

## TRANSGENDER RELATIONS & UNCERTAIN DILEMMAS OF INDIAN SOCIETY-A CRITIQUE

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*"Give to every human being every right that you claim for yourself."*

**-Robert G. Ingersoll**

### **Introduction**

India, a nation & society known for its morality, ethics and cultural heritage, has been a topic for global discussion for its burning issue on the status of transgender relations. India has always been into a dilemma when it comes to the topic of culture, religion and rights given to its citizens. Issues pertaining to come in conflict with the well established customs and religious practices are not brought to the forefront, for the reasons best known to the 3 organs of the constitution.

In 2009, a topic of taboo, was starting to be discussed in the various society circles. The topic was whether 'homosexual intercourse was a criminal offence under Section 377 of the Indian Penal Code, 1860? Was it constitutional? We can atleast take to our credit, being one of the few nations to accept a third gender. Beyond that, the entire picture, of what rights are given to them is hazy.

### **Conceptual Clarity on LGBT**

The initialism LGBT is intended to emphasize a diversity of sexuality and gender identity-based cultures and is sometimes used to refer to anyone who is non-heterosexual or non-cisgender instead of exclusively to people who are lesbian, gay, bisexual, or transgender.<sup>124</sup>

Chapter XVI, Section 377 of the Indian Penal Code dating back to 1860, [1] introduced during the British rule of India,

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<sup>124</sup> <https://www.google.co.in/#q=Full+form+of+LGBT>

criminalizes sexual activities "against the order of nature", arguably including homosexual acts.<sup>125</sup>

The concepts of LGBT and Sec. 377 of the Indian Penal Code, both have been inserted to bring in a clear view of what exactly we are dealing with.

India, not having an uniform civil code, has given the liberty to its citizens to apply that code which is based on their community and religion. None of the marriage acts, clearly define that marriage is an union between a man and a woman, nor do they prohibit same sex union. Time and again the law has interpreted it and prohibited same sex union.

### A Legal Timeline on LGBT Rights in India

The movement to repeal Section 377 was led by the Naz Foundation (India) Trust, a non-governmental organization, which filed a lawsuit in the Delhi High Court in 2001, seeking legalization of homosexual intercourse between consenting adults.<sup>126</sup> This was the second such petition, the first filed in 1994 by AIDS Bhedbhav Virodhi Andolan.<sup>127</sup> In 2009, the Delhi High Court passed a judgement stating Section 377 and other legal prohibitions against private, adult, consensual, and non-commercial same-sex conduct to be in direct violation of fundamental rights provided by the Indian Constitution.

In February 2012, the Ministry of Home Affairs expressed its opinion in the form of opposition to the decriminalization of homosexual activity, stating, homosexuality is seen as being immoral, in India. Again in late February, the Central Government had a new stand wherein they claimed that there was no harm in decriminalizing the homosexual activity. On 11 December 2013, the Supreme Court set aside the 2009 Delhi High Court order decriminalizing consensual homosexual activity within its jurisdiction.<sup>128129130</sup>

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<sup>125</sup> [https://en.wikipedia.org/wiki/Section\\_377\\_of\\_the\\_Indian\\_Penal\\_Code](https://en.wikipedia.org/wiki/Section_377_of_the_Indian_Penal_Code),

<sup>126</sup> <http://www.ibnlive.com/news/india/chronology-8-year-long-legal-battle-for-gay-rights-319600.html>, last

<sup>127</sup> Fernandez, Bina, ed. (1999). *Humjinsi: A Resource Book on Lesbian, Gay and Bisexual Rights in India*. Mumbai: India Centre for Human Rights and Law. p. 35.

<sup>128</sup> "Supreme Court sets aside Delhi High Court judgment in Naz Foundation; Declares S.377 to be constitutional".

<sup>129</sup> <http://www.telegraph.co.uk/news/worldnews/asia/india/10509952/Indias-top-court-upholds-law-criminalising-gay-sex.html>.

