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Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to

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Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8 Articles in various reputed Law Journals. Conducted 1 Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.



Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

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ISSUES AND RIGHTS OF LGBT IN INDIA: A LEGAL STUDY

Author - Dr. Swapnil Tripathi,
Assistant Professor, Nehru Gram Bharti
Deemad To Be University, Prayagraj.
Co. Author - Dr. Mayank Shekher Tiwari,
Assistant Professor, Mathura College of Law,
Mirzapur, Uttar Pradesh.

Abstract

Lord Macaulay drafted the IPC in 1860 and enacted in 1861. Haplessly, we are still bearing the odds of Section 377 of the IPC, which was drafted 156 years ago. Though the IPC introduced in 1860, it was amended in 1935 only and included the *oral sex*. It has earlier been restricted to *anal sex* in 1884. It continues to be applicable to non-consensual and non-vaginal sex. In the case of *Khanu Vs. Emperor (1925)*, it was held that “the natural object of sexual intercourse is that there should be the possibility of conception of human beings”. Since inception, homosexuality has been a matter of debate across the world. In Britain, King Edward VI went on to repeal the Buggery Act, an anti-sodomy law, a number of times in 1548 only, it is to be re-introduced 15 years later. Denmark became the 1st country in 1989 to grant the same rights to same-sex partners as to married partners with Norway, apartheid Africa enshrined gay rights in its constitution. In the light of the landmark judgment delivered in *Obergefell Vs. Hodges*¹, the USA in its constitution made 14th Amendment as “the state shall not deprive any person of life, liberty or prosperity without due process of law and the state shall not deny any person “the equal protection of the laws”. By reckoning the sensitivity, and a humungous criticism from all quarters, the Apex court bestowed the issue to the Five Men Bench, which is yet to be delivered its verdict. It is an augur well for the LGBT community that the Apex Court on 15-04-2014, declared that transgender people as a socially and economically backward class entitled to reservations in education and job and also directed the Central and State Governments to frame the welfare schemes for them. Further on 24-04-2015, the Rajya Sabha passed the Rights of Transgender Persons Bill, 2014 guaranteeing rights and entitlement allowances and skill development for the Transgender people. By reckoning the rapid changing circumstances in the LPG scenario, it is positively extrapolates that the Full Bench of the Apex Court will certainly deliver its verdict in the interest and well-being of the LGBT community.

¹ Obergefell Vs. Hodges, 576 US (215) US. SC.

Key Words: Unnatural Offenses, Homosexuality, Etymology And Usage, Sexuality And Gender Identity, Sexual Identity Development, Social Construct, Same-Sex Romance And Relationships, Demographics, Homosexuality And Psychology.

1.1 UNNATURAL OFFENSES

The debate about the removal of section 377 from the Indian Penal Code, 1860 has been raging in India for many years, it gained momentum after the Naz Foundation, an NGO based in Delhi filed a case in the Delhi High Court seeking deletion of this section on the grounds that it violates the fundamental rights granted to the citizens of India by the Constitution of India. Though this section does not specifically mention the word “Homosexuality”, it covers the same under the sweeping definition of “Unnatural Offenses”.

1.2 DEFINITION OF UNNATURAL OFFENSES UNDER SECTION 377 OF THE INDIAN PENAL CODE, 1860:

“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”

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

This section is intended to punish the offense of ‘sodomy’, ‘buggery’ and ‘bestiality’. The offense consists in a carnal knowledge committed against the order of the nature by a person with a man, or in the same unnatural manner with a woman or by a man or woman in any manner with an animal. As in rape so also in an unnatural offense, even the slightest degree of penetration is enough and it is not necessary to prove the completion of the intercourse by the emission of seed². Under Sexual Offenses Act, 1967, ‘buggery’ is no longer an offense in England if committed in Private between two consenting adults of and above the age of 21. This Act has however, been criticized even in England as negating states’ right to suppress a social voice.

In a case arising out of unnatural offence, it was held that the acts alleged against the accused

² Hughes (1841) 9C & P 752; G.D.Ghadge, 1980 CrLJ 1380 (Bombay)

falling into two categories (1) sexual intercourse per OS (mouth) and (2) manipulation and moment of penis of the accused whilst being held by the victims in such a way as to create orifice like thing for making manipulated moment of insertion and withdrawal till ejaculation of simen, fell within the sweep of unnatural carnal offenses and quashing of proceedings was not warranted³.

