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## Reconstructing Gender as a Social Construct: Promoting Substantive Equality Across Genders

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### Abstract

The article attempts to critically examine gender as a social construct, advocating for nuanced reforms to promote equity, equality and inclusivity across all gender identities. Traditional laws are rooted in the binary concept of gender, equating it with a biological sex and imposing a rigid categorisation that marginalises the non-binary, genderqueer, transgender, and intersex persons. Such systems deeply perpetuate discrimination in the credentials of identity, employment protections, family laws and health care access, etc., failing to incorporate the contemporary understandings of gender as a fluid and wide spectrum shaped by economic, cultural, and political forces. Sociological relational models, psychological identity affirmations and the cultural relativism of anthropology trace the legal evolution of gender. The patriarchal binary, inheritance and marriage were concretised in pre-modern and colonial laws under the influence of scriptures like the Manu Smriti and shaped laws like the Hindu Widows Remarriage Act of 1856. Constitution of India, through articles like 14, 15, and 21, challenged these patriarchal norms with milestone judgments like in the case of NALSA v. Union of India, recognising the identity of the transgenders and the case of decriminalisation of homosexuality, Navtej Singh Johar. C-16 Bill of Canada and the self-ID laws of Argentina highlight the global progress amid gender gaps. Binary frameworks are often criticised for their single excess approach, ignoring intersectionality, whereas gender, by its nature, intersects with caste, race, class, disability, sexuality, compounding various crimes of oppressions like the vulnerabilities of blind Dalit women. Stereotypes in the “reasonable man” test, asymmetrical family laws, and Lack of gender-neutral language in law, entrench inequalities and demand for reconstruction of neutral constructs. The principle of reform emphasises simplification of the process of self-identification, non-binary “X” markers, gender-neutral statutes, especially in the family domain, criminal and labour laws, anti-discriminatory acts, establishing affirmative equity-targeted programs, and the mechanism of gender-affirming care. A gender sensitisation training to the judicial officers, establishment of fast-track benches to ensure effective and timely enforcement, and balancing the idea of privacy by the state agencies and private parties can create a gender friendly environment in the legal domain. Challenges of social and cultural resistance persist, but the contemporary jurisprudential advances hints transformation. Law is expected to prioritise substantive equity over formal equality while fostering inclusive societies, affirming gender diversity and upholding the dignity of all gender identities.

**Keywords:** Social Construct, Gender, Intersectionality, Self-Identification, Binary, Substantive Equality.

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### Introduction

Most of the legal systems have framed gender as a binary construct linked to the biological sexes, embedding a rigid dichotomy of male and female into statutes and administrative practices.<sup>1</sup> This conventional approach views gender as an immutable trait, which is determined at birth and a perspective, which is enforced through colonial era laws and the personal codes, most of which prioritise the reproductive roles over the identity of the individuals.

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<sup>1</sup> Hindu Marriage Act, 1955, sec. 5 (India); see also Manusmriti 5.147-148 (codifying binary gender roles in ancient Hindu law).

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Such legal frameworks marginalise a large number of the population, including transgender, non-binary, intersex persons and genderqueers, whose experiences defy robust categorisation and lead to a systematic exclusion of this population in important domains like healthcare access, employment quotas, identity documentation, and family law entitlements, etc.<sup>2</sup>

The contemporary schools of social science challenge this orthodoxy and establishes gender as a fluid social construct evolved and shaped by political discourse, cultural norms, economic structures, and personal agencies. Sociology highlights the mechanism of evolution of gender roles across societies, for example, the anthropological studies show matrilineal systems in some parts of India where women hold primacy in the property rights, contrasting patrilineal dominance elsewhere. Psychology underscores the primacy of self-perception, supported by scientific research affirming gender identity as innate yet malleable and independent of chromosomes. This interdisciplinary discourse compels the jurisprudence to adapt and recognise gender as a wide spectrum rather than a switch.<sup>3</sup>

This attempts to propose a legal system undertaking a paradigm shift to embrace intersectionality, gender diversity, and the principle of self-identification, while advancing substantive equity and equality. In contrast to the formal identical treatment propounded by the concept of equality, equity demands tailored interventions in the form of resource allocations, affirmative protections, and sensitive policy making to rectify the historical imbalances and marginalisations. Kimberlé Crenshaw's Theory of intersectionality reveals how genders intersect with class, religion, disability, and sexuality, which results in amplification of oppression and creates a compound effect of restrictions and barriers invisible to a single-axis analysis.

