script where freedom broadens every day. Identity is equivalent to divinity³². After *Navtej Singh Jauher v. Union of India*³³ case the part of section 377 of IPC, that stated homosexuality as a crime was removed but the part that criminalizes bestiality is still enforceable. It overruled the decision of the case *Suresh Kumar Koushal and another v. Naz Foundation*. It used the *National Legal Services Authority v. The Union of India* and *K.S. Puttaswamy (Privacy-9 J.) v. Union of India*. The bench also relied upon the authorities in *Shakti Vahini v. Union of India*³⁴ and others and *Shafin Jahan v. Asokan K.M.*³⁵ wherein it has been clearly recognized that an individual's exercise of choice in choosing a partner is a feature of dignity and, therefore, it is protected under Articles 19 and 21 of the Constitution. Earlier section 377 of IPC termed homosexuality as 'unnatural offences.' It stated that "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine." The *K.S Puttaswami v. Union of India* case or the 'right to privacy' case acted as the precedent of this case and ended the long struggle of the LGBT community for recognition. In the reading of the verdict of section 377 of IPC, Justice Indu Malhotra said that "History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries."

³² CJI Deepak Mishra, *Navtej Singh Jauhar v. Union of India*, (2018) 10 SCC 1

³³ *Navtej Singh Jauhar v. Union of India*, (2018) 10 SCC 1

³⁴ *Shakti Vahini v. Union of India*, (2018) 7 SCC 192

³⁵ *Shafin Jahan v. Asokan K.M.*, AIR 2018 SC 357

THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

“This Bill exists to erase transgenders by having complete control over us from the way we identify to what socioeconomic opportunities we should get and condoning violence against us, it places us in a vulnerable position³⁶”.

The Transgender Persons (Protection of Rights) Act, 2019 was meant to help and protect the transgenders but it only outraged them and snatched away more rights from them. The bill was drafted and passed without any consultation from the trans community. The assumptions were made based on stereotypes as no one from the trans community was even asked what they need or require.

An Outline of the Act

The act has nine chapters.

CHAPTER I

Section 2 of Chapter I provides the definitions used in the act such as transgender, establishment, etc.

CHAPTER II

This chapter consists of Section 3 of the act. It provides for prohibition of discrimination in the fields of education, employment, health, etc.

CHAPTER III

This chapter consists of sections 4 to 8. It focuses on the recognition of the identity of the transgender. It also lays down guidelines to the mechanism which helps in recognizing the identity of the transgender. The process involves the District Magistrate, District Screening Committee, and The Chief Medical Officer.

CHAPTER IV

³⁶ Liliansa il Graziosco Merlo Turan, Why are there objections to the Transgender Persons Bill?, <https://www.thehindu.com/news/national/why-are-there-objections-to-the-transgender-persons-bill/article30125894.ece>, (last visited on 21st July 2020)

It consists of section 9 which lays down measures to be taken by the government to increase the acceptance of the transgender community in our society.

CHAPTER V

This Chapter involves Sections 10 to 13. This chapter mainly states the obligations of the establishments and the people working there to not discriminate against transgenders.

CHAPTER VI

This chapter consists of sections 14 to 16. These sections mainly work on improving the livelihood of the transgender community through education, health care, and welfare schemes.

CHAPTER VII

This chapter consists of Sections 17 and 18. This chapter mainly focuses on the NCT which is the National Council for Transgenders and the representation of transgenders in different departments of government.

CHAPTER VIII

This chapter consists of section 19 which penalizes any person who compels a transgender to beg or do any kind of forced labor.

CHAPTER IX

It consists of sections 20 to 24. They mention miscellaneous provisions such as protection of government for actions done in good faith, grants by the center, etc.

