

## CHAPTER 21

### SOCIO-LEGAL INCLUSION OF LGBTQ RIGHTS-ISSUES AND CHALLENGES

-Dr. Parmila Dhiman, Asst Prof., KPMSOL, NMIMS

-Ms. Pinny Pathak, Asst. Prof., KES' Sh.J.H.Patel Law College

#### ABSTRACT

The 6th day of September, 2018 marks a historic moment by bestowing the rights and identity to the LGBT Community. The honourable supreme court on this historic day for the very first time recognised the fundamental rights of LGBTQ community by decriminalising section 377 of Indian Penal Code<sup>[1]</sup> but even after more than three years homosexuality and queer identities are not fully accepted by their families, homes and schools. It will be difficult for members of the Indian orthodox community to embrace LGBT people and their sexual orientation. Transgender persons in India face an uphill battle because of the difficulty of publicly expressing their gender identity, despite the fact that this is a fundamental right for every Indian citizen.

The Act recognising and protecting the rights of this community was introduced in the parliament which got its presidential assent in 2019 and got enforced on 10th January 2020 as *The Transgender Persons (Protection of Rights) Act, 2019*. Unfortunately the Central Government and State Governments seems failed to provide social security and protection to this community. The rights and struggles of the LGBTQ community are some issues which are examined in the research paper followed by the domestic and the international legal framework for protecting the LGBTQ community with concluding remarks and recommendations.

#### KEYWORDS

Queer, LGBT, Transgender Persons (Protection of Rights) Act 2019, Socio-Economic challenges, Equality, Discrimination, Societal acceptance, Homosexuality

#### STATEMENT OF PROBLEM

*“I am what I am, so take me as I am” – Johann Wolfgang von Goethe*

It was very well said by the renowned English writer cum poet Shakespeare once while playing his role in a drama that what is in the name, if we call a rose flower by any other name it won't change it and would still give the same fragrance and these lines convey a very impressive and substantial message that there is nothing in the name but what matters is the basic qualities of a person. Similarly, no human being shall be discriminated or denied the human rights as well as the fundamental rights on the basis of their

sexuality and gender preferences.[\[2\]](#) The fundamental ideology of human rights is to treat all human beings with dignity. Any type of discrimination on any basis is the violation of the natural principle of morality and equality as well as it violates the spirit of the Preamble which is a key to Indian Constitution and article 15 of our Indian Constitution which ensures justice and equality to all its citizens socially, economically and politically.[\[3\]](#)

Many movements such as the Gay Pride parades have taken place in metropolitan cities on 29 July, 2008 which witnessed that the Indian youth largely in number has started accepting LGBTQ identities open heartedly more than ever since, but they are still constantly struggling within their own homes, families and schools for being accepted for their sexuality and for the freedom to express their gender preferences in a diverse country like India.[\[4\]](#)

As per 2011 census report, there are over four lakh eighty thousand transgender people in India and they consist one of the most depressed and vulnerable sections of the society and within the LGBTQ community as well. Over the period the LGBTQ community people have experienced a lot of discrimination by the society at large as well as by the State authorities. The emotional anguish and physical abuse that transgender people endure is never fully appreciated by the general public. Since time immemorial Transgender people have been discriminated from the masses, criminalised and have faced criminal threats, forced to work on streets, pushed into prostitution, and denied the access to social welfare including health, education and employment. They have been exploited sexually as well as physically and also many people from the community have been killed due to their gender choices.[\[5\]](#)

## **UNDERSTANDING THE TERMS - SEX, GENDER, & GENDER IDENTITY**

The biological gender that an individual is assigned at birth is the only aspect to know the gender whether it's a boy or a girl. It is not always possible to determine a person's identity based on its biological or ascribed sex. To understand this concept one should know the difference between these three terms called sex, gender and gender identity. In first instance all these terms look common so people easily get confused with these terms but when they are explained and discussed they all are entirely different from one another.[\[6\]](#)

- A human is tagged, with a label of male or female as soon as it gets birth, by a medical professional, which is based on the chromosomes that person possesses and the genitals that person is born with. Sex is a label that identifies a person as being either male or female. It will be included on his or her certificate of birth.
- Gender isn't as simple as the word "Sex." It is considered as a status of a person in the society and his role as a human being in the society. It's a set of expectations or can be said a set of social rules made by the society for everyone to behave in the society being a part of it as a male or female. Every culture has some basic rules and standards about how men and women should act, which are usually based on their gender. But it has less to do with body parts and more to do with how a person should act because of their sex.

