



GENDER IDENTITY OF LGBT AND THEIR POSITION IN INDIA

By *Ragini Umrao*

From *Indian Institute of Technology, Kharagpur*

INTRODUCTION

In India, Lesbian, gay, bisexual, transgender and intersex(LGBTI) face legal and social difficulties from non-LGBTI persons. In India, LGBTI peoples have gained more and more tolerance, especially in metropolitan cities. Apart from this most of the LGBTI people remain closeted, fearing discrimination from their families in India, they might see homosexuality as shameful. In India Data has shown honor killings, attacks, beatings of members of the LGBTI community are not uncommon. LGBTI people face discrimination and ignorance from rural areas as well many of urban areas, in these areas society doesn't accept them and forced for marriage with their opposite sex. They see homosexuality as a sin. Sexual activity between opposite sex people is legal, but until recently sexual activities between the same-sex couple was considered as a crime but now on 6 September 2018, the Supreme court of India decriminalized the homosexuality and declared section 377 of the Indian penal code unconstitutional.

Since 2014, in India transgender peoples have been permitted to change their gender without sex reassignment surgery, have right under the constitution that they can register themselves under the third gender. In India some of the States protect hijras, states provide welfare benefits, pension schemes,

housing programmes, free surgeries in government hospitals and other vital programmes for them. Data are showing that in India approximately 4.8 million transgender people are living¹.

HISTORY OF LGBTI

The Khajuraho temples in India famous for their erotic's sculpture, contain various depictions of homosexual activities. Historians have argued that pre-colonial Indian society has not criminalized homosexuality nor did it consider this relationship as a sinful or immoral. Hijra as a third gender acknowledged by the Hindus. In the MAHABHARAT many characters had changed their gender such as Shikhanall etc. the Kama-sutra which has written in the Sanskrit language based on human sexual behavior, it contains the word TRITIYA- PRAKRITI to define men with homosexual desire and describe practices in full details. Kama-sutra also portrays lesbians such as Svairini who engage in lovemaking with other women and transgender people. In India homosexual relationship came into existence through section 377 of the Indian penal code by the British, after the independence of India, which stood for more than 70 years².

The [British Raj](#) criminalized [anal sex](#) (heterosexuals) and [oral sex](#) (homosexuals) under [Section 377 of the IPC, 1860, Code](#) came into force on 1861. If any person to voluntarily has carnal intercourse against the order of nature, he or

¹ Abraham, Rohan (30 November 2017). "[All you need to know about the Transgender Persons Bill, 2016](#)". *The Hindu*.

² "[India decriminalizes gay sex in a landmark verdict](#)." *Al Jazeera*. 6 September 2018.



she committed the offense, and they will be liable for punishment under section 377.

Protection against Discrimination under Indian constitution³

Article 15 of the Indian Constitution talks about Prohibition of discrimination on the only grounds of sex, race, caste, religion, place of birth;

(1) The State shall not discriminate to any citizen on the grounds of religion, caste, sex, race, place of birth or any of them.

(2) No citizen shall, on grounds only of race, caste, religion, sex, place of birth or any of them, be subject to any liability, disability, restriction or condition about-

(a) access to shops, hotels, public restaurants, and palaces of public entertainment; or

(b) The State maintained wholly or partly out of funds or dedicated to the use of the general public such as wells, bathing ghats, tanks, roads and places of public resort.

If any persons facing discrimination because of their sexual orientation, can challenge and seek the remedy by the court of law.

LGBTI Position in Defense Service

LGBTI people are banned from joining the services in Indian Army Forces⁴, Indian Navy, Indian Force. In December 2018, MP [Jagdambika Pal](#) who is the member of Bhartiya Janata Party(BJP), introduced a bill in Parliament for amendment of the Army Act 1950, the Navy Act, 1957 and the Air

Force Act 1950 and allowed LGBTI people to serve in the Armed Forces⁵.

Recognition of same-sex relationships by Court

Naz Foundation vs. GOVT. of Delhi⁶:

In 2009, the Delhi High Court found that section 377 of Indian penal code and other legal restrictions and prohibitions against private, adult, consensual, and non-commercial same-sex activities to be a direct violation of Fundamental rights which have given by the Indian Constitution of law. Section 377 of IPC talks about "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be liable for punishment 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," with this added explanation that: "Penetration is sufficient to constitute the carnal intercourse necessary to the offense described in this section 377 under Indian Penal Code⁷."

