

Right And Protection To Lesbian Gay Bio sex And Transgender (A Legal Study In Indian Context)

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1. Inroduction

Hindu, and transgender issues are diverse “View Of Homosexuality” and ,in gender LGBT (lesbian, gay, bisexual and different Hindu group have distinct views Homosexuality is regarded as one of the possible expressions of human desire although some Hindu Dharma texts contain injunction against homosexuality , a number of Hindu mythic stories have portrayed homosexual experience as natural and joyful.¹ There are several Hindu temples which have carving that depict both men and women engaging in homosexuality sex.² Same sex relation and gender variance have been represented within Hinduism from Vedic times through to the present day, in rituals, law books religious or so called mythical narratives commentaries, paintings and sculpture. The extent to which these representations embrace or reject homosexuality has been disputed within the religion as well as outside of it. In 2009 The United Kingdom Hindu Council issued a statement that ‘Hinduism does not condemn homosexuality; subsequent to the high court decision of the Delhi High court to legalize homosexuality in India.³ The Supreme court decision in a move cheered by domestic Hindu groups in India such as the influential right –wing RSS, which concedes it should be kept to the bedroom ,’ does not believe it illegal but immoral as it is considered a rare condition.

¹Bo villain, Nancy (2001). Women and men: cultural constructs of Gender .

² Keene, Michael (2002). Religion in Life and Society .

³ "'Hinduism does not condemn homosexuality' -

LGBT in India has been documented for different times, in recent times due to the unbanning of homosexuality and promotion of LGBT rights has made caused large amount of researches and opinions regarding the LGBT in India. There are a number of ancient Indian texts which are relevant to modern LGBT causes. The Arthashastra, an ancient Indian treatise on statecraft, mentions a wide variety of sexual practices which, whether performed with a man or a woman, were sought to be punished with the lowest grade of fine. While homosexual intercourse was not sanctioned, it was treated as a very minor offence, and several kinds of heterosexual intercourse were punished more severely.

- I. **Pre-colonial India** Sex between non-virgin women incurred a very small fine, while homosexual intercourse between men was sought to be censured by prescription of a bath with one's clothes on, and a penance of "eating the five products of the cow and keeping a one-night fast" – the penance being a replacement of the traditional concept of homosexual intercourse resulting in a loss of caste.⁴
- II. **Colonial era**-The Goa Inquisition prosecuted the capital crime of sodomy in Portuguese India, but not lesbian acts. The Mughal empire combined a number of the preexisting Delhi Sultanate laws into the Fatawa-e-Alamgiri, mandating a common set of punishments for Zina (unlawful intercourse, these ranged from 50 lashes for a slave, 100 for a free infidel, to death by stoning for a Muslim. Though a Dutch traveler in Mughal Empire wrote that male homosexuality⁵ "is not only universal in practice among them, but extends to a bestial communication with brutes, and in particular with sheep." The British Raj criminalized sexual activities "against the order of nature", arguably including homosexual sexual activities, under Section 377 of the Indian Penal Code, which entered into force in 1861. It was similarly instituted throughout most of the British Empire due to the Christian religious beliefs of the British colonial governments.

⁴ Vinita & Kidwai (2001,)

⁵ "Xavier was aware of the brutality of the Inquisition". Deccan Herald. 27 April (2010.) 18 September 2017

