

A Historical Analysis of Organized LGBT Movement in Post-Independent India

Dr. Rajarshi Chakrabarty
Department of History, University of Burdwan

Abstract

Pre-colonial Indian society was much more inclusive about various gender identities and sexual orientations. The colonial rulers came with a civilizing mission by Section 377 of IPC prohibited non-reproductive sex. Moreover they tried to rigorously control and ultimately lead to the extinction of the *hijras* or eunuchs. But *hijras* survived inspite of these efforts. In the last decade of the twentieth century LGBT activists started movement against Section 377 of IPC and for the rights of the transgender/*hijra* persons. This ultimately led to the reading down of Section 377 of IPC in 2018 and Transgender Persons (Protection of Rights) Act in 2019.

Keywords: Colonial rule, Hijra, Section 377 of IPC, homosexuality, Supreme Court.

At present India is celebrating 75 years of its independence from colonial rule. It is true that India got political independence from British imperialism in 1947 and the Constitution it adopted in 1950 gave equal rights to all its citizens. However, the fact remains that many citizens of India had to fight for equal rights and freedom from discrimination for years after the constitution was formally adopted. This particular essay will look at the struggles of the LGBT (lesbian, gay, bisexual, transgender) people for equality and freedom from discrimination and try to analyze their struggle.

The colonial regime in its civilizing mission passed certain legislations that were inimical to the rights of LGBT population in South Asia. The Indian Penal Code framed by Thomas Babington Macaulay and adopted by the British Government in India in 1861 contained Section 377 which criminalized certain sexual acts as

“unnatural offences” to be punished with imprisonment and/or fine. This Section continues to be a part of Indian Penal Code and was used against gay/bisexual males mainly. In 2018, the Supreme Court of India read down this section stating that consensual sexual activity among adults in private cannot be construed as a crime. This decision of the Supreme Court was a result of prolonged activism and legal battles fought by LGBT people in India. Moreover, the *hijras* or ‘eunuchs’ in colonial parlance were targeted under the Criminal Tribes Act which was enacted by the colonial government in 1871. According to the act *hijras* could be imprisoned up to two years if they appeared in public dressed as women. Thus the *hijras* who in pre-colonial period enjoyed close proximity to the nobility as guards of the harem and held responsible administrative positions were reduced to criminals. After independence, the criminal tribes were denotified on 31st August 1952, but the condition of the transgenders or *hijras* did not improve much. They continued to be discriminated against and their only means of livelihood was begging (*challa*) or collecting alms during child birth (*badhai*) or dancing during Chat Puja. After years of activism by the LGBT people in general and transgenders in particular the Supreme Court gave the NALSA judgement on 15th April 2014. This was a positive step to secure the rights of the transgender community in India. Thereafter, the Indian Parliament passed the Transgender Persons (Protection of Rights) Act in 2019 which was regressive compared to the NALSA judgement. The LGBT community is still fighting for certain rights like that of same-sex marriage, right to inheritance of partner’s property, right to adoption and other rights. In this essay, however, the focus will be on the movement of LGBT community till date, its achievements and limitations.

The decade of the 1990s actually saw the beginning of LGBT activism in India. The decade of 1990s was a decisive watershed in the history of independent India, particularly economically as well as politically, which had their corresponding resonances in the cultural and social fields. India opened herself to the neo-liberal policies and marked the end to the ‘inward-looking’ economic approach. The country diverted from her socialistic, welfare-oriented ideological base, towards privatization. At the political spectrum, till 1980s, despite a number of shortcomings and failures, the Congress party was ‘truly a hegemonic force’. In the late 1980s, the economic basis of this hegemony, the License Raj, declined to give way to liberalization and the governmental institutions crumbled down under the pressure of corruptions.¹ India faced a severe crisis of foreign exchange reserves at the end of the decade of 1980s and beginning of the 1990s and asked for aid to International Monetary Fund and World Bank. According to the suggestions of the International Monetary Fund and World Bank, in order to tide over this crisis India decided to liberalize its economy.² Economic liberalization had many social impacts also. A more openness as regards gender and sexuality issues in the social sphere was felt in the 1990s which may have led to the founding of support groups