- Whereas gender identity refers to how a person identifies themselves on the inside and how they display their gender outside through things like clothes, behaviour, and their own personal look. It is a sentiment or sensation that manifests itself at a very young age in a person's life.

## ‘GENDER’

A person's biological sex is only one aspect of their gender, which is a more expansive and nuanced concept. The concept of gender encompasses gender roles, which is more likely expected by the society from the people regarding their behaviours, ideas, and qualities that are associated with their ascribed sex. Consider, for instance, ideas regarding the appropriate ways for men and women to act, dress, and interact with one another in the culture. Girl and boy, man and woman, each signify a different social position in addition to their assigned roles in the legal system.

It is easy to get confused with the terms 'sex' and 'gender'. One should just need to understand that the biological or assigned sex is something related to the chromosomes, biology and anatomy whereas the term 'Gender' is society's assumptions and outlook about how a man or a woman must act in the society as a part of it.[\[7\]](#)

## ‘GENDER IDENTITY’

When a person has some feelings inside and the way he expresses those feelings is the 'Gender identity'. The way one wears the Cloths or how it appears or behaves in the society shows the one's gender identity.

The vast majority of society or people have the perception that are either man or a woman. Some people have the experience of being a feminine man, while others have the experience of being a masculine female. Those individuals who do not identify with either gender may want to be referred to as "transgender", "queer", "gender variant," or "gendesr fluid." The feelings about a gender identity begins earliest at the age of 2 or 3.[\[8\]](#) Some people are referred to as "Cisgender", since their biological sex and gender identification are same. Meanwhile, the people who don't identify with their biological sex i.e. when a person's biological sex is male but their preferred gender is female or vice versa are described as "Transgender" or trans people.[\[9\]](#)

## Meaning of LGBTQ+[\[10\]](#)

The term ‘LGBTQ+’ is not a single term but has different communities of genders in it. It is used to denote the various sections of people of the society. In the term LGBTQ+, the first letter stands for **Lesbian** which means a girl or female who is a homosexual and is attracted sexually as well as romantically to same sex i.e. a woman. Next letter denotes a **Gay** community where a man is a homosexual and is attracted sexually and

romantically to same sex i.e. a man. The third letter represents in the term denotes **Bisexual** which means a person of either sex is attracted sexually to both the sex i.e. male and female both. Further is a **Transgender** is a person whose biological sex is different from his/her gender identity means whose biological sex is a male but he likes to be female and prefer to get dressed up like a female and vice versa. The last letter Q denotes **Queer** and these are all those people whose sexual and gender identities are neither heterosexual nor cisgender which is opposite of transgender. Queer is considered as a whole community in itself, who like to be called by the pronouns instead of being called as male or female. The symbol '+' in the term 'LGBTQ+' signifies that the term is not restricted to these above mentioned sections only but it also includes many more categories like pansexual, intersex, asexual etc.