- III. **Modern India** In 1977 Shakuntala Devi published the first study of homosexuality in India. Whilst convictions under Section 377 were rare, with no convictions at all for homosexual intercourse in the twenty years to 2009, Human Rights Watch have said that the law was used to harass HIV/AIDS prevention activists, as well as sex workers, men who have sex with men, and other LGBT groups. The group documents arrests in Lucknow of four men in 2006 and another four in 2001. Homosexual intercourse was a criminal offence ⁶until 2009 under Section 377 of the Indian Penal Code, 1860. This made it an offence for a person to voluntarily have "carnal intercourse against the order of nature."
- IV. **2009-2013 -Asia's first Gender queer Pride Parade at Madurai with Anjali Gopalan (July 2012)** This law was struck down by the 2009 Delhi High Court decision *Naz Foundation v. Govt. of NCT of Delhi*, which found Section 377 and other legal prohibitions against same-sex conduct to be in direct violation of fundamental rights provided by the Indian Constitution. Decisions of a High Court on the constitutionality of a law (i.e. judicial review) apply throughout India, and not just to the territory of the state over which the High Court in question has jurisdiction. However, even after the pronouncement of verdict, there have been (rare) incidents of harassment of homosexual groups. On 16 February 2012, the Supreme Court, during a hearing of a bunch of appeals filed against decriminalization of gay sex, observed that homosexuality should be seen in the context of changing society as many things which were earlier unacceptable have become acceptable with passage of time. The two-judge bench, composed of Justices G S Singhvi and S J Mukhopadhyaya, opined that homosexuality should be seen in the light of changing times where phenomena of live-in relationship, single parents and artificial fertilization have become normal. They had also pointed out that many things, which were considered immoral 20 years ago, have become acceptable to society now. The bench said that gay sex was not an offence prior to 1860 and referred to paintings

⁶AIR. 2009 HIGH COURT

and sculptures of Khajuraho. Senior Advocate Amrendra Sharan, who opposed the Delhi High Court order of decriminalizing gay sex on behalf of the Delhi Commission for Protection of Child Rights, had then submitted that social issues cannot be decided on the basis of sculptures. The apex court bench, however, observed that it is a reflection of society of that time and homosexuality should not be seen only in terms of sexualinter course. Earlier, the Supreme Court bench had asked the anti-gay rights groups, challenging legalization of gay sex to explain how such acts are against the order of nature as submitted by them. The apex court was hearing petitions filed by anti-gay rights activists and also by political, social and religious organizations which have opposed the Delhi High Court vermicides criminalizing homosexual behavior. However, on 23 February 2012, the Union Home Ministry of the UPA government replying to a Supreme Court observation, told the Supreme Court that it was opposed to the decriminalization of gay sex. "This is highly immoral and against the social order," the Home Ministry told the apex court. It said that India's more land social values were different from other countries, and therefore, The nation should not be guided by them. The Central Government reversed its stand on 28 February2012, asserting that there was no error in decriminalizing gay sex. This resulted in the SC pulling up the Centre for frequently changing its stand on the issue. *Don't make mockery of the system and don't waste the court's time*, an apex court judge told the government. Also in 2012, a guide titled 'Creating Inclusive Workplaces for LGBT Employees in India' was developed by IBM, Goldman Sachs, Google together with Community Business, a nonprofit organization. In December 2013, however, India 'stop court upheld the law that criminalizes gay sex, in a ruling that reverses a landmark 2009 Delhi High Court order which had decriminalized homosexual acts. The court said it was up to parliament to legislate on the issue.⁷ Indians have traditionally interpreted Section 377, a 153-year-old colonial era law, as condemning a same-sexrelationship as an

⁷ Ibid 2

"unnatural offence", and also considering it punishable by 10-year jail term. Political, social and religious groups petitioned the Supreme Court to have the law reinstated in the wake of the 2009 court ruling.

- V. **2013-present** The protests against the reinstitution of Section 377 took place across India, and resulted in political activism across political parties to declare their support for the law's repeal. By April 2014, the month of the upcoming election, at least three major political parties - the Aam Aadmi Party, the Congress and the Communist Party of India (Marxist) - had included support for decriminalization of homosexual relations in their election manifestos,[21] while the BJP's leadership supported the law. In July 2014 first book on Gender queer in Tamil and first Tamil book on LGBTQIA was from Sri Madurai was released by BJP's state general secretary, Vanathi Srinivasan, at the 6th Hindu spiritual service foundation's sixth service fair, Chennai. In June 2016, a dating platform called Amour Queer Dating was launched in India, for LGBTIQ people seeking long term companions. In May 2017 the first Bhopal Pride March was conducted, gathering the participation of around 200 members.