In India, there have been many incidents of sexual harassment of LGBTI groups by authorities under the law. The Ministry of Home Affairs was expressed their opinion on LGBTI On 23 February 2012, and opposed to the decriminalization of homosexual activity, stating that in India, homosexuality is seen as sinful and

³ ["Article 15 in The Constitution Of India 1949". indiankanoon.org.](#)

⁴ Dutta, Amrita (7 September 2018). ["Indian Army is worried now that men can legally have sex with other men."The Print.](#)

⁵ ["Parliament winter session Bills seek ban on non-veg food at official events, rights to LGBT to serve in armed forces".The New Indian Express.](#) 28 December 2018.

⁶ 160 Delhi Law Times 277

⁷ ["India: The Indian Penal Code". www.wipo.int.](#) World Intellectual Property Organization.



immoral⁸. The Central Government reversed its decision on 28 February 2012 and saying that there was no legal error in decriminalizing homosexual activity. This decision was given by the two judges of the Supreme court.

Human Rights (groups protects the rights of human) given expressed concerns that the Supreme court ruling on LGBT would render same-sex couples vulnerable to police harassment and asserting that the supreme court decision is a disappointing setback for human dignity, non-discrimination and the fundamental rights to privacy⁹.

The Naz Foundation said that it would file a petition for reviewing the decision of courts. The Supreme court has dismissed the petition for review on section 377 of Indian penal code filed by Naz Foundation and Central Government and several others on 28 January 2014¹⁰. the supreme court bench said and claiming that "While reading down Section 377 of IPC, the High Court has overlooked that a minuscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgender people and in the more than 150 years past, less than 200 persons have been prosecuted for committing offense under Section 377 of IPC, and it cannot be made a great basis for

declaring that Section ultra vires Articles 14, 15 and 21 of the Indian constitution¹¹." Shashi Tharoor who is a member of the Indian National Congress party introduced a bill in parliament for the repeal of section 377 of Indian Penal Code, but this bill had rejected in the house¹². The Supreme court has decided to review the section 377 which states that homosexual activities are a crime on 2 February 2016.

In 2017, in the case of **K.S. puttaswamy vs. state of Tamilnadu**¹³. The Supreme Court has decided unanimously that the right to individual privacy is an intrinsic and fundamental right under the Indian Constitution. The Court followed this judgment and ruled that a person's sexual orientation is a privacy issue, this decision giving hopes to LGBTI people as well as activists that the Supreme Court would soon strike down Section 377. After that in January 2018, the Supreme Court agreed to refer the issue on Section 377's validity to a larger bench and heard several petitions. In response to the court's request, the Central Government announced that it would not oppose the petitions, and they would leave the case "to the wisdom of the court"¹⁴. A supreme court hearing began on 10 July

⁸Mahapatra, Dhananjay (23 February 2012). "[Centre opposes decriminalization of homosexuality in SC.](#)" *Economic Times*. [Times Internet](#). Retrieved 9 September 2014

⁹ IANS (2013-12-11). "[Apex court ruling disappointing: rights body.](#)" *Business Standard India*. Retrieved 2017-09-14.

¹⁰ "[Supreme Court refuses to overrule its Verdict on Section 377 and Homosexuality](#)". IANS. *Biharprabha News*. Retrieved 28 January 2014.

¹¹ J. Venkatesan (11 December 2013). "[Supreme Court sets aside Delhi HC verdict decriminalizing gay sex.](#)" *The Hindu*. Chennai, India. Retrieved 2013-12-12

¹² "[India parliament blocks MP's bill to decriminalize gay sex.](#)"

¹³ WRIT PETITION (CIVIL) NO 494 OF 2012

¹⁴ "[India on the brink of biggest gay rights victory as Supreme Court prepares to rule on gay sex ban.](#)" *Independent.co.uk*. 14 July 2018.



2018 with a verdict expected before October 2018¹⁵.

After that in the case of **Navtej Singh Jauhar Vs. Union of India**-The petition has filed by dancer Navtej Jauhar, journalist Sunil Mehra, Chef Ritu Dalmia, etc. for declaring the section 377 as illegal and unconstitutional. On 6 September 2018, the Supreme Court decided its verdict. The Court unanimously gave judgment that Section 377 is unconstitutional as it is infringing the fundamental rights under Indian constitution of autonomy, intimacy, and identity. Thus court legalizes homosexuality in India¹⁶. The Court has explicitly overturned its 2013 judgment.