like the Counsel Club in Calcutta (1993) Humsafar Trust in Mumbai (1994), NAZ Foundation (India) Trust in Delhi (1994). Apart from economic liberalization, contemporary globalization also contributed to the growth of LGBT activism in India. Global health issues, like spread of HIV/AIDS also contributed to the growth of LGBT activism as MSM (males having sex with males) constituted one of the high risk groups as far as HIV transmission was concerned. With the spread of HIV, discussion about LGBT issues started in the public domain. Moreover, the support groups for LGBT people could sustain themselves, at least during the initial days, with funds given for HIV prevention.

One of the main rallying points for the Indian LGBT movement was the removal of Section 377 of Indian Penal Code. Section 377 of IPC read as follows:

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 –for a term which may extend to 10 years, and shall be liable to fine.

Explanation:-Penetration is sufficient to constitute the carnal intercourse necessary to the offense described in this Section.

In India, the history of public debate on the repeal of Section 377 of IPC begins soon after the release of AIDS Bhedbhav Virodhi Andolon's report titled *Less Than Gay: A Citizens' Report on the Status of Homosexuality in India* which was the first document to publicly demand queer rights in India. A petition was moved by AIDS Bhedbhav Virodhi Andolon (ABVA) in the Petitions Committee of Parliament. The repeal of Section 377 was demanded on the grounds that it violated the following articles of the Indian Constitution:

1. Article 14-15 (Right to protection against discrimination)
2. Article 19 (Right to freedom of speech and expression)
3. Article 21 (Right to life and liberty-which encompasses the right to privacy)

This parliamentary petition, however, remained dormant for want of a Member of Parliament to argue the petition in Parliament.

Meanwhile, in 1994, media attention focused on Tihar jail where Inspector General of Prisons, Kiran Bedi refused to allow distribution of condoms to the male prisoners on the grounds that there was no homosexual activity in prisons. She argued that even if there was, the prison authorities would be encouraging a crime. ABVA used this incident to initiate a public interest litigation in the Delhi High Court for the reading down of Section 377 of IPC. This petition used the

immediate reasons of the sexual health of prison inmates as one ground for the reading down of Section 377 of IPC.³

In 2001, the NAZ Foundation (India) Trust, a non-governmental organization filed a lawsuit in the Delhi High Court seeking legalization of homosexual intercourse among consenting adults. In 2003, the Delhi High Court refused to consider a petition regarding the legality of the law, saying that the petitioners had no *locus standi* in the matter. NAZ Foundation appealed to the Supreme Court of India against the decision of the High Court to dismiss the petition on technical grounds. The Supreme Court decided that NAZ Foundation had the standing to file a public interest lawsuit in the case and sent the case back to the Delhi High Court to reconsider it on the merits.

In 2006, the National AIDS Control Organization filed an affidavit stating that the enforcement of Section 377 of IPC violates LGBT rights. Subsequently, there was a significant intervention in the case by a Delhi-based coalition of LGBT, women's and human rights activists called Voices Against 377, which supported the demand to "read down" Section 377 to exclude adult consensual sex from within its purview.

The case came up for hearing before a bench comprising Chief Justice Ajit Prakash Shah and Justice S. Muralidhar, and the judgment was delivered on 2nd July 2009. The court located the rights to dignity and privacy within the right to life and liberty guaranteed by Article 21 (under the fundamental Right to Freedom charter) of the Constitution, because it creates an unreasonable classification and targets homosexuals as a class. Public *animus* and disgust towards a particular social group or vulnerable minority, it held, is not a valid ground for classification under Article 14. Article 15 of the Constitution forbids discrimination based on certain characteristics, including sex. The court held that the word "sex" includes not only biological sex but also sexual orientation. The court also noted that the right to life under Article 21 includes the right to health and concluded that Section 377 is an impediment to public health because it hinders HIV prevention efforts.

The court did not strike down Section 377 of IPC as a whole. The Section was declared unconstitutional in so far it criminalized consensual sexual acts of adults in private. The judgment keeps intact the provision in so far as it applies to non-consensual non-vaginal intercourse and intercourse with minors. The court stated that the judgment would hold until Parliament chose to amend the law.

