

Utrecht University

European Master's Degree in Human Rights and Democratisation
2016/2017

Hijras and their rights:
in Mythology and Socio-Cultural practises of India

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Abstract

In this thesis, I attempt to locate the rights of the Hijra(s), a trans community in India, within the mythological, socio-cultural context of contemporary Indian law. Culture and rights, however, are extremely sensitive and subjective topics. In this huge, International world of rights, in which State and International rights are supposed to co-exist, the term ' culture' becomes contentious. The presence or absence of rights, either National or International is, and can be seen through the lens of culture or history. In lieu of this, over the last decade, many South Asian countries such as India, Nepal, and Pakistan have adjudicated legal recognition for transgenders. They use the terminology of 'third sex,' to denote individuals who are neither men nor women, and are characterized as such either by themselves or by the society. The term 'third gender' is also often used to denote certain communities in these countries, 'hijras' being one of those.

The thesis aims to explore how human rights for hijras on an equal footing with other (cisgender) people can best be advanced in India. The pivotal point of this study is the community of hijras. The subsequent chapters will discuss the circumstances of hijras through the historical and mythological perspective of the Indian sub continent and the legal standing in Indian legislature. I aim to analyze their place in the history of the country, and the contemporary acceptance or lack of acceptance they face due to that history. The research aims to :

Evaluate the place accorded to hijras in the socio-cultural, mythological context of India, and whether that place can be re-evaluated in the modern context.

Professor Tom Zwart's receptor approach vis-a vis the implementation of the rights accorded by international treaties.

Finally, whether the advancement of human rights for hijras can best be achieved through the lens of the ancient socio-cultural beliefs of India, and the cultural relativist receptor approach conceived by Tom Zwart's.

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Chapter 1

Introduction

The Indian Subcontinent is one of the ancient civilizations of the world¹, and has experienced multiple conquests, spreading over centuries.² Throughout the centuries, the subcontinent has had a rich cultural and religious tradition, that circumscribes their everyday life. The culture of the subcontinent has changed over time; with every Mughal conquest, and the subsequent colonization by the British, the contemporary socio-cultural practices are a fusion of the impacts of the multifaceted factors of these historical influences. In a similar manner, the subcontinent has had an ancient mythological and historical presence of the LGBTI community³. The Kamasutra, Ramayana, Mahabharata, the theological texts within Jainism⁴ and Buddhism¹, all make references to homosexual practices and gender fluidity.⁵ Devdutt Pattanaik, an Indian mythologist and author writes in his book, ‘Shikhandi: And Other Tales They Don't Tell You’:

“Hindu mythology makes constant references to queerness, the idea that questions notions of maleness and femaleness. There are stories of men who become women, and women who become men, of men who create children without women, and women who create children without men, and of creatures who are neither this, nor that, but a little bit of both, like the makara (a combination of fish and elephant) or the yali (a combination of lion and elephant). There are also many words in Sanskrit, Prakrit and Tamil such as kliba, napumsaka, mukhabhaga, mukhabhaga, sanda, panda, pandaka, pedi that suggest a long familiarity with queer thought and behavior. It is common to either deny the existence of such fluidity in our stories, or simply locate them in the realm of the supernatural or point to law books that, besides endorsing patriarchy and casteism, also frown upon queer behavior. Yet the stories are repeatedly told and shown.

¹ Serena Nanda, *Neither Man Nor Woman* (Wadsworth Pub Co 1999).

² Serena Nanda, *Neither Man Nor Woman* (Wadsworth Pub Co 1999).

³ Serena Nanda, *Neither Man Nor Woman* (Wadsworth Pub Co 1999).

⁴ Jainism is a an ancient Indian religion, which finds its roots in Sanskrit scriptures

⁵ Serena Nanda, *Neither Man Nor Woman* (Wadsworth Pub Co 1999).
 Devdutt Pattanaik, *Shikhandi: And Other Tales They Don't Tell You* (Penguin Books Ltd 2014).

Gentle attempts, perhaps, of wise sages to open up stubborn finite minds and lead them towards infinity.”⁶

It is in the re-telling of these mythologies and stories that the space accorded to the queer in India is embedded. In this thesis, I attempt to locate the rights of the Hijra(s)⁷, a trans community in India, within the mythological, socio-cultural context of contemporary Indian law. Culture and rights, however, are extremely sensitive and subjective topics. In this huge, International world of rights, in which State and International rights are supposed to co-exist, the term 'culture' becomes contentious. The presence or absence of rights, either National or International is, and can be seen through the lens of culture or history.⁸ In lieu of this, over the last decade, many South Asian countries such as India, Nepal, and Pakistan have adjudicated legal recognition for transgenders. They use the terminology of 'third sex,' to denote individuals who are neither men nor women, and are characterized as such either by themselves or by the society. The term 'third gender' is also often used to denote certain communities in these countries, 'hijras' being one of those. In 2014, the Supreme Court of India declared transgenders to be a 'third gender,' and affirmed that they would be provided equal rights as granted by the Constitution of India⁹.

However, these equal rights have neither been completely granted by the legislature, nor have been completely implemented. Implementation of these laws would require the disclaiming of prejudice against the trans community, while homosexuality is still illegal in India¹⁰, which negates the sexual rights of transgenders. It therefore, becomes pivotal to comprehend and look at the various facets of these rights, both internationally and within state boundaries, in order to understand culture and rights, and to perhaps try and ascertain a similar foundational block. This

⁶ Devdutt Pattanaik, *Shikhandi: And Other Tales They Don't Tell You* (Penguin Books Ltd 2014).

⁷ Hijras- a community in India and South Asia, mainly consisting of transgender and intersex individuals.

⁸ Peter R Baehr, *Human Rights* (Palgrave 2001).

⁹ *National Legal Services Authority v Union of India* [2014] Supreme Court (Supreme Court).

¹⁰ 377 IPC.- Unnatural sexual offenses: - 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 may extend to ten years, and shall also be liable to fine. Explanation - Penetration is sufficient to constitute the carnal intercourse necessary to the offense described in this section.”

thesis attempts to do so, by reviewing the origin of the hijra community within the historical and mythological dynamics of the Indian Subcontinent, and suggesting that the lives and rights of homosexuals be perceived through the lens of this heritage, wherein their gender identity and sexual orientation was accorded its due space.

In South Asia, there was often arbitrary drawing and re-drawing of territorial boundaries, cultural practices, and religious beliefs. The legal language was written by the colonial masters, and the laws were imported from a European Context. They wrote the Criminal Tribes Act¹¹, and subsequently section 377 which prohibited homosexuality and homosexual conduct in general. It further restricted the presence of communities like those of hijras and eunuchs in the social sphere or workforce. The Section 377¹² was subsequently adopted by the Independent India, and Homosexuality became illegal. Before the colonial rule, homosexuals, intersex and transgenders were granted a social and sexual role, albeit a romantic one in the Mughal era, but during and after colonization they were shunned to the peripheries of society.¹³

India is home to four major world religions, Buddhism, Hinduism, Christianity and Islam. Religion plays a central role in the political and social life of the country, as it's often the norms derived from religious sources that influence the behavior of people in intimate matters such as sexuality. Prohibitions on homosexuality majorly, therefore, derive their moral legitimacy from religious authorities and it is the resilience of the religious discourse that accounts for the continued stigmatization of LGBT communities. This, however can also be contended. Islam, for example prohibits homosexuality. But, religious and ancient texts in Hinduism make no such claim. In ancient texts like the Kamasutra, the Mahabharata, the Ramayana, and the Vedas, there is an explicit mention of the LGBTI community, albeit in a different way as seen today, with the Kamasutra detailing sexual conducts between multiple men and women, the Mahabharata talking about the sexual transition of 'Arjuna' the warrior, and his sexual relations with other men, the Ramayana narrating the sexual union of 'Vishnu' and 'Shiva', two major deities of Hinduism.¹⁴ This leads one to question whether the contemporary negation of the rights of the LGBTI is truly rooted in

¹¹ Kidwai in Serena Nanda, *Neither Man Nor Woman* (Wadsworth Pub Co 1999).

¹² *ibid*

¹³ Serena Nanda, *Neither Man Nor Woman* (Wadsworth Pub Co 1999).

¹⁴ Ramayana and Mahabharata are the two main mythological texts of Hinduism. Devdutt Pattanaik, *Shikhandi: And Other Tales They Don't Tell You* (Penguin Books Ltd 2014).

religious practices, or whether it is impacted by the historical, socio-cultural scenario or maybe the impact is broadly due to the inter-mixing of the religious practices occurring/ happening for centuries. Either way, it would suffice to say that the amorphous nature of various cultures and religions in India has had a deep impact on the legal situations, individually and together. It is a reflection of this that India, recognized the equality of rights for the third gender, but is yet to decriminalize homosexuality.

Hijras, and other transgender groups have been a separate community since Vedic times, and find their relevance in the mythology of that time. The sSupreme Court in 2014 NALSA case¹⁵ alludes to their mythological presence and purpose since ancient India, before allocating them their due rights. The judgment further paved way for many government schemes and reservations meant for the betterment of transgenders in general, and hijras in particular. The implementation of these, however because of prejudice and lack of empowerment advocacy is hindered. “Empowerment advocacy requires intervention strategies to contextualize itself within these multi-leveled dynamics to make any sense and to be effective, beyond the actual structures and models of activism”, writes Aditya Bandopadhyay in his book on laws effecting the LGBTI in South Asia.¹⁶

Many groups and individuals are now attempting to subvert the norms and practices associated with transgender groups, and are trying to differentiate between sexual orientation and gender identity. But, this subversion becomes complicated as it is an attempt to subvert all notions of family life and reproductive health. Often adoption of an identity, because it is seen as being against the socially sanctioned identity yoked to the family and its milieu, is therefore, actively subverted, especially so if it an identity that is based on sexuality or sexual practice(s), against religious and cultural beliefs. A public acceptance and acknowledgement of homosexuality or a different gender identity by an individual that is separate from the binary understanding is considered to bring a loss of honor to the family and is considered a matter of shame. The legal sanctions thus, which are either accorded or negated face a problem in implementation due this lack of societal acceptance .The norms and ideas of Universality of Human Rights, perhaps need to be

¹⁵National Legal Services Authority v Union of India [2014] Supreme Court (Supreme Court).

¹⁶ Aditya Bondyopadhyay, Laws Affecting LGBT Persons In South Asia (outh Asia LGBT Network 2011)

questioned in this regard, if not in their essence or formation, then with regard to their implementation.

The Universality of Human Rights, strictly speaking, is an idea mainly conceptualized in the Universal Declaration of Human Rights, 1948. The idea ascribes a certain set of rights to every individual and society, which are politically and universally legal, having been accepted by all member states, which have to be converted into international and national obligations.¹⁷ While Human Rights are and should be universal, their terminology and implementation can be questioned with regard to the cultural climate or beliefs of a state. In a country, where the society is prioritized over the individual, and duties, promoting individual Universal Human Rights, especially in terms of the LGBTI is contentious. Tom Zwart in his essay, 'Using Local Culture to further the implementation of International Human Rights¹⁸ : the Receptor approach', writes about what he terms as the 'receptor approach', i.e broadly speaking, a specific way of looking at and implementing Human Rights in conjugation with the local communities, and culture. He suggests that Human Rights would be better implemented by using local culture and practices, as opposed to solely using the International Standards. But, the question that needs to be asked is how far can these international standards and rights be applicable in societies, who refuse to see certain people as human, or rather choose to ignore a basic facet of their identity vis-a vis their sexual behavior and nature.

But, as Gagnon and Parker elucidate that, "Sexual behavior is not the isolated phenomenon of the individual but lies within a context of culture, social and economic conditions.."¹⁹

If this sexual behavior or gender identity is perceived through the lens of the historical, economic, and social context of the country, and not as a separate idea brought in the country either by the colonizers, globalization, or international treaties, implementation and advocacy of sexual and gender rights might be achieved. Further, authors Aditya Bandopadhyay, Gayatri Reddy, and Vinita Kidwai note that in analysis of the legal systems in the countries of South Asia to the question of homosexuality and/or treatment of LGBT makes it apparent that the legal responses are

¹⁷ UDHR

\Tom Zwart, 'Using Local Culture To Further The Implementation Of International Human Rights: The Receptor Approach' (2012) 34 Human Rights Quarterly. 1

¹⁹ Gagnon and Parker in Serena Nanda, *Neither Man Nor Woman* (Wadsworth Pub Co 1999).

primarily based on the particular criminalization attached to the same in the Indian Penal Code of 1860, introduced by the British, and its subsequent continuation under the legal systems of the independent nation- states of the region²⁰. Moreover, in contemporary India, in lieu of the presence of section 377 of the Indian Penal Code, violence against homosexuals and transgenders has been recorded.²¹ Many men resort of having sex in public, and transgenders are alienated from everyday life, even after the 2014 NALSA judgment. The number of reported incidents of HIV is on the rise²², due to the lack of awareness about sexual health. Traditionally, hijras had a specific function as boon-givers,²³ but now resort to begging and working as sex workers. Bandopadhyaya writes that, “A variety of factors contribute to male and Hijra sex workers lack of access to HIV prevention services, including stigma and lack of targeted health promotion for male and hijra sex workers.”²⁴ In such a climate, the empowerment advocacy is vital to assess the Universality of Human Rights, in belief, practice, as well as implementation. The rights of hijras, transgenders and homosexuals need to be implemented as much as granted by legislature.

In lieu of this legal socio-cultural climate, the thesis aims to explore how human rights for hijras on an equal footing with other (cisgender) people can best be advanced in India. The pivotal point of this study is the community of hijras. The subsequent chapters will discuss the circumstances of hijras through the historical and mythological perspective of the Indian sub continent and the legal standing in Indian legislature. I aim to analyze their place in the history of the country, and the contemporary acceptance or lack of acceptance they face due to that history. The research aims to :

- Evaluate the place accorded to hijras in the socio-cultural, mythological context of India, and whether that place can be re-evaluated in the modern context.

²⁰ Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007).

²¹ UNDP India, 'HIJRAS/ TRANSGENDERWOMEN IN INDIA: HIV, HUMAN RIGHTS AND SOCIALEXCLUSION' (UNDP INDIA 2010).

²² UNDP India, 'HIJRAS/ TRANSGENDERWOMEN IN INDIA: HIV, HUMAN RIGHTS AND SOCIALEXCLUSION' (UNDP INDIA 2010).

²³ Serena Nanda, *Neither Man Nor Woman* (Wadsworth Pub Co 1999).

²⁴ Aditya Bondyopadhyay, *Laws Affecting LGBT Persons In South Asia* (outh Asia LGBT Network 2011).

- Tom Zwart's receptor approach vis-a vis the implementation of the rights accorded by international treaties.
- Finally, whether the advancement of human rights for hijras can best be achieved through the lens of the ancient socio-cultural beliefs of India, and the cultural relativist receptor approach conceived by Tom Zwart's.

The literature used for the thesis consists of the mythological texts of Hinduism, and other folk tales of the sub-continent, mainly the Kamasutra²⁵, Ramayana²⁶, and Mahabharata²⁷. Throughout the course of my work, I constantly refer to Devdutt Patanaik, who is an Indian mythological author, Serena Nanda, an anthropologist, who has done extensive research on hijras, Gayatri Reddy, a gay activist and scholar, and Laxmi Narayan Tripathi, a hijra activist. Other than that, I have used the case laws of the two primary cases in India regarding LGBTI i.e NALSA vs Union of India, 2014²⁸ and Naz Foundation v Govt of NCT ²⁹, along with various reports by UNDP and Government of India regarding transgenders.