Here I have written important para of judgment-

1-Criminalizing carnal intercourse is irrational, arbitrary and manifestly unconstitutional. By Chief Justice [Dipak Mishra](#)¹⁷.

2-History owes an apology to these LGBTI people and their families. Homosexuality is part of human sexuality. They have the right to dignity, and they are free from any discrimination. sexual consensual acts of adults are allowed for the LGBTI community by Justice [Indu Malhotra](#)

3-It is challenging to decide the right a wrong by history. But we can establish a course for our future. This case had involved much more than decriminalizing

homosexuality. It is about peoples wanting to live with freedom and dignity by Justice [D.Y. Chandrachud](#)

Furthermore, it stated that any discrimination based on sexual orientation is a violation of the constitution of India¹⁸. Sexual orientation is biological phenomena which are natural and inherent in an individual and controlled by biological and neurological factors. The science on sexuality has theorized that an individual exerts little or no control over who he/she gets attracted to. Any discrimination by one sexual orientation would entail a violation of the fundamental right of freedom of expression under the constitution of India.

The Supreme Court had given direction the Government of India to take all necessary measures to properly broadcast the fact among the public that homosexuality is not a criminal offense, and also create public awareness and to give the police force periodic training to sensitize them about the issue which happens with LGBTI people. The supreme court judgment also included an inbuilt safeguard to ensure that it cannot be revoked again under the "Doctrine of Progressive Realization of Rights."

Some of the Legal experts have requested the Government of India to pass legislation and makes laws to protect their rights if same-sex couples want to marry they can no one can restrain from this, adoption by

¹⁵ ["SC to hear petition against Section 377 next week"](#). *www.aninews.in*. Asian News International. 6 July 2018.

¹⁶ ["Section 377 verdict: Here are the highlights"](#). *The Indian Express*. 6 September 2018

¹⁷ ["India court legalizes gay sex in landmark ruling"](#). *BBC News*. 6 September 2018

¹⁸ Misra, Dipak. ["Navtej Singh Johar and Ors. Vs. Union Of India and Ministry Of Law and Justice"](#) (PDF). *The Hindu*. p. 160. Retrieved 6 September 2018



same-sex couples (if they're going to adopt a child they can take) and inheritance rights¹⁹.

Non-Consensual sex (rape), Sex with minors and bestiality remain criminal offenses under section 377 of Indian Penal Code. The Supreme Court judgment may not extend to the state of [Jammu and Kashmir](#), because Jammu and Kashmir are governed by its criminal law, the [Ranbir Penal Code](#)²⁰.

LGBTI Position in States

States of [Tamil Nadu](#) and [Kerala](#) both was the first [Indian states](#) to introduced a transgender welfare policy for LGBTI Community. Transgender peoples can access free [sex reassignment surgery](#) in government hospitals, free housing program, various citizenship documents²¹. Admission in government colleges with a full scholarship for higher studies, alternative sources of livelihood through the formation of self-help groups and initiating income-generation programmers by transgender welfare policy, the state of Tamil Nadu also the first state to establish a transgender welfare board with transgender community representatives. The state of Kerala has started implementing free surgery in government hospitals In 2016. The state of [Odisha](#) has enacted welfare benefits for transgender peoples, giving them the same benefits as those living below the poverty

¹⁹ Das, Shaswati (7 September 2018). "[Historical verdict holds hope for same-sex marriages, adoption.](#)" *Livemint.com*.

²⁰ Singh, Dalip; Rautray, Samanwaya (10 September 2018). "[High Court's 1995 ruling offers hope to Jammu and Kashmir's LGBT community.](#)" *The Economic Times*.

²¹ Devasia, TK. "[Why Kerala's free sex-change surgeries will offer a new lifeline for the transgender community.](#)" *Scroll.in*. Retrieved 2016-03-19

lineIn July 2016. [Drinking Water and Sanitation](#) Ministry instructed and stated that and allow to transgender people to use the public toilet of their choice at any place On April 2017²².

On October 2017, the [Karnataka](#) Government issued the "State Policy for Transgender, 2017", raised awareness of transgender people among the public within all educational institutions in the state with the aim of Educational institutions in the state will address issues of violence, abuse, and discrimination against transgender people²³.