Some special leave petitions were filed in the Supreme Court requesting an interim stay of the judgment, pending an appeal. However, the Supreme Court rejected those requests. A batch of appeals were filed with the Supreme Court, challenging the Delhi High Court judgement. On 27th March 2012, the Supreme Court reserved verdict on these. After initially opposing the judgement, the Attorney General G.E.

Vahanvati decided not to file any appeal against the Delhi High Court's verdict, stating, "in so far as [Section 377 of the Indian Penal Code] criminalizes consensual sexual acts of adults in private [before it was struck down by the High Court] was imposed upon Indian society due to the moral views of the British rulers."

On December 11, 2013, the Supreme Court's two member bench of Justices G.S. Singhvi and S.J. Mukhopadhyay, overturned the decision of the Delhi High Court. It said that the 2009 order of the High Court is "constitutionally unsustainable as only Parliament can change a law, not courts."⁴ In 2015, Shashi Tharoor, who was a Congress M.P. prepared a Private Member's Bill to amend Section 377 but it was defeated in Lok Sabha without having a discussion on it. Dr. Tharoor exclaimed that "We shouldn't have a law in a book that can be used to oppress and harass innocent people conducting their lives in private. What two people do to express their love and desire for each other should be strictly between them. The Government has no place in India's bedroom."⁵ He also said that the law should be amended, as it is drafted in 1860 according to British relics and it has no place in the 21st century.⁶

On 27th April 2016, five people filed a new writ petition in the Supreme Court challenging the constitutionality of Section 377 of IPC. The petitioners claimed that the issue which they raised in their petition were varied and diverse from those raised in the pending curative petition in the 2013 *Koushal v. NAZ Case*, in which the Supreme Court had upheld the constitutionality of Section 377. The NAZ case had been earlier referred to a five-judge bench in order to decide whether the curative petition could be accepted for consideration. The petitioners were dancer Navtej Singh Johar, journalist Sunil Mehra, Chef Ritu Dalmia, hoteliers Aman Nath and Keshav Suri and businesswoman Ayesha Kapur. This case was the first instance wherein the petitioners argued that they had all been directly aggrieved because of Section 377, alleging it to be a direct violation of fundamental rights. The opposition to decriminalization petitions was led by Apostolic Alliance of Churches, Utkal Christian Council and Trust God Ministries. Advocate Manoj George represented the first two and Senior Advocate KS Radhakrishnan the third. The NDA government took a neutral stance, leaving the decision to the "wisdom of the court" as long as it applies to "consensual acts of adults in private."

The petition was first placed before the former Chief Justice of India, Justice S.A. Bobde and Justice A.K. Bhushan on 29th June 2016. An order was passed to post the matter before Justice Dipak Misra for appropriate orders since a curative petition was already pending before the constitution bench. On 8th January 2018, the case (*Navtej Singh Johar and others v. Union of India*) was listed to be heard by the Chief Justice's bench, which passed an order stating that the case would be heard by a constitution bench.

The matter was heard from 17th January 2018 by a five-judge constitution bench of the Supreme Court. On 10th July 2018, the Supreme Court commenced hearing of the pleas challenging the constitutionality of Section 377. The bench ended its hearing on 17th July and reserved its verdict, asking for both sides to submit written submissions for their claims by 20th July. On 6th September 2018, the court delivered its unanimous verdict, declaring portions of the law relating to consensual sexual acts between adults unconstitutional. This decision overturns the 2013 ruling in *Suresh Kumar Koushal v. NAZ Foundation* in which the court upheld the law. However, other portions of Section 377 relating to sex with minors, non-consensual sexual acts, and bestiality remain in force.