²⁵ Kamasutra is an ancient Hindu text

²⁶ Ramayana is a Hindu mythological text, almost referred to as a religious text

²⁷ Mahabharata is a hindu epic

²⁸ National Legal Services Authority v Union of India [2014] Supreme Court (Supreme Court).

²⁹ Naz Foundation v Govt of NCT of Delhi [2009] Delhi High Court (Delhi High Court).

CHAPTER 2

Hijras : From Mythological existence to historical presence

‘Hijra(s)’, an Urdu word used in many parts of South Asia to denote a specific socio-religious ‘queer’ community³⁰, are commonly understood in the rest of the world as transgenders or third-genders.³¹ In this chapter, I will discuss and layout the role accorded to hijras in a historically chronological order. They are often trans men who dress as women, and their culture centres around the worship of a certain ‘Bedhraj Mata’, a version of the Mother Goddess worshipped in India.³² For the most part, in their worship of ‘Bedhraj Mata’, hijras renounce their sexual desires and practises by undergoing emasculation, or an excision of their penis and testicles. As a result, they are believed to have been endowed with the power to confer fertility on newlyweds or newborn children.³³ This is considered to be their primary role in Indian society, though mainly due to contemporary changes in religious-cultural practises, many of them have become involved in prostitution in order to make ends meet. The transition from the ritualistic purpose of ‘those who bless’ to ‘those who indulge in flesh trade’ has been a result of historically decreased belief in the ‘boon-giving powers’ of hijras, and their basic need for economic sustainability, which was earlier achieved in alms given to them as a sign of gratitude.³⁴ In this chapter, I will discuss and layout the role accorded to hijras in a historically chronological order.

However, the connotations associated with the term ‘hijras’ are multi-faceted. They are not simply men who dress as women, or transgenders as understood in the modern sense³⁵. A majority of the individuals in these communities are men who identify themselves as women, those with homoerotic or asexual desires who subsequently excise their genitalia in accordance with the

³⁰ Serena Nanda, *Neither Man Nor Woman* (Wadsworth Pub Co 1999).

³¹ Serena Nanda, *Neither Man Nor Woman* (Wadsworth Pub Co 1999).

³² Serena Nanda, *Neither Man Nor Woman* (Wadsworth Pub Co 1999).

³³ Nanda, S. 1990. *Neither Man nor Woman: The Hijras of India*. New York: Wadsworth. (Second ed. published in 1999.) F9X IT

³⁴ Laxmi Narayan Tripathi, R Raj Rao and P. G Joshi, *Me Hijra, Me Laxmi*.

³⁵ Serena Nanda, *Neither Man Nor Woman* (Wadsworth Pub Co 1999), Laxmi, revathi, Zwillling

mythological aspects of the community³⁶, a minority are individuals who are intersex i.e those born with chromosomal irregularities or ambiguous genitalia.³⁷ Some, also choose not to excise their genitals, and live life as homosexual, cross dressers, such as the case with Laxmi Narayan Tripathi, the famous hijra activist³⁸.³⁹ Hijras are individuals with a vast range of sexual desires, anatomies, and psychological dispositions. To critically comprehend the contemporary legal position of hijras, the multiple identities, agendas associated with them need to be looked at, from the space accorded to them since ancient times in the Indian subcontinent to the modern ‘men having sex with men’ ideologies and dialogues. According to Nanda, the various and distinct critical constructions of the third sex that have dominated the existing literature can be broadly classified in four categories: ancient, medieval, colonial, and contemporary.⁴⁰

- Ancient Indian Subcontinent

The ancient Indian texts , particularly Brahmical, Buddhist, and Jain, written from around 1500 BCE, often narrate tales about the third sex and Hijras.⁴¹ Zwilling and Sweet⁴², start from the premise that ,“ the category of a third sex has been a part of the Indian worldview for nearly three thousand years”. They elucidate the categories, as referred to in various Sanskrit and Buddhist texts as ‘Kilba’, ‘pandaka’, ‘napumsaka’. ‘Kilba’ means someone who is sterile,⁴³ ‘pandaka’, someone who is a eunuch, and napumsaka can be literally translated to mean someone who is neither a man, nor a woman⁴⁴. They also provide historical evidence for a pre-Islamic concept of a third nature of

³⁶Laxmi Narayan Tripathi, R Raj Rao and P. G Joshi, *Me Hijra, Me Laxmi*. Serena Nanda, *Neither Man Nor Woman* (Wadsworth Pub Co 1999).

³⁷ Serena Nanda, *Neither Man Nor Woman* (Wadsworth Pub Co 1999).

³⁸ Laxmi Narayan Tripathi, R Raj Rao and P. G Joshi, *Me Hijra, Me Laxmi*.

³⁹ Serena Nanda, 'The Hijras Of India:' (1986) 11 *Journal of Homosexuality*.

⁴⁰ Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007).

⁴¹ Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007). Patanayik

⁴²Zwilling, L., and M. J. Sweet. 1996. “Like a City Ablaze”: The Third Sex and the Creation of Sexuality in Jain Religious Literature. *Journal of the History of Sexuality* P 362

⁴³ Zwilling, Doniger, Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007).

⁴⁴Zwilling, Doniger, Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007).

sexuality. In Hindu mythology and folklore, same sex procreation,⁴⁵ gender and sexual fluidity, transposed genders⁴⁶, shifting-forms⁴⁷, sexual masquerades have been a part of Hindu mythology and folklore.⁴⁸ According to Zwilling and Sweet⁴⁹, however, the Jains, a minority religion in India, have specific literature and postulations about gender and sex ambiguities, constituting “the single richest source for knowledge of the third sex, as well as for speculations on sex and gender, to be found in India from the ancient to medieval periods”. By virtue of a “pan- Indian acceptance of a third sex,”⁵⁰ they argue, this category has “served as a focal point for speculations that ultimately resulted in the formation of an autonomous idea of sexuality” for the Jains, much like that postulated by sexual historians for the modern, nineteenth-century West.

By the third century BCE, there were three distinct views on the essential characteristics by which a person could be assigned to one of the three genders; those of purusa, stri, and napumsaka, ‘purusa’ the man, ‘Stri’, the woman, and ‘napumsaka’, one that is neither man, nor woman. The first view, the Brahmanical one characterized gender by the presence or absence of certain primary and secondary characteristics, mainly physiological, a doctrine that was also endorsed by the Buddhists.⁵¹ The second, the Buddhist position (which was also a Brahmanical belief elaborated most clearly in Indian medical literature⁵²) assigned gender by the presence or absence of procreative ability, with impotence signifying membership in the third, or napumsaka, category⁵³.

⁴⁵ Devdutt Pattanaik, *Shikhandi: And Other Tales They Don't Tell You* (Penguin Books Ltd 2014).

Tolen, R. 1991. *Colonizing and Transforming the Criminal Tribesman: The Salvation Army in British India*. *American Ethnologist* 18

⁴⁷ Doniger, W. 1999. *Splitting the Difference: Gender and Myth in Ancient Greece and India*. Chicago: University of Chicago Press.

Devdutt Pattanaik, *Shikhandi: And Other Tales They Don't Tell You* (Penguin Books Ltd 2014).

⁴⁸ Shikhandhi- Devdutt Patanayik

⁴⁹ Zwilling and Sweet, 1996 P-363 quoted in Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007).

⁵⁰ Zwilling and Sweet, 1996 P-363 quoted in Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007).

⁵¹ Filliozat (1964) as mentioned in Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007) 35.

⁵² Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007). 35

⁵³ Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007). 35

The Jains, however, rejected both these Brahmanical and Buddhist bases for differentiating masculine and feminine markers.⁵⁴ As Zwilling and Sweet contend:

the Jain system of thought is the only Indian system to differentiate between what they term “biological sex,” or dravyalinga (material [sexual] mark), distinguished by primary and secondary sexual characteristics, and “psychological gender,” or bhavalinga (mental [sexual] mark), referring to the psychic makeup of a particular individual. Given this additional marker of gender assignment in the Jain exegetical literature, determinations based on primary and secondary sexual characteristics alone (as in the Brahmanical and Buddhist systems) were deemed insufficient.⁵⁵

Jains, thus, distinguished between gender and sex, by and before the fifth century BCE. For them, the biological sexual markers were distinguished from the personal notions of gender identity. Zwilling and Sweet, in their search further elucidate that by the fifth century BCE, Jains rejected the Buddhist and Brahmanical criteria of gender assignment that made reproductive capacity the pivotal focus of sexual identity, as they believed it to alienate prepubescent and postmenopausal women. They believed that prepubescent and postmenopausal women would then, technically not be termed as women. Instead, they distinguished on the basis of sexual characteristics, or the role adopted in sexual intercourse, i.e. the sexual behaviour of a receptive or penetrative partner.⁵⁶ Based on this sexual differentiation, there appeared another differentiation in sex, the masculine *napumsaka* which basically translates to somehow who is neither a man or a woman, but has characteristics of both, with primary masculine traits. They were discerned by their sexual behaviour of being both the penetrative and receptive sexual partner.⁵⁷ Their penetrative behaviour was considered as the main determinant sexual behaviour.^{58 59} While, this is still not close to the modern practices and understandings of hijras, it sheds light on a discourse that distinguished between the ideas of gender

⁵⁴ Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007).

⁵⁵ Zwilling and Sweet, 1996 P-363 quoted in Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007).

⁵⁶ Zwilling as mentioned in Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007). 30

⁵⁷ Zwilling and Sweet in Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007).

⁵⁸ Zwilling and Sweet in Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007).

⁵⁹ Zwilling and Sweet in Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007)

and sex, during the Vedic times. This ancient presence of a discourse on the differences between sex and gender in religious canonical texts, might help with what Tom Zwart⁶⁰ calls the 'receptor approach' to be discussed later.

As mentioned earlier, contemporary debates or understanding of hijras and their sexual identities are not merely extensions of the various gender and sexual identities mentioned in the vast corpus of Jain literature and Kamasutra.⁶¹ Their sexual and gender identity has become intertwined with multiple faces of socio-religious practices. Zwillig and Sweet, however, argue otherwise when they state that, "the class of transvestite singers, dancers, and prostitutes known as hijras are the contemporary representatives of the unmales and third sex of earlier times"⁶².

Given that the term hijra is believed to be an Urdu word, used widely in the subcontinent only after the arrival of the Mughals in the sixteenth century, it is difficult to see this term in explicit relation to the terms used in the Sanskrit and Pali texts to refer to "unmales and the third sex" prior to this period, namely, *trtiyapra*, *krti*, *kliba*, and *napumsaka*.⁶³ In fact, as Wendy Doniger notes, the term 'kliba' is explicitly not the same as "third nature" or *trtiyaprakrti*,⁶⁴. The meanings of these Sanskrit and Pali terms vary widely based on their etymology. Doniger notes that 'kliba' can be translated to literally mean "eunuch," which she dates to ninth century, and roots in a Turko-Persian language, but can also denote someone "who was sterile, impotent, castrated, a transvestite, a man who had oral sex with other men, who had anal sex, a man with mutilated or defective sexual organs, a hermaphrodite, or finally, a man who produced only female children"⁶⁵.

⁶⁰ Tom Zwart, 'Using Local Culture To Further The Implementation Of International Human Rights: The Receptor Approach' (2012) 34 Human Rights Quarterly.

⁶¹ Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007) 35

⁶² Zwillig and Sweet mentioned in Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007)

⁶³ Brian K. Smith and Wendy Doniger, 'Sacrifice And Substitution: Ritual Mystification And Mythical Demystification' (1989) 36 *Numen*.11

⁶⁴ Brian K. Smith and Wendy Doniger, 'Sacrifice And Substitution: Ritual Mystification And Mythical Demystification' (1989) 36 *Numen*.11

⁶⁵ Brian K. Smith and Wendy Doniger, 'Sacrifice And Substitution: Ritual Mystification And Mythical Demystification' (1989) 36 *Numen*. 11

Despite the contentions amongst various religious communities, it is evident that there were interactions with the people of a 'third nature' and multiple attempts were made at both understanding and delienating them. Such mythological discourses, though have helped in paving way to the hijras of today, can perhaps be also be used to delineate them in the modern times, in the process of legal implementation, by establishing both their sexuality and gender identity in mythology. Their narrative, however constantly changed from the ancient to the medieval, and the modern. In the narrative of the ancient Indian subcontinent, they were understood through the lens of Buddhist, Jain, and Brahmanical lens, but,

- Medieval Indian Subcontinent

The medieval times in Indian History were marked by the Mughal invasion and the subsequent combination of the two cultures, Indian and Mughal. According to critics Vanita and Kidwai⁶⁶, explicit references to the eunuchs of South Asia increases dramatically with the arrival of the Mughals in the eleventh and the twelfth centuries. As historian Shaun Tougher⁶⁷ notes, the predominant focus in the historical study of eunuchs has tended to be "their place and function at royal and imperial courts," despite, as he notes, "other interesting and fertile topics of study". The works of various medieval European travellers and historians like Zwilling reflect a deep fascination and intrigue with the prominence and domination of the notions of gender and sexuality, along with the physical presence of eunuchs in literature, and political Mughal life. Eunuchs were often chambermaids, and guardians of the inner female domain as they were seem both as masculine and effeminate at the same time. They did not pose any sexual threat, yet were masculine enough to be considered guardians.

The space accorded to hijras has been analysed through early Roman, Byzantine, and Chinese empires but, much of the literature focuses on the role of eunuchs in Islamic empires, including the Mamluk Sultanate in what is now Egypt and the Delhi Sultanate and Mughal empire in present-day India and Pakistan⁶⁸. In these analyses, the question of why eunuchs were able to

⁶⁶ Vanita, R., and S. Kidwai, eds. 2000. *Same-Sex Love in India: Readings from Literature and History*. New York: St. Martin's Press.

⁶⁷ Shaun Toughner (2002, 143)

⁶⁸ Vanita, R., and S. Kidwai, eds. 2000. *Same-Sex Love in India: Readings from Literature and History*. New York: St. Martin's Press.

rise to such prominence was an explicit focus of inquiry. According to David Ayalon, their prominence owes as much to Islamic gender segregation in the social sphere and to the “special character of the Muslim slave institution” that was dominated by people of non-Arab, slave origin who were thus bound to their owners/patrons, as to the stereotypic perception of eunuchs as clever, loyal, and trustworthy servants who had free access to all spatial domains and segments of the population⁶⁹.

It is evident that during the medieval times, eunuchs existed in large numbers in most Islamic empires, and were designated roses of prominence in the courts and the female sphere.⁷⁰ However, Indrani Chatterjee notes that most eunuchs began their careers as slaves⁷¹. She elaborates that slavery in precolonial Indian context is not similar to the forms of slavery exhibited in the eighteenth and nineteenth century plantation economy. According to her, it is not merely servitude, but a more romantic notion of peaceful commerce that highlights the dialectic of “alienation and intimacy,” rather than violence⁷². Slavery, Chatterjee argues is central to the historical understanding not only of social hierarchy, but also of same-sex desire in the Indian past. Perso-Urdu poetry alludes to same sex desire, in terms of slavery and servitude, and its sets servitude as the ‘normative framework’⁷³ for same-sex desire. In these poems, the author-lover speaks of his beloved, an adult male who is often employed in his servitude.⁷⁴ As long as representations of desire did not subvert the social order, that is, “threaten a reversal of real power relations (the slave controlling the ‘slave of love,’ his master)”⁷⁵, this trope was the normative lens of scrutinising same- sex desire.