FLAWS AND RECOMMENDATIONS

According to the act, a transgender person can apply to the District Magistrate to issue a certificate of identity as a transgender person, in such form and manner, and accompanied with such documents, as may be prescribed and in the case of a minor child, such application shall be made by a parent or guardian of such child³⁷. The District Magistrate shall issue to the applicant under section 5, a certificate of identity as transgender person after following such procedure and in such form and manner, within such time, as may be prescribed indicating the gender of such person as transgender³⁸. This certificate will confer rights and be proof of the person's identity as a

³⁷ Transgender Persons (Protection of Rights) Act, 2019, s. 5

³⁸ Transgender Persons (Protection of Rights) Act, 2019, s. 6(1)

transgender person. After the issue of a certificate, if a transgender person can undergo surgery to change their gender as a male or female, such person may make an application, along with a certificate issued to that effect by the Chief Medical Officer or the Medical Superintendent of the medical institution in which that person has undergone surgery, to the District Magistrate for the revised certificate, in such form and manner as may be prescribed³⁹. The District Magistrate shall, on receipt of an application along with the certificate issued by the Medical Superintendent or Chief Medical Officer, and on being satisfied with the correctness of such certificate, issue a certificate indicating change in gender in such form and manner and within such time, as may be prescribed³⁹. These sections of the Transgender Persons (Protection of Rights) Act, 2019 imply that for a transgender person to be considered as male or female they have to go through sex change to be considered as male or female. Not all transgenders want to go through sex reassignment process and neither something that all of them can afford as it is a very expensive process. This is also violation of the right to privacy of the transgenders. This also contradicts the 2014 judgement of NALSA (National Legal Services Authority of India) by the Supreme Court, which gave transgender people the right to self-identify and also did not mandate undergoing surgery to attain that right. According to the bill a transgender person means “a person whose gender does not match with the gender assigned to that person at birth and includes transman or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta”⁴⁰. The fact that the Bill conflates transgender people with intersex people proves that it was not thought through, and was made with inadequate knowledge. This is because of the fact that not every intersex person identifies as transgender person, and not every transgender person is an intersex person. The Transgender Persons (Protection of Rights) Act, 2019 does not punish people who bully or harass transgender people at educational institutes or workplaces, and neither did it introduce provisions related to adoption rights, transfer of property and marriage rights of the transgenders. According to the act with orders from the court a transgender person can be placed in a rehabilitation centre, if the person’s family is unable to take care if them. This denies the right that a trans person has to join other transgender communities. The act does not even provide reservation to the transgenders which would ensure their survival and also give them opportunities to progress. The act made sexual offence against transgenders a crime but in a gender biased way. If a cisgender woman is raped, the punishment for the rapist is imprisonment for seven years which can also extend to

³⁹ Transgender Persons (Protection of Rights) Act, 2019, s. 7(2),

⁴⁰ Transgender Persons (Protection of Rights) Act, 2019, s. 2(k)

death penalty where as in the case of rape of a trans woman, the punishment mentioned is only for 6 months which can extend by the court to a maximum of 2 years. This showed the shallow mindedness of the government and showed that the government does not think the impact of sexual abuse on a transgender woman is as impactful as on a cisgender woman. This made not only transgenders but people of all sexes furious. Many people took the street and fill the internet with the hashtag '#RapeIsRape'.

CONCLUSION

We live in a country that had accepted lesbians, gays, bisexuals, and transgenders way before many other countries and our ancient texts, architecture and statues and Khajuraho statues are a proof of that. According to Nāradaśmṛti there are 14 types of panda or men who are impotent with women. A few of these are the mukhebhaga or the men who have oral sex with other men, the sevyaka or the men who let other men sexually enjoy them. The irshyaka also known as the voyeur watches and derives pleasure from other men engaging in sexual activities. The ancient scripture Kama-Sutra uses the term tritiya-prakriti as a term to define men who desire homosexual activities, lesbians as svairini, bisexuals as kami, or paksha, and also talks about transgender and intersex people. Let's not move backward and make Bharat a country where all genders are treated equally. With constant efforts, biasness on the bases of gender and sexual preferences will be gone forever.

I will conclude my paper in reference to the butterfly effect. The butterfly effect is based on the analogy that if a butterfly flaps its wings in Chicago, a tornado occurs in Tokyo. In simpler words, small actions can have great consequences. The Indian system of justice has three pillars: legislative, judiciary, and executive. From the acts and statutes discussed above, we can see if even one of these pillar tilts, the whole system is disturbed. To ensure equality of all sexes we have to take little steps to achieve it. Flapping our wings might create a tornado that would destroy inequality from its root.