The court found that the criminalization of sexual acts between consenting adults violated the right to equality guaranteed by the Constitution of India. While reading the judgement, the then Chief Justice of India Dipak Misra pronounced that the court found “criminalizing carnal intercourse” to be “irrational, arbitrary and manifestly unconstitutional.” The court ruled that LGBT people in India are entitled to all constitutional rights, including the liberties protected by the Constitution of India. It held that “the choice of whom to partner, the ability to find fulfilment in sexual intimacies and the right not to be subjected to discriminatory behaviour are intrinsic to the constitutional protection of sexual orientation.” “History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries. The members of the community were compelled to live a life full of fear of reprisal and persecution. This was on account of the ignorance of the majority to recognize that homosexuality is a completely natural condition, part of a range of human sexuality”, said Hon’ble Justice Indu Malhotra. The judgement also made note that LGBT community is entitled to equal citizenship and protection under law, without discrimination.⁷

This will mark the end of an era, where this law will no longer be available for use or abuse, to foster, facilitate or perpetuate an atmosphere conducive to human rights violations of a certain kind and will put an end to the discrimination that many millions have faced because of sexual orientation or gender identity and sexual expression. The ruling of the Supreme Court will not only impact India, but will also undoubtedly have immense transnational value. The effect of this judgement is especially likely to be felt in other common law countries, and it will, hopefully, provide an impetus to those countries that will have equivalent provisions in their statute books, to critically consider the lawfulness and legality of provisions that similarly criminalize consensual sexual relations.⁸

Among the LGBT population the condition of transgenders or *Hijras* is the worst. The *Hijras* are present in south Asia from times immemorial. In the nineteenth century the British colonial rulers of India thought that the *Hijras* or ‘eunuchs’ in

colonial parlance, were ‘habitual sodomites’, beggars, an obscene presence in public space and the kidnappers and castrators of children. In 1865, the North Western Province declared that its aim was to ‘reduce’ the number of ‘eunuchs’ and thus gradually lead to their extinction. This project of extermination was formalized under the Criminal Tribes Act of 1871. While the Part I of the Criminal Tribes Act targeted the ‘criminal tribes’-groups that were apparently hereditary criminals by caste-occupation, the second part of the law targeted so-called ‘eunuchs’. Under the CTA, *Hijras* found their gender embodiment, domestic arrangements and livelihood scrutinized and policed in new ways. The anti-*Hijra* campaign was a provincial project, since Part II of the CTA was enforced specifically in the North Western Province. The CTA required police to draw up registers of the personal details of ‘eunuchs’. Specifically, police had to register ‘eunuchs’ who were ‘reasonably suspected’ of sodomy, kidnapping and castration, thus legally defining a eunuch as a criminal and sexually deviant person. The 1871 law provided police with increased surveillance powers, prohibited registered people from wearing female clothing and ‘adornments’ or performing in public; provided for the removal of children in registered people’s households; and included provisions that interfered with *Hijra* discipleship and succession patterns. The short-term aims of the law included the cultural elimination of *Hijras* through the erasure of their public presence. The explicit long-term ambition was ‘limiting and thus finally extinguishing the Eunuchs’. Fortunately, the *Hijra* community survived these colonial attempts to cause their ‘extinction’ as is evident today in India, Pakistan and Bangladesh.⁹

According to many colonial officials, *Hijras* were not only a danger to ‘public morals’, but also a threat to colonial political authority. The colonial government thus viewed the policing of *Hijras* as an ‘important branch’ of the ‘duties’ of ‘district officers’ and a priority in local policing. To many high-ranking colonial officials, the small *Hijra* community endangered the imperial enterprise and colonial authority. The anti-*Hijra* campaign illustrates that gender expression, sexual behaviours, domestic arrangements and intimate relationships were central to colonial governance. In fact, these matters were so germane to colonial rule that British officials demanded that the ‘immoral’ *Hijra* community be rendered extinct.¹⁰