1.3 HOMOSEXUALITY

Homosexuality is romantic or sexual attraction or behavior among members of the same sex or gender. As a sexual orientation, homosexuality refers to "an enduring pattern of or disposition to experience sexual, affectional, or romantic attractions" primarily or exclusively to people of the same sex⁴; "it also refers to an individual's sense of personal and social identity based on those attractions, behaviors expressing them, and membership in a community of others who share them⁵".

Homosexuality is as old as humanity. The queer practices were secretly existent among the queens in harems, cowherds, soldiers, slaves, prisoners, nuns, priests, harvesting women and the highly spinning maidens in the olden days. The instances of "Ghilman" in Islam, "Sodom and Gomorrah" in Christianity, and "Ardhanarishwar" in Hinduism testify further to the ancient inscriptions of homosexuality in the prominent religions of the world⁶.

Homosexuality is one of the three main categories of sexual orientation, along with bisexuality and heterosexuality within the heterosexual-homosexual continuum. The longstanding consensus of the behavioral and social sciences and the health and mental health professions is that homosexuality is a normal and positive variation in human sexual orientation⁷, though many religious societies, including Catholicism⁸, Mormonism⁹ and

³ Brother John Antony V. State of Tamil Nadu, 1992 CrLJ 1352 (Madras)

⁴ A acronyms, initialism & abbreviation dictionary, Volume 1, Part 1 Gale Research Co., 1985 @ IN 978-0-8103-06 Factsheet five, Issue 32-36, Mike Gunderloy, 1989.

⁵ Swain, Keith W. (21 June 2007) "Gay Pride Needs New Direction" Denver Post Retrieved 2008-07-05.

⁶ Wilcox, Melissa M. (2003, ISBN 0-253-21619-2) "Coming out in Christianity Religion, Identity and Community", Indiana University.

⁷ The 2008 Community Center Survey Report: Assessing the Capacity and Programs of Lesbian, Gay, Bisexual and Transgender Community Centers. August 29, 2008. Terry Stone, Center link (formerly The National Association of Lesbian, Gay, Bisexual and Transgender Community Centers) Report link and National Lesbian & Gay Journalists Association: Stylebook Supplement on LGBT Terminology, NLGIA 2008. Stylebook Supplement.

⁸ Shankle, Michael D (2006 ISBN 1-56023-496-2). "The Handbook of Lesbian, Gay, Bisexual and Transgender Public Health: A Practitioner's Guide to Service". Howorth Press. Retrieved 2008-07-05.

Islam and some psychological associations, such as NARTH, teach that homosexual activity is sinful or dysfunctional¹⁰.

The most common adjectives in use are lesbian for women and gay for men, though gay can refer to either men or women. The number of people who identify as gay or lesbian and the proportion of people who have same sex sexual experiences are difficult for researchers to estimate reliably for a variety of reasons¹¹. In the modern West, according to major studies, 2% to 13% of the population are homosexual¹². A study conducted in the year 2006 suggested that 20% of the population anonymously reported some homosexual feelings, although relatively few participants in the study identified themselves as homosexual. Homosexual behavior in animals is also widely encountered.

Many gay and lesbian people are in committed same-sex relationships. These relationships are equivalent to heterosexual relationships in essential psychological respects. Homosexual relationships and acts have been admired, as well as condemned, throughout the recorded history, depending on the form they took and the culture in which they occurred. Since the end of the 19th century, there has been a movement towards increased visibility, recognition and legal rights for homosexual people, including the rights to marriage and civil unions¹³, adoption and parenting, employment, military service and equal access to health care¹⁴.

1.4 ETYMOLOGY AND USAGE

The word 'homosexual' is a Greek and Latin hybrid with the first element derived from Greek *homos*, 'same', thus connoting sexual acts and affections between members of the same sex, including lesbianism. 'Gay' generally refers to male homosexuality, but may be used in a broader sense to refer to all LGBT people. In the context of sexuality, 'lesbian' refers only to female homosexuality. The word "lesbian" is derived from the name of the

⁹ The Santa Cruz Country in-query, Volume 9, Santa Cruz Lesbian, Gay, Bisexual and Transgender Community Center, 1996. Books.google.com 2008-11-01. Retrieved 2011-10-23.