⁶⁹ David Ayalon quoted in Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007)

⁷⁰ Vanita, R., and S. Kidwai, eds. 2000. *Same-Sex Love in India: Readings from Literature and History*. New York: St. Martin’s Press.

⁷¹ Chatterjee, I. 1999. *Gender, Slavery, and Law in Colonial India*. New Delhi: Oxford University Press.

⁷² Chatterjee, I. 1999. *Gender, Slavery, and Law in Colonial India*. New Delhi: Oxford University Press. 61

⁷³ Chatterjee, I. 1999. *Gender, Slavery, and Law in Colonial India*. New Delhi: Oxford University Press. 61

⁷⁴ Chatterjee, I. 1999. *Gender, Slavery, and Law in Colonial India*. New Delhi: Oxford University Press. 61

⁷⁵ Chatterjee, I. 1999. *Gender, Slavery, and Law in Colonial India*. New Delhi: Oxford University Press. 61

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European colonial encounter, by the eighteenth century however, subverted the conception of same sex love. Colonial practises rendered all homosexual relations as 'criminal,' and brought them from the realm of literature and romantic poetry to one segregated by the ideals of gender and sexuality, as understood by them. The previous discourses of partnership, and sexual behaviours were reinterpreted in the binaries of "masculine" and feminine or "natural" and "unnatural" (collective) propensities⁷⁶. Gradually, the lens of gender or sexuality "displace[d] the lens of slavery in the language of the colonized")⁷⁷. The uniform sexualisation of the romantic language of love, and the binaries created hereto, along with the gradual shift in the cultural practises due to colonisation, resulted in a shift in the understanding of homoeroticism in colonial India, which resulted in pushing Eunuchs and hijras to the peripheries. According to Kidwai, "Eunuchs and hijras, it would seem, were central to this colonial (mis)representation"⁷⁸.

Further, in Colonial Indian , Hijras were classified and registered along with other "criminal castes," a new category of being in the discourse and polity of colonial India⁷⁹. Following the promulgation of the Criminal Tribes Act (Act 27) of 1871, which called for the "registration, surveillance and control of certain tribes and eunuchs," hijras were officially included under this rubric of dangerous outlaws.⁸⁰ The Criminal Tribes Act was initially applicable in Punjab, Northwest provinces and Awadh, many sections of the act were extended to the entirety of British India, by the early twentieth century. Under this act, the term eunuch was "deemed to include all persons of the male sex who admit themselves, or on medical inspection clearly appear to be impotent," a classification that then allowed for the registration, surveillance, and ability to arrest all

⁷⁶ Chatterjee, I. 1999. *Gender, Slavery, and Law in Colonial India*. New Delhi: Oxford University Press 67

⁷⁷ Chatterjee, I. 1999. *Gender, Slavery, and Law in Colonial India*. New Delhi: Oxford University Press-67

⁷⁸ Vanita, R., and S. Kidwai, eds. 2000. *Same-Sex Love in India: Readings from Literature and History*. New York: St. Martin's Press.

⁷⁹ Tolen, R. 1991. *Colonizing and Transforming the Criminal Tribesman: The Salvation Army in British India*. *American Ethnologist*

⁸⁰ Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007)

such individuals. This category included individuals who (a) “are reasonably suspected of kidnapping or castrating children, or of committing offences under section 377 of the Indian Penal Code, or of abetting the commission of any of the said offences”; (b) “appear, dressed or ornamented like a woman, in a public street or place, or in any other place, with the intention of being seen from a public street or place”; or (c) “dance or play music, or take part in any public exhibition, in a public street or place or for hire in a private house”.⁸¹ The constitution of this colonial category—a “criminal caste”—involved the construction and detailed elaboration of “a body of knowledge defining the nature, habits, and characteristics” of individuals so classified⁸². This criminal caste, Yang writes, was postulated on the prevailing understanding of Indian society and caste system that the British had, and was inter-mingled with British ideas of crime and vagrancy.⁸³ As Tolen (1991) notes:

By the mid-nineteenth century, the idea of the “dangerous classes”—who were composed of the unemployed, vagrants, the poor, criminals, drunkards and prostitutes—was firmly ensconced in Victorian thought, and a common discourse identified their physical characteristics, habits and locale. Various causes were proposed to explain the criminality of the dangerous classes: strong drink, ignorance, poor upbringing, indigence, character defects, and hereditary predisposition. The theory that certain people had an inborn propensity for crime implied that nothing, other than overt control, could prevent them from acting on such propensities.⁸⁴

The construction saw crime as an embedded, inborn notion that was hereditary and passed onto new generations. Thus, the new idea of the criminal class was accorded the similar status as caste. This construction according to Tolen, was in essence, seen to be “written onto the bodies of

⁸¹ (Collection of Acts Passed by the Governor-General of India in Council of the Year 1871).

⁸² Tolen, R. 1991. *Colonizing and Transforming the Criminal Tribesman: The Salvation Army in British India*. *American Ethnologist* 106

⁸³ Yang (1985), mentioned in Tolen, R. 1991. *Colonizing and Transforming the Criminal Tribesman: The Salvation Army in British India*. *American Ethnologist*

⁸⁴ Tolen, R. 1991. *Colonizing and Transforming the Criminal Tribesman: The Salvation Army in British India*. *American Ethnologist* 108

the so-called criminal castes”⁸⁵ The colonial efforts then, were also directed to the labours that these bodies performed. In the case of hijras, as the Criminal Tribes Act indicates, this labor was both sexual (Article 377 of the Penal code which prohibits sodomy), or asexual i.e occupation related, dancing, singing, even clothing.

The Section 377, by the same name, was subsequently adopted by the Constitution of an Independent India, which prohibits sodomy. The notion of a criminal caste was not adopted in the constitution, but the restriction to their sexuality was adopted. The language of love, worship, sexual orientation and gender identity was translated to the language of criminality, sexual inhibitions and prohibitions. The uniform misrepresentation of hijras and other transgenders for almost two centuries by the British paved way for a flawed understanding of hijras and their sexuality; one that was far removed from the aboriginal belief system associated with them. The legal system, then, needs to be assessed and evaluated through the lens of the historical development of hijras, transgenders, and the LGBTI community. The next chapter will scrutinize the legal position of hijras in India.

⁸⁵ Tolen, R. 1991. Colonizing and Transforming the Criminal Tribesman: The Salvation Army in British India. *American Ethnologist* 108

Chapter 3 Hijras in Modern India

Section 377 of the Indian penal Code, dating back to 1860, criminalises private sexual activities between adults that are against 'the other of nature,' and any criminal activity that is 'non-vaginal'⁸⁶. This is the case despite India's State obligations to various international conventions. There is a high level of legal discrimination and violence against the LGBTI, including the Hijra community. Therefore, articles 14, 1, 19, 21 of the Indian Constitution would be cited in this chapter, along with various International Conventions that India is a party to, which aim at protect Human Rights, especially in correlation to the rights of the LGBTI.

The UNHRC, adopted a resolution in 2011, which documented discriminatory laws against individuals on the grounds of their sexual orientation and gender identity.⁸⁷ According to this resolution, gay rights were considered human rights, and included rights such as the right to marry, anti-bullying laws, non-discriminatory laws, but were not only limited to these. India, like many UN member states has ratified the UDHR, ICCPR, ICESCR, yet it has constantly failed to acknowledge and grant LGBTI rights. Many of these conventions have been converted into legislative matters by the Indian Parliament, such as the Immoral Traffic Prevention Act, Protection of Human Rights Act, and others.⁸⁸ However, with respect to gender identity and sexual orientation, the Indian Courts seem reluctant to abide by their international obligations⁸⁹.

In 2009, the Delhi High Court, decriminalised gay sex in private between two consenting adults, outlawing homosexuality. But, in 2013, the Supreme court overruled the 2009 judgement,

⁸⁶ Section 377, IPC

⁸⁷ Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe, Council of Europe, Strasbourg, June 2011

⁸⁸ Sabharwal, Y.K., "Human Rights and International Law,"

⁸⁹ *Naz Foundation v Govt of NCT of Delhi* [2009] Delhi High Court (Delhi High Court)

and re-criminalised gay sex⁹⁰. The petitioners, the NAZ Foundation, filed a review of the verdict, which was further dismissed. The Curative petition was heard by the Supreme Court in 2016, which referred the matter to the constitutional bench, without altering the verdict. According to advocate Tejas RK Motwani and advocate Neeraj Grover :

[A]n interesting development relevant to the adjudication of the Curative Petition is the enactment of the Criminal Law (Amendment) Act in March 2013. This new amendment would be the thrust of the curative petition. This Act amends provisions of law criminalizing rape (section 375 of IPC) by expanding its scope from non-consensual vaginal penetration to non-consensual penile non-vaginal acts as well (including penile-oral and penile-anal acts; hereinafter, “Penile Non-Vaginal Acts”). This implies that the said section on rape would cover not only vaginal penetration, but also Penile Non-Vaginal Acts between man and woman that are performed without consent. This amendment to Section 375, by de-criminalising all consensual sexual acts between heterosexuals, has taken it completely out of the purview of the IPC. In a nutshell, according to this view, the amendment to Section 375 has a cascading effect over the scope of Section 377 as well. ⁹¹

Section 377 of the IPC which before the Curative Law Amendment Act written to inculcate all Penile Non-Vaginal Acts has been reduced to engulf only Penile Non-Vaginal Acts between two men and transgender persons . It does not accord any differentiation between consensual or non consensual sexual acts. This specificity, of highlighting the sexual conduct of trans and homosexual men renders the article discriminatory, and in negation of the principle of equality enshrined in the constitution of India. But, according to gay rights lawyers Tejas Motwani and Neeraj Grover, this new amendment might not necessarily have an effect on the Supreme Court’s adjudication in the repeal to section 377.⁹²

⁹⁰ *Naz Foundation v Govt of NCT of Delhi* [2009] Delhi High Court (Delhi High Court)

⁹¹Tejas RK Motwani & Neeraj Grover; Read more at: <http://www.livelaw.in/will-the-curative-be-the-cure/>

⁹² Tejas RK Motwani & Neeraj Grover; Read more at: <http://www.livelaw.in/will-the-curative-be-the-cure/>

It can be argued, they think, that even though one provision of the IPC criminalises only one aspect of sexual conduct, it does not necessarily decriminalise it, hence, rendering it discriminatory. Thus, the rights of trans and homosexuals, legally fall under the scope of the specificity to be discussed in a curative petition by the Supreme Court. MAKE ONE PARArOn February 2, 2016, a three-judge bench headed by the Chief Justice of India decided to constitute a five-judge Constitutional Bench to reconsider the constitutionality of Section 377. The Delhi High Court read down the provisions of Section 377 on only three grounds, namely, violation of the right to equality under Article 14, right against non-discrimination under Article 15, and right to life under Article 21 of the Constitution of India. The Delhi High Court was of the opinion that, “Section 377 caused an unfair and unreasonable discrimination against homosexuals and hence violated Article 14.” The Supreme Court, however, reversed the aspect relating to Article 14 and observed “that a classification based on those who indulge in sexual intercourse in the ordinary course and those who indulge in it ‘against the order of nature’ constitutes different classes, and that there is no arbitrariness or irrational classification.”⁹³ However, the presence or absence of section 377 for heterosexuals is not of momentous concern as it is for homosexual men, and transgenders.

Further, former Additional Solicitor General and Senior Advocate Raju Ramachandran has criticized the Supreme Court verdict in the following words:

Even more disappointing was the Supreme Court’s treatment of the Article 15 argument. The High Court had, after a careful analysis, held that discrimination on the basis of sexual orientation is not permitted by Article 15. This creative interpretation was not even touched upon by the Supreme Court. It dismissed the Article 15 argument in the same breath as it dismissed the Article 14 argument . . . [T]he Right to Life under Article 21 was viewed by the High Court as including the rights to dignity, autonomy and privacy. This aspect was not dealt by the Supreme Court. It cited passages from several judgments on Article 21, but did not ultimately record a reason about why in its

⁹³ Ramachandran, R., “The Sentinel Who Will Not Protect,” *Journal of Indian Law and Society*, Kolkata, Issue December 2013, pp. 1–4, <https://jilsblognujs.wordpress.com/2013/12/13/the-sentinel-who-will-not-protect>

view there is no violation of Article 21. The Court has also devoted a disproportionate amount of space to its critique of the High Court relying on foreign judgments, and has implied that these judgments have been applied 'blindfolded.' ... Finally, the Court's view that there was insufficient factual foundation to sustain a challenge to the constitutional validity of the law is contradicted by its own recording of the fact that there have been only two hundred prosecutions and that it is the miniscule minority which needs the court's protection.⁹⁴

Articles 14, 15, and 21 were clearly assessed by the supreme Court and the High Court with varying perspective. As Raju Ramachandra mentions that the supreme court critiqued high court's judgement based on Article 21, the right to life, which they ascribed as encapsulating the rights to dignity, autonomy and privacy. But, for a trans and homosexual person, these rights are intermingled with their right to a sexual life and existence. *NALSA v Union of India* took a different stance on Article 21, to be discussed later in this chapter.

The Supreme Court, as Raju Ramachandra highlights in the above cited statement, also commented on the High Court's decision of applying judgements from foreign countries, forgetting India's obligation to International treaties. The *NALSA* judgement however, not only quoted international judgement but procured heavily from ancient Indian theology. The Supreme Court, in its judgement and language proved that there is hardly any awareness about sexual orientation and gender identity. The lack of proper knowledge on part of the law makers leads to prejudice and misconceptions about homosexuality and inter-connected aspects. The private lives of trans and homosexuals are inter-mingled with the legal sanctions accorded to them, which are in turn accorded due to the national, legal understanding of sexuality and gender. The need to educate law makers and civilians alike, should be addressed, and can perhaps be done with the help of a bottom-up approach, similar to Zwart's ⁹⁵receptor approach. Along with spreading awareness about the international standards of equality accorded to people of all sexual orientations and gender identity,

⁹⁴ Ramachandran, R., "The Sentinel Who Will Not Protect," *Journal of Indian Law and Society*, Kolkata, Issue December 2013, pp. 1–4, <https://jilsblognujs.wordpress.com/2013/12/13/the-sentinel-who-will-not-protect>

⁹⁵ Tom Zwart, 'Using Local Culture To Further The Implementation Of International Human Rights: The Receptor Approach' (2012) 34 *Human Rights Quarterly*.

that have been mentioned in the Yogyakarta Principles, references should be made to India's long tradition of homosexual and transsexual practises, as discussed in the second chapter.

There are a few recorded case laws wherein homosexual acts (anal and oral sex) have been penalised.⁹⁶ There is a scarcity of judgments or judicial statements addressing gay rights and discriminating circumstances. Articles 14,⁹⁷ 15⁹⁸ and 19(1)a⁹⁹ and 21¹⁰⁰ of the Constitution of India were invoked in the NAZ foundation case, to address section 377 of the Indian Penal Code, but they were disregarded by the Supreme Court. Contrarily, the judgement of National Legal Services Authority (NALSA) v. Union of India¹⁰¹ carried out in 2014, was in conjunction with the rights meted out in the constitution of India and the various international treaties ratified by India. The court in its judgement cited articles 14, 15, 16, 19, and 21 of the Constitution.¹⁰² NALSA, along with certain hijras and activists filed a case with the supreme court, demanding the recognition of their separate gender and the various rights under the constitution.