British officials in north India considered the *Hijra* community a problem population because they viewed *Hijras* as ungovernable in a multitude of ways. British commentators frequently portrayed the *Hijra* community through images of filth, disease, contagion and contamination. These colonial representation of *Hijra* highlight that gender and sexual disorder were interlaced with, and in fact signaled, political disorder to India’s colonial rulers. The British saw *Hijras* as ‘habitual sodomites’, a term which disregarded *Hijras*’ feminine gender identities and

portrayed them as ‘men’ who were ‘addicted’ to sex with men. *Hijras*’ ostensible practices were a threat to the colonial social order, which was premised on a pattern of succession based on reproductive sexuality, patrilineal descent and heterosexual conjugality. The *Hijra* community appeared to the British to be beyond the binary gender categories of male and female, an unclassifiable in-between that challenged colonial attempts to make the Indian population legible by means of classification. Moreover, in the eyes of the colonizers, *Hijras*’ feminine dress, ‘begging’, songs and dances, joking, erotic language and ‘obscene’ actions undermined the order of public space, and even its ‘cleanliness’. The ‘eunuch problem’ was spatial in another respect too: *Hijras*’ periodic travels for alms-collection, though usually of short distance, undermined colonial concepts of centralized political authority by destabilizing political borders and were seen as evidence of *Hijra* criminality. This aspect of the *Hijra* stereotype was related to long-standing association between peripatetic peoples and criminality in colonial discourse and law. Mobile *Hijras* were especially accused of kidnapping Indian boys in order to forcibly castrate them. The British in India viewed ‘kidnapping’ as a problem of illicit commerce, as well as ‘immoral’ sexuality. Colonial officials further claimed that *Hijras* prostituted kidnapped boys to Indian men, resulting in their sexual corruption and the further ‘spread’ of ‘sodomy’. In the context of the marginalization of various kinds of discipleship lineage under colonial Indian law, *Hijra* discipleship practices were characterized as coercive and criminal.

In sum, for the British in north India, *Hijras* were an ungovernable people that needed to be regulated in order to produce an orderly and knowable population. The colonial concern with *Hijras* thus illuminates the ways that the British conceptualized a governable colonized populace. Issues of sedentary social patterns, economic productivity, sexual relations, household arrangements, gendered behaviour and embodiment were closely interlinked in colonial efforts to make *Hijras* controllable. This reflected the broader colonial management of population.¹¹ Legal and queer studies scholars have suggested that the British brought with them to India a legal culture and a code of sexual morality that stigmatized ‘deviant’ sex.¹²

In today’s India, *Hijras* interact with the state from three subject positions. First as a criminal community that need to be policed; second, as a ‘third’ gender and, therefore, a separate category of legal personhood; and third, as a backward community that is entitled to ‘reservations’ or affirmative action policies. The representation of the *Hijras* as a criminal population has a long history, but the framing of *Hijras* as citizens entitled to rights, legal recognition of their gender identity and welfare measures is a very recent development.

In post-colonial India, the police, the bureaucracy and the media still following the colonial mentality often view *Hijras* as criminal in multiple, intersecting ways.

When a researcher asked Delhi police about the *Hijra* community in the early 2000s, they responded with comments such as, ‘They are criminals’; ‘They do sex in public places’; ‘They rob and steal their clients’; ‘They do wrong’; ‘They solicit sex’. The perceived criminality of *Hijras* encompass a broad range of acts like begging, extortion, stealing and ‘unnatural’ sex.

Presently in India a web of laws and policing practices facilitate the prosecution and punishment, and more commonly, arrest and harassment of the *Hijra* community takes place by the police more often for bribes. *Hijras* were threatened, harassed and even arrested charged under Section 377 of IPC prior to its reading down in 2018. *Hijras* are also frequently arrested under the Immoral Traffic Prevention Act (IPTA) of 1956, the primary legal instrument for the policing of prostitution in India, which since 1986 has been applied to sex workers regardless of gender. In practice, the IPTA has the effect of criminalizing ‘the figure of the sex worker’ and, consequently people like *Hijras* who are widely assumed to participate in prostitution. Police frequently make arrests merely on the basis of suspicion that a *Hijra* is a sex worker, or use the IPTA to retrospectively justify arbitrary arrests of *Hijras*. *Hijras* are also arrested under Section 294 of the Penal Code, which criminalizes ‘obscene’ acts that ‘cause annoyance to others’ and Section 268, which prohibits ‘public nuisances’. There are also documented cases of *Hijras* arrested (and often beaten) on false charges of kidnapping. Thus, a nexus of law and policing practices regulate the everyday lives of *Hijra* in India.