Historical marginalisation has flourished over time with the help of rigid characterisation in the identification process in India through the issuance of an Aadhar card or a passport, which forces non-binary individuals to falsify their identities to rule out the possibility of discrimination. Many other deprivations, like denial of health care services to the trans-person or refusal of hormone therapy without certification, violate the basic bodily autonomy, while personal laws like the Hindu Marriage Act exclude same sex marriages, perpetuating the stigma and enhancing the discrimination. Such violations foster violence, and the National Crime Records Bureau's data also reflect the increasing rate of atrocities against gender minorities.

Thoughtful reforms prioritising the lived realities over the stereotypes, integrating the sociological relational models with psychological identification affirmations, and anthropological cultural relativism might enrich legal interpretations of social constructs of gender and its placement. The policymakers must dismantle the idea of binaries, fostering an inclusive society where all genders live with dignity and substantive equality.

#### **Evolution Of The Concept Of Gender In The Legal Framework**

The conceptualisation of gender in law has gone through a profound transformation, and a big shift has been seen from a rigid biological determination of the binary gender description to a socially constructed gender spectrum responsive to the contemporary societal dynamics. Since ancient texts like Manusmriti held gender as an immutable concept connecting women to an irrevocable, stereotypical domestic roles, creating a subordination for them in the spheres of inheritance and Marriage, supported with reinforcement of the patriarchal customs such as dowry, sati, devdasi, and child marriages, etc. The colonial influence further codified these wineries through the Hindu Widows Remarriage Act of 1856, offering very limited relief while preserving male dominance in property law, along with laws like the Indian Succession Act of 1925, which connected inheritance strictly to the biological sexes across the communities. These legal frameworks equated genders regardless of their biological

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<sup>2</sup> National Legal Services Authority v. Union of India, (2014) 5 SCC 438 [para 59] (recognizing transgender as third gender and critiquing binary exclusions).

<sup>3</sup> Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1991) 43 Stan L Rev 1241, 1244 (introducing intersectionality to dissect compounded discriminations).

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reproductive capacity and ignored the cultural variance, like Khasis and Nair having matrilineal systems, giving women historically wielded economic powers.

After independence, the Constitution of India marked a pivotal shift enshrining the idea of equality and non-discrimination on the grounds of sex under Articles 14, 15, and 21, challenging the entrenched norm of gender stereotypes. During Constituent Assembly debates, Dr Ambedkar strongly advocated for bringing women at par with men, and many early statutes like the Hindu Succession Act of 1956 systematically began to dismantle binaries yet retained some male-centric defaults. However, certain labour laws as the Maternity Benefit Act of 1961, acknowledged the biological differences but still overlooked the needs of non-binaries.

Judicial activism further escalated the change. Shah Bano<sup>4</sup> case pierced it to the personal laws mandating maintenance for Muslim women and questioned the religious binaries. Visakha guidelines<sup>5</sup> for the protection of women in the workplace against cases of sexual harassment evolving into the Prevention of Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013. The watershed came with NALSA v. Union of India,<sup>6</sup> wherein the court recognised transgender persons as a 3<sup>rd</sup> gender with self-identification rights under the concept of fundamental freedoms, dissociating gender from the biological sex. Navtej Singh Johar<sup>7</sup> is the case, where the court decriminalised consensual sex between two adults belonging to the same sex, given under section 377 of the Indian Penal Code. This affirmed the privacy and the dignity.

The international legal framework also harmonises with Indian law on gender rights. The US case of Obergefell v. Hodges,<sup>8</sup> legitimised same-sex marriages while the C-16 Bill<sup>9</sup> Canada granted gender identity and its protection. The Yogyakarta principles of 2006 hugely influenced the reasoning of the NALSA judgment. The principles emphasise fluidity in the cultural and political connotation of gender. In India Transgender Persons (Protection of Rights) Act of 2019 still regresses as it dilutes the concept of self-identification, by requiring certification panels. This evolution reflects adaptation shown by Indian laws to the economic shift, like the entry of women's workforce in economic activities and their mobilisation in politics, resulting in the strengthening of the feminist movements. Still, the gaps persisted in the form of non-binary inheritance ambiguities and questionable implementation of the quotas. In order to honour a gender-neutral social construct, the legal systems are expected to fully embrace self-identification as a reflection of modern gender diversity.

