



**CONTRADICTIONARY LAWS ON GENDER AND SEXUALITY IN INDIA – WITH HOMOSEXUALS NOW SINGLED OUT AS A THREAT**

**By Anvesha Pipariya**  
**From National Law University, Jodhpur**

Let's start with a brief description about LGBT community. LGBT community includes, Gay, lesbian, bisexual and Transgender. While gay & lesbians are people attracted towards same sex (homosexuals), bisexuals are both homosexual and heterosexual. Transgender, on the other side is a blanket term used for Eunuchs, people born with both sex characteristics; Transmen/Transwomen, people who have gender identity opposite to that of assigned sex; Transsexuals, people who desire to medically transition into opposite sex and Cross dressers, people who like to wear clothes of opposite sex.

It goes without saying that the stature of LGBT community is oppressed to the extreme. The existence of homosexuality goes back to the pre-colonial times where several texts were related to LGBT causes. Even though in many ancient hindu scripts homosexuality had been considered as a heinous offence; in Arthashastra, homosexuality is considered a minor one.<sup>1</sup> Even historic sculptures in temples of Khajuraho (Madhya Pradesh) depicts

homosexuality. Throughout Hindu and Vedic texts there are many descriptions of saints, demigods, and even the Supreme Lord transcending gender norms and manifesting multiple combinations of sex and gender.<sup>2</sup> There are several instances in ancient Indian which depicts the union of gods and goddess. But even if our ancient scripts had a mixed opinion about homosexuality, today in this 21st century people consider homosexuality as good as untouchability and transgender as the most down ridden section of the society.

It was only in 20th century, it was brought to consideration that LGBT community was discriminated on the grounds of sexuality. Few magazines like Sakhi and Bombay raised the LGBT community rights' violation issues and strengthen their voice to make them audible to the society.

But needless to say, while hanging at the edge of this intolerant society of 21st century, homosexuality and LGBT issues are still uncultured to be talked about. This community is seen as a threat and are being out casted by our society. Today when social status, casteism, regionalism and religious rights are one of the key oppressions in our society, sexuality is still considered as frivolous and awarded by ignorance. Today our society is developing in almost every corner, every field from technology to live in relationships, to single parenting, artificial fertilisation, etc but when it comes to transsexuals the society is

<sup>1</sup> Vanita & Kidwai 2001, p. 25.

<sup>2</sup> Ritiya-Prakriti: People of the Third Sex, p. 40.



unwilling to accept them as a part of the society. Sexuality rights still have a long struggle to finish to get their space in the broader human rights battle.

Legal jurisdictions have been equally disappointing by criminalizing homosexuality and not providing vivid policies to the LGBT community regarding their fundamental human rights.. Here is the evolution of LGBT movement and major events of indian judiciary on homosexuality.

1860 - Homosexual intercourse was declared "unnatural" which made it a criminal offence under Chapter 16, Section 377 of the Indian Penal Code, 1860

July 1999 - India's first LGBT pride parade in Kolkata

December 2001 - An NGO fighting for gay rights, Naz Foundation files PIL seeking legalisation of gay sex among consenting adults.

July 2009- High Court strikes down section 377, decriminalising homosexuality

December 2013- Supeme court reverses high Court's decision

### REASONS FOR BEING UNACCEPTABLE

- A "taboo "

In present times people are still not willing to discuss freely about LGBT rights, homosexuality, gender-identity, etc. and only young youths of this generation are interested in this discussion and actively take part. But a large portion of the society still is not ready to take up such issues. Indian society is tethered by it's culture, traditions, etc. thus talking about such an issue has become a Taboo in present society.

#### • Family unit

One's own family plays an important influence on a person. The expectation of the relatives and family for marriage and to have kids exerts immense pressure which often leads to commit suicide by the person.

#### • Rituals and cultures

People in the Indian society believe in rituals, customs and culture and according to which homosexuality is considered immoral. LGBT individual face social stigma and are still not completely accepted by the society.