Facts of the NALSA case:

The case concerns with legal gender recognition of transgenders, and scrutinised whether the lack of legal measures to particularly cater to the needs of people who do not identify themselves as men or women, negates their constitutional rights. Pre-existing Indian law only recognised the binaries of male and female, Due to the absence of any legislation concerning the rights of trans and intersex people, they were pushed to the peripheries of social life. Their constitutional rights to a dignified life, equality before law, protection from non discrimination, and

⁹⁶ Ramachandran, R., "The Sentinel Who Will Not Protect," Journal of Indian Law and Society, Kolkata, Issue December 2013, pp. 1–4, <https://jilsblognujs.wordpress.com/2013/12/13/the-sentinel-who-will-not-protect>

⁹⁷ Equality before law.

⁹⁸ Protection from discrimination.

⁹⁹ Freedom of speech and expression.

¹⁰⁰ Right to Life

¹⁰¹ National Legal Services Authority v Union of India [2014] Supreme Court (Supreme Court).

¹⁰² National Legal Services Authority v Union of India [2014] Supreme Court (Supreme Court).

freedom of expression were negated. In the judgement, the court noted that that the transgender community (broadly defined by the Court to include Hijras, eunuchs, Kothis¹⁰³, Aravanis¹⁰⁴ and numerous others)¹⁰⁵ has faced prejudice and disadvantage since the eighteenth century in India.¹⁰⁶ The court acknowledged that the transgenders are denied health care, employment, education due to prejudice, discrimination, and lack of any legal sanctions and declared steps to be taken by the state and central government in order to ensure the constitutional rights of transgenders.

In reaching its decision, the Court stated that gender identity is an integral part of the personality and one of the most basic aspects of self-determination, dignity and freedom. The court also emphasised that no one should be forced to undergo medical procedures just as sex reassignment surgery and hormonal therapy as a requirement for the legal recognition of their gender identity. Psychological gender is given priority over biological sex, and the court recognised that human dignity, and rights need to be protected under the constitution of India, and its international obligations. It stated that the wide discrimination faced by the transgender community creates a “necessity to follow the international Conventions to which India is a party and to give due respect to other non-binding international Conventions and principles”¹⁰⁷ and that any international convention not inconsistent with the fundamental rights of the Constitution must be read into the national provisions. Accordingly, it stated that it would recognise and follow the principles in the international covenants and the Yogyakarta

¹⁰³ A kothi or koti, in the culture of the Indian subcontinent, is an effeminate man or boy who takes on a female gender role in same sex relationships, often with a desire to be the penetrated member in sexual intercourse. The word kothi (or koti) is common across India, similar in use to the term Kathoey of Thailand.- Reddy, G., & Nanda, S. (2009). Hijras: An "Alternative" Sex/Gender in India. In C. B. Brettell, & C. F. Sargent, *Gender in Cross-Cultural Perspective* (pp. 275-282). Upper Saddle River, New Jersey: Pearson - Prentice Hall.

¹⁰⁴ Tamil term used to define Hijras

¹⁰⁵ National Legal Services Authority v Union of India [2014] Supreme Court (Supreme Court).

¹⁰⁶ Sharmila Chandran, 'RIGHTS OF THIRD GENDER' (Academia.edu, 2017) <http://www.academia.edu/8762870/RIGHTS_OF_THIRD_GENDER> accessed 13 July 2017.

¹⁰⁷ National Legal Services Authority v Union of India [2014] Supreme Court (Supreme Court).

principles.¹⁰⁸

The Court held that the right to choose one's gender identity is integral to the right to lead a life with dignity and therefore falls within the scope of the right to life, Article 21 of the constitution. . The court further emphasised the need to safeguard the rights of transgenders in lieu of the universal acceptance of transgenders and their harsh social reality in modern India. The court noted that Article 21 must be interpreted as encompassing the right to dignity, and freedom as they are pivotal to the right of life, and the recognition of one's gender identity lies at the heart of it. Interestingly, the court's analysis of Article 21 in this case was in contrast to its analysis of article 21 in the NAZ Foundation case, regarding action 377.

Further, the court cited Article 14, the right to equality and Articles 15 and 16 , prohibition of discrimination on the basis of sex, gender, religion, and caste. With regard to the right to equality before the law (Article 14), the Court recalled that the state shall not deny "any person" equality before the law or equal protection of the laws. Article 14, in ensuring equal protection, imposes a positive obligation on the state "to ensure equal protection of laws by bringing in necessary social and economic changes".¹⁰⁹

Discrimination on the basis of sex, caste, religion listed out in Articles 15 and 16, were understood by the supreme court to allude to gender based discrimination, and was heavily emphasised in the judgement. The emphasis put on tackling sex-based discrimination in the Constitution means that people have a "fundamental right to not be treated differently for the reason of not being in conformity with stereotypical generalisations of the binary genders".¹¹⁰ Article 15 also includes a requirement to take affirmative action for the advancement

¹⁰⁸ Sharmila Chandran, 'RIGHTS OF THIRD GENDER' (Academia.edu, 2017) <http://www.academia.edu/8762870/RIGHTS_OF_THIRD_GENDER> accessed 13 July 2017.

National Legal Services Authority v Union of India [2014] Supreme Court (Supreme Court).

¹⁰⁹ National Legal Services Authority v Union of India [2014] Supreme Court (Supreme Court).

¹¹⁰ Sharmila Chandran, 'RIGHTS OF THIRD GENDER' (Academia.edu, 2017) <http://www.academia.edu/8762870/RIGHTS_OF_THIRD_GENDER> accessed 13 July 2017.

of socially and educationally disadvantaged groups. The court noted that transgenders have not been accorded this specific provision even though they have been discriminated for over two centuries, and are forced to live on the peripheries of social life. In this vein, they advised the state and central government to devise schemes for the betterment of transgenders.¹¹¹

Further, the court also cited the Yogyakarta Principles, which were formulated in Indonesia in 2006, and alluded to Principles 1,¹¹² 2¹¹³, 4¹¹⁴, 6¹¹⁵, and 18¹¹⁶ of the Yogyakarta to emphasise the importance of their decision. The judgement states:

UN bodies, Regional Human Rights Bodies, National Courts, Government Commissions and the Commissions for Human Rights, Council of Europe, etc. have endorsed the Yogyakarta Principles and have considered them as an important tool for identifying the obligations of States to respect, protect and fulfil the human rights of all persons, regardless of their gender identity. United Nations Committee on Economic, Social and Cultural Rights in its Report of 2009 speaks of gender orientation and gender identity as follows:- Sexual orientation and gender identity ‘Other status’ as recognized in article 2, paragraph 2, includes sexual orientation. States parties should ensure that a person’s sexual orientation is not a barrier to realising Covenant rights, for example, in accessing survivor’s pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination, for example, persons who are transgender, transsexual or intersex, often face serious human rights violations, such as harassment in schools or in the workplace.”¹¹⁷

The court also cites various articles of the UDHR, and the ICESCR, referring to the obligations of the Indian State to adhere to the rights provided in these conventions. Not

¹¹¹ National Legal Services Authority v Union of India [2014] Supreme Court (Supreme Court).

¹¹² The Right to Universal Enjoyment of Human Rights

¹¹³ The Right to Equality and Non-Discrimination

¹¹⁴ The right to Life

¹¹⁵ The Right to Privacy

¹¹⁶ Protection from Medical Abuses

¹¹⁷ National Legal Services Authority v Union of India [2014] Supreme Court (Supreme Court).

surprisingly, the case alludes to the judgement of the NAZ foundation, regarding section 377¹¹⁸, and refuses to make any comment in that regard :

...even though, he was acquitted on appeal, this case would demonstrate that Section 377, though associated with specific sexual acts, highlighted certain identities, including Hijras and was used as an instrument of harassment and physical abuse against Hijras and transgender persons. A Division Bench of this Court in Suresh Kumar Koushal and another v. Naz Foundation and others [(2014) 1 SCC 1] has already spoken on the constitutionality of Section 377 IPC and, hence, we express no opinion on it since we are in these cases concerned with an altogether different issue pertaining to the constitutional and other legal rights of the transgender community and their gender identity and sexual orientation. ¹¹⁹

Thus, even while alluding to gender identity and sexual orientation in the Yogyakarta Principles, the court chooses to overlook certain aspects of the lives of transgenders and Hijras, pertaining to their sexual orientation. Additionally the Rajya Sabha (Upper House of the Parliament) has recently passed the Rights of Transgender Persons Bill, 2015, which ensures a family life for transgender persons. The Bill prescribes that, “ No child, who is born a transgender, shall be separated from his parents. Only a court order can take the child away from the parents, and courts too can intervene only in the interest of the child.”¹²⁰ The Bill further enjoins “the local governments not to discriminate transgender persons in matters of admissions in educational institutions and to provide them with monetary aid” and “to provide them reservations in matters of employment and education.”¹²¹ More significantly, as per the Bill, “trans-gender persons are free to choose sex of their choice viz, male, female or third gender. The local authorities are required to provide transgender for free “sex reassignment surgery.” ¹²²

¹¹⁸NAZ Foundation v. Union of India, Civil Appeal No.10972 of 2013.

¹¹⁹National Legal Services Authority v Union of India [2014] Supreme Court (Supreme Court).

¹²⁰ Rights of Transgender Persons Bill, 2015

¹²¹ Rights of Transgender Persons Bill, 2015

¹²² Subodh Ghildiyal, “Bill ensures family life for transgender children,” TNN December 30, 2015, 05.41 A.M IST, <http://socialjustice.nic.in/pdf/TGBillFinal.pdf>

It can be argued that following the NALSA case, efforts are being made by the centre to provide equal rights to transgenders, in congruence with the international treaties. However, the hundred pages long judgement, does not merely refer to the legal standing of the country in correlation to the international conventions, or to the constitution of India. The judgement also refers to the mythological standing of the community of transgenders and hijras, reflecting the intermeshed nature of socio-cultural practises with legal documents. While citing the history of the transgender community in India, the judgement refers to the place of Hijras in mythology :

Lord Rama, in the epic Ramayana, was leaving for the forest upon being banished from the kingdom for 14 years, turns around to his followers and asks all the ‘men and women’ to return to the city. Among his followers, the hijras alone do not feel bound by this direction and decide to stay with him. Impressed with their devotion, Rama sanctions them the power to confer blessings on people on auspicious occasions like childbirth and marriage, and also at inaugural functions which, it is believed set the stage for the custom of badhai in which hijras sing, dance and confer blessings.

14. Aravan, the son of Arjuna and Nagakanya in Mahabharata, offers to be sacrificed to Goddess Kali to ensure the victory of the Pandavas in the Kurukshetra war, the only condition that he made was to spend the last night of his life in matrimony. Since no woman was willing to marry one who was doomed to be killed, Krishna assumes the form of a beautiful woman called Mohini and marries him. The Hijras of Tamil Nadu consider Aravan their progenitor and call themselves Aravanis. ¹²³

Thus, addressing the place of the hijra community in mythology, and history, the court cites the legal obligations of the country. In such a context, it is important to look at the status accorded to these treaties in the socio-legal context. While, the same constitutional articles and international conventions were cited in the case of the Supreme Court v Naz Foundation, they were revoked, partly due to their incongruence with the socio-cultural practises of the country; these, however, were upheld, when a consonance was found in and with mythology. Whether the International conventions ratified by the state, then, hold a high place in implementation or are only certainly accorded a legal standing when found in congruence with local, cultural practises is a question

¹²³National Legal Services Authority v Union of India [2014] Supreme Court (Supreme Court).

worth detailing. The ideas of Universalism, and cultural relativism can be seen, highlighted in these parallel cases, and the difference in their judgements.

Chapter 4

International Standards : Universalism , Cultural Relativism or a different approach to Hijra rights

In this chapter, I will discuss the notions of Universal Human Rights and Cultural relativism, while problematising both, vis a vis International human rights treaties and individual notions of culture. This chapter also attempts to scrutinise the bottom-up approach of international human rights implementation formulated by professor Tom Zwart, who is a professor of International and European Law at Utrecht University; and locate the implementation of rights of hijras with the help of this theory. Professor Zwart has been extensively quoted in this chapter, along with social theorists Peter Baehr and Jack Donnelly.

“Universal human rights instruments are based on the assumption that they reflect universally accepted norms of behaviour," states Dr Baehr¹²⁴. The idea of universal human rights was acknowledged in the acceptance of the Universal Declaration of Human Rights in 1948, by the General Assembly of the United Nations. ¹²⁵ Baehr, interestingly, points to the fact that universal acceptance of human rights is the basis of the supervisory powers of the UN.¹²⁶ The preamble to the UDHR states that the ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’ .¹²⁷ To elucidate the origin of the concept of universal human rights, Baehr writes:

In the eyes of a superficial observer, the question of the universality of human rights seemed to be resolved at the World Conference of Human Rights held in Vienna in 1993. In the Final Declaration of that Conference, it was stated: ‘All human rights are universal, indivisible and interdependent and interrelated.’¹²⁸

¹²⁴ Peter R Baehr, Human Rights (Palgrave 2001).

¹²⁵ Peter R Baehr, Human Rights (Palgrave 2001).

¹²⁶ Peter R Baehr, Human Rights (Palgrave 2001) 9.

¹²⁷ Peter R Baehr, Human Rights (Palgrave 2001) 9.

¹²⁸ Peter R Baehr, Human Rights (Palgrave 2001) 9.

But, as Baehr comments, the additional clause highlighting sovereignty complicates the idea, ‘the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind’.¹²⁹ This additional clause, which Baehr calls the “result of a political compromise”¹³⁰, while highlighting the sovereignty of nations, and protecting their cultural practises, convolutes the idea of universal human rights, in giving some reservations to sovereign states. This conflict, particularly in implementation and state sanctions, further results in the popularisation of the idea of cultural relativism. The idea of cultural relativism was first introduced by Franz Boas, in the early 20th century. In his anthropological work of 1887, Boas wrote that, “...civilisation is not something absolute, but ... is relative, and ... our ideas and conceptions are true only so far as our civilisation goes.”¹³¹ Since then, a lot of debate has taken place about and around the ideas of cultural relativism and universalism.¹³²

A basic definition of cultural relativism is that it is “the theory that beliefs, customs, and morality exist in relation to the particular culture from which they originate and are not absolute.”¹³³ Yvonne Donders explicates this :

Universalism asserts that every human being has certain human rights by virtue of being human. According to this theory, human rights are inalienable and meant to protect human dignity and all persons should equally enjoy them. The fact that human rights should be universally enjoyed – by all persons on the basis of equality – is not very controversial. However, universalism is also linked to the universal character of the norms themselves. This universal character, or universal content, of the legal norms, is debated more frequently, especially by supporters of cultural relativism. The relativist position reflects the empirical fact that there is an immense cultural diversity in the world, including diverse views about right and wrong. Cultural relativism, accordingly, claims that there are no universal human values and that the variety of cultures implies

Peter R Baehr, *Human Rights* (Palgrave 2001) 10.

¹³⁰ Peter R Baehr, *Human Rights* (Palgrave 2001) 10.