In January, 2014, the Apex Court of India dismissed the review petition against its December 11 verdict on Section 377 of IPC. The Bench said: "While reading down Section 377, the High Court overlooked that a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders, and in the more than 150 years past, less than 200 persons have been prosecuted for committing offence under Section 377, and this cannot be made a sound basis for declaring that Section ultra vires Articles 14, 15 and 21."<sup>131</sup>

### **The Positive and the Flip Aspects of LGBT in India**

Various high profile organizations like Goldman Sachs, Google, Accenture, Godrej are creating inclusive workplaces for LGBT through diversity training. National, state and local helplines have been set up by NGOs for this community. There are various examples of where transgenders are getting elected in local bodies.

The flip side is the violence and the discrimination they face in various walks of life. The negative media coverage, adds to the pressure. The LGBT community, is mostly shunned by the people close to them or are asked to hide their choice. Due to this a lot of youngsters are facing depression and suicidal tendencies.

### **Uncertain Dilemmas of Indian Society**

Seeing the preceding timeline, we can assess that time and again we have tried to broach upon the subject of homosexuality, but have not been able to reach a concrete decision. Here the question arises, that is it only the Judiciary who is to blame? Or is the Judiciary just mirroring what is felt by the majority of the Indian society?

In the 21st century, the Indian society stands at 2 crossroads. A road which would like to adopt the LGBT as an integral part, and give them all the rights to lead a normal life. The other road which is still bound in the shackles of morality and the larger than life Indian culture. Where we wish to claim India as an

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<sup>130</sup> <http://www.dnaindia.com/india/report-supreme-court-makes-gay-sex-punishable-offence-activists-dejected-1933110>.

<sup>131</sup> <http://www.thehindu.com/news/national/supreme-court-sets-aside-delhi-hc-verdict-decriminalising-gay-sex/article5446939.ece?homepage=true>.

advanced and a developed society, at par with the western world, we are facing a problem in providing even the basic rights to its citizens. The citizens who are an equal part of the society, but the society refuses to acknowledge their existence.

The other aspect to be keenly studied before we reach any conclusion is whether if we do decide to give a legal status and decriminalize Sec 377, is the society going to accept it. In 2009, when the Delhi High Court had attempted to do so, it was faced with wrath of various religious organizations. Even, if a bill is proposed to give equal rights to the LGBT community, will the society accept them?

The society which sees marriage as a sacred union between 2 permissible mates, i.e. a male and a female, is still not ready to accept the *coming out* of these individuals. It faces a dilemma as to accepting them as they are with their choice of gender or ignoring their existence. India has an estimated 25 lakh gay population, a number which cannot be ignored. This number is still a rough estimate, with many people not ready to come out and declare their choice of gender in fear of the society.

Most studies have been carried out in Western countries and they report a wide range — anything between 2% and 13% of the population exhibits same sex preference.<sup>132</sup>

If the statistics mentioned above are taken to be true, then, a large population of homosexuals is still not counted.

The dilemma is a mixture and a confusion of an advanced Indian bogged down by religion, culture and morality.

## Conclusion

India, has been a nation, open to changes. Still these changes have always been in the ambit of the framework provided by the social institutions which are considered to be the pillars of the Indian society .i.e. the institutions of religion, culture and morality. For the judiciary or the legislative to take up a concrete stand on the topic of Transgender relations, it requires the backbone of these institutions. No law can be effectively implemented till it has the support of the society. In India, the society is dictated by these institutions.

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<sup>132</sup> <http://timesofindia.indiatimes.com/india/Gay-count-varies-from-2-to-13-of-population/articleshow/4731097.cms>.

Today, to simply put it, for the topic of transgender relations, the Indian society is still in its adolescence stage. Any act or law will have its full application when the society is mature enough to take it. It is a matter of time, which will tell us which crossroad the Indian society walks down upon.

