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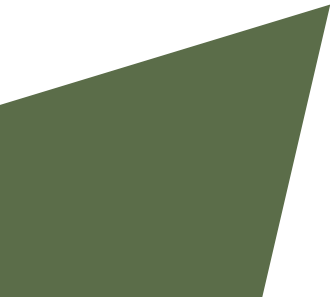
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LGBT orientation on Virtual plane: A Legal Perspective

Prof. Indrajit Acharyya

ABSTRACT

Human emotions, sexual passion and preferences, romanticism cannot be put into a straight jacket formula. Modern and civilized law, society had learnt to accept that attraction towards same-sex is nothing abnormal. But it is spleenful that still obscurity of a group of people eclipses the love between them. As soon as a child is born the society recognizes it as a male or female by their primary and secondary sex organs. But for people who are transgender and gender non-conforming, the sex they're assigned at birth may not align with the gender they know themselves as their Sexual preference effects by the structure of brain. PET and MRI concluded that the two halves of the brain are more symmetrical in heterosexual women and homosexual men than in homosexual women and heterosexual men. Science has progressed to the extent where Trans-men retaining the primary sex organs can become pregnant. Starting from British India to Independent and Democratic India there had been several changes in the view of judicial condition of third gender, their individualism; The Judicial activism has finally redeemed and liberated those sections from the continuous hardship. Various NGO's has transgressed social barriers and ultimately justice and equity are given to them. The TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019 defined transgender and prohibited discrimination against them providing punishment for such act. Problems with the Act is that it gives recognition to a transgender person on the basis of approval (certification) of the District Magistrate , and lack of infrastructure in health and education and jail of just 2 years even for sexual harassment. Society has failed to accept them as they are even today. Moreover this pandemic and Covid 19 have made their situation more vulnerable due to their limited resources.

Keywords: *LGBT, Gender Conformation, Biological Syndrome, Judicial Activism, Punitive Action.*

INTRODUCTION

“The true revolution is guided by great feelings of love”. Che Guevara

Love is an intense affection and attachment for another person who knows no bars. Human emotions, sexual passion, and preferences, romanticism cannot be put into a straight jacket formula. Modern and civilized law, society had learned to accept that attraction towards same-sex is nothing abnormal. The love between same-sex couples is as beautiful and pious as the love between the opposite sexes. But it is spleenful that still, the obscurity of a group of people eclipses the love between them.

The LGBT (Lesbian, Gay, Bisexual, and Transgender) community is often subjected to such injustice and improbity. The LGBT (Lesbian, Gay, Bisexual, and Transgender) community refers to the Lesbian, Gay, Bisexual, and Transgender community. By the 20th century in the western world, protests and movements of people for their rights who recognized themselves as gay, lesbian, bisexual was gradually becoming popular. But they were not properly being represented especially when it came to appreciating the sexual orientation of a woman. From about 1988, activists began to use the initial LGBT in the United States. During the 1990s their movements paid equal respect to lesbian, gay, bisexual, and transgender. Earlier there were lots of hassles and clutter among the communities which consummately terminated the perturbation.

WHAT ARE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER?

Reproductive physiology is a process that involves creating new people of the same kind along with slight genetic, structural, and physiological variation. As soon as a child is born the society recognizes it as a male or female by their primary and secondary sex organs. But how can one recognize the gender of the child? Very few people understand that sex and gender are two different phenomena. But for people who are transgender and gender non-conforming, the sex they're assigned at birth may not align with the gender they know themselves are. They may find different sex than what they are assigned at birth. It says that sex is one's apparent and esoteric identity whereas gender is the soul, the brain of one's self-identification. And the situation becomes sluggish and harsh for people who find themselves in a different gender with respect to their sex. Society often decides by itself and sets a bar that is very obvious for a man to love and get attracted to a woman and vice versa. Even in this internet era, our society gulps down to accept that similar sex attraction is spontaneous and innate. Now let us define all these terms:-

- *HOMOSEXUAL*: Person who is sexually attracted and in love with people of same-sex
- *HETEROSEXUAL*: A person who is sexually attracted to people of the opposite sex.
- *GAY*: A man who is sexually attracted to a male.
- *LESBIAN*: A woman who is sexually attracted to a female.
- *BISEXUAL*: Person who is sexually attracted to both men and women.

TRANSGENDER: One who is born into sex but find themselves in a different gender which doesn't assign with the sex they were born. It also includes Hizras or Eunuchs.

EUNUCHS: People who don't find them either as a male or female either naturally or by castration.

CIS-GENDER: A person whose gender identity matches the gender assigned to them at birth.