Hijras in India has long protested against their categorization as ‘male’ and the use of male names they were given at birth, rather than their female names, in government records and identification documents. Such protests have occurred both in the context of *Hijra* community organizing, such as at periodic ‘all-Indian *Hijra* conferences’ that were held from the late 1940s, if not earlier-and in *Hijras*’ everyday encounters with state bureaucracies. For example, in the 1971 elections there were reports of *Hijras* who ‘refused to exercise their franchise, resenting the “injustice” done to them by the election office by classifying them as males in the electoral roles’. The persistent efforts of the *Hijras* and other LGBT activists led to the Indian Supreme Court’s NALSA judgement in 2014. The NALSA judgement established the right to self-determination of gender and thus mandated the legal recognition of a ‘third/transgender identity’. Further, it declared that *Hijras* and eunuchs can legally identify as third gender. The court clarified that gender identity did not refer to biological characteristics but rather referred to it as “an innate perception of one’s gender”. Thus, it held that no third gender persons should be subjected to any medical examination or biological test which would invade their right to privacy. The Court interpreted ‘dignity’ under Article 21 of the Constitution to include diversity in self-expression, which allowed a person to lead

a dignified life. It placed one's gender identity within the framework of the fundamental right to dignity under Article 21.

Further, it noted that the right to equality (Article 14 of the Constitution) and freedom of expression (Article 19(1) (a)) was framed in gender-neutral terms ("all persons"). Consequently, the right to equality and freedom of expression would extend to transgender persons.¹³

It drew attention to the fact that transgender persons were subject to "extreme discrimination in all spheres of society" which was a violation of their right to equality. Further, it included the right to express one's gender "through dress, words, action, or behaviour" under the ambit of freedom of expression.

Under Articles 15 and 16, discrimination on the ground of "sex" is explicitly prohibited. The Court held that "sex" here does not only refer to biological attributes (such as chromosomes, genitalia and secondary sexual characteristics) but also includes "gender" (based on one's self-perception). Thus, the Court held that discrimination on the ground of "sex" included discrimination on the basis of gender identity.

Thus, the Court held that transgender persons were entitled to fundamental rights under Articles 14, 15, 16, 19(1)(a) and 21 of the Constitution. Further, the Court also referred to core international human rights treaties and the Yogyakarta Principles to recognise transgender persons' human rights.

The Court held that public awareness programs were required to tackle stigma against the transgender community. It also directed the Central and State Governments to take several steps for the advancement of the transgender community, including:

1. Making provisions for legal recognition of "third gender" in all documents
2. Recognising third gender persons as a "socially and educationally backward class of citizens", entitled to reservations in educational institutions and public employment.
3. Taking steps to frame social welfare schemes for the community.

The significance of this landmark decision is that it is the first to legally recognise non-binary gender identities and uphold the fundamental rights of transgender persons in India. The judgement also directed Central and State governments to take proactive action in securing transgender persons' rights.¹⁴

While the decision in the NALSA petition was still pending, an Expert Committee Report on issues relating to transgender people was published in January 2014, after consultations by the Ministry of Social Justice and Empowerment with transgender people in August 2013. In this context, Tirchi Siva of the Dravida

Munnetra Kazhagam party introduced a private member's bill in the Rajya Sabha, namely the Rights of Transgender Persons Bill, 2014 (Bill No. 49 of 2014).

The government had in the beginning asked Siva to withdraw the bill due to there being "some anomalies" in the text; however, the opposition had a majority in the house and the bill was unanimously passed in the Rajya Sabha on 24 April 2015. The bill was welcomed by queer rights activists in India. However, some transgender activists noted their absence from the entire process and called for their recommendations to be sought. The Rights of Transgender Persons Bill, 2014 was the first private member's bill to be passed by the Rajya Sabha in thirty-six years and by the Parliament as a whole in forty-five years.