## **EVOLUTION OF THE 'LGBTQ' COMMUNITY**

Till 18th century, these two terms 'gender' and 'sex' were used as similar terms based on male-female specific binary and till then the only way to determine the gender of a person was the person's biological birth sex but then in 1920's many researchers started studying the sex, gender and gender identities. one of the many famous researchers a German sexologist Magnus Hirschfeld came up with new concept of sexuality and gender identity. He then published his work explaining the difference between the homosexuality and a transgender for the first time.[\[11\]](#)

Before the 1950s, there was no study done concerning gender and gender identity except some of the psychologists such as Jerome Kagan and John Money who believed that the gender of a human is determined only on the basis sex assigned as male or female at the time of its birth and the identification of their gender is the role they have to perform as a male or female in the society which is necessary for possessing a secure sense of self and for the well-being of the society in which they live.[\[12\]](#)

Later in 1960's to 1980's many researchers such Richard Green, Robert Stoller, Harry Benjamin, and Sandra Bem came up with many more different concepts and the theories of gender and gender identities. Sandra Bem argued and explained how societies pressure or expectations from a human being performing gender roles as a male or female in the society is promoting negative adjustments rather than making it positive which would further bring inequalities among the people of the society. Whereas, Benjamin, Stoller, and Green believed that there is more of biological, rather than psychological nature responsible for incongruence between a person's assigned sex at birth and its gender identity. They furthered with their studies and went on to pioneer the establishment of gender identity clinics, as well as gender-related medical and surgical treatments.[\[13\]](#) Hence, it is proved by many researchers that the sexuality and the gender identity is not decided only on the basis of assigned birth sex but it can be determined even by the person's feelings and belief of being one self in the society without any assumptions and expectations of the people expecting them to behave in a prescribed manner restricting them just to be a man or a woman. [\[14\]](#)

## **LEGISLATIONS DECLARED 'EUNUCHS' CRIMINALS**

In India, it was not only the section 377 of Indian Penal Code [15] which was violating the fundamental rights of the LGBTQ community but there were many rigid, violative and derogatory legislations passed by the Britishers in the country discriminating the people on the basis of their gender identity. Under the Britishers laws the transgenders and intersex was criminalised and they were termed as 'Eunuchs'. Later they passed an amendment in 'The Criminal Tribes Act,1873' which was applied specifically to the 'Eunuchs' in the year 1897 to bring them in the category of the criminals who are pre-assumed to be the criminals for any crime happens in the society.[16] The 'Eunuchs' under this law was defined as the people who being a male sex has accepted themselves or declared as impotent medically and local government required to maintain a register of the names and the addresses of all these eunuchs who were assumed the suspects of committing crimes like kidnapping or castrating young children or of committing offences under section 377 of IPC or any other crimes under such provisions"[17]

In 1949, The Criminal Tribes Act, got repealed, but some other legislations made by Britishers against Transgenders were still prevailing in the society like 'Telangana Eunuchs Act', which was enacted in 1919 and was having exactly the same provisions to keep an eye on the activities of transgender people to hold a control on them. Under Section 4[18] of the said Act, the transgenders could be arrested without any warrant if they are seen being dressed up not belonging to their sex.[19] Similar provisions were also incorporated in the, Karnataka Police Act 1963 where under Section 36A[20] the Eunuchs were surveillance and assumed as criminals. All these legislations were mostly inspired by laws and ordinances of the United states making the people criminals appearing dressed up not belonging to their respective sex.[21]

Despite of many such illegal legislations and provisions making transgenders criminals no such initiative or any mass movement took place in the country opposing such laws. Though from 90's onwards the Human rights activists including Transgender activists were very active and enthusiastic to highlight LGBTQ issues in various cities of the country but till then they never united to initiate a mass movement for LGBTQ rights, also never thought to oppose such arbitrary laws including section 377 of Indian Penal Code.

### **DECRIMINALISATION OF SECTION 377- A long battle for the rights**

The battle for the rights of LGBTQ community initiated in the year 1994 for the first time when an activist group called *AIDS Bhedbhav Virodhi Andolan* which was working on HIV/AIDS challenged section 377 as violative of constitutional rights but unfortunately it couldn't make through. Then the real legal tussle for the protection of LGBTQ rights initiated in the year 2001 when a petition was filed in Delhi High Court [22] by the Naaz Foundation, which was working exclusively with a Gay community, challenging the validity of the section 377 of IPC. The said petition filed by the Naaz NGO was the outcome of the police raid in Lucknow where many innocent people were got arrested by the police unreasonably for distributing condoms and other materials as a part of their HIV health works, on the grounds of suspected homosexuality.