¹⁰ Argon Angela Pattatuchi (2006 ISBN 1-56023-645-0) "Challenging Lesbian Norms: Intersex, Transgender, Intersexual and Queer perspectives". Haworth Press. Retrieved 2008-07-05.

¹¹ "Yogyakarta Principles in Action Activist's Guide" www.ypinaction.org. Retrieved 2011-10-23.

¹² HIV Awareness and First LGBT March in Pune a Short Report December 22, 2011.

¹³ Humjinsi, "A research book on Lesbian, Gay and Bisexual rights in India", Combat Law Publications (Pvt) Ltd., Mumbai, Revised Edition 2002.

¹⁴ Makadon : Harvey J.; Kenneth H. Mayor, Jennifer Paller. Hilary Goldhammer (2008 ISBN 1-930513-95-X). The Fenway "Guide to Lesbian, Gay, Bisexual and Transgender Health" ACP Press Retrieved 2008-07-05.

Greek island Lesbos, where the poet Sappho wrote largely about her emotional relationships with young women.

The adjective 'homosexual' describes the behavior, relationships, people, orientation, etc. The adjectival form literally means "same sex", being a hybrid formed from Greek homo, and "sexual" from *Medieval Latin* sexualis. Many modern style guides in the U.S. recommended against using homosexual as a noun, instead of using gay man or lesbian. Similarly, some recommended completely avoiding the usage of homosexual as it has a negative, clinical history and because the word only refers to one's sexual behavior and thus it has a negative connotation. Gay and lesbian are the most common alternatives. The first letters are frequently combined to create the abbreviation LGBT (sometimes written as GLBT), in which B and T refers to Bisexual and Transgender people.

1.5 SEXUALITY AND GENDER IDENTITY

Sexual orientation is commonly discussed as a characteristic of the individual, like biological sex, gender identity or age¹⁵. This perspective is incomplete because sexual orientation is always defined in relational terms and necessarily involves relationships with other individuals. Sexual acts and romantic attractions are categorized as homosexual or heterosexual according to the biological sex of the individuals involved in them, relative to each other. Indeed, it is by acting or desiring to act with another person that individuals express their heterosexuality, homosexuality or bisexuality. This includes actions as simple as holding hands with or kissing another person. Thus, sexual orientation is integrally linked to the intimate personal relationships that human beings form with others to meet their deeply felt needs for love, attachment and intimacy. In addition to the sexual behavior, these bonds encompass nonsexual physical affection between partners, shared goals and values, mutual support and ongoing commitment.

1.6 SEXUAL IDENTITY DEVELOPMENT: "COMING-

¹⁵ Blashus Mark (1994, ISBN 1-56639-173-3) "Gay and Lesbian Politics. Sexuality and the Emergence of a New Ethic". Temple University Press Retrieved 2008-07-05.

OUT PROCESS"

Many people who feel attracted to members of their own sex have a so-called "coming out" at some point in their lives. Generally, coming out is described in three phases. The first phase is the phase of "knowing oneself," and the realization emerges that one is open to the same-sex relations. This is often described as an internal coming out. The second phase involves one's decision to come out to others, e.g. family, friends, and/or colleagues. The third phase more generally involves living openly as an LGBT person. At this age, they may not trust or ask for help from others, especially when their orientation is not accepted in society. Sometimes their own families are not even informed.

1.7 GENDER IDENTITY

The earliest writers on a homosexual orientation usually understood it to be intrinsically linked to the subject's own sex. For example, it was thought that a typical female-bodied person who is attracted to female-bodied persons would have masculine attributes and vice versa. This understanding was shared by most of the significant theorists of homosexuality from the mid-19th century to early 20th century, such as Karl Heinrich Ulrichs, Richard Von Krafft-Ebing, Magnus Hirschfeld, Havelock Ellis, Carl Jung and Sigmund Freud, as well as many gender variant homosexual people themselves. However, this understanding of homosexuality as sexual inversion was disputed at the time and through the second half of the 20th century, gender identity came to be increasingly seen as a phenomenon distinct from sexual orientation.

Transgender and cisgender people may be attracted to men, women or both, although the prevalence of different sexual orientations is quite different in these two populations. An individual homosexual, heterosexual or bisexual person may be masculine, feminine, or androgynous, and in addition, many members and supporters of lesbian and gay communities now see the "gender-conforming heterosexual" and the "gender-nonconforming homosexual" as negative stereotypes.