The 2014 bill underwent significant changes when the government drafted its own version of the bill, omitting provisions in the 2014 bill. After recommendations were collected from transgender persons, the bill was sent to the Ministry of Law and Justice. It came to be known as the Rights of Transgender Persons Bill, 2015. After that on 26th February 2016, the bill was introduced in the Lok Sabha for debate by Baijayant Panda of the Biju Janata Dal. He argued that the bill would help extend constitutional rights and end discrimination against transgender people, allowing them to live a life of dignity. The bill was discussed in the Lok Sabha on 29th April 2016. Siva stated that he will not be withdrawing the 2014 bill.

While the 2014 bill passed by the Rajya Sabha was still pending, the government tabled the Transgender Persons (Protection of Rights) Bill, 2016 (Bill no. 210 of 2016), on 2 August 2016, following the reconstitution of the Lok Sabha after the 2014 general elections. The 2016 bill had various provisions which were reportedly regressive and inferior to those in the 2014 bill. The bill was met with criticism and protests from Indian transgender people and was referred to the standing committee, which submitted its report in July 2018. The Lok Sabha tabled and passed a newer version of the bill with twenty-seven amendments on 17 December 2018. The bill was once again met with severe criticism and protests across India, as it overlooked the recommendations made by the standing committee and the suggestions that had been offered by transgender people. The 2018 bill lapsed due to the dissolution of the Lok Sabha. With the house's dissolution, the Rights of Transgender Persons Bill, 2014 that was still pending before the Lok Sabha also lapsed.

Following the reconstitution of the Lok Sabha after the 2019 general elections, the bill was reintroduced on 19th July 2019 by the Minister of Social Justice and Empowerment, Thawar Chand Gehlot. Before this the bill had been approved by the Union Cabinet on 10th July 2019. The bill was passed by a voice vote in the Lok Sabha on 5th August 2019. The bill was introduced in the Rajya Sabha by Thawarchand Gehlot on 20th November 2019, upon which it was passed without any amendments on 26th November 2019 following a motion to refer it to a select

committee that failed by 77 noes against 55 ayes. The bill received presidential assent on 5th December 2019, following which the Ministry of Law and Justice published it in the Gazette of India as Act No. 40 of 2019. The act came into effect from 10th January 2020 after a notification of the same in the *Gazette* by the Ministry of Social Justice and Empowerment.¹⁵

The statutory provisions of the 2019 act prohibit discrimination against transgender people. The act includes intersex people, hijras, jogtas, and kinnars within its definition of transgender people, as well as trans-men, trans-women, and genderqueers, though these latter terms are undefined. The 2019 act describe a transgender person as someone whose gender does not match with the gender assigned to them at birth. Under the provisions of the 2019 act, a transgender person can apply to the district magistrate for transgender person certificate which will give them the right to change the name on their birth certificate and have all documents updated accordingly. However, a transgender person can be identified as male or female only after applying for a revised certificate to the district magistrate, post sex reassignment surgery.

The 2019 act also protects transgender children and provides for states and institutions to come up with adequate policies to ensure the welfare of transgender people. The act states that a transgender child can be separated from their family by a court order. However, unlike the Right of Transgender Persons Bill, 2014 neither the 2018 bill nor the 2019 act provide for reservations for transgender people in educational institutions and jobs. The 2014 bill had provided for two percent reservations in educational institutions and public employment. The 2019 act provides for punishment for crimes against transgender people, which stands as an imprisonment for a term not less than six months but which may extend to two years and a fine. The 2019 act provide for the constitution of a National Council for Transgender Persons.

The 2019 act have been met with protests by transgender people. The day of their passing has been referred to some transgender people as a “black day” and as “gender justice murder day”. Others described them as “draconian and discriminatory”. On 27th January 2020, the Supreme Court issued a notice requiring the central government to respond in a petition challenging the constitutionality of the 2019 legislation filed by judge and transgender rights activist Swati Bidhan Baruah. On 12 June 2020, the Supreme Court issued notice to the government in another petition filed challenging the constitutionality of the statute, tagging it with the petition filed by Baruah.

The Act has been criticized for overlooking the demand of transgender community for reservations in the matter of appointment which was recommended in NALSA judgement (2014) by the Supreme Court of India. The Act also provides for punishment upto two years for sexual abuse of transgender persons which is

significantly less than the punishment for sexual assault of women.¹⁶ In spite of the lacuna in the Transgender Persons (Protection of Rights) Act 2019, the transgenders are applying online for Transgender Identity Card in the hope that they will get benefits of various government schemes in the future.