When the said PIL was filed in 2001 challenging Section 377, the LGBTI community and activism never thought of embracing any legal action and use of the law within their social work. Even the people from the transgender community too criticised the action taken and raised concerns that the aim of the petition is to achieve social transformation and not to get conflicted with the laws as they believed that the laws and litigation have very limited effect. Many of the members, transgenders and gender minorities were scared of the fact that if they get conflicted with the laws and officials they would be harassed sexually and mentally and also the nation and the Higher courts would not support them. Then in 2004, the fear of many gender minorities and transgender turned into real when the Delhi High Court refused to consider the petition lacking Locus Standi. But, thereafter, in the year 2006, the petitioners appealed to the Apex Court where the court ordered the Delhi High Court to take the petition back and treat it as a PIL and decide on it.[\[23\]](#)

At last, in 2009, Delhi High Court in the case before [\[24\]](#) held that Section 377 of IPC is unconstitutional and violates the fundamental rights of LGBTQ community. Court also said that section 377 of IPC imposes unreasonable restrictions over two major people consensus on having sexual relations even privately. Thus, imposing such restriction to a certain group of a people is a massive violation of articles 14 ensuring Right to equality, Article 15, non-discrimination, Article 19, Right to speech and Article 21 which guarantees Right to life. The judgement in Naaz Foundation case brought a big relief and happiness to the sexual and gender minorities across the nation. Contrary the religious leaders condemned it and declare it and discouraged the decision [\[25\]](#). Thereafter in 2013 the Supreme Court over-ruled the judgement pronounced by the Delhi High Court in case of *Suresh Koushal v. Union of India*[\[26\]](#) and held that Section 377 is a valid provision which cannot be repealed and it was left with the Parliament to take all such aspects into consideration and decide on decriminalization of homosexuality. [\[27\]](#)

Once again, gays are prosecuted as criminals for engaging in consenting sexual acts after the 2013 verdict of the Delhi High Court was over-ruled by the Apex Court in Suresh Kumar Koushal Case. When prominent Indians across the country including *hotelier Keshav Suri, actress Ritu Dalmia, and dancer Navtej Singh Johar*, among many others, joined and questioned the validity of Section 377 of the IPC in a petition to the Supreme Court, an outpouring of support for LGBT rights emerged across the country. After hearing multiple petitions on the matter, the Supreme Court agreed to forward it to a larger bench. Additionally, the government has declared that it will not intervene in the dispute and will allow the Supreme Court to make a decision based on the law as it sees fit. Petitioners claimed that Section 377 went against their constitutional protections against invasion of privacy, stifling of free speech, discrimination, and more.[\[28\]](#)

Subsequently in 2014, the Supreme Court in its “NALSA” judgement [\[29\]](#) recognised the identity of transgenders, and legally declared them as ‘*Third Gender*’ and the most noticeable and appreciable part of this judgment was granting a ‘Right of self-determination’ to LGBTQ community with regards to their gender preferences.

Then in the year 2017, another landmark judgment was passed by the Supreme Court of India recognising the 'Right to privacy' in *Puttuswamy v. UOI* [30] where the Supreme Court held and interpreted that the Right to life (Article 21), Equality and Fundamental Freedoms include '*Right to Privacy*' which specifically includes the right to sexual orientation and gender identity and a right to have sexual relations of one's own choice without any discrimination.[31]

Finally, in September 2018 in *Navtej Johar v. Union of India*[32] a long awaited judgement was passed by the supreme court where the section 377 of IPC was struck down decriminalising all consensual sex amongst adults including all the genders.[33] a five- judge bench headed by the chief justice of India established a precedent by over ruling the the Kushal judgement. J. Chandrachud, recognized that Section 377 was not only destructive of the identities of a group of people but has also pushed off such people to the corner and held that every human of any gender as a citizen of India are equal and enjoy all the fundamental rights and the protection fully in the country.[34]