2. Third Gender Meaning- The "Third Gender" the term "third" is usually understood to mean "other" and Gender on the other hand is the state of mind i.e. one who born female but live has a male or vice versa. Basically they are neither considered as male or female, it is indeed sex and gender are not synonymous.⁸ The term "sex" refers to either biologically female or male. Therefore the term generally described as an umbrella term for person whose identity, expression or behavior does not conform to their biological. They also include persons, who intend to undergo Sex Re- Assignment Surgery (SRS) or have undergone SRS to align their biological sex with their gender identity in order to become male or female. Further there are persons who like to cross-dress in clothing of opposite gender i.e., called as transvestites. The term Third Gender can be used in the wider sense Even gay, lesbian, bisexual

⁸ Human right and transgender in India.

can be included by the descriptor “third gender”. However ,they are known by different names in different parts odd India such as: Hijas in Bangla desh, Arvanis in the South India , the Jotas and Jogappas in Maharashtra and Karnataka, and lastly Shiv-Shakthis and Chakkas across India .In India , the “third gender” are the group of people who belong to ‘Hijras . They are not seen as woman or man , but rather the mixture of both due to their biological condition (impotency) or their personally choice i.e, transgenderism. Hijras are not transsexual as they do not see themselves as woman trapped in the men’s body .As a matter or fact the emasculation opration does not transform them men to women or vice versa but men to hijra .Hence . A hijras see himself as an in herself as an in between who belong to third gender. Therefore ,the third gender can be describe as a natural mixing or combination of the male or female and to thr point in which they can no longer be categorized as male or female in the traditional sense of the word .To culture or individual , a third gender may represent as themselves as between men and women a man of being both such as the men of the female in the body of the male .the state of being nither culture the identity to cross or swap gender category altogether independent of male or female .⁹

3. What are “sex” and “gender”?

Because of the indicate association with deep issues such as mind and body ,identity and culture and society and the individual, there actually aren’t any consenses definition for sex and gender but for general form desing purposes, it is sufficient to use the following very board description:

- a) **SEX-** The biological but not binary distinction between male or female biological means anatomical (eg; breasts or a penis), hormonal (eg; level of gender) and or chromosomal .

⁹ Ibid

b) **Gender**-How the person identifies (psychologically) and /or expresses themselves. Some one's gender may or may not make reference to their biological sex. for example ,a person with female genitalia may feel like and identify as ,a man another person may identify as 'gender-queer', signifying that they see themselves outside the binary constructs of male and female. as you can see, what a person would report as their 'sex' can be very ,very different from what they may say is their 'gender' this is why need to think very carefully about what it is you want to collect with your form.¹⁰

c) **Definition of Third Gender**-Recently Indian supreme court has acknowledged transgender people as the third gender by amendment of Indian constitution and it has created a special pluse over the nation. Third gender generally described as an umbrella term for persons whose gender identity , behavior or expression does not conform to their biological condition or sex which assigned at birth , and they do not identify as either male or female .sex refers to biological different while gender describes the characteristics that a society or culture delineates as masculine or feminine.

4. Laws in India and Homosexuality India has a very dynamic and progressive Constitution which in a way is the backbone of this very vast and complex nation. The Indian Constitution provides rights and protections to each and every citizen of this country whether he is in majority or in minority. The Constitution treats everyone equally without any discrimination. It is the duty of the State to ensure that no one should be discriminated against.

LGBT community persons are in minority and they too have equal constitutional rights. But their right to equality and right to get equal treatment in the society are

¹⁰ Sharma shubharam "transgender in India : human right and social servies

violated on regular basis. Not only society as whole but State machinery also treat them differently, especially police. They are regular victim of rights violations. They are deprived of their basic human right and right to life which includes right to enjoy life properly.