### Gender As A Social Construct: Balancing Liberation And Limitations

The theory of social construct establishes gender as a comprehensive concept including gender roles, norms, and gender identity, which emerge primarily from social, cultural, and interactive processes rather than biology alone. While biological sex involves anatomy and chromosomes, gender is a reflection of learned behaviours, stereotypes, and expectations shaped by society, media and education. This feminist-based sociological perspective challenges the rigidity of binaries and highlights how societies "do gender" through daily actions and performances. The idea also sparks a debate about the implications of social constructs on gender identities and eventually on policies.

The social construct theory can be used to challenge stereotypes and inequalities. The theory dismantles the patriarchal barriers by framing attributes like women as caregivers or men as providers as culturally imposed rather than natural. This can become a foundation to concretise the reforms, such as equal pay for equal work

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<sup>4</sup> Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 2 SCC 556.

<sup>5</sup> Vishaka v. State of Rajasthan, (1997) 6 SCC 241.

<sup>6</sup> National Legal Services Authority v. Union of India, (2014) 5 SCC 438.

<sup>7</sup> Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

<sup>8</sup> Obergefell v. Hodges (2015): *Obergefell v. Hodges*, 576 U.S. 644 (2015).

<sup>9</sup> Canada's Bill C-16 (2017): An Act to amend the Canadian Human Rights Act and the Criminal Code, S.C. 2017, C. 13 (Bill C-16, assented June 19, 2017).

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legislation, maternity benefit laws, paternity leave mandates, and corporate quotas for women's leadership. For example, instead of viewing women labourers as "emotional labour" as per the social expectation, viewing them with a female essence has boosted workforce participation of women, increasing their roles up to 30 in the management globally.<sup>10</sup> Such a shift can be seen as the initiation of a reduction in discrimination and a step towards fostering economic equity.

The theory promotes inclusivity and fluidity, particularly in the context of transgender people and people with non-binary gender identities, dissociating the concept of gender from genitals or chromosomes, which justifies the policies related to self-identification and also allows diverse identities to have legal recognition without any medical gatekeeping. National Legal Services Authority v. Union of India<sup>11</sup>, is the case that exemplifies this, as the court affirmed the rights of transgender individuals based on their self-perceived psychological identity, rather than their biological sex. This approach enhances the chances of validation to their lived experiences by reducing stigma and by providing a supportive excess to the affirming care, while upholding the mental health of the people involved.

Cultural adaptability is another strength, as the gender norms vary widely from matrilineal societies like the Khasis, granting inheritance rights primarily to women, to the contradictory patrilineal norms elsewhere. Recognising the diversity helps in forming intersectional policies having the potential to address the overlapping of caste, race and class upon each other. One such reference can be found in the Global Framework of CEDAW<sup>12</sup>, enabling tailored interventions while establishing a universal mandate of equality between the genders.

Social construct theory also endorses personal agency. The individuals can reshape their identities by rejecting the social constructs like "boys don't cry" or "girls don't ride bikes."

However, the theory ignores the biological realities and the innate differences that link testosterone to aggression or spatial skills. The Brain dimorphism persists in all cultures, connecting ovulation to various behaviours.

Gender neutral policies as unisex sports policies, risk fairness. Males and females have different physiological advantages, primarily due to the biological differences between the sexes. Evolutionary psychologists also highlight universally that sexes differ psychologically, while men prefer risk-taking roles, women are more comfortable in the role of caregivers and nurturers.

Logical incoherence is a core disadvantage of the social construct theory in the context of gender. If stereotypes are arbitrary interventions, then basing the transgender validation on them creates a vicious circle because dysphoria implies a fixed trait contradicting the constructionism of gender to the fullest. For example, pink dresses are not essentially feminine, yet the theory often relies on this connotation in its implication.

The dependency upon essentialism further weakens the theory, as in the words of a feminist philosopher, Elizabeth Grosz,<sup>13</sup> the constructionism presupposes unexamined biological raw material i.e. sex, endangering an infinite regress. Jay Prosser<sup>14</sup> further criticises it for erasing personification and reducing the identity to Judith Butler's performativity,<sup>15</sup> misread as denying physicalness.

Gender as a social construct sometimes focuses on the peripheries of culture and overlooks the universal applicability, and fails to predict the fluidity globally. A rapid increase in the identification with the other genders

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<sup>10</sup> StudyCorgi, 'The Social Construction of Gender' (2023) <https://studycorgi.com/the-social-construction-of-gender/>.

<sup>11</sup> (2014) 5 SCC 438 [para 59].

<sup>12</sup> The Convention on the Elimination of All Forms of Discrimination Against Women, adopted in 1979 and entering into force in 1981.