## **THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019- SHORTCOMINGS & LOOPHOLES**

The Transgender Persons (Protection of Rights) Act, 2019, aims to cover each facet of the rights of the transgender community, promising them of a better future, equality and justice in the eyes of law and society. However, a perusal of the Act, demonstrates grave problems which will pose difficulty for a citizen to comply and abide with. Following enumerated are the shortcomings: -

- The Act focuses majorly upon the “Identity” and on the ways to “identify a transgender”. The Act puts forward of making application and attaining Identity Card.
- The concept of introducing Identity Card or having one is itself inappropriate and degrading because: -
  - One can claim no benefit of it apart from acknowledging or being acknowledged as “Transgender”.
  - The process can be misused by the people by creating or giving false statements in the application form for or on behalf of a person leading to defaming him/ her.
  - As per the provisions of the Act, the person declaring himself as transgender is allowed only to change the First name and not the Last name. Therefore, the fear of social threat and name shaming of the family members and the relatives doesn't decline with the change of name in the Identity Card. Therefore, the Act does not focus or list out what actions will be undertaken by the government authorities and agencies to include and accept them as members of society and the approach of the society towards them.
  - The legislative authorities fail to realize that the Identity Card will be of use only when privileges such as reservation will be allotted to them. The legislative authorities cannot expect that just by displaying or flashing their Identity Card they will be accepted in the society members.
- The Act fails to provide a humanitarian concern and approach of the society towards them.

- The Act provides for a very less punishment for the failure of compliance by the people of any of the provision of the Act.
- One of the provisions of the Act states that the government has to provide data and statistics of the facilities and availability of infrastructure at various sectors for the transgender community. However, the Act fails to provide the duration within which it has to be complied with, the manner in which the data has to be collected and records to be maintained.
- The Act fails to mention about the necessary amendments to be brought under personal laws for e.g., Right to Education Act, Adoption Act to co-occur with the provisions of this Act.

## CONCLUSION & SUGGESTIONS

To provide protection to the LGBTQ community from the abuses and discriminations, ‘The Transgender Persons (Protection of Rights) Act 2019’ was passed which came into existence on 10th January 2020. Surprisingly, the Act not only ignores the recommendations made by the Standing Committee but also fails to meet the directions given by the Apex Court. Government has to come up with some strong legislation/ amendments so that the Equality, the basis of the Constitution, can be achieved but this is also fact that the law alone cannot ensures the Trans-equality but the society has to change its way of looking at the ‘Third Gender’ community.

- Along with a strong and effective legislation government should also initiate programs to sensitize the society from the very basic level.
- Strict punishment for discrimination and criminal offences against this community.
- To make the legislation more effective the term Third Gender/LGBTQ+ should be used instead of ‘Transgender’ to include all the members of LGBTQ+
- Establishment of an active redressal mechanism to deal with the complaints from this community.
- Separate sanitation facility at restaurants, schools, hospitals.
- Reservation in education and in Government bodies
- Equal opportunities in employment should be provided
- Homosexual Marriages should be legalised.
- Right to Adoption should be given.

## REFERENCES:

[1] Navtej Johar v. Union of India (2018) 10 SCC 1

[2] Sharma. Rachit (2021); Rights of LGBTQ in India and the Struggle for Societal Acceptance; International Journal of Law Management and Humanities, vol 4, pp. 18-32, issue 3

[3] Ibid

[4] Ibid

[5] Bal. Ankana (2020); “The Transgender Persons (Protection of Rights) Act, 2019: A Critical Analysis”; International Journal of Law Management & Humanities, vol.3, pp. 1069, issue 6



[6] Sex and Gender Identity: Available at <https://www.plannedparenthood.org/learn/gender-identity/sex-gender-identity>

[7] *ibid*

[8] *ibid*

[9] *ibid*

[10] *Supra* n. 2

[11] Top Health Issues for LGBT Populations Information & Resource Kit: Available at <https://store.samhsa.gov/sites/default/files/d7/priv/sma12-4684.pdf>

[12] *Ibid.*

[13] *ibid*

[14] *ibid*

[15] Indian Penal Code, 1860 Section 377 Unnatural offences- “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 10 years, and shall also be liable to pay a fine.”