5. Section 377 of IPC and Rights of LGBT community:

One of the major lacuna or contentious legal provision in our laws is Section 377 of the Indian Penal Code, 1860. Section 377 of the IPC says: 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 term which may extend to ten years,¹¹ and shall also be liable to fine.” Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offense described in this section. Thus the section makes any sexual activity against the order of the nature as criminal offence. Even voluntary act of such kind is punishable. Thus consent between two persons of same gender for such activity is immaterial. Therefore, section 377 criminalizes homosexual activity and makes it punishable with as high punishment as life imprisonment. This provision of IPC has become a major controversial point and topic of debate in recent times. People of LGBT community are trying from quite sometimes to convince and pressurize our law makers to decriminalize Section 377. In other words, LGBT social action groups are demanding that if two consenting adults of same sex are involved in homosexual activities, it should not be a criminal offence. But when their plea was not responded by our legislatures, they went to the Court for appropriate and just solution to their grievances through a Public Interest Litigation (PIL). The said PIL was filed by a NGO namely Naz Foundation in Delhi High Court. In the case *Naz Foundation v Govt. of NCT of Delhi* (2009 Delhi H C) passing a landmark judgment on 2nd July 2009, Delhi High Court declared Section 377 as illegal as far as it criminalizes same sex sexual activity between two consenting adults done in private. Thus, in effect Delhi High Court, in its historic decision upheld and secured the LGBT people’s right to sexuality.

¹¹ AIR 1963 SC 1295. In April 2014

6. CONSTITUTIONAL LAW AND JURISPRUDENCE

The idea of Fundamental Rights was first conceptualized in *the Bill of Rights of the American Constitution* and has been adopted into the Indian one. *Preamble to the Constitution of India* mandates Justice - social, economic, and political, equality of status. In essence, the Constitution of India is sex blind, that is to say, the basic premise of equality is based on a Constitutional mandate that the sex of a person is irrelevant save where the Constitution itself requires special provisions to be made for women.¹²

I. Right to Equality The Constitution provides every person an equal status before the law and an equal protection of laws within the territory of India. The word „any person“ here means every individual, without any discrimination based on any of the category which includes, caste, creed, religion, sex, etc. A transgender in India is included within the words „any person“ and is given equal status to that of every cis-gender in India.⁸ The transgender community cannot be discriminated on the ground of non-application of any of the laws within the nation by reason of their differences and dividing them based on any arbitrary class.¹³

In *National Legal Service Authority v. Union of India*,⁹ the interpretation of the word person was widened and was held that Article 14 of the Indian Constitution does not restrict the word „person“ and its application only to male or female. Hijras/transgender persons who are neither male/female fall within the expression „person“ and, hence, entitled to legal protection of laws in all spheres of State. Bill of Rights of the United States of America (1791). The first 10 amendments to the Constitution make up the Bill of Rights. Written by James Madison in response to calls from several states for greater constitutional protection for individual liberties, the Bill of Rights lists specific prohibitions on governmental power. Other precursors to the Bill of Rights include

¹² AIR 2014 SC 1863 at 1890 .

¹³ A.I.R. 1981 S.C. 1675

English documents such as the Magna Carta, the Petition of Right, the English Bill of Rights, and the Massachusetts Body of Liberties. *Available at:* The Constitution of India - Preamble. The Constitution of India - Article 15. National Legal Service Authority v. Union of India, activity, including employment, healthcare, education as well as equal civil and citizenship rights, as enjoyed by any other citizen of this country. The transgender community falls within the purview of the Constitution of India and thereby they are entitled to all the rights as guaranteed under the same.

II. **Equality of Opportunity and Right against all forms of Discrimination**

The key word with regard to the protection of Transgender is the word “sex”. The interpretation of the word “sex” includes these communities irrespective of them falling under the category of male or female. The Apex Court of India in a landmark case¹⁰ observed that both gender and biological attributes constitute distinct components of sex. Biological characteristics include genitals, chromosomes and secondary sexual features, but gender attributes include one’s self image, the deep psychological or emotional sense of sexual identity and character.¹⁴ The discrimination on the ground of “sex” under *Articles 15* and *16 of the Indian Constitution* includes discrimination on the ground of gender identity. The expression “sex” is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male or female. *Articles 15(2)* and *16(4)* has also been interpreted to provide social equality to these communities such as equality in public employment, it provides that the states shall have the power to make any special provision for the upliftment of these vulnerable minority who are now included within the category of socially and educationally backward classes.