¹³¹ Franz Boas 1887 "Museums of Ethnology and their classification" *Science* 9: 589

¹³² Donnelly, Donnelly, Peter Baehr, and Tom Zwart

¹³³ Dictionary***

that human rights can, and may, be interpreted differently. In between, moderate forms of both theories exist.¹³⁴

Further, after the UDHR was formulated in 1948, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) came into force in 1966, and turned the ideas/norms/beliefs of the UDHR into legally binding sanctions. As Donders elucidates, the preambles of both the covenants highlight that “all human rights are interrelated, indivisible, interdependent and equally important. States have reaffirmed this principle on various occasions, for instance in the Declaration of the World Conference on Human Rights in Vienna in 1993”.¹³⁵

Despite this, a lot of states have asserted that Human Rights should be viewed in terms of cultural relativity, and not all rights can be implemented within a particular state context. Polis elaborates on this:

Despite the claims by Western states as to their success in achieving global acceptance of the universality of human rights, a careful reading of the Declaration reveals that the West made major concessions. A compromise was reached precisely on the issue of universality, a claim that was challenged by the representatives of numerous states... The most forceful in arguing its divergence from Western doctrines was the Bangkok Declaration which stated that “while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.”¹³⁶

¹³⁴ Yvonne Donders, 'Do Cultural Diversity And Human Rights Make A Good Match?' (2010) 61 *International Social Science Journal*.

¹³⁵ Yvonne Donders, 'Do Cultural Diversity And Human Rights Make A Good Match?' (2010) 61 *International Social Science Journal*. (5)

¹³⁶ Adamantia Pollis, 'Cultural Relativism Revisited: Through A State Prism' (1996) 18 *Human Rights Quarterly*.

Keeping this in mind, the signatory states were given the power to make certain reservations¹³⁷. India, is one of the countries to have made reservations to the Covenant on Economic, Social, and Cultural Rights. Article 1 of the ICESCR states :

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.¹³⁸

The Government of India, in lieu of the notion of cultural relativism, made reservations to Article 1 of the ICESCR, with regard to the right to self-determination :

"I. With reference to article 1 of the International Covenant on Economic, Social and Cultural Rights and article 1 of the International Covenant on Civil and Political Rights, the Government of the Republic of India declares that the words 'the right of self-determination' appearing in [this article] apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people or nation--which is the essence of national integrity.¹³⁹

The right to 'Self-determination', thus while can be seen and is a fundamental ideal of human rights, has become problematised within this particular context. The legal reservation, thus gave India the sanctions to regulate the right to self-determination. Article 15 of the Constitution of India, also alludes to the right to self-determination, and in the case of *NALSA v Union of India*¹⁴⁰, the Supreme Court alluded to this particular article, however, they choose to negate this right in the case of *NAZ foundation v Govt. of NCT of Delhi*. Despite being bound by the ICESCR, the legal

¹³⁷ Peter R Baehr, *Human Rights* (Palgrave 2001) 15.

¹³⁸ ICESCR (Part 1, Article 1)

¹³⁹ ICECR

¹⁴⁰ *National Legal Services Authority v Union of India* [2014] Supreme Court (Supreme Court).

reservation accorded them the right negate the citizens right to self-determination. Jack Donnelly, further problematises the very notion of 'self-determination'¹⁴¹. He writes :

Self-determination and sovereignty ground a tolerant relativism based on the mutual recognition of peoples/states in an international community. Self-determination, understood as an ethical principle, involves a claim that a free people is entitled to choose for itself its own way of life and its own form of government. The language of "democracy" is also often used. Democratic self-determination is a communal expression of the principles of equality and autonomy that lie at the heart of the idea of human rights...Legally sovereign states need not satisfy or reflect the ethical principle of self-determination. Too often, international legal sovereignty shields regimes that violate both ethical self-determination and most internationally recognised human rights which brings us back to the relative enjoyment of human rights, based largely on where one happens to live...However we interpret it, though, legal sovereignty introduces a considerable element of relativity into the enjoyment of internationally recognized human rights in the contemporary world. ¹⁴²

This, 'relativity' that Donnelly refers to, however, creates a certain ambiguity in the enjoyment of human rights for individuals of a country. While, in a lot of countries around the world, these reservations lead to extreme denial of human rights, in India the reservation to the 'Right to Self-determination' hinders the rights of sexual minorities, along with others. The reservations provided by the international legal system, though are accorded to protect the ideals of cultural relativism, still, problematises the rights of individuals in specific contexts. In such situations, looking at culture from a different perspective, at both the implementation and drafting of these rights would be worthwhile. But, the concept of culture is also problematic, since culture is a highly relative term, both in terms of geography and history. Problematising, or de-problematising

¹⁴¹ Jack Donnelly, 'Cultural Relativism And Universal Human Rights' (1984) 6 Human Rights Quarterly. 297

¹⁴² Jack Donnelly, 'Cultural Relativism And Universal Human Rights' (1984) 6 Human Rights Quarterly. 297

the concept of culture, Yvonne Donders in her essay, 'Do cultural diversity and human rights make a good match', calls culture a "vague" concept.¹⁴³ She further elaborates :

It(culture) can refer to many things, from cultural products, such as arts and literature, to cultural process or to culture as a way of life. Culture is something that can develop and change in the course of time. It is not static, but dynamic; it is not a product, but a process, be it one without well-defined boundaries. Culture has both an objective and a subjective dimension. The objective dimension is reflected in visible characteristics such as language, religion, or customs, while the subjective dimension is reflected in shared attitudes and ways of thinking, feeling and acting. Culture has both an individual and a collective dimension: cultures are developed and shaped by communities, which individuals identify with, building their personal cultural identity.¹⁴⁴

Moreover, this subjective and objective dimension that Donders refers to can also be seen as objective and subjective in terms of temporality. The hijra community in India, was at its inception in Vedic times, a separate cultural - Hindu community, with their origin in Hindu mythology¹⁴⁵. But, in the contemporary scenario, is a mixed community with members from all religions who practise a specific set of ritualist rites, example emasculation in certain cases.¹⁴⁶ Culture, then, as Donders elaborates becomes a "process," with subjective basis in temporality, and contemporary practises. But, as Donders further points out:

Culture is, however, not an abstract or neutral concept: it is shaped by when it is instrumentalised, a process in which power structures play an important role. Culture is not necessarily intrinsically of positive value. Culture may also harm people or constraint their development. There exist cultural practices, for example, that are questionable from a human rights

¹⁴³ Yvonne Donders, 'Do Cultural Diversity And Human Rights Make A Good Match?' (2010) 61 International Social Science Journal.15

¹⁴⁴ Yvonne Donders, 'Do Cultural Diversity And Human Rights Make A Good Match?' (2010) 61 International Social Science Journal.15

¹⁴⁵ Ramayan(find the source of the article, nanda, maybe?)

¹⁴⁶ Serena Nanda, *Neither Man Nor Woman* (Wadsworth Pub Co 1999).

perspective. The breadth, complexity and sensitivity of the concept of culture have been crucial challenges in its transformation into legal human rights norms.¹⁴⁷

This transformation of cultural challenges into legal norms, thus, becomes problematised as seen in the case of India and the ICESCR. In a world where legal reservations are provided in order to maintain state sovereignty and cultural relativism, protecting the rights of the minorities, or culturally discriminated groups becomes a challenge. The International legal system, though despite the presence of the availability of the power to make reservations by states is largely and mainly based on the notion of universal human rights.¹⁴⁸ And, in cases where reservations are utilised, as in the case of India and the reservation to Article 1 of the ICESCR, the rights of minorities can still be negated. Further, as Baehr mentions, “There is a big difference between universalism in standard-setting and universalism in implementation. With regard to the latter there can be little doubt: there is none”.¹⁴⁹ He further refers to annual reports of Amnesty International and various other human rights organisations that document the disregard to universal human rights around the world.¹⁵⁰ Thus, collectively, the implementation of universal human rights in the context of state sovereignty becomes contentious in legal and socio-cultural terms. Various levels of approaches can be taken in order to correlate the ideals and ideas of universal human rights and cultural relativist arguments. Jack Donnelly suggests :

Different places at different times will draw on different cultural resources to provide support for (and opposition to) human rights. The different cultural idioms by which human rights are justified and explicated are of immense local importance. Therefore, effective advocacy of human rights requires knowledge of and sensitivity to how human

¹⁴⁷ Yvonne Donders, 'Do Cultural Diversity And Human Rights Make A Good Match?' (2010) 61 *International Social Science Journal*.
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¹⁴⁸ Yvonne Donders, 'Do Cultural Diversity And Human Rights Make A Good Match?' (2010) 61 *International Social Science Journal*.

¹⁴⁹ Peter R Baehr, *Human Rights* (Palgrave 2001). 11

¹⁵⁰ Peter R Baehr, *Human Rights* (Palgrave 2001). 11

rights fit with local cultures—and histories, and economies, and ecologies, and social structures.¹⁵¹

Donders terms such a form of effective advocacy as a “moderate form”¹⁵² of human rights implementation. A lot of these “moderate forms,” as termed by Donders, or methods of implementation of human rights standards have been introduced by scholars like Sally Angel Merry, Renteln, An-Na’im, Tom Zwart. Tom Zwart introduces a bottom-up approach, he terms as ‘the receptor approach’.¹⁵³ This chapter will now focus on the discussion of the receptor approach as put forward by Professor Tom Zwart.

According to Zwart, the universal concept of human rights and the ideals of cultural relativism can be converged in a bottom-up approach, wherein social and local institutions, along with traditional cultural practises can be utilised for extending the postulation of human rights, in cultural, non-individualistic societies. He writes:

The receptor approach starts from the premise that, by relying on local socio-cultural arrangements during the implementation stage, human rights protection will be enhanced and reinforced rather than diminished. This can be done first by matching, i.e. identifying and making visible, domestic social arrangements supporting and protecting human rights that are already in place. Second, if these arrangements fall short of the international human rights requirements, amplification is the next step: elements must be added to the existing institutions rather than attempting to replace them with Western-centered solutions.¹⁵⁴

Further, Tom Zwart’s formulates the receptor approach on two presuppositions:

¹⁵¹ Jack Donnelly, 'The Relative Universality Of Human Rights' (2007) 29 Human Rights Quarterly. 112

¹⁵² Yvonne Donders, 'Do Cultural Diversity And Human Rights Make A Good Match?' (2010) 61 International Social Science Journal.

¹⁵³ Tom Zwart, 'Using Local Culture To Further The Implementation Of International Human Rights: The Receptor Approach' (2012) 34 Human Rights Quarterly.

¹⁵⁴ Tom Zwart, 'Using Local Culture To Further The Implementation Of International Human Rights: The Receptor Approach' (2012) 34 Human Rights Quarterly.

First, states are bound by the obligations laid down in the human rights treaties which they have ratified. In other words, they may neither water down nor compromise such obligations unilaterally by invoking local cultural values, but should implement them diligently and in good faith. Second, states are encouraged to rely as much as possible on their own culture and social institutions at the implementation stage to enable them to fulfil their treaty obligations fully.¹⁵⁵

Taking these presuppositions, Zwart attempts to focus on the ‘rights’ based policy of the international legal system, and not the means based policy.¹⁵⁶ He asserts that international humanitarian law can be better implemented if not applied only through and with the concept of rights of individuals, but the ‘means’ should be culturally and locally developed. He further states that the international standards of human rights will be more effective if based on and dependent on socio-cultural norms in various cultures around the world. One of the basis of the main assertions of Tom Zwart’s receptor approach is that the western approach to human rights is equated to the granting of rights to individuals. Though a lot of non-western societies, particularly in Asia, and Africa are not based on the rights of individuals but of communities.¹⁵⁷

He elaborates :

However, in many African and Asian societies, which are communal in nature, substantial cultural texture is provided by non-legal social institutions like community, duties, and religion. In the West, the Southern and Eastern reluctance to translate human rights obligations into legal rights has sometimes been regarded as a failure to implement them. The question thus begged is whether international law and human rights treaties require implementation through taking legal steps or conferring

¹⁵⁵ Tom Zwart, 'Using Local Culture To Further The Implementation Of International Human Rights: The Receptor Approach' (2012) 34 Human Rights Quarterly. 547

¹⁵⁶ Julie Mertus - The United Nations and Human Rights

¹⁵⁷ Aditya Bondyopadhyay, Laws Affecting LGBT Persons In South Asia (outh Asia LGBT Network 2011).

enforceable rights, or whether states parties may rely on other social arrangements instead.¹⁵⁸

But, as mentioned earlier in this chapter, and as Zwart mentions himself, the implementation or even legalisation of International treaties need not be purely legal. The State has the right to choose their means of implementation, along with the legal means. Yvonne Donders and Vincent Vleugel lay emphasis on the same in their essay, ‘The Receptor Approach: A new Human Rights Kid on the Block or Old Wine in New Bags?’:

With regard to the second assumption, international human rights law does *not* require states in the East and South to give up their traditions and institutions to make way for the Western values and institutions. Evidence for this statement cannot be found anywhere in the treaties or the supervisory system. In fact, the treaties, as well as the supervisory bodies, leave ample space for diversity.¹⁵⁹

Zwart’s, receptor approach however, is mainly based on accepting the cultural practises of various societies. He states that, “The receptor approach is based on sensitivity to and respect for the culture of every society. It assumes that every value system—whether Northern or Southern, Eastern or Western—has its own inner logic and is aimed at achieving its own conceptualisation of fairness and human dignity. This means that every concept in every system has to be approached with an open mind in order to identify its rationale.”¹⁶⁰ Zwart’s here, however creates a binary between the East and the West, and between the societies that have ratified the treaties and between the treaties. Rather, than thus, a one-sided approach to the implementation and practise of cultural relativism, an empirical study of these cultures could be conducted to analyse and understand the cultural positions.

¹⁵⁸ Tom Zwart, 'Using Local Culture To Further The Implementation Of International Human Rights: The Receptor Approach' (2012) 34 Human Rights Quarterly.549

¹⁵⁹Yvonne Donders, 'Do Cultural Diversity And Human Rights Make A Good Match?' (2010) 61 International Social Science Journal. 657

¹⁶⁰ Tom Zwart, 'Using Local Culture To Further The Implementation Of International Human Rights: The Receptor Approach' (2012) 34 Human Rights Quarterly. 554

In India, with respect to the NALSA case ¹⁶¹, the court utilised a three fold system to pass a judgement. The court referred to the place of 'transgenders' in Indian mythology and history, then the Constitution of India, and then its international Legal Obligations.¹⁶² However, Zwart writes that that, "the receptor approach assumes that human rights shortfalls should not be remedied by legal engineering, i.e. by simply transplanting the international individual right norms laid down in the treaties to national system ¹⁶³.

He suggests a bottom-up approach of human rights implementation and a method of looking at legislature and rights through the lens of culture. Following a similar pattern, the Indian State, along with its legal systems, uses something called the ' Panchayat Raj'¹⁶⁴. Under the system, villages can form their own judicial body, for small village affairs and elect 5 members to over-see this. These members answer to the district court, and are in charge of the goodwill and functionality of the villages. ¹⁶⁵ However, being humans, they are guided by the principles of their own conditionality. These people are a part of a system that denies the rights of homosexuals or mock transgenders.¹⁶⁶ Thus, in order to apply the receptor approach in such situations, one would have to go through the almost-impossible task of changing social conditionings. These social conditionings could be changed, over time, by trying to find a culturally relevant approach to the adjudication of rights. The receptor approach can be applied, particularly, and specifically with the context that this thesis is concerned with, that of the hijras in India.