#### • Illiteracy and lack of awareness

Lack of awareness and illiteracy plays a pivotal reason for treating LGBT community as stranger and therefore, still people are not able to understand the problems being faced by them and deny to acknowledge them as of their standard.

Nowadays, even educated folks condemn these people and are not willing to



recognize them as equals and are ill-treated.

It has to be understood by us that Transgenders, homosexuals, transsexuals, etc are no different from us, they too are humans and have feelings and should not be treated as cursed or immoral.

Every person has right to live their life in the way in which he or she wants and this right cannot be taken away by anyone including the government, parliament, judiciary as such rights are granted to every citizen by the Constitution and thus not treating LGBT people equally or not granting them same opportunities like everyone else will be an infringement of the constitution.

**MAJOR CHALLENGES:** The regime of discrimination and challenges this community has been facing through ages is endless. Few of them are as follows:

**1. Legal discrimination:  
Prevention of unnatural offences-**

Section 377 of IPC reads:

**Unnatural Offence:** 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 offence

described in this section.”<sup>3</sup>

This itself is a contradictory law and discriminates on the basis of sex and equality. Since equal rights are not given to this community. Therefore laws on criminalising homosexuality in itself are contradictory laws and are in violation of Article 14, 15 and 21

**Right to privacy to LGBT community-** the constitution does not directly provide the right to privacy as a fundamental right to LGBT community hence withholding them from freedom to choose their sexual orientation.

**Discrimination of grounds of sex:** our constitution does not allow any discrimination on the grounds of Sex. Hence the rights of LGBT cannot be violated on grounds of:

- Right to freedom
- Right to religion

<sup>3</sup> Section 377, Indian Penal Code ,1802.



Basic hygiene facilities

Educational facilities

Right to live with family

Right for equal pay

Right to equality

Right for dignity

Right to freedom of expression

Right to livelihood

**2. Societal Discrimination** - These people are discriminated in every field, at every stage in their life. Whether it is at home, work place, or any other place. They often become the victim and are abused and harassed. They are being cursed by the straight people.

**3. Discrimination at workplace** - They are not recruited for any job in any sector. People are unwilling to give them the opportunity to progress and move ahead and thus have created a hindrance in their growth and development. The society itself neither consider them as a part of the society nor is ready to accept them and give same status and opportunity to move forward. There is hardly any place in India which recruits them. There is no work place for them by which they can earn a handful sum for livelihood and therefore they left with no other option but to choose another way of earning such as prostitution,

beseeking, go in marriages and ask for money, etc.

**4. Exile from Family -**

**5. Fear of coming out** - Many individuals from LGBT community restrain themselves to disclose their identity and some even conceal their sexuality at home from friends and family due to the fear that they might be disown by their family or that people in surrounding might harm them or segregate them. Thus many refuse to come out of the closet to disclose their identity. They fear to accept as who they are in public.

**6. Mental Health:**

#### A STEP FOR DEVELOPMENT

##### Political Representation

In 2002, Kali became the first hijra person to stand for elections in Bihar. She was elected as ward councillor to the Patna Municipal Corporation.

In Chhattisgarh, Madhu Bai Kinnar made history too, after being elected as the first trans mayor of Raigarh.

- **Pride Marches**

The first ever Pride Marches in New Delhi and Mumbai were organised simultaneously in 2008. The two metropolitan cities saw a large and encouraging turn out, and it set the pace for the years to come, as Pride only grew bigger and brighter.



In July 2016, The first Gurgaon Pride March was held bringing visibility and encouragement to Millennium City.

- **A ray of hope**

In 2001, the Delhi High Court passes a landmark judgement on July 2, 2010, by striking down the Section 377 of the IPC and declared it unconstitutional. In effect, it granted equal rights and was one of the most euphoric moments for LGBTQ Indians.

- **First Transgender Principal**

Manabi Bandhyapadhyay became the first openly transgender college principal in 2015. She held the post at Krishnanagar Women's College.