These Articles read with the Directive Principles of State Policy and various international instruments to which India is a party, call for social equality, which the transgender could realize, only if facilities and opportunities are extended to them so that they can also live

¹⁴ AIR 2014 SC 1863

with dignity and equal status with other genders. Poonam Verma, *Sorrows of Transgender, Judiciary and our Society*.¹⁵

III. **-Fundamental Freedom-** All the basic values of privacy, self-identity, autonomy and personal integrity are the basic and fundamental rights which are guaranteed to the members of the transgender community under Article 19(1)(a) of the Constitution of India and the State is bound to protect as well as recognize the rights of the citizens.

*Article 5 of the Indian Constitution*¹² identifies the persons who are entitled to be citizens of India. None of the conditions specified therein require a determinate sex or gender identity as a pre-condition of acquiring citizenship. Therefore, a transgender has the right to express his feelings, his behaviour and personality towards the society and the state has the duty to protect it. The state cannot restrict this expression being a part of the fundamental right.

7. CONCLUSION

The LGBT community or GLBT community, commonly referred to as the gay community, is a loosely defined grouping of lesbian, gay, bisexual, and transgender (LGBT) and LGBT-supportive people, organizations, and subcultures, united by a common culture and social movements. These communities generally celebrate pride, diversity, individuality, and sexuality. LGBT activists and sociologists see LGBT community-building as an antidote to heterosexism, homophobia, biphobia, transphobia, sexualism, and conformist pressures thought to exist in the larger society. Homosexuality is a feeling or desire involving sexual attraction to people of one's own sex. In common usage, the term homosexual is used to refer to both same-sex oriented males and females. The word 'Gay' is often used as a synonym for male homosexual behavior while the term 'Lesbian' is referred to a woman who is sexually attracted to another woman. In terms of sexual orientation of individuals, a bisexual person is sexually attracted to both men and women. nascent. Until recently, most homosexuals in India did

¹⁵ Maharashtra v. Public Concern for Governance Trust, A.I.R. 2003 S.C. 223

not have many social and cultural avenues to express their sexuality. This is changing now, thanks to greater awareness and education. Many men of homosexual orientation are choosing to identify themselves as 'gay' and embracing. Although homosexuality has a long history in India, the gay movement is relatively a lifestyle that resists marriage and other conventions of an otherwise heterosexual society. They remain largely invisible and form networks that shy away from the public glare for fear of social and familial backlash. The new understanding was based on studies that documented high prevalence of same-sex feelings and behavior in men and women, its prevalence across cultures and among almost all non-human primate species. Investigations using psychological tests could not differentiate heterosexual from homosexual orientation. Research also demonstrated that people with homosexual orientation did not have any objective psychological dysfunction or impairments in judgment, stability and vocational capabilities. Psychiatric, psychoanalytic, medical and mental health professionals now consider homosexuals as a normal variation of human sexuality. Homosexuality has an ancient history in India. Ancient scriptures like Rig-Veda which dates back around 1500 BC and sculptures and vestiges depict sexual acts between women as revelations of a feminine world where sexuality was based on pleasure and fertility. The description of homosexual acts in the Kama sutra, the harems of young boys kept by Muslim Nawabs and Hindu Aristocrats, male homosexuality in the medieval Muslim history, evidences of sodomy in the Tantric rituals are some historical evidences of same sex relationship. Homosexuality is generally considered a taboo subject by both Indian civil society and the government. Public discussion of homosexuality in India has been inhibited by the fact that sexuality in any form is rarely discussed openly. In recent years, however, attitudes towards homosexuality have shifted slightly. In particular, there have been more depictions and discussion of homosexuality in the Indian

news media and by Bollywood. On **2 July, 2009**, Delhi High Court, decriminalised homosexual intercourse between consenting adults adjudged **section 377** of 'the Indian Penal code to be conflicting with the fundamental rights guaranteed by the Constitution of India.

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