Taking the case of hijras, one could easily advocate at a grass roots level, the place accorded to them in Hindu mythology. They were treated as blessed individuals by Lord Rama, were warriors and sages in Mahabharata. Even the god, Vishnu, once took the 'avatar' of a woman and copulated

¹⁶¹ National Legal Services Authority v Union of India [2014] Supreme Court (Supreme Court).

¹⁶²National Legal Services Authority v Union of India [2014] Supreme Court (Supreme Court).

¹⁶³ Tom Zwart, 'Using Local Culture To Further The Implementation Of International Human Rights: The Receptor Approach' (2012) 34 Human Rights Quarterly. 559

¹⁶⁴ Panchayat Raj is a quasi-judicial system practised in the villages of India

¹⁶⁵ Tom Zwart, 'Using Local Culture To Further The Implementation Of International Human Rights: The Receptor Approach' (2012) 34 Human Rights Quarterly.

¹⁶⁶ Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007)

with the deity Shiva.¹⁶⁷ Prejudice can thus be curbed by highlighting the presence of hijras in mythology and cultural context, and furthering their importance of their sexuality as presented by the divine deities. This application would, perhaps, however be different from what Zwart suggests. Further, an approach similar to the one taken by the supreme court of India would be necessary, a holistic approach that finds its way into mythology and cultural practices, along with the dependency of media and legislature. This application would, perhaps, however be different from what Zwart suggests. As Zwart writes :

The receptor approach instead assumes that states will often be able to meet their human rights obligations by relying on existing social institutions and traditional culture, both of which must be discovered and interpreted with the help of ethnographic research. If, despite the existence of these social institutions, there appears to be an implementation gap, the gap must of course be filled through reform. This should be done as much as possible, however, by adding to existing social arrangements rather than by replacing them, and by applying home-grown rather than Western-centered solutions. ... The receptor approach will therefore appeal to societies with rich cultural traditions, because it takes those traditions as its point of departure. This appeal is amplified by its view that social institutions other than law and rights may serve to honour human rights obligations. This approach will fit well with countries that have a communal rather than an individualistic culture and which value restorative justice over litigiousness.¹⁶⁸

Thus, taking tradition as the point of departure, the Supreme Court of India accorded equal rights to transgenders and termed them as a separate 'third gender', the implementation of these rights can also be done by taking the cultural relativist approach suggested by Zwart, to be further discussed in the next chapter.

¹⁶⁷ As discussed in Chapter 2 and Chapter 5

¹⁶⁸ Tom Zwart, 'Using Local Culture To Further The Implementation Of International Human Rights: The Receptor Approach' (2012) 34 Human Rights Quarterly. 569

Chapter 5

Socio Cultural Practises of Hijras and the 'Receptor Approach'

The previous chapters discussed the positioning of Hijras in particular, and transgenders in general, in the mythology and history of the Indian subcontinent. Hijras and other communities of sexual minority have had a place in the history and mythology of the subcontinent since ancient times.¹⁶⁹ In this chapter, I will discuss the space accorded to hijras in the mythological tales within Hinduism, their boon-giving purposes in contemporary India, and the amalgamation of Hindu and Muslim practises and beliefs within the Hijra community

Hijras find their origin in the worship of Bahuchara Mata¹⁷⁰, but as Serena Nanda writes in her essay, 'The Hijras of India: Cultural and Individual Dimensions of an Institutionalised Third Gender', they "make no distinctions within their community based on caste origin or religion..."¹⁷¹ However, as Gayatri Reddy elucidates, the hijras identify themselves as primarily Muslims, in their prayer and funeral practises.¹⁷² A common tale often narrated amongst Hijras, emphasising their third gender is mentioned in the Hindu epic 'Ramayana'.¹⁷³ In the tale, Rama, the prince of Ayodhya is about to leave his native city of Ayodhya and his kingdom to live in the forest for 14 years, to fulfil his duty as a son. All his subjects followed him to the peripheries of the forest, upon reaching which, he says, 'Ladies and gents, please wipe your tears and go away'.¹⁷⁴ But, hijras who were neither men, nor women, were unsure of their Lord's orders, and stayed behind to wait for him for 14 years. On his return, he found all those people in meditation, waiting. Pleased by their

¹⁶⁹ Serena Nanda, *Neither Man Nor Woman* (Wadsworth Pub Co 1999).

¹⁷⁰ Serena Nanda, *Neither Man Nor Woman* (Wadsworth Pub Co 1999).

¹⁷¹ Serena Nanda, 'The Hijras Of India:' (1986) 11 *Journal of Homosexuality*. 2

¹⁷² Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007)

¹⁷³ Serena Nanda, 'The Hijras Of India:' (1986) 11 *Journal of Homosexuality*. 2, Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007), Patanayik

Ramayana is an epic written by Valmiki, which enjoys the status of a religious text in Hinduism. Rama, the protagonist is considered as one of the ten Avatars of the deity Vishnu

¹⁷⁴ Serena Nanda, 'The Hijras Of India:' (1986) 11 *Journal of Homosexuality*. 2

devotion and penance, he blessed them and granted them a boon. In a similar, mythologically blessed situation, the hijras find their divine powers, to be able to give a curse or a boon.¹⁷⁵

In one of the many creation myths in Hindu mythology, god Shiva cuts off his phallus, as a form of ascetic penance, and throws it into the earth. “His act results in the fertility cult of lingab worship, which expresses the paradoxical theme of creative asceticism”, Nanda elaborates.¹⁷⁶ Since some of the hijras are emasculated and some are born inter-sexed, they are unable to fulfil their ‘reproductive purposes’ as seen by the Indian society, thus, through emasculation can transform this inability into an ascetic “creative power which enables them to confer blessings of fertility on others”, elucidates Nanda.¹⁷⁷ The creative asceticism, that paves way to their ‘divine’ powers, is referred to as the ‘Badhai ritual’,¹⁷⁸ and is considered one of their primary purposes.¹⁷⁹ As a result of their worship of the mother goddess, ‘Bahuchara Mata’, and the belief in their abilities to confer fertility, throughout the subcontinent, hijras are called when a male child is born to a family, or when a wedding takes place, to bless the child and the couple.¹⁸⁰ At these celebrations, hijras dance, confer blessings on the infants, use sexual innuendo, all the while exercising their place in the contemporary society due to their place in mythology. They do these activities in exchange for a sum of money, which over time has become their primary source of income.¹⁸¹ This practice is called the ‘badhai’ ritual, literally translated to mean congratulatory ritual. Emphasising the ambiguity of these moments, Nanda quotes Hildebeitel :

The presence of eunuchs at births and weddings . . . marks the ambiguity of those moments when the non differentiation of male and female is most filled with uncertainty and promise – in the mystery that surrounds the sexual identity of the still

¹⁷⁵ Devdutt Pattanaik, *Shikhandi: And Other Tales They Don't Tell You* (Penguin Books Ltd 2014).

¹⁷⁶ Flaherty, mentioned in Serena Nanda, 'The Hijras Of India:' (1986) 11 *Journal of Homosexuality*. 2

¹⁷⁷ Serena Nanda, 'The Hijras Of India:' (1986) 11 *Journal of Homosexuality*. 4

¹⁷⁸

Laxmi Narayan Tripathi, R Raj Rao and P. G Joshi, *Me Hijra, Me Laxmi*.

¹⁷⁹ Serena Nanda, 'The Hijras Of India:' (1986) 11 *Journal of Homosexuality*. 2

¹⁸⁰ Devdutt Pattanaik, *Shikhandi: And Other Tales They Don't Tell You* (Penguin Books Ltd 2014).

¹⁸¹ Laxmi and various sources. Their source of income, or acceptance in the workplace to be discussed in the next chapter.

unborn child and on that [occasion] which anticipates the reunion of male and female in marital sex. ¹⁸²

Hijras have had an explicit part in the historical development of the subcontinent¹⁸³, but they have had an extensive role in Hindu mythology, as analysed in detail by Devdutt Patanaayik, Serena Nanda, Gayatri Reddy, amongst others. As Devdutt Patanayik elucidates :

The celebration of queer ideas in Hindu stories, symbols and rituals is in stark contrast to the ignorance and rigidity that we see in Indian society. Some blame the British for making Indians defensive about being so ‘feminine’ and for criminalising, amongst many others, queer communities like the hijras and everyone else who indulges in ‘sodomy’ (a biblical word for sexual deviation that was practised in the ancient city of Sodom). Others blame Muslims for it, especially those particular traditions that frown upon all forms of sensual arts. Still others blame the Buddhist vihara and the Hindu matha traditions, which favoured yoga (restraint) over bhoga (indulgence).¹⁸⁴

However, as has been discussed in the second chapter, the notions of gender fluidity was found in Jain texts as early as the fifth century. Eunuchs and hijras were accorded privileged places within the Mughal courts and were often the muses in romantic mughal poetry. Further, The symbols and rituals that Patanyik mentions, taken in convergence with the lived contemporary experiences of the Hijras expound on a more ambiguous lived experience. Patanayik, in his book, *Shikhandi*¹⁸⁵, refers not only to the mythological narrative discussed previously, but to the place of queer sexuality in the ‘kamasutra’, and the epic ‘Mahabharata’. Shikhandi is a tale within the epic, ‘Mahabharata’, in which Shikhandi is a trans son of the king, Drupad. Patanayik illuminates the dichotomy of Shikhandi’s life with the contemporary times: Shikhandini(a woman), who became Shikhandi(a male), is what modern queer vocabulary would call a female-to-male transsexual, as

¹⁸² Hildebeitel mentioned in Serena Nanda, 'The Hijras Of India:' (1986) 11 Journal of Homosexuality. 5

¹⁸³ Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007)

¹⁸⁴ Devdutt Pattanaik, *Shikhandi: And Other Tales They Don't Tell You* (Penguin Books Ltd 2014). (287-291)

¹⁸⁵ Devdutt Pattanaik, *Shikhandi: And Other Tales They Don't Tell You* (Penguin Books Ltd 2014). 287

her body goes through a very specific change genitally. But re-tellers avoid details and tend to portray him/her either as a eunuch (castrated male), a male-to-female transexual (a man who rejects his male biology), a male-to-female transgender (a man who wears women's clothes as he feels like a woman), an intersexed hermaphrodite, or simply a man who was a woman (Amba) in his past life. It reveals a patriarchal bias even in the queer space.¹⁸⁶ He further discusses about their sexual space in the 'Kamasutra'. He mentions about various sexual practises involving gender ambiguous individuals.

It would, thus, be in the retelling of these tales, that the ideas of the receptor approach¹⁸⁷, would have to be located. The supreme court of India, in its decision of the NALSA case¹⁸⁸ refers to the mythological importance of the third sex to impart their human rights in the contemporary understanding, similar references would need to be made to completely imbibe the third sex in everyday life. They need to not only be asexual, castrated humans with supposed divine abilities, but warriors, princes, sexual individuals who have a space beyond their ritualistic purposes. The bottom-up approach then, would be in the re-telling of myths and tales, and reclaiming various facets of human life, in emphasising the consequential, paramount prevalence of sexuality within and without these myths, tales, and narratives, for humans and deities alike¹⁸⁹; for transexuals, and homosexuals alike, for those who conform to the normative framework, and those who don't.

The re-telling, however, in the specific case of hijras, cannot only be based on the framework of Hindu mythology, as their contemporary existence is not only dominated by them. As mentioned earlier, hijras, while belonging to different religions and social structures, mostly consider themselves Muslims, especially in funeral and personal traditional practises.¹⁹⁰ Gayatri Reddy elucidates:

¹⁸⁶Devdutt Pattanaik, Shikhandi: And Other Tales They Don't Tell You (Penguin Books Ltd 2014). 440

¹⁸⁷ Tom Zwart, 'Using Local Culture To Further The Implementation Of International Human Rights: The Receptor Approach' (2012) 34 Human Rights Quarterly.

¹⁸⁸ National Legal Services Authority v Union of India [2014] Supreme Court (Supreme Court).

¹⁸⁹ Devdutt Pattanaik, Shikhandi: And Other Tales They Don't Tell You (Penguin Books Ltd 2014). 440-442

¹⁹⁰ Gayatri Reddy, With Respect To Sex (University of Chicago Press 2007) 100

That an integral element of Hijra identity is constructed through and by their religious affiliation, which in turn is understood and mediated primarily by their practice of Islam. The various Muslim-identified rituals that they perform, festivals that they celebrate, and commensal and sartorial rules that they subscribe to inform hijra identity as (Hyderabadi) Muslims.¹⁹¹

She further elaborates that in their practise of Islam, hijras highlight the importance of ritualistic practise, rather than belief. She writes :

As scholars have noted, Islamic doctrine is best captured by the term “orthopraxy” rather than “orthodoxy,” highlighting the importance of practice rather than belief (Smith 1957). In this context, hijras, too, could be characterized as orthoprax religious practitioners. In their orthopraxy, however, hijras not only blur the gender boundary in their practice of Islam, following rules of comportment specified by the shari’at (Islamic law) for both men and women, but they also practice a form of religion wherein they identify and practice (for the most part) as Muslims but simultaneously derive their power and social legitimacy from a Hindu goddess, Bedhraj Mata (also known as Bahuchara Mata).¹⁹²

Hijras, then, while believe their certain social purposes and origin story to be based in Hindu mythology practise Muslim rights, along with celebrating Hindu festivals and traditions. They then, are neither men nor women, nor Hindu, Muslims or Christians.¹⁹³ In their religious practice, they are Muslims, and in their social purposes, they find their existence in Hindu mythology. The funeral rights are performed according to Islamic practises, and most hijras wear saris without bindis, which are an adornment accessory of Hindu women, but they perform their ‘Badhai’ purposes in Hindu households. Reddy adds another dimension to this dichotomy :

While hijras identified as Muslim, this was by no means an unambiguous affiliation. For one thing, hijras, as “neither men nor women” in Serena Nanda’s (1990) words, did not see themselves as restricted to performing only (Muslim) men’s or only (Muslim) women’s practices. Instead

¹⁹¹ Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007) 100

¹⁹² Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007) 100

¹⁹³ Laxmi Narayan Tripathi, R Raj Rao and P. G Joshi, *Me Hijra, Me Laxmi*.

hijras practiced a combination of both men's and women's (Muslim) rituals and customs. In addition, despite their self-professed Muslim affiliation, hijras did not restrict themselves to an orthodox, Quranic practice of Islam; instead, they assimilated Hindu elements into their religious practice.¹⁹⁴

This ambiguity is further emphasised in their extension of the practice of circumcision exercised by Muslim men, in their observance of castration rituals. Reddy suggests that because they get castrated, while Muslim men get 'only' circumcised, hijras consider themselves to be more muslims than muslims men.¹⁹⁵ True to the religious and gender ambiguity experienced by them, as hijras generally dress like women, they also wear burqas when venturing into public alone. They, however, don't wear burqas when they go out in groups or for 'badhai purposes'.¹⁹⁶ Reddy elucidated:

However, when hijras went out as a group either for badhai purposes or to go shopping, there was absolutely no question of wearing a burqa. On these occasions, hijras intend to attract greater attention to themselves as hijras, rather than attempting to conceal their identity and appear as "good" Muslim women. Thus, rather than invoking an explicitly feminine religious self-image, the burqa could potentially be used just as a means of concealment, a cloak of anonymity. Nevertheless, the fact that hijras adopted this explicitly Muslim practice rather than other forms of (Hindu) veiling is perhaps significant¹⁹⁷