On 28 November 2017 [N. Chandrababu Naidu](#), the [Chief Minister](#) of [Andhra Pradesh](#), N. Chandrababu Naidu has announced the enactment of pension plans for transgender people²⁴. On 16 December 2017, the Andhra Pradesh Cabinet has passed the policy. According to this policy, the State Government will provide an amount of 1500 per month to every transgender person above the age of 18 for social security pensions. Also, the Government will construct individual toilets in public places, like malls and cinema halls, for transgender people²⁵.

²² Sharma, Kuheena (6 April 2017). "[Sanitation ministry allows transgender people to use public toilets, wants them recognized as equal citizens.](#)" *India Today*. New Delhi. Retrieved 2 November 2017.

²³ [Transgender policy cleared by Karnataka cabinet](#)". *The Indian Express*. Press Trust of India. 27 October 2017.

²⁴ ANI (2017-11-28). "[CM Naidu announces pension scheme for state's transgenders.](#)" *ABP Live*.

²⁵ Apparasu, Srinivasa Rao (17 December 2017). "[Transgenders to get pension, ration and more in Andhra; govt clears welfare policy.](#)" *Hindustan Times*.



In January 2018, the Finance Minister of Kashmir had introduced a proposal to Legislative Assembly of the Jammu and Kashmir, that would grant free life and medical insurance for transgender people, and a monthly sustenance pension for those Transgender who are 60+ and registered with the Social Welfare Department. Transgender activists have criticized aspects of the bill, including its requirement to establish medical boards to issue "transgender certificates"²⁶."

SURVEY DATA: in 2016 survey question asked to the public-

Should same-sex marriage be legal?

Yes (35%)

Against (35%)

Don't know (30%)

Indian public little bit unsure about the LGBTI community, in Indian public opinion regarding LGBTI rights is complicated. According to the poll conducted by International Lesbian, Gay, Bisexual, Trans, and Intersex Association, in the year of 2016 that 35% people in India were in favor of legalizing the same-sex marriage, 35% were people opposed, and rest of the public did not know the answer of this issue. And another survey had done by the Varkey Foundation found that the support for same-sex marriage was higher among the 18 to 21 years old ²⁷. According to 2017 poll conducted by international Lesbian, Gay, Bisexual, Transgender and Intersex Association, 58% Indian were agreed that Gay, Lesbian, and Bisexual people should

also enjoy the same rights as straight people, while 30% Indian disagreed²⁸.

CONCLUSION

LGBTI people, for me, are as ordinary as any other homo sapiens. They have every right to live normally and every right to love. It's shocking how our society reacts to someone being sexually different from themselves. They state it as being 'abnormal.' And it's genuinely heartbreaking how these people are treated by society. LGBTI still fighting for their rights. Gopi Shankar Madurai was youngest and also the first openly intersex and genderqueer candidate in the election, contesting a seat in the state of Tamil Nadu Legislative Assembly election, 2016.

The All India Hijra Kalyan Sabha had fought for over a decade to get their voting rights. Finally, they got their rights in 1994. Here are several examples- Kali stood for office in Patna under the then Judicial Reform Party in the year of 1996. Also, Munni ran in the elections as well for South Mumbai that year and They both lost. Two transgender people were appointed in Legal Services Authority as panel members for the local Lok Adalat by the Kolhapur District on 12 February 2017. Members of the Kolhapur legal service authority have stated: "Our main achievement is the inclusion of transgenders as a panelist in Lok Adalat. As per the judgment which had given by the Supreme Court's, transgenders must be recognized as the third gender in our country.

²⁶ Jammu and Kashmir: Transgender community welcomes steps taken by Mehbooba Mufti government." 12 January 2018.

²⁷ "Young people and free speech." The Economist. 15 February 2017.

²⁸ "ILGA-RIWI Global attitudes survey." *igla.org*. The International Lesbian, Gay, Bisexual, Trans and Intersex Association. October 2017



In July 2017, [Joyita Mondal](#) was appointed in Lok Adalat in [Islampur](#), [who](#) became [the](#) first transgender judge in West Bengal's. Swati Bidham Baruah first transgender who became the judge in [Assam](#) In 2018. Now law, as well as Government, has a high authority to support such things. Some countries do favor same-sex marriage while others don't.

Since the supreme court has recognized the rights of LGBTI, it is a move towards a liberal society in the modern era. However, there is a reluctance in the community towards their acceptability.

