

Self, Community, and the State among Intersex People in India

Chessana Malik

Vasant Valley School, Delhi, India

Email: chessanam26[at]gmail.com

Abstract: *The intersex community has always been subjected to oppression in the form of unwarranted socio-medical interventions in the pursuit of popular notions of “normal” and “abnormal” bodies. The law plays a role in the denial of equal protection of the rights and liberties of intersex persons which further contributes to their oppression on top of the social stigma they already face. The paper aims to analyse the different ways in which both the law and society oppress and marginalise intersex persons. In the first part, it aims to clarify the meaning of the term “intersex” and goes on to adjudge it as a socially constructed category. In response to such constructions, the paper notes the reaction of the law in classifying the division between “normal” and “abnormal bodies.” In the second part, the paper explores the different ways in which the law, besides being a part of the problem, can be a part of the solution. It focuses on three aspects with reference to recent Indian jurisprudence vis-a-vis the judgements of the Supreme Court and the Madras High Court. The paper concludes by emphasising how societal awareness can be increased through art production by intersex communities.*

Keywords: Law, Sexuality, Gender, Human Rights, Transgender People

1. Introduction

Sexuality has always been an axis of oppression. Non-heterosexual persons have often been discriminated against in a number of ways. The stigma towards different sexualities eventually attached itself to the person(s) involved and over time, covered those with non-heteronormative bodies. In his discussion about the transformation of the external practice of sodomy into the internal properties of the person, Foucault (2007) illustrates how heteronormative subjectivities perceive and reproduce non-heteronormative subjects:

The psychological, psychiatric, and medical category of homosexuality was constituted the day it was characterised - the famous article by Westphal on the 'contrary sexual sensations' (1870) can be taken as a date of birth -not because of the type of sexual relations but because of a certain sexual sensitivity, a given way of inverting in oneself the masculine and feminine roles. Homosexuality became one of the figures of sexuality when it was downgraded from the practice of sodomy to a type of interior androgyny, of hermaphroditism of the soul. Whereas the sodomite was a deviant, the homosexual was now a species.

Closely connected to the detesting of marginal sexualities is the history of oppression faced by intersex people owing to their different bodies. Intersex is a general term for a variety of conditions in which a person is born with reproductive organs or sexual anatomy that do not fit into the common definition of female or male. For example, a person may be born female on the outside but have predominantly male anatomy on the inside. Alternatively, a person may be born with genitalia that are somewhere between normal male and female genitalia. For example, girls may be born with a noticeably large clitoris or no vaginal opening, and boys may be born with a particularly small penis or vagina, or their scrotum might be split to look like labia. Alternatively, a person may be born with mosaic genetics, so some cells

have her XX chromosomes and others have her XY chromosome (ISNA, n.d.).

Although we speak of intersex as a congenital condition, intersex anatomy does not necessarily appear at birth. In some cases, the anatomical diagnosis of intersex cannot be made until puberty is reached, infertility or death of old age occurs, and an autopsy is performed. Some people live and die without anyone (including themselves) knowing their intersex anatomy. This indicates that intersex is a socially constructed category that reflects real biological variation (ISNA, n.d.). Similar to race, socio-medical classifications are made in the case of sex and gender solely to serve the needs and interests of society. For instance, labelling people as either 'black' or 'white' was carried out solely to suit the physical, economic, and social needs of society - by itself, social constructions serve no inherent purpose. Social constructions, being fickle in nature, require constant coercion and pressure to sustain themselves over the long term. A similar coercion and pressure can be discerned in the case of intersex people.

It is believed that intersex people and bodies cannot integrate into society. Despite concerns about need, outcome, behavior and consent, medical interventions for often healthy bodies remain the norm, depending on perceived family and cultural needs. Human rights abuses against intersex people continue today and are deeply rooted in a history of conscious silence. Intersex people are often treated by society and the medical profession as having scars that can be corrected with surgery or drugs. Intersex children around the world receive non-consensual and unnecessary medical care, both internal and external, to make prominent their sexual characteristics according to society's normative notions of being male or female. These treatments include surgery to change the appearance of external sexual characteristics and removal of internal genitalia that do not match the "assigned gender." Hormonal treatments and psychological interventions are used to enhance and enhance

their “assigned sex” and gender. The results are usually disastrous, the claimed benefits are largely unproven, and the interventions pose immediate health concerns. Surgery that can be postponed until the intersex children are old enough to decide if they want it is instead performed on the infant, who must then accept the consequences for the rest of his life. Intersex people are not uncommon, but they are often misunderstood.