Reddy further, points out, in the context of an Indian society, this ambiguity is not unlikely.¹⁹⁸ Over the centuries, religious practises have become constantly intermixed, due to inter-changing rulers and spending life in close quarters. Explicating this, Reddy quotes Maulvi Zakullah in her essay, "for a thousand years, [the] religion of Islam has been intimately bound up with India; and in India, Islam has won some of its greatest triumphs for its own popular form of

¹⁹⁴ Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007) 102

¹⁹⁵ Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007) 103

¹⁹⁶ The celebratory, blessing giving purpose previously discussed

¹⁹⁷ Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007) 104

¹⁹⁸ Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007) 111

civilization”¹⁹⁹ Thus, it is not unlikely, considering the ambiguity and amorphousness of their gender identity and practises that, hijras have adopted multiple religions. In choosing to become a hijra, they leave their homes and families behind²⁰⁰, and in some cases are asked to leave the home, either way, their choice results in developing a separate family and identity, and peripheral social and civil existence. They, thus practise the purificatory and burial customs of Muslims²⁰¹, while simultaneously worshipping a Hindu goddess through whom they derive their divine power, and obtain social legitimacy.²⁰² Reddy further elaborates :

... Even though they practiced and identified as Muslims, when asked directly, they would answer, “hijras have no jati [caste/class] or dharm [religion].” Hijras did not see a disjuncture or conflict in either the “consistency” of their religious identities as Hindu or Muslim, or in their religious orthopraxy in the face of an apparently secular ideology.²⁰³

Thus, for them, behaviour, social practises, and sexual identity is not dominated by written doctrines but are enacted and interpreted according to their personal traditional context, and situation in society. It is through this ambiguity that Hijras find their place and function in contemporary society. As has been discussed in the previous chapters, hijras have been termed as the third gender, and been granted equal rights in accordance with the constitution of India²⁰⁴, but they have yet to find their legitimacy in their sexuality, or acceptance in the society. They live on the peripheries, mocked, shamed, and unaccepted.²⁰⁵

In her autobiography, Laxmi details her struggle with her transition from male to female and more importantly, her family’s reaction to her transition. While Laxmi and her family came to terms

¹⁹⁹ Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007) 112

²⁰⁰ Laxmi Narayan Tripathi, R Raj Rao and P. G Joshi, *Me Hijra, Me Laxmi*.

²⁰¹ Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007)

²⁰² Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007)

²⁰³ Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007) 111

²⁰⁴ *National Legal Services Authority v Union of India* [2014] Supreme Court (Supreme Court).

²⁰⁵ Laxmi Narayan Tripathi, R Raj Rao and P. G Joshi, *Me Hijra, Me Laxmi*.
A Revathi and Nandini Murali, *A Life In Trans Activism* (Zubaan 2016)

with her gender identity, Revathi, a hijra and LGBTI activist, could never find that solace.²⁰⁶ She was shunned and constantly abused by her family, and the society. Since the NALSA decision, various attempts have been made by the civic body to incorporate hijras in everyday society, and provide jobs and educational opportunities to them. While trans activists like Laxmi have found work in the entertainment business, an average hijra is shunned and mocked. Various bottom-up approaches would have to be undertaken in order to combine the various elements of the lives of hijras in particular, and trans people in general, with everyday social life. The provision of the third-gender 'box' opens up new avenues to them, and provides them with their constitutional rights, but it would be in their acceptance in society, and moving away from a ghetto lifestyle that they would find their human rights.

In lieu of this, hijras use their religious and gender ambiguity in astonishing and amazing ways. They are considered to have the power to confer blessings and curses, and their emasculated genitalia provide them with 'further weapons' against the gendered mindset. Hijras have been known to use this ambiguity in times of civil strife. During the partition, hijras were rendered safe from any violence as they belong to no religion and all religions, no gender, yet are both men and women.²⁰⁷ They were not only unharmed, but at places were able to protect civilians and control rioting, by threatening to remove their clothes. In a similar civic strife incident in New Delhi, in 2014, hijras curbed religious rights in New Delhi, by threatening to strip naked. This stripping, while threatening the ideas of a respectable society and their gendered norms, also highlights the inherent belief that Indian citizens have in their divine powers.²⁰⁸ The religious ambiguity which accorded them protection in terms of religious practises, and communal violence, can be turned into a way of spreading awareness about the community, which imbibes the aspects of all the religions, and is able to sustain their mythology and traditions. The implementation of their civic rights, would have to be in accordance to the amorphous nature of their existence, and cannot be solely on the basis of the legal structure, but rather, on the basis of their true acceptance within all the religious practises, and the high place accorded to them in the history of the sub-continent and the mythology of the people.

²⁰⁶ A Revathi and Nandini Murali, *A Life In Trans Activism* (Zubaan 2016)

²⁰⁷ Serena Nanda, *Neither Man Nor Woman* (Wadsworth Pub Co 1999).

²⁰⁸ <http://timesofindia.indiatimes.com/india/Eunuchs-hold-off-Trilokpuri-goons/articleshow/44954443.cms>

In a similar vein, in order to promote acceptance, recently, the Kochi metro decided to hire 23 transgenders, in an effort to imbibe them in civic life, and curb stigma. Other upcoming metro projects followed suit, in order to not only provide them with employment but to spread awareness.²⁰⁹ Such an approach by the civic society, combined with the legal stance taken by the constitution would and could be utilised in the promotion of the rights of hijras.

It would, thus, be in the retelling of these tales, that the ideas of the receptor approach²¹⁰, would have to be located. The supreme court of India, in its decision of the NALSA case²¹¹ refers to the mythological importance of the third sex to impart their human rights in the contemporary understanding, similar references would need to be made to completely imbibe the third sex in everyday life. They need to not only be asexual, castrated humans with supposed divine abilities, but warriors, princes, sexual individuals who have a space beyond their ritualistic purposes. The bottom-up approach then, would be in the re-telling of myths and tales, and reclaiming various facets of human life, in emphasising the consequential, paramount prevalence of sexuality within and without these myths, tales, and narratives, for humans and deities alike²¹²; for transexuals, and homosexuals alike, for those who conform to the normative framework, and those who don't.

²⁰⁹ <http://www.nagpurtoday.in/kochi-metro-hires-transgender-hijras-can-nagpur-metro-follow-the-example/05131505>

²¹⁰

Tom Zwart, 'Using Local Culture To Further The Implementation Of International Human Rights: The Receptor Approach' (2012) 34 Human Rights Quarterly.

²¹¹ National Legal Services Authority v Union of India [2014] Supreme Court (Supreme Court).

²¹² Devdutt Pattanaik, Shikhandi: And Other Tales They Don't Tell You (Penguin Books Ltd 2014).

Chapter 6

NALSA Case, and afterwards

The National legal service authority v Union of India judgment meted out by the supreme court of India, on April 15, 2014 recognised the rights of transgenders in the eyes of the law, acknowledging their constitutional rights under Articles 14, 15, 16, 19, and 21 of the Constitution of India. The supreme court also extensively referred to India's obligations to the UDHR, ICESCR, and invoked the Yogyakarta principles, while mentioning India's long tradition of transgender communities.

The Apex Court Declared on the Third Gender :

- Hijras, Eunuchs, apart from binary gender, be treated as “third gender”²¹³ in order to safeguard their rights under the Constitution.
- The right to self determination of their chosen gender, by choosing their legal recognition as male, female, or as third gender.
- Further, the Court stated, “ We direct the Centre and the State Governments to take steps to treat them as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.”²¹⁴
- Centre and state government were directed to operate HIV surveillance centres to monitor the sexual health of Hijras, as they often face sexual health issues due to lack of awareness or unsafe practises.²¹⁵
- The court ordered the State and Centre Governments to ensure the provision of proper medical care to transgenders in hospitals, public toilets, and other facilities. The court also ordered the government bodies to advance the rights of transgenders by providing welfare schemes and curb stigma.

²¹³ National Legal Services Authority v Union of India [2014] Supreme Court

²¹⁴ National Legal Services Authority v Union of India [2014] Supreme Court

²¹⁵ National Legal Services Authority v Union of India [2014] Supreme Court , As quoted in http://www.academia.edu/8762870/RIGHTS_OF_THIRD_GENDER

AFTER THE JUDGMENT

After the judgement, a committee termed as the ‘Expert Committee’ was formed, under the ministry of Social Justice and empowerment. The committee was formulated to conduct in-depth research on the predicament of transgenders in order to make appropriate recommendations.²¹⁶ Many states have set up welfare boards for transgenders like the Aravani²¹⁷ Welfare board in Tamil Nadu, which was called a landmark initiative in a report by UNDP²¹⁸, the civilian welfare foundation in Kolkata, the National AIDS control programme, amongst others. Tamil Nadu was the first state to have established a transgender welfare board, and the state government offers free sex reassignment surgery to trans people²¹⁹. Karnataka has launched a social security scheme called ‘Mythri’, which aims to inculcate trans people in communities, and to wean the communities away from sex work and begging.²²⁰ These foundations and programmes are tasked with studying the health care problems faced by the transgenders after even after the NALSA judgement.

1. Sexuality and Sexual Health

A UNDP report of 2010 conducted a detailed study on Indian transgenders, particularly Hijras, stated that HIV has been steadily increasing amongst trans women, and upto 41% are vulnerable to HIV.²²¹ The UNDP report states:

HIV and STI(s) are prevalent among transgender populations in India. The estimated size of MSM and male sex worker populations in India (latter presumably includes Hijras/TG communities) is 2,352,133 and 235,213, respectively. No reliable estimates are available for Hijras/TG women. HIV

²¹⁶ National Legal Services Authority v Union of India [2014] Supreme Court

²¹⁷ Aravani is the term used for Hijras in the state of Tamil Nadu http://www.in.undp.org/content/dam/india/docs/HIV_and_development/the-case-of-tamil-nadu-transgender-welfare-board--insights-for-d.pdf

²¹⁸ UNDP India, 'HIJRAS/ TRANSGENDERWOMEN IN INDIA: HIV, HUMAN RIGHTS AND SOCIALEXCLUSION' (UNDP INDIA 2010).

²¹⁹ UNDP India, 'HIJRAS/ TRANSGENDERWOMEN IN INDIA: HIV, HUMAN RIGHTS AND SOCIALEXCLUSION' (UNDP INDIA 2010).

²²⁰ Hindu newspaper, SUDHIR RANGAPPA NARAYANA, 'Narratives Of Transgender People In Accessing Identification And Welfare Schemes In Bangalore'.

²²¹ UNDP India, 'HIJRAS/ TRANSGENDERWOMEN IN INDIA: HIV, HUMAN RIGHTS AND SOCIALEXCLUSION' (UNDP INDIA 2010).

prevalence among MSM populations was 7.4% as against the overall adult HIV prevalence of 0.36%. Until recently, Hijras/transgender people were included under the category of MSM in HIV sentinel zero surveillance. Recent studies among hijras/transgender (TG) women have indicated a very high HIV prevalence (17.5% to 41%) among them. A study conducted in a Mumbai STI clinic reported very high HIV seroprevalence of 68% and high syphilis prevalence of 57% among Hijras. In Southern India, a study documented a high HIV seroprevalence (18.1%) and Syphilis prevalence (13.6%) among Hijras. A study conducted in Chennai documented high HIV and STI prevalence among Aravanis: 17.5% diagnosed positive for HIV and 72% had at least one STI (48% tested seropositive for HSV-1; 29% for HSV-2; and 7.8% for HBV).²²²

Moreover, apart from the high rate of sexually transmitted diseases, Hijras face a high risk of sexual violence which further impairs their access to sexual health.²²³ The NALSA judgement, while acknowledging the presence of the trans community, and opening up avenues for self-determination of gender, is portrayed and sought to be implemented in isolation. As long as section 377 of the IPC ²²⁴is in place, their sexuality is constantly denied which makes them extremely vulnerable to sexual diseases, assault, criminal charges. The 'illegality' of their sexuality, in turns makes it difficult for them to access healthcare. In *“Unnatural Offences” Obstacles to Justice in India Based on Sexual Orientation and Gender Identity*, the authors quote an interview with a trans woman talking about her right to sexual life. They write:

As M, a transgender woman, told the ICJ “See, we have got the gender right. But [it’s as if] we’ve got our hands but we won’t be able to do any work. Gender right is there, [but] sexual right is not there. So, are we expected to live a life of an ascetic, lost in meditation?” Since then, a group of transgender persons have also joined the curative petition against section 377 as affected parties.⁸⁴

²²² UNDP India, 'HIJRAS/ TRANSGENDERWOMEN IN INDIA: HIV, HUMAN RIGHTS AND SOCIALEXCLUSION' (UNDP INDIA 2010).

²²³ Laxmi autobiography - Laxmi Narayan, the trans activist was raped since a young age because of being an effeminate man. She not only faced violence at the hands of the people she knew, but also the authority. One of Laxmi's Hijra friend's who was a sex worker was assaulted and murdered. There was no legal recourse for her. Nanda, Reddy, and others also mention the high risk of sexual violence experienced by the transpeople.

²²⁴ UNDP India, 'HIJRAS/ TRANSGENDERWOMEN IN INDIA: HIV, HUMAN RIGHTS AND SOCIALEXCLUSION' (UNDP INDIA 2010). 4

In addition to that, education and socio-economic factors influence an individual's awareness about sexual health, or ability to access it. The UNDP report highlights this:

Both personal- and contextual level factors influence sexual health condition and access to and use of sexual health services. For example, most Hijras/TG are from lower socioeconomic status and have low literacy levels that pose barrier to seeking health care. Consequently, Hijras/TG communities face some unique barriers in accessing treatment services for STIs.²²⁵

Apart from the sexual health, hijras and transgenders face a lot of mental health issues. They are often harassed, abused, and mocked by the society, and not accepted by their own family. Revathi, a hijra activist mentions her struggle with her identity and family in her autobiography.²²⁶ She was driven to commit suicide, though she failed to take her own life, the struggle and sexual violence trans people face indicates the flaw in the social structure, even after the legal structure has been implemented to make the situation better.

Further, the criminalisation of homosexuality paves way to prejudice, violations, and other human rights problems. It is this criminalisation that partly makes it impossible to reduce sexually transmitted diseases, particularly of transgenders and hijras, whose role in mythology rests on their practise of emasculation. As the Special Rapporteur on torture and other ill-treatment noted :

A clear link exists between the criminalization of lesbian, gay, bisexual and transgender persons and homophobic and transphobic hate crimes, police abuse, community and family violence and stigmatization ... The criminalization of same-sex relationships and pervasive discrimination against lesbian, gay, bisexual, transgender and intersex persons

²²⁵ UNDP India, 'HIJRAS/ TRANSGENDERWOMEN IN INDIA: HIV, HUMAN RIGHTS AND SOCIALEXCLUSION' (UNDP INDIA 2010). 4

²²⁶ A Revathi and Nandini Murali, *A Life In Trans Activism* (Zubaan 2016).

lead to the denial of health care, information and related services, including the denial of HIV care.²²⁷

Thus, while homosexuality is still criminalised, prejudice and stigma against transgenders exist, spreading awareness about their sexual health, or providing them with the required health services will be deterred.