[16] “In 1871, *Hijra* elimination was formalised through the 1871 Criminal Tribes Act (CTA), Part I of which designated certain communities as “[criminal tribes](#)” while Part II targeted “eunuchs,” primarily *Hijras*. The CTA mandated that “eunuchs” who were “reasonably suspected” of sodomy, kidnapping or castration should be registered by police. Evidence of convictions was not necessary; instead, if a “eunuch” performed publicly or wore feminine dress they were considered “suspect.” Registered people were then prohibited from the important *Hijra* cultural practices of dancing, singing, playing music and wearing women’s clothing, provisions that aimed to bring about the cultural elimination of *Hijras*. British colonial officials claimed that *Hijras*’ feminine dress indicated their “addiction” to sex with men—labelling them “habitual sodomites” and “unnatural prostitutes”—and described *Hijras* as “obscene” performers who contaminated public space”. Explained by Jessica Hinchy (2019, April 29)“Registers of eunuchs” in colonial India”; History of Workshop

[17] Parasar. Anuradha; “Homosexuality In India – The Invisible Conflict” Retrieved from <https://www.delhihighcourt.nic.in/library/articles/legal%20education/Homosexuality%20in%20India%20-%20The%20invisible%20conflict.pdf>

[18] The Andhra Pradesh (Telangana Area) Eunuchs Act, 1329 F (Act No XVI of 1329 F) Section 4 “Every registered eunuch found in female dress or ornamented in a street or a public place or in any other place with the intention of being seen from a street or public place or who dances or plays music or takes part in any public entertainment in a street or a public place may be arrested without warrant and shall be punished with Imprisonment for a term which may extend to two years or with fine or with both”.

[19] “Section 377 and Beyond A New Era for Transgender Equality?” (Kothari. Jayana) Retrieved from <https://clpr.org.in/wp-content/uploads/2019/06/Section-377-and-Beyond.pdf>

[20] The Karnataka Police Act, 1963, Section 36A. “Power to regulate eunuchs.- The Commissioner, may, in order to prevent or suppress or control undesirable activities of eunuchs, in the area under his charge, by notification in the official Gazette, make orders for,- (a) preparation and maintenance of a register of the names and places of residence of all eunuchs residing in the area under his charge and who are reasonably suspected of kidnapping or emasculating boys or of committing unnatural offences or any other offences or abetting the commission of such offences, (b) fling objections by aggrieved eunuchs to the inclusion of his name in the register and for removal of his name from the

register for reasons to be recorded in writing; (c) prohibiting a registered eunuch from doing such activities as may be stated in the order. (d) any other matter he may consider necessary.”

[21] Supra n. 19

[22] Ibid.

[23] Ibid.

[24] Naaz Foundation v. Govt. of NCT of New Delhi and Others (2009) 111 DRJ 1.

[25] Supra n. 2

[26] (2014) 1 SCC 1

[27] Supra n. 19

[28] Supra n. 2

[29] National Legal Services Authority v. Union of India (2014) 5 SCC 438

[30] (2017) 10 SCC 1.

[31] Supra n. 19

[32] (2018) 10 SCC 1

[33] S. Thendralarasu and K. Valli Madhura (2021, June 24); “Queering the Judiciary: The Growing Inclusivity in Indian Courts.” Jurist Legal News and Commentary; Retrieved from <https://www.jurist.org/commentary/2021/06/thendralarasu-valli-indian-judiciary-queer-inclusivity/>

[34] Supra n. 19

[35] Here Are 11 People From India's LGBTQIA+ Community Who Have Inspired Us With Their Stories (2019, July 2019); Indiatimes.com Retrieved at <https://www.indiatimes.com/lifestyle/here-are-11-people-from-india-s-lgbtqia-community-who-have-inspired-us-with-their-stories-369051.html>