EARLY DAYS OF LGBT ISSUES IN INDIA

Due to rigid traditional values and after-effects of over two centuries of British rulings/colonialism homosexuality or transgender was illegal in our country and very seldom it talks about in open or public forum /domain or in our social milieu. Even after independence over the years both the Governments of ours i.e. State & Central Governments ignored these issues and they were also not-self assured or confident enough to frame policies to combat or tackle LGBT issues. But very recently things have changed mostly because of the propagation of social media and Indian people are much more vocal about their standing and opinions now a day. They have thrown all the cautions through the window to come out on road in numbers, showing their protest, agitations, filing of many PILs or forming various forums/associations to bring all the same minded persons along with LGBTs under one roof and to fight for their issues collectively. The outcome of these is visible through several homosexual representations in Bollywood Movies in recent Years which were few and far even before one or two decades ago. This coupled with more frequent portraying of transgender or homosexuality in our News Channels and various other Media as they have provided an open platform to discuss sexuality for the past few years.

To understand these issues one must first understand and recognize that the traditional family (heterosexual) system is the backbone and pillar of our culture and society. We from the very first day of our life are very much into the fact of getting married and have children and it is due to this heterosexual oriented mentality very little room for transgender or homosexuals to live their life fullest. Hence these LGBTs are very often subjected to harassment at public places as well as at workplaces. Here it is also noteworthy that Indian society is very much patriarchal and it is because of this unequal distribution of power within our society lesbians are more ousted/discriminated in comparison to gay people.

INDIAN LAW AND LGBT COMMUNITY

With time there has been a gradual change in the mindset of society. The change of law develops the society. Many times the enthusiasm of the common mass and its opinion is the reason behind the mutation and change in the law. But what if the majority of the society didn't substantiate that there is a necessity for change in society. It calls to mind that changes in society are often initiated by the mindset of the few people who had always spoken for the oppressed minority section and their rights. Starting from Raja Ram Mohan Roy, Iswarchandra Vidyasagar demanding for rights of woman to Anna Hazare demanding for corruption

free society through Lokpal, the changes have brought by the vision and objection of a single man desiring for many in the society.

IS BEING GAY, LESBIAN, AND TRANSGENDER UNNATURAL?

No, not all. Research says that sexual preference influenced by the structure of the brain. In the year 1991, a science journal published that *“there is a difference in hypothalamus in homosexual men than in straight men”*. ‘Hypothalamus’ is responsible for the release of sex hormones from the ‘pituitary gland’. Further study through PET and MRI concluded that *“the two halves of the brain are more symmetrical in heterosexual women and homosexual men than in homosexual women and heterosexual men”*. Even in 1992 research has shown that the smaller connection between the brain's two hemispheres which is known as ‘anterior commissure’ is larger in homosexual men than in straight men. But an objection with the term straight used at these research papers. Here one may fail to understand on what basis we differentiate people into straight or coiled when both of them are a creation of nature. It is in science. Science also says that it is absolutely normal for one's sexual orientation to change at any stage of our life. Life is a long journey and thus full of new discoveries.

The uplifting of human brains takes place since we are in the mother's womb. The character of an unborn child also depends on the hormones to which the fetus opens in the uterus of the mother. Estrogens and progesterone are the two main female hormones. Estrogens along with reproductive and sexual development are also the reason for brain development. Women also have a little amount of Testosterone hormone. It regulates sexual desires. And thus an inference draws that hormones along with the sex of a person also decide the gender which can't be observed through one's naked eyes. Hence people who can find their true identity undergoes and endures through lots of surgeries to make a perfect and immaculate match of their sex with the gender, soul with the body. But then a question peeps in our mind that people who find themselves as a man in a woman's body or vice versa and do not undergo any surgery are they transgender too? Well, we will discuss this later.

Much to our surprise regardless of hormone replacement therapies Transgender men can also conceive who have a functioning vagina, ovary, and uterus. Although trans-men who carry pregnancy are often subjected to lots of disavowal of society. On the other hand, although Trans woman yet does not have possession of anatomy to give birth to a new life. But various universities, medical teams are now focused on bringing successful uterine transplantation.

THE WORLD AND OUR NATION:

On 15th June 2020, the Supreme Court of the United States of America in BOSTOCK v. CLAYTON COUNTRY¹ pronounced a landmark judgment protecting the basic civil right of gay and transgender workers from discrimination at the workplace. It is now illegal to sack and discharge any employee from L.G.B.T community just on the idea of belonging from the above-mentioned minority community which was legal in more than half of the States before this judgment. It is elegiac and doleful to behold the truth that a progressive nation like the United States had also neglected and scorned the basic principle of equality.