1.8 SOCIAL CONSTRUCT

Because a homosexual orientation is complex and multi-dimensional, some academics

researchers, especially in Queer studies, have argued that it is a historical and social construction. In 1976 the historian Michel Foucault argued that homosexuality as an identity did not exist in the 18th century; that people instead spoke of "sodomy" which referred to sexual acts. Sodomy was a crime that was often ignored but sometimes punished severely.

The term 'homosexual' is often used in European and American cultures to encompass a person's entire social identity, which includes self and personality. In Western cultures some people speak meaningfully of gay, lesbian and bisexual identities and communities¹⁶. In other cultures, homosexuality and heterosexual labels don't emphasize an entire social identity or indicate community affiliation based on sexual orientation. Some scholars, such as David Green, state that homosexuality is a modern Western social construct and as such cannot be used in the context of non-Western male-male sexuality, nor in the pre-modern West.

1.9 SAME-SEX ROMANCE AND RELATIONSHIPS

People with a homosexual orientation can express their sexuality in a variety of ways, and may or may not express it in their behaviors. Some have sexual relationships predominantly with people of their own gender identity, another gender, bisexual relationships or they can be celibate. Research indicates that many lesbians and gay men want and succeed in having, committed and durable relationships. For example, survey data indicate that between 40% and 60% of gay men and between 45 % and 80% of lesbians are currently involved in a romantic relationship. Survey data also indicates that between 18% and 28% of gay couples and between 8% and 21% of lesbian couples in the U.S. have lived together ten or more years. Studies have also found same-sex and opposite-sex couples to be equivalent to each other in measures of satisfaction and commitment in romantic relationships that age and gender are more reliable than sexual orientation as a predictor of satisfaction and commitment to a romantic relationship and that people who are heterosexual or homosexual share comparable expectations and ideals with regard to romantic relationships¹⁷.

1.10 DEMOGRAPHICS

¹⁶ Mohr, Richard D (1988, ISBN 0-231-06735-6). *Gay/Justice : "A study of Ethics, Society and Law"* Columbia University Press. Retrieved 2008-07-05.

¹⁷ Bloodsworth-Lugo, Mary K (2007, ISBN 0-7914-7221-3) *"In between Bodies: Sexual Difference Race and Sexuality"*. SUNY Press .

Reliable data as to the size of the gay and lesbian population is of value in informing public policy. For example, demographics would help in calculating the costs and benefits of domestic partnership benefits of the impact of legalizing gay adoption. Further, knowledge of the size of the "gay and lesbian population holds promise for helping social scientists understand a wide array of important questions about the general nature of labor market choices, accumulation of human capital, specialization within households, discrimination, and decisions about geographic location.

Measuring the prevalence of homosexuality may present difficulties. The research must measure some characteristic that may or may not be defining of sexual orientation. The class of people with same sex desires may be larger than the class of people who act on those desires, which in turn may be larger than the class of people who self-identify as gay/lesbian/bisexual.

1.11 HOMOSEXUALITY AND PSYCHOLOGY

'Psychology' was one of the first disciplines to study a homosexual orientation as a discrete phenomenon¹⁸. The first attempt to classify homosexuality as a disease was made by the fledgling European sexologist movement in the late 19th century. In 1886 noted sexologist Richard Von Krafft-Ebing listed homosexuality along with 200 other case studies of deviant sexual practices in his definitive work, *Psychopathia Sexualis*. Krafft-Ebing proposed that homosexuality was caused by either "congenital [during birth] inversion" or an "acquired inversion". In the last two decades of the 19th century, a different view began to predominate in medical and psychiatric circles, judging such behavior as indicative of a type of person with a defined and relatively stable sexual orientation. In the late 19th century and early 20th century, pathological models of homosexuality were standard.

The American Psychological Association, the American Psychiatric Association, and the National Association of Social Workers state:

"In 1952, when the American Psychiatric Association published its first Diagnostic and Statistical Manual of Mental Disorders, homosexuality was included as a disorder.