Such misunderstanding has often been the case in India as well which has a huge transgender population (over four hundred and eighty-seven thousand) - As per the 2011 census, the term ‘transgender’ was an umbrella term that covered all those people who did not identify as either male or female (Statista Research Department, 2022). Notably, there is a difference between intersex and transgender persons - the latter refers to persons who identify with a gender different from the one which they were assigned at birth whereas intersex persons can continue to identify with the gender they were assigned at birth. Intersex people may identify with a gender other than the one they were assigned at birth but this is not necessary of all intersex persons. Regardless, the 2011 census recorded the literacy rates of transgender persons with the lowest literacy rate being in Bihar of 44.3%.

A study done in 2018 by the National Human Rights Commission found that 96% of transgender people are refused employment opportunities and are forced to engage in low-wage or degrading occupations, such as begging, badhais, and sex labour. The first-ever survey on the rights of transgender people also found that 92% of transgender people in the nation are denied the opportunity to engage in any kind of economic activity, with even qualified individuals being denied employment. Nearly 89% of transgender people claimed that even qualified individuals cannot find employment. According to the survey, between 50 and 60 percent never went to school, and those who did experienced significant discrimination. (Outlook, 2023).

Sexual abuse, humiliation, bullying, isolation, and non-consensual medical intervention constitute everyday life and living for intersex people in India (Banerji, 2019). Given the large intersex population in the country and their widespread mistreatment, concerted efforts towards their welfare need to be made if one is to secure their rights as equal individuals who deserve to live a dignified and healthy life. This paper examines such recent efforts and highlights areas for further improvement through a close reading of legal texts and an analysis of the art and cultural productions of the community to understand the lived experience of members of the intersex community.

2. Background

The law has a huge impact on the lives of intersex people. Only recently has the treatment of intersex people been recognized as a human rights issue. Intersex is popularly thought of as a “disease,” “condition,” or “disorder,” rather than a viable legal identity and as an extension, was thought to be a category that exists outside the bounds of the law. To be considered human under the law, one must have a recognizable and classifiable gender. Certain human rights

for intersex children are believed to be non-existent, as children with "sexless" bodies are not considered human. The body is surgically made human, that is, given a gender. This is one of the problems activists seek to contend with when they claim surgical operations amount to attacks on human dignity or human rights. It is believed that this operation itself marks the child as 'human' - to give the child the humanity that "it" never had before medical intervention. This surgery is a gift of the right body and human beings to grant its existence as a legal subject and a citizen. Assisting such developments has been the fact that in recent history, the category of "intersex" has been discursively presented as a medical rather than a legal issue (Bird, 2006).

Susanne Kessler uncovers links between the cultural fear of intersex and medical practice of genital intolerance. Laws determine which bodies can survive without surgical intervention and which bodies are considered abnormal justify altering the hormonal, anatomical, and endocrine characteristics of intersex bodies are considered both legally and biologically abnormal. There is no purely biological body in which the law does not intervene (Bird, 2006). In other words, one can imagine the actions of medical practitioners (and of those involved in the surgical operations of the intersex person) as being guided by the demands of law and legal personhood. Indeed, the law can be thought of as compelling the actions of the larger society. In such a context, it becomes important to examine precisely how the law demands such conduct of people and what recent developments in the legal status of intersex people in India can do to change the status quo.

There are two ways in which the law compels people to act against the interests and dignity of intersex people: firstly, it sanctions intersex people by not recognising their existence solely because their bodies are considered to be abnormal or too anomalous to be given legal status. As such, intersex people cannot access the panoply of social, economic, and political rights enjoyed by other citizens. This situation of asymmetrical access makes it harder for intersex people to affirm their identity and reclaim it. Therefore, medical interventions on intersex people become necessitated if they are to live their lives as free and equal human beings.

The second way in which the law negatively impacts intersex people is by perpetuating the stigma around intersex bodies. Those enjoying the full panoply of rights by virtue of their cisgender and/or heteronormative bodies secure their status as free and equal human beings by constantly marginalising those with different bodies. The recognition of intersex people as free and equal citizens of a country would mean that one does not need to have a specific gender or sex as a prerequisite to being a citizen. The very project of intersex rights undermines the security that conforming to a particular gender or sex gives to citizens. It is to protect that security and to be safe in their knowledge/constructions that cisgender citizens with a heteronormative body stigmatise those with bodies different than theirs. Until the law recognises that one does not need to be of a particular sex or gender, the stigmatisation of intersex bodies will continue unabated.