India however since the advent of the Constitution has given the emphasis on the protection of minority rights. The aims of the Constitution makers could be easily perceived from the Preamble of the Constitution. Moreover, Article 14 and Article 15 not only states about equality but also prohibits discrimination on grounds of religion, race, caste, sex, or place of birth. Further Article 16 provides equal opportunity in matters of public employment. But it is remembered that the success of legislation doesn't depend on its enactment but execution.

PROLIFERATION OF SOCIAL MEDIA WITH NEW HORIZON OF LGBT RELATIONSHIP AND THEIR LEGAL PERSPECTIVE:

After being decriminalization of Sec.377 of IPC many dating apps have come out for LGBT community and they are very much happening on digital media as it makes the community a happening one especially in helping them to find out their soul partner which they can't do easily in public in a patriarchal society like India. Such apps are Grindr, Zoe, Just She, Surge, Fem, etc. But like other dating apps, there are few pros and cons of LGBT dating apps as well. They are VIZ:

Pros:-

- Its approachability
- Convenience
- Personality & Confidence booster
- User friendly

Cons:-

- Dishonesty / Mensrea
- Distancing
- Cyber Crime
- Anonymity / Cheating by Personation

¹ Bostock v Clayton Country, 590 US Docket No: 17-1618, 140 S. Ct. 1731; 2020 WL 314

- Stigma

THE TEMPLE OF LAW AND RELIEF AGAINST CRIMINALIZATION OF CONSENSUAL SEX UNDER SECTION 377:-

The first step towards victory erected by the NAZ Foundation decided by the two Judges Bench of Delhi High Court in Naz Foundation v Govt. of NCT of Delhi². A Public Interest Litigation lodged by a Non-Governmental Organization, NAZ which challenged the constitutional validity of Section 377 of the Indian Penal Code which penalized ‘unnatural offences’ of criminalizing consensual sexual acts in private.

They pleaded such draconian law was violative of Article 14, Article 15, Article 19 and Article 21³ of the Constitution of India. Article 19 of the Indian Constitution aims at the protection of certain rights like freedom of speech and expression, freedom of occupations etc. Article 21 deals with the protection of life and personal liberty. Section 377 of Indian Penal Code⁴ which comes with a ‘marginal note’ “*Of Unnatural Offences*” reads as –

“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 ten years, and shall also be liable to fine.”

They limited their plea by stating that section 377 should only be applied to non-consensual penile and non vaginal sex and penile and non vaginal sex in minors.

The dispute with Section 377 was that it criminalized consensual sex also violating the basic fundamental rights of people. In Khanu v. Emperor, AIR 1925⁵, Kennedy A.J.C. held that “*Section 377 IPC punishes certain persons who have carnal intercourse against the order of nature with inter alia human beings*”.

Further in cases like Calvin Francis v. Orissa⁶, and Fazal Rab Choudhury v State of Bihar⁷ it observes that Section 377 IPC implied ‘sexual perversity’.

Although the concept of penalizing homosexuality started in British India it was de-criminalized homosexuality in Britain by the Sexual Offences Act, 1967, which decriminalized homosexuality and acts of sodomy between consenting adults.

² NAZ Foundation v Govt. of NCT of Delhi; 160 Delhi Law Times 277

³ Article 14, Article 15, Article 19, Article 21 of the Constitution of India, 1950

⁴ Section.377 of Indian Penal Code, 1860

⁵ Khanu v. Emperor AIR 1925 SIND 286

⁶ Calvin v. Orissa 1992 I OLR 316

⁷ Faizal Rab Chaudhury v.State of Bihar AIR 1983 SC 323

Finally, in NAZ Foundation v. GOVT of NCT of Delhi, the two Judges Bench of Delhi High Court consisting of the then Chief Justice Ajit Prakash Shaw who was the author of the judgment and Justice S. Murlidhara held that “treating consensual homosexual sex between adults as a crime was a violation of fundamental rights protected by the Constitution”. They declared that Section 377 was violative of Article 14, 15, and 21 to the extent to which it criminalized consensual sexual acts of adults in private in case of adults.