In concluding this essay it may be said that the colonial rulers in their zeal to civilize Indian society passed laws that only allowed procreative sex and prohibited all forms of sex that did not lead to procreation. With the onset of colonial modernity heterosexuality and heteronormativity were established in colonial India society which was earlier more open to homoeroticism and homosexual relationships.¹⁷ This in turn, led to invisibilization or purging of homosexuality from all spheres of life including art, literature etc.¹⁸ Homosexuality came to be associated with pre-modern primitive societies, whereas, heterosexuality became a modern progressive trait. Not only this, homosexuality was also deemed as something ‘unnatural’ or ‘perversion’ to normal human behaviour. The exemplar to this was Section 377 of the Indian Penal Code which made homosexuality a ‘crime’ under the category of ‘unnatural sex’.¹⁹ Similarly, the *Hijras* or eunuchs in colonial parlance were looked upon as criminals and the colonial state decided to strictly police them and ultimately lead to their extinction. However, in spite of their best efforts the *Hijras* continue to exist today in India, Pakistan and Bangladesh. Activism by people who were marginalized in post-colonial society due to their gender identity and/or sexual orientation led to the reading down of Section 377 of the Indian Penal Code in September 2018 and the passing of Transgender Persons (Protection of Rights) Act in 2019 by the Indian Parliament. These are, however, the beginning of the struggle and there are miles to go for LGBT people before they sleep.

References

1. Hansen, Thomas Blom, *The Saffron Wave: Democracy and Hindu Nationalism in Modern India*, Princeton University Press, 1999, pp. 152.
2. https://en.Wikipedia.org/wiki/Economic_liberalisation_in_India accessed on 17.12.2022.
3. Ms. Shobha Aggarwal, ABVA, “ABVA Writ Petition for the Repeal of Section 377”, Bina Fernandez ed. *Humjinsi: A Resource Book on Lesbian, Gay, Bisexual Rights in India*, India Centre for Human Rights and Law, 1999, p.34.
4. https://en.wikipedia.org/wiki/NAZ_Foundation_V.Govt._of_NCT_of_Delhi accessed on 02.10.2022.
5. Shashi Tharoor, *Why I am a Hindu*, Aleph Book Company, 2018, pp.248-49.
6. Gyaaneshwar Joshi, “Section 377: An Insight into Controversy”, *IJLMH* (www.ijlmh.com), volume 2, issue 2, p.5.

7. https://en.wikipedia.org/wiki/Navtej_Singh_Johar_v_Union_of_India accessed on 02.10.2022.
8. http://timesofindia.indiatimes.com/articleshow/65712471.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst accessed on 05.10.2022.
9. Jessica Hinchy, *Governing Gender and Sexuality in Colonial India: The Hijra, c1850-1900*, Cambridge University Press, United Kingdom, 2019, pp.1-2.
10. Ibid, p.3
11. Ibid.pp, 8-9
12. Ibid.,p. 10
13. Ibid., pp. 257-260.
14. <https://translaw.clpr.org.in/case-law/nalsa-third-gender-identity/> accessed on 29.03.2023.
15. [https://en.wikipedia.org/wiki/Transgender_Persons_\(Protection_of_Rights\)_Act_2019](https://en.wikipedia.org/wiki/Transgender_Persons_(Protection_of_Rights)_Act_2019) accessed on 29.03.2023.
16. Ibid.
17. Ruth Vanita and Salim Kiwdai, ed. *Same Sex Love in India: Readings from Literature and History*, Palgrave, New York, 2000
18. Carla Petievich, 'Gender Politics and Urdu Gazal: Exploratory Observations on Rekhta versus Rekhti', *The Indian Economic and Social History Review*, 38(3), pp223-248.
19. Saurav Kumar Raj, 'Colonial Archives, Vernacular Literature and the History of Homosexual Relationships in Colonial India', *JIGYASA*, Vol. IV, No.3, September 2013, pp. 266-267.