The recent judgements of the Supreme Court of India are instructive in this regard for they seek to overturn many of the previously held notions of the pre-requisites of legal citizenship. In the landmark case of *NALSA vs Union of India*, the Supreme Court of India upheld the constitutional rights of transgender people under Articles 14, 15, 19, and 21 of the Constitution. The court upheld the right of transgender people to choose their own gender and instructed the Centre and state governments to legally recognize gender identities such as male, female, and third gender. For intersex people, this judgement is important as it recognises the fundamental right of Indian citizens to recognize their gender and this extends to the large population of intersex persons in India. Further, in 2017, a nine-judge bench of the Supreme Court announced the right to privacy as a fundamental right under the Constitution. The *KS Puttaswamy vs Union of India* judgement provides relief for intersex people as by granting them the right to privacy, it prevents unwarranted intrusions - medical or otherwise - into their lives or bodies. Justice DY Chandrachud said whilst commenting on the importance of privacy:

Sexual orientation is an essential component of identity. Equal protection demands protection of the identity of every individual without discrimination. (The Indian Express, 2023).

Following in the footsteps of the Supreme Court of India, the Madras High Court has delivered yet another judgement that protects intersex rights. This judgement is examined in the next section which addresses the efforts that can be taken in order to protect intersex rights more broadly.

3. Discussion

On the heels of the growing efforts for intersex justice - both within legal circles and without - the order by the Madras High Court to ban medical interventions in the case of intersex people serves as a milestone. The step taken by the constitutional court reflects a sensibility that is required for long-term intersex justice. In 2021, the constitutional court suggested a ban on all medical practitioners from attempting to medically 'cure or change' the sexual orientation of LGBTIQ+ people to heterosexual or the gender identity of transgender people to cisgender. The court also directed the National Medical Commission, Indian Psychiatric Society, and Rehabilitation Council of India to take action, including withdrawal of licence to practise, against professionals involved in any form or method of conversion "therapy" to LGBTIQ+ community members. This apart, Justice N Anand Venkatesh prescribed a number of guidelines that cover issues ranging from gender-neutral restrooms for the gender-nonconforming student and help to change name/gender on academic records for transgender persons, besides suggesting separate jails for transsexuals (Kumar, 2021).

Such a judicial pronouncement was swiftly followed up with legislative compliance. The Health and Family Welfare Department of the Tamil Nadu Government in consultation with the various medical associations in Tamil Nadu set up a committee that regulates medical interventions and barring cases of necessity, banned sex reversal surgeries

(Government of Tamil Nadu, 2019). It also sets guidelines for the life-threatening situations that are to be permitted for medical intervention. Legislative and judicial interaction thus worked to secure the rights of intersex people in Tamil Nadu and displays the kind of sensibility that is required within governmental setups for securing such goals.

Similar governmental action and societal sensibility are required in light of the histories of violence that the intersex community has faced. The medicalised violence faced by the community in the absence of governmental protections has found a prominent place in queer art across the world (Kost, 2018). Artists like David Antonio Cruz explore the impact of the failure of government machinery in the protection of the rights of queer people through his paintings, sculptures, and performances. Cruz's painting explores the violence faced by members of the queer community through different lenses - that of an asylum seeker's, an activist's, and an everyday citizen (Binlot, 2019). In this context, the work of intersex artists is no exception to this larger trend of depiction of violent histories particularly that faced by the intersex community. Even in India, the work of queer artists reflects queer experiences and is growing as an art sector. The paintings of Bhupen Khakhar display this sensibility and have also been commercially viable, having been sold at Sotheby's (Barua, 2020). The queer community has expanded its cultural influence tremendously in recent years through art exhibitions, film, literature, entrepreneurship and fashion. But the real success of this rainbow moment comes when communities start finding formal employment (Roy, 2022). Such empowerment and visibility have to also be accompanied by strong judicial and legislative action for it is the interplay of both that sensitises society and effectively protects intersex rights.

4. Conclusion

The intersex community has historically faced a lot of violence in light of the fact that their bodies differ from what is considered to be 'normal.' Intersex persons are exposed to unwarranted socio-medical interventions wherein they are subjected to harsh medical procedures just so that their bodies conform to the norm (World Health Organisation, 2015, p. 40). However, judicial and legislative actions can improve the protection of the equal and free rights of intersex people by taking measures like banning medical interventions. Whilst the law is also part of the problem by rigidly defining what bodies count as a "body," they can form part of the solution through a wider sensitization of all society as effected through avenues like art. The intersex art community reflects the experiences of the community and grows in tandem with the rest of the queer community.

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