¹⁸ Bohan, Janis S (1996, ISBN 0-415-91514-7). "Psychology and Sexual Orientation: Coming to Terms". Page | 12

Almost immediately, however, that classification began to be subjected to critical scrutiny in research founded by the National Institute of Mental Health. That study and subsequent research consistently failed to produce any empirical or scientific basis for regarding homosexuality as a disorder or abnormality, rather than a normal and healthy sexual orientation. As results from such research accumulated, professionals in medicine, mental health, and the behavioral and social sciences reached the conclusion that it was inaccurate to classify homosexuality as a mental disorder and that the DSM classification reflected untested assumptions based on once-prevalent social norms and clinical impressions from unrepresentative samples comprising patients seeking therapy and individuals whose conduct brought them into the criminal justice system”.

In recognition of the scientific evidence, the American Psychiatric Association removed homosexuality from the DSM in 1973, stating that "homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." After thoroughly reviewing the scientific data, the American Psychological Association adopted the same position in 1975, and urged all mental health professionals "to take the lead in removing the stigma of mental illness that has long been associated with homosexual orientations." The National Association of Social Workers has adopted a similar policy.

Thus, mental health professionals and researchers have long recognized that being homosexual poses no inherent obstacle to leading a happy, healthy, and productive life, and that the vast majority of gay and lesbian people function well in the full array of social institutions and interpersonal relationships.

The research and clinical literature demonstrate that same-sex sexual and romantic attractions, feelings, and behaviors are normal and positive variations of human sexuality. The longstanding consensus of the behavioral and social sciences and the health and mental health professions is that homosexuality per se is a normal and positive variation of human sexual orientation. There is now a large body of research evidence that indicates that being gay, lesbian or bisexual is compatible with normal mental health and social adjustment. The World Health Organization's ICD-9 (1977) listed homosexuality as a mental illness; it was removed from the ICD-10, endorsed by the Forty-third World Health Assembly on May 17, 1990. Like the DSM-II, the ICD-10 added ego-dystonic sexual orientation to the list, which refers to people who want to change their gender identities or sexual orientation because of a

psychological or behavioral disorder. The Chinese Society of Psychiatry removed homosexuality from its Chinese Classification of Mental Disorders in 2001 after five years of study by the association. According to the Royal College of Psychiatrists" This unfortunate history demonstrates how marginalisation of a group of people who have a particular personality feature (in this case homosexuality) can lead to harmful medical practice and a basis for discrimination in society, still there is now a large body of research evidence that indicates that being gay, lesbian or bisexual is compatible with normal mental health and social adjustment. However, the experiences of discrimination in society and possible rejection by friends, families and others, such as employers, means that some LGBT people experience a greater than expected prevalence of mental health difficulties and substance misuse problems. Although there have been claims by conservative political groups in the USA that this higher prevalence of mental health difficulties is confirmation that homosexuality is itself a mental disorder, there is no evidence whatever to substantiate such a claim.

1.12 CONCLUSION:

Most of the Lesbian, Gay, and Bisexual people who seek psychotherapy do so for the same reasons as heterosexual people (stress, relationship difficulties, difficulty in adjusting to social or work situations, etc.); their sexual orientation may be of primary, incidental, or no importance to their issues and treatment. Whatever the issue, there is a high risk for anti-gay bias in psychotherapy with the lesbian, gay, and bisexual clients. Psychological research in this area has been relevant to counteracting prejudicial ("homophobic") attitudes and actions, and to the LGBT rights movement generally. a landmark decision of the Supreme Court of India that decriminalised all consensual sex among adults, including homosexual sex.¹⁹

The appropriate application of affirmative psychotherapy is based on the following scientific facts:

- Same-sex sexual attractions, behavior, and orientations per se are normal and "positive variants of human sexuality; in other words, they are not indicators of mental or developmental disorders.
- Homosexuality and bisexuality are stigmatized, and this stigma can have a variety of

¹⁹ *Navtej Singh Johar & Ors. v. Union of India thr. Secretary Ministry of Law and Justice*, W. P. (Crl.) No. 76 of 2016

negative consequences (e.g. minority stress) throughout the life span.

- Same-sex sexual attractions and behavior can occur in the context of a variety of sexual orientations and sexual orientation identities.
- Gay men, lesbians, and bisexual individuals can live satisfying lives as well as form stable, committed relationships and families that are equivalent to heterosexual relationships in essential respects.
- There are no empirical studies or peer-reviewed research that support theories attributing same-sex sexual orientation to family dysfunction or trauma.