But this major chronicled decision of the Delhi High Court was unfortunately overruled in 2013 in Suresh Kumar Kaushal and another v. NAZ Foundation⁸ and others by two Judges Bench of the Supreme Court. In 2017 after lots of curative pleas the Supreme Court agreed to reconsider its decision. After its re-evaluation a five Judges Bench of the Supreme Court in Navtej Singh Johar v. Union of India⁹ in 2018 overturned the judgment of the Suresh Kumar Kaushal’s case. It says that “*bigoted and homophobic attitudes dehumanize the transgender by denying them their dignity, personhood and above all, their basic human rights.*”

The Supreme Court further stated that “*the character of Section 377 was unreasonable because the LGBT community was exploited, secluded and harassed at the hands of majority*”. It further states the advent of homosexuality is not a mental disorder. The Supreme Court concluded the case of Suresh Kumar Koushal by saying “*constitutionally impermissible which shrugged its shoulders by saying that the LGBT community comprised only a minuscule fraction of the total population and that the mere fact that Section 377 of Indian Penal Code was being misused is not a reflection of the fact that it ultra vires the Constitution or there is no violation of fundamental rights*”. And their love and sexual desires got protection from the Honorable Supreme Court of India.

RECOGNITION OF THIRD GENDER:

In National Legal Services Authority v. Union of India¹⁰ in the year 2013 a Bench comprising K.S Radhakrishnan and A.K Sikri gave the landmark judgment where for the first time the Honorable Supreme Court gave acknowledgment and admitted the happening of the third gender. The Supreme Court has held that Article 14 does not restrict the word person and its application only to male or female and Hijras/transgender persons who are neither male nor female fall within the expression ‘person’. According to the Apex Court the Transgenders also have the right to privacy, right be treated with dignity as well as the right to life along with the right to equality and non-discrimination, and right be protected from medical abuses, right to freedom of speech and expression. The Court also observed the traumas and hardship caused to one of the petitioners Laxmi Narayan Tripathi who identified herself as a hizra. In Pará 129 of the alleged

⁸ Suresh Kumar Koushal v. Naz Foundation; Civil Appeal No:10972,(2014)1 SCC 1

⁹ Navtej Singh Johar v. Union of India W.P.(Cri)No 76 of 2016

¹⁰ National Legal Services Authority of India v. Union of India and others (2008) 3 SCC 438

Judgment, the Supreme Court gave 7 directions to the Central Government for protection of their rights. The Supreme Court came to know that an expert committee framed to make an in-depth study of the problems faced by the Transgender community and suggest measures implemented by the Government to ease their problems and to give its report with recommendations within three months of its constitution.

In K.S Puttaswamy v. Union¹¹ of India popularly known as the *Aadhar Judgment* it was conclusively determined by the nine Judges Bench of the Supreme Court by mentioning that right to privacy is a fundamental right. Therefore non-conformity of such right will be disrespect or dishonor to the pious Constitution of our Country.

TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

The Act consists of a total of 23 sections and 9 chapters. The main provisions of the Act are:-

1. Section 2k of the Act states "transgender person" means "*a person whose gender does not match with the gender assigned to that person at birth and includes -*

Trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, gender queer and person having such socio-cultural identities as kinner, hijra, aravani and jogta."¹²

2. Chapter 2 of the Act prohibits discrimination against a transgender person or unfair treatment in educational establishments, health care, employment or occupation or termination from there too, or unfair treatment in terms of health care, residence, standing for public or private office, etc or denial in enjoying goods, accommodation, and service.

3. Chapter 3 gives a transgender adult person as a right to recognition and self-perceived gender by applying before the District Magistrate who shall give a certificate of identity of a transgender person under section 5. In case of a minor such certificate to make by the parent of such child.

4. The proper government shall formulate welfare schemes and programs for non-stigmatizing and none discriminate them and engage them in social and cultural activities.

5. Chapter 5 of the Act has another interesting feature which bars separation of the child from parents or immediate family on grounds of being a transgender except on order of a court in the interest of the child. It has also prohibited discrimination in the establishment of recruitment for being transgender.

6. Chapter 7 of the Act states that the State shall constitute a National Council for Transgender persons to look into their development in every field and shall advise formulation of policies, programs for them.

¹¹ K.S Puttaswamy and Anr V. Union of India and others (2017) 10 SCC 1

¹² www.indiakanoon.com

7. Chapter 8 of the Act states about penalties of imprisonment with six months which can extend to two years and declares compelling of transgender people for bonded labor, denial of the right to a passage at a public place, forcing them to leave the place of residence, or any kind of abuse to them as offence.