<sup>13</sup> Elizabeth Grosz, *Volatile Bodies: Toward a Corporeal Feminism* (Allen & Unwin, St Leonards 1994).

<sup>14</sup> Jay Prosser, *Second Skins: The Body Narratives of Transsexuality* (Columbia University Press, New York 1998).

<sup>15</sup> Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, New York 1990).

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by the enforcement of new norms somehow seems to dilute the idea of social constructivism in the context of gender.

The social constructionist theory deconstructs the oppression, but to understand the biological interplay. A hybrid approach where gender is partly constructed and partly innate might offer a more nuanced understanding and can create a more equitable foundation for the policy without any logical pitfalls. Reforms integrating the idea of self-identification with the safe, while recognising the cultural variance along with the universal implications, can be formed. The core idea should foster an inclusive society where all the agencies can thrive without erasing the basic human sexual differences.

### **Conclusion: Shift In The Transformative Legal Paradigm**

Cultural resistance and the flaws in implementation pose certain challenges in the path of gender reforms by testing the resilience of the progressive legal visions, aspiring to create gender equality. The conventional religious ideologies discard the idea of the Uniform Civil Code and use the freedom of religion given under Article 25 of the Constitution of India as a shield to uphold their personal laws, and eventually use them to reinforce patriarchy, which in turn supports the orthodox religious and cultural Norms based on a patriarchal mindset. Without any uniform legal scrutiny and due to a lack of intent, in the Executive bodies, the ideas get stalled, such as quotas for transgender individuals. Despite the NALSA judgment, which made it mandatory to provide an employment quota to transgender persons in the public sector. Ambiguous guidelines, incorrect and multiple interpretations, creating confusion in terms of understanding and untrained hiring panels further widen the gap between the law and its execution. The judicial backlog also results into delay in justice, and in the cases of gender discrimination, such delay further strengthens the patriarchy and discrimination, through hardened gender constructs. Social stigma also fuels violence, as reported by various reports of the National Crime Records Bureau, specifically, in the case of transgender individuals and vulnerable women. Polarisation also increases the hurdles and makes it difficult to break the Conservative discords. Economic constraints also implement certain ideas non-feasable for example: subsidies in the cost of Sex reassignment surgeries or extended maternity support plans, etc., are most of the time stalled due to lack of funds.

The self-identity also creates a threat to the idea of a binary family and the marital union, thereby creating a reasonable apprehension of the creation of imbalance in the Indian Society founded upon family structure.

Recent judicial activism has advanced a never-before-seen momentum through cases like: NALSA, Puttaswamy, Navtej Singh Johar, Sabarimala Case and Re Independent Thought Case,<sup>16</sup> etc. The courts have upheld gender equality by recognising the non-binary genders, expanding the idea of privacy to encompass gender autonomy, dismantling section 377 and its colonial legacy, establishing equality in religious places and upholding the relevance of consent in marital sex. The activism reflects a global shift and illustrates the capacity of the judiciary to evolve, from the strict periphery of the gender binary to a more relaxed and inclusive gender spectrum by the way of encompassing gender realities, honouring fluidity and self-identification.

Law must repose as an inclusive tool and not a patriarchal relic. Gender constructions based upon caste, class, disability and religion not only deter the gender growth, but also the development of a nation as a whole.

Gender construct needs to be unlearned and then learned through a thoughtful adaptation of the idea of facilitated, counselled and well-thought-out self-identification on a foundation of respect and the idea of inclusivity, constructed after integrating social science, can ensure reforms.

Gender justice demands a holistic transformation, with thoughtfulness in design and equity in delivery. Dismantling binaries, by affirming thoughtful constructs, and enforcing accountability, can lead India as a global

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<sup>16</sup> NALSA v. Union of India, (2014) 5 SCC 438, Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1, Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, Indian Young Lawyers Association v. State of Kerala (Sabarimala Case), (2019) 11 SCC 1, Independent Thought v. Union of India, (2017) 10 SCC 800.



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leader in the field of gender diversity, fuelling social strength. It is high time that the constitutional mandate of justice, liberty and equality are realised by the lawmakers, judiciary, and the citizens, to make all the genders strive and not only to become victims of century-old patriarchal social constructs.

A well-designed and fluid gender construct embodying the multiplicity of the genders can be an effective way to cultivate empathy, awareness and sensitisation. It will further foster respect, equality and inclusivity by representing diverse experiences and voices. This can ultimately contribute in scripting a more equal and just society.