2. Identity Documents

After the NALSA decision, transgender people of India have continued to face stigma, and traverse uncharted and unclear legal and administrative situations. A report conducted by the International Commission of Jurists published in 2017 titled, *“Unnatural Offences” Obstacles to Justice in India Based on Sexual Orientation and Gender Identity* details the hassles faced by transgender communities and individuals in order to avail the rights accorded to them by the constitution and current situation.²²⁸ The report states: Fr There is no national uniform system in place to issue a new identity card or make changes in existing identity cards. Instead, the department in charge of each identity document put in place its own process for this. There are several options for identity documents in India: passports, *aadhar* cards, ration cards, pan cards, school certificates, driving licenses, and voter identity cards. There is technically no requirement for all identity cards to carry the same name and gender. In fact, one transgender woman showed the ICJ the several identity documents she possessed, showing different names and gender identities, depending on what changes she had been able to make. People can decide to make changes depending on which document they use most. However, transgender persons told the ICJ that they would prefer to have consistency across all documents, which they considered desirable as it would

²²⁷ ra 15 & 48, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/31/57, 5 January 2016, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/000/97/PDF/G1600097.pdf?OpenElement>

As quoted in **“Unnatural Offences”**

Obstacles to Justice in India Based on Sexual Orientation and Gender Identity. P-58

²²⁸ **“Unnatural Offences”**

Obstacles to Justice in India Based on Sexual Orientation and Gender Identity

reduce administrative confusion and make the resort to using each relevant identity document easier for the person in question.²²⁹

However, as the report highlights, the process of issuing new IDs or of making changing to existing IDs varies according to the states and particular documents.²³⁰ In most of the cases, an individual needs to get an affidavit made stating their preferred name and gender identity, which can be done publishing it in the local paper, before changing their names and gender on the specific documents. This, however also varies; in a aadhar card and passport, the options provided are male, female, and transgender, while for documents like the Voter ID, the options provided are male, female, and other. The same is implemented in college applications and documents.²³¹ Furthermore, the requirements differ across documents. For some documents – like passports, *aadhar* cards, and voter IDs – the process to change gender identity is set out. Others do not – like school certificates - and people found it harder to obtain the desired changes in those. The ICJ report further suggests that several people have already acquired identity cards that reflect their preferred name and gender.²³² . However, many people also told the ICJ they have either decided not to change their documents or have found it difficult to for a variety of reasons.

Any future legislation on this issue must acknowledge and address these issues to ensure that all persons are able to fully exercise their right to legal recognition of their chosen, self identified gender identity. There is also no clarity about the process of changing identification. The UNDP report quotes interviews with many hijras who had trouble getting their gender-identity

²²⁹ UNDP India, 'HIJRAS/ TRANSGENDERWOMEN IN INDIA: HIV, HUMAN RIGHTS AND SOCIALEXCLUSION' (UNDP INDIA 2010).

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²³⁰ UNDP India, 'HIJRAS/ TRANSGENDERWOMEN IN INDIA: HIV, HUMAN RIGHTS AND SOCIALEXCLUSION' (UNDP INDIA 2010).

²³¹ "Unnatural Offences" Obstacles To Justice In India Based On Sexual Orientation And Gender Identity' (International Commission of Jurists 2017).

²³² "Unnatural Offences" Obstacles To Justice In India Based On Sexual Orientation And Gender Identity' (International Commission of Jurists 2017).

modified. As discussed earlier, the process varies with each document and there is no uniformity.²³³ ICJ was further told by these people that the process varies not only according to different documents, but in different states. In some states, every newspaper notification of the change in gender and name had to be approved by the state cabinet, which is a tiresome and long process in itself.²³⁴ ²³⁵ In another state, people were asked for a residential certificate²³⁶ for any documentation.²³⁷

The ICJ was further informed by the transgender interviewees that in some cases, the village headmen would refuse to grant a residential certificate to transgenders because of prejudice and stigma, leaving them with no solution for their dilemma. Along with legal sanctions, a bottom-up approach, for curbing stigma becomes necessary in situations such as this. While rights have been accorded by the government, the society is still not ready to forget prejudice. Spreading awareness about gender identity through the tales might help relate the notions to the village people better than suggesting international treaties.²³⁸ Moreover, the lack of clarity about the legal procedure has paved way to easy corruption. The UNDP report states that :In one city, the ICJ was

²³³ "Unnatural Offences" Obstacles To Justice In India Based On Sexual Orientation And Gender Identity' (International Commission of Jurists 2017).

²³⁴ "Unnatural Offences" Obstacles To Justice In India Based On Sexual Orientation And Gender Identity' (International Commission of Jurists 2017).

²³⁵ "Unnatural Offences" Obstacles To Justice In India Based On Sexual Orientation And Gender Identity' (International Commission of Jurists 2017).

²³⁶ Residential certificates are usually issued by the village headman, a customary administrative head, and attest to the fact that an individual resides in a certain location.

²³⁷ "Unnatural Offences" Obstacles To Justice In India Based On Sexual Orientation And Gender Identity' (International Commission of Jurists 2017).

²³⁸ "Unnatural Offences" Obstacles To Justice In India Based On Sexual Orientation And Gender Identity' (International Commission of Jurists 2017).

told that the authorities were asking for a “gender certificate”, which was being issued for a fee by a private hospital, before allowing for a gender change on documents.²³⁹

In a similar vein, Laxmi Narayan Tripathi, in her autobiography narrates about getting her passport before the NALSA judgement, and she was asked to get a doctor’s certificate about her ‘gender identity’²⁴⁰. But, the report suggests that not much has changed in these terms even after the NALSA judgement. This requirement about gender certificates, after the NALSA judgement is not officially mandated, but due to a lack of awareness is still carried out.²⁴¹²⁴²

This is highlighted in a account narrated by a transperson to the ICJ :

A, a transgender man, told the ICJ of his experience trying to change his name and gender identity on documents after making an affidavit: “An officer there laughed at me and asked me if it’s possible for someone to change their gender. I told them that I was called [previous name] earlier and I have changed it to A now and that these transitions are now possible. I told them I had documents to show them. This happened at the District Magistrate’s office. I couldn’t meet the District Magistrate but officers outside told me to leave since they had no information regarding this and they made fun of me. I was trying to talk to them in hushed tones but they spoke loudly and everybody got to know of my issue. I showed them my affidavit and they told me to come back after a month. Like that, an entire year went by and nobody helped me out.”²⁴³

²³⁹ “Unnatural Offences” Obstacles To Justice In India Based On Sexual Orientation And Gender Identity’ (International Commission of Jurists 2017).

²⁴⁰ Laxmi Narayan Tripathi, R Raj Rao and P. G Joshi, *Me Hijra, Me Laxmi*.

²⁴¹ “Unnatural Offences” Obstacles To Justice In India Based On Sexual Orientation And Gender Identity’ (International Commission of Jurists 2017).

²⁴² “Unnatural Offences” Obstacles To Justice In India Based On Sexual Orientation And Gender Identity’ (International Commission of Jurists 2017).

²⁴³ “Unnatural Offences” Obstacles To Justice In India Based On Sexual Orientation And Gender Identity’ (International Commission of Jurists 2017).

3. Elections

Following the NALSA judgement, hijras were accorded the right to political participation, not as a male or female, but as the trans person, or the third gender. They realised that they did not just have right to vote but also the right to be elected. Hijras have used their specific circumstances to control and curb rioting and other civil unrest, as discussed in the previous chapter, but over the years, they have become politically active. Sonam Kinnar filed her nomination in Amethi against Raghul Gandhi along with Kumar Vishwas & Smriti Iraani. In Varnasi Hijra named Kamala contested against BJP's Narendra Modi. Shabna Mausani as an MLA from Sohagpur (MP) Ashadani as Gorakhpur Mayor. Bijli Bai as local body chief in Kamalganj. Heera Bai contested from Jabalpur and Samajwadi party ticket.²⁴⁴

4. Educational Institutions

In the NALSA judgement, the Supreme Court ruled that people who identify themselves as 'third genders' would be accorded reservations in academic institutions, and for that specific purpose would fall under the category of OBC²⁴⁵. Following this, many universities introduced the box of a third gender in their application forms. Bangalore university was the first university in India to pen its gates to third genders and accord the quota of one reserved seat in their post graduate courses. The centre for environment planning & technology (CEPT) University became the first institute in Gujarat to include third gender in admission session in 2014. University of Delhi and Jawaharlal Nehru University, in Delhi followed suit and acknowledged third gender students. These students, however, still face stigma in school.

Apart from the problems trans people face in the implementation of getting their documents changed, many are still unaware of the way the 'third gender' box intersects with their caste or religious quotas. A few questions were raised by the transgenders and cited in the UNDP report : what tax bracket would people fall under after the gender change? In instances where personal laws provide different entitlements based on gender (e.g. under Muslim law in India, gender impacts the

²⁴⁴ Laxmi Narayan Tripathi, R Raj Rao and P. G Joshi, *Me Hijra, Me Laxmi*.

²⁴⁵ OBC or Other backward classes, is an umbrella term for a specific lower caste in India.

fraction of property share one is entitled to if parents die intestate), how would people's rights be understood if they identified as transgender?²⁴⁶

These questions become more problematic in lieu of the religious dichotomy experienced by hijras. The legislative implementation process needs to be accompanied by excessive government schemes, efforts at spreading awareness about both the norms of gender identity, and the changes in their legal status. However, spreading awareness about gender fluidity or dichotomy in a country like India, which extensively relies on its patriarchal customs²⁴⁷ is a problematic endeavour. This cannot be achieved only by providing government guidelines, but has to be achieved by explaining the place and status accorded to hijras, transgenders in particular, and the LGBTI community in general, in the mythological and cultural heritage of the subcontinent. Hijras are, at the same time, trans people, muslims (whose given name might be Hindu), residents of a particular village, belonging to a particular caste and community; they thus imbibe multiple personalities and identities at once, and all these identities need to be accorded a place in society.

²⁴⁶ "Unnatural Offences" Obstacles To Justice In India Based On Sexual Orientation And Gender Identity' (International Commission of Jurists 2017).

²⁴⁷ Serena Nanda, *Neither Man Nor Woman* (Wadsworth Pub Co 1999).

Conclusion

Twenty-first century India still frames same sex desires as an import from the West. Structured by this myth, “most twentieth century texts that represent same sex desire, strive to reinforce an imagined pure Indian-ness of manhood or womanhood”, writes Ruth Vanita²⁴⁸. While talks about the twentieth century, it finds cognisance with the twenty-first century. Modernity has been seen in the previous has made the spaces accorded to self expression cramped. It has not been particularly liberating. Modern India, in fact, has somehow managed to block itself within a convoluted idea of an imagined past, where in human rights are violated in the name of history and culture.

Expressions of queer sexuality, thus, as has been seen has been much older than colonisation and gender was not constructed in binary terms, but understood as fluid. Menon says that, “ The normalisation of heterosexual identity [is] a part of the processes of colonial modernity”²⁴⁹ Modern Anxieties around homoeroticism have circulated in various spheres, writes Reddy²⁵⁰. Kathryn Hansen’s works on the Indian theatre shows how cross-dressing created various forms of uneasiness at the desire being evoked between the male spectator and the cross-dressing male actors .²⁵¹ Illustrations of this anxiety can be seen through the demonstrations against films with queer storylines such as *Fire* and *Girlfriend* by the Hindu right wing²⁵². As Pattanaik points out , modern homophobia finds its place not in history or cultural practises, rather in the notion of patriarchal and by extension nationhood.²⁵³ Menon points out that in the Indian context, ‘the heterosexual patriarchal family [is] the cornerstone of the nation’ and ‘any radical transformative politics today

²⁴⁸ Vanita, R., and S. Kidwai, eds. 2000. *Same-Sex Love in India: Readings from Literature and History*. New York: St. Martin’s Press.

²⁴⁹ Menon in Vanita, R., and S. Kidwai, eds. 2000. *Same-Sex Love in India: Readings from Literature and History*. New York: St. Martin’s Press.

²⁵⁰ Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007)

²⁵¹ Hansen in Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007)

²⁵² Ghosh in Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007)

²⁵³ Devdutt Pattanaik, *Shikhandi: And Other Tales They Don't Tell You* (Penguin Books Ltd 2014).

must therefore be post-national²⁵⁴. The cosmopolitanism of the Indian culture in Medieval India as described by Kidwai²⁵⁵ and discussed in this thesis is missing and Thomas Babington Macaulay's Section 377 to the Indian Penal Code²⁵⁶ still looms large over this country.

Rights of the queer, then need to be located within this history of the modern India and the amorphous socio-cultural practises of the country. While the NALSA judgment acknowledges the gender fluidity inherent within humans, 377 of the IPC refuses to acknowledge or perceive their sexuality. Hijras and other trans-people are expected to live a life devoid of their sexuality, in negation of their human right to 'love or be loved'. In addition, the lack of awareness within and outside the hijra communities makes them live a segregated life, away from any social interaction beyond their mythological purpose.²⁵⁷ It is within this context that the NALSA judgement and international human rights standards need to be situated. This, then, cannot only be achieved through legal sanctions, but by placing the legal language within the language of mythology, socio-cultural and religious practises. The receptor approach²⁵⁸, then, in such a context would be partly, about re-defining and re-inventing the queer narrative, and partly about implementing the said narrative in cognisance with the legal language.

Third gender is a box for most Indians of various social, religious, and cultural strata. Hijras are people who dance on the streets, bless children²⁵⁹ and newly married couples, and are involved in sex work²⁶⁰. Their lives exist as though on the different side of a veil, which they partially pierce to harass, demand money, dance in the streets, or to bless. They are welcomed at celebratory occasions, and are shunned otherwise. They are not seen as people who participate in daily life, or a

²⁵⁴ Menon (2005:38) in Vanita, R., and S. Kidwai, eds. 2000. *Same-Sex Love in India: Readings from Literature and History*. New York: St. Martin's Press.

²⁵⁵ Vanita, R., and S. Kidwai, eds. 2000. *Same-Sex Love in India: Readings from Literature and History*. New York: St. Martin's Press.

²⁵⁶ 377 IPC

²⁵⁷ Serena Nanda, *Neither Man Nor Woman* (Wadsworth Pub Co 1999).
Kidwai

²⁵⁸ Tom Zwart, 'Using Local Culture To Further The Implementation Of International Human Rights: The Receptor Approach' (2012) 34 *Human Rights Quarterly*.

²⁵⁹ Serena Nanda, *Neither Man Nor Woman* (Wadsworth Pub Co 1999).

²⁶⁰ Gayatri Reddy, *With Respect To Sex* (University of Chicago Press 2007)

part of the social milieu. They are a part of the mythological religious aspect of life, the ones blessed by Lord Rama.²⁶¹

Thus, it is within the present narrative that the rights need to be provided. This centuries old narrative cannot be modulated to fit international standards, not yet perhaps. These norms would have to be made accessible within the narrative. The supreme court's judgement in the NALSA case did exactly that. The judgement referred to the podium accorded to hijras through the centuries, it is within that narrative that the present legal standards would have to be implemented. To look back, assess, and harmonise the ancient and the modern in a country dictated by the ancient,²⁶² and striving towards the modern, perhaps might pave the way for the veil to be pierced.

²⁶¹ Serena Nanda, 'The Hijras Of India:' (1986) 11 Journal of Homosexuality. 5
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²⁶² Serena Nanda, 'The Hijras Of India:' (1986) 11 Journal of Homosexuality.

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2017

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<https://doi.org/20.500.11825/304>

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