- **Inclusion at work place**

In May 2017, the Kochi Metro made the bold decision to hire 23 transgender women. They even released a moving ad campaign featuring these employees.

- **A public platform.**

In 2016 , Anwesh Kumar Sahoo became Mr. Gay World India.

- **Literacy for Transgenders**

The Kerala State Literacy Mission, launched at the start of June 2017, said it will hold classes for transgender school drop-outs in Kollam, Kozhikode, Malappuram, Thrissur, Kollam, Kozhikode, Kottayam and Thiruvananthapuram thus a step to support them for education.

- **Film- Industry**

Many movies are being made which touch the issue , problems faced by these people and are a medium for creating mass awareness. Movie like Aligarg, Dostana ,

The Journey (2004 film), My Brother Nikhil , The Pink, etc are few movies which are helping in creating mass awareness and are an initiate to discuss about homosexuality, transgenders on an open platform and publically.

### ACTS TO BE DONE FOR THEIR VISIBILITY

The criminal justice system needs an overhaul in this direction as well. Reforms are needed to change the situation, one should understand every person must have the right to decide their gender expression and identity, including transsexuals, transgenders, transvestites, and *hijras*. They should also have the right to freely express their gender identity. This includes the demand for *hijras* (as they are called) to be considered female as well as a third sex. There should be a special legal protection against this form of discrimination inflicted by both state and civil society which is very akin to the offence of practicing untouchability.

Protection and safety should be ensured prevent rape in police custody and in jail. The police at all levels should undergo sensitization workshops by human rights groups/queer groups in order to break down their social prejudices and to train them to accord *hijras* and *kothis* the same courteous and humane treatment as they should towards the general public.

A comprehensive sex-education program should be included as part of the school curricula that alters the heterosexist bias in



education and provides judgement-free information and fosters a liberal outlook with regard to matters of sexuality, including orientation, identity and behavior of all sexualities. The need to answer a psychological question is felt here, if we have prisoner rights for both men and women then, why not for the 'hijras', as we refer to them?

### A RAY OF HOPE

With passage of time and continuous petitions the judiciary realised the need to review its decision of setting aside the Delhi High Court's decision of legalising Section 377 of IPC.

Also, in the landmark judgment by the Supreme Court of India the transgender people were granted the status of a "third gender" category, recognising them as a socially and economically disadvantaged class. "*It is the right of every human being to choose their gender*", the detailed judgment stated, thus granting rights to those who self-identify as neither male nor female. By this decision the apex court has given a ray of hope to LGBT community by allowing them to choose their gender which will be recognised even for housing, ration cards, etc. By this step SC has encouraged justice and visibility to this community.

Due to efforts of the LGBT community and activists, recently SC in its historic ruling confirming the right of the country's LGBT people to express their sexuality without discrimination.

The Supreme Court's verdict declaring the right to privacy to be a fundamental right has led a hope for the gay and LGBT community that was dealt a blow by the same court when it criminalised sex between two consenting adults of same sex and brought it under the ambit of Section 377. But in this landmark judgement Judges ruled that sexual orientation is covered under clauses in the Indian Constitution that relate to liberty. The ruling lead a way for discriminatory practices against LGBT people to be challenged in the courts. The apex court concluded that privacy includes at its core the preservation of personal intimacies and that sexual orientation is an essential attribute of privacy. The court held that privacy and protection of sexual orientation lie at the core of the fundamental rights under Articles 14, 15 and 21 of the Constitution.

Discrimination against an individual on the basis of sexual orientation is intensely offensive to the self-esteem and character of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform.

Though from last few years the society is becoming aware about LGBT people and is understanding the challenges they face every day but this issue cannot be solved until the whole society gets ready to accept the LGBT community and treat them equally. No government schemes, NGOs efforts will be fruitful without the cooperation of the society. Therefore, to



give these people their rights it is necessary for all of us to come together and make this world a better and a habitable place, where anyone can be anything , can do anything irrespective of their gender, sexual orientation, etc. only then these small efforts would yield the effective results for everyone.