PROBLEMS OF TRANSGENDER PERSONS (PROTECTION OF RIGHTS)

ACT, 2019:

-
1. The gender identity of one depends on the certification of the District Magistrate. But in India are all District Magistrate prepared mentally or are equipped enough to deal with such issues? So how far it is a fair determination of one's gender be finalized by a quasi-judicial body like the office of District Magistrate?
 2. If a person after receiving of certificate undergoes surgeries the District Magistrate shall, on receipt of an application along with the certificate issued by the Medical Superintendent or Chief Medical Officer, and after being satisfied enough with the genuineness or legality of such certificate, issue a certificate indicating the change in gender. But no details have been given on reasons for dissatisfaction of the medical officer or medical superintendent and so for non-issuance of the alleged certificate, they are bound to assign any reason for such rejection.
 3. The Act mentioned that after receiving the concerned medical certificate from the Medical Superintendent or Chief Medical Officer, the District Magistrate on being satisfied with such certification will decide the person as a Transgender or not. But is the District Magistrate medically knowledge or acquainted enough with the physiology and psychology of a Trans person?
 4. What will happen if the District Magistrate or the Medical Superintendent or Chief Medical Officer refused to certify the concerned person as the LGBT community for some legal, technical and medical reasons? Any other decisions are given by District Magistrate under Sec.144, 133, 106 of Cr.P.C, 1973 reversible through Revisional Jurisdiction, then why can't the same (Revision, Review) be accessed by LGBTs once their petition rejects by the District Magistrate or the Medical Superintendent or Chief Medical Office?
 5. The Act fails to give infrastructure for proper health facilities to the extent which requires.
 6. The Act states about equal treatment of Trans people. But it doesn't give a Trans person an opportunity to adopt a child and enjoy parenthood.
 7. There is no provision of punishment for forced unnecessary and non-consensual sex reassignment surgery.

8. It is very much unfortunate that the punishment for sexual abuse to a transgender is mostly of 2 years. Does not the value of dignity and chastity of a transgender value as much as of a Cisgender? Isn't this a grave violation of equality?

PROBLEMS FACED BY LGBT PEOPLE IN THIS SOCIETY:

1. LGBT is an umbrella term. Although the lesbian and gay love had got a legal sanction yet no step has taken to give legal recognition to their marriage. Everybody dreams of a family with their loved ones. Very little progress has been made in this regard.

2. Society had yet not accepted the LGBT community as they accept other males and females.

3. There are lots of fields where opportunities for transgender communities have not been made. The Hijra community had a long history in India. Despite characters like Shikhandi in mythology we have learned very little from it. The government and society had failed to deploy them shielding from the danger of states. Although it can't be denied that society is evaluating with time and hence starting from Manabi Mukherjee as the first trans-woman principal of a government college we have Joyita Mondol, the first transgender judge, we are witnessing many such instances in our society.

It is infelicitous that Manabi Mukherjee had to resign due to non-cooperation from her colleagues who were the educator of our mass society.

4. It seems that Tagore's Chitrangada wasn't really appreciated in the corporal life. Many legends including Rituparno Ghosh was discourteously treated, disrespected, rough necked and people had been insolent with him for being different.

5. Research says that LGBT youth have the highest rate of suicide attempts. The constant bullying of LGBT youths had forced them to take such drastic steps.

6. It can't be denied that home and residence are one of the major problems faced by the LGBT community. Very little attention had been given to their health issues since independence.

7. The lion share of Indian society is yet Transphobic. The behavior one does with a eunuch or Hijra, the way many cisgender react with transgender or the conduct of many heterosexual people with homosexual people depicts the idiocy of such people. It must be borne in mind that they are as normal as us and won't force us for a sexual relationship that we don't desire. Because such a wrong image had always been portrayed by commercial industry at times.¹³

8. Parents often fail to understand that their children represent or belong from the LGBT community and that isn't any physiological or psychological disease.

¹³ www.lawcorner.in

9. The cohabitation of one person with any person from the LGBT community in the false promise of marriage has not got any special attention from the legislature or other authority, nor any special penal provision for providing punishment to them is compared with the womenfolk who have a shield-like 'Section 376 of Indian Penal Code' which to some extent protect them from being exploited in lieu of false promise of marriage.

LOCKDOWN, COVID 19 AND THE LGBT:

The COVID 19 and lockdown make the LGBT community more vulnerable. Most of the Transgender who are sex workers or beggars are struggling to survive. Their livelihood affected. Very few of them has access to ration card or other relief services. But these issues are least discussed.

CONCLUSION

There are miles to go before we sleep. As a nation, we must remember the Constitution had always impliedly provided rights to all of them which we failed to understand. They need our support. Often a man trolled for his deeds and tagged as a 'Chakka' or 'Hizra'. Being Chakka or Hizra is better than being hypocrite, uncivilized moron. Why aren't Transgender in the film industry? Why aren't they widely participating in the development activities of the nation? How many LGBT representations do we have at the Parliament? Why is it considered that on any news debates or on any public forum people from the LGBT community can only talk about their own community and not on Indo-Chinese dispute or Legal issues or Scientific topics? Why there is no public loo for Transgender at malls, Airports, cinema halls, or at any auditorium? It's high time that India should know these answers.