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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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March 14th, 2019

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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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LEGALITY OF SAME SEX RELATION: **MAPPING SEXUALITIES**

Author -TANISHA BANTHIA,
BRAND EXECUTIVE

LINKGENIC DIGITECH COMPANY, AHMEDABAD

Co Author- SAURABH RANKA,
U.G. SCHOLAR

DEPARTMENT OF LEGAL STUDIES
SANGAM UNIVERSITY, BHILWARA

ABSTRACT

An Individual's sexual preference or who one is actually attracted to describes the sexual orientation of that person. A person may be attracted to the members of the same or other sex. Cisgender and heterosexual orientations are the prevailing norm in society. Those Outside of this are categorised as LGBTQ+ and face a lot of social and legal issues in a world that does not accept their identities. This is a gender law- based research paper which provides a brief summary of Gender laws in India and the rest of the world. This research paper contains detailed information about sexualities and their rights.

This research paper will discuss the broad range of sexualities that exist in society, particularly, the different sexual orientations, how it affects those who are outside of the norm, why are they called "alternative", what is LGBTIQ and some of the key legal and social challenges those with different sexual orientations face in Indian society. These issues are extremely relevant for building a society that is accepting of diversity among humans and it is crucial to keep an open mind and read more on these topics to further understanding.

1. INTRODUCTION

It is ironic that Sigmund Freud (1856-1939), whose writings were fundamental to providing new non-biological - directions in the study of sexuality in the West, firmly believed that sexuality was subjected to biological drives. Despite literary, historical, artistic and other evidence that suggests that sexuality - both its expression and control - is fundamentally linked to contexts such as class, religion, wealth, and, gender norms, we nevertheless tend to

de-link it from these social realities. If anything, we are inclined to think of these aspects as incidental, choosing to believe that 'underneath it all' there lurks a fundamentally fixed essence - and a drive we can identify as sexuality.

So, the kinds of question this unit seeks to explore are: Can we regard 'sexuality' as a fixed concept that can be easily understood both across different time periods and different cultures? Or, is it a made up of the most diverse contexts of social and cultural life, registering changes as these change? European theorists of the topic such as Michel Foucault (1990) have suggested that sexuality as a clearly demarcated field of study and debate emerges during the early 18th century through a combination of medical, legal, educational and other discourses. That is to say, certain ideas regarding sexuality that did not earlier exist emerged during this period and that the emergence of these ideas was linked to the ways in which sexual behaviour was sought to be understood and controlled by a variety of 'experts' such as doctors, judges, and teachers. This, in turn, led to the emergence of different categories of 'sexual beings' such as the homosexual, the heterosexual, the sexualised woman, the sexually awakened child, the reproductive family, the pervert, etc. Soon after, Foucault suggests, sexuality became focused on the family. That is to say, an entire range of experts (doctors, psychiatrists, priests, teachers, etc.) concentrated their attention on the family, advising against the perils of 'bad' sexuality and ensuring its good health. So, through these processes, the family was both 'sexualised' and acted as an agent of sexualisation. That is, it became the benchmark for topics such as 'good' and 'bad' sexuality, and 'healthy' sexual behaviour. In this way, Foucault suggests, sexuality became a very important topic of discussion, rather than being banned from being discussed (or, repressed) as is commonly thought. "Good" sexuality within the family- reproductive sexuality, able to produce a suitable labour force then became part of the development of capitalism. As we will see in the sections that follow, there are several additional contexts to be considered when we think of sexuality in the non-Western context. However, the key point to retain is the social and historical nature of sexuality.

There is one final point to consider that also relates to the way in which the topic of sexuality is researched. From a social science perspective, sexuality remains an area of study - perhaps even more than other kinds of social behaviour where any degree of methodological precision is impossible to posit. This perspective differs from that shared by medically trained

sexologists and others who offer a 'scientific point of view. This follows from the perspective that we must re-think the truth-of-our- sexuality perspective as well as the biologism that has historically afflicted sexuality studies. The former suggests that a) sexual behaviour ought to be judged according to certain norms; and, b) there is an underlying 'truth about our sexual lives that we must understand (for example: the gay gene explains homosexuality': 'sexual orientation is a fixed trait': 'men have uncontrollable sexual drives', etc.). Biologism in the study of sexuality, as already indicated above, is connected to the view that it (sexuality) can be explained by recourse to a set of unchanging bodily essences and drives. Hence, just as we tend to think that our genders are biologically determined, so too we assume that our sexual lives unfold according to an inner biological template. This, in turn, connects to two other ideas. Firstly, we think in terms of 'expressing our sexuality as if it is an essence that simply appears through its own natural logic. Another point of view would be to say that we enact our sexual selves, that is, it is learnt behaviour. And, secondly, we too easily assume that 'underneath our visible differences such as class and status, we harbour the same sexual 'drive'".

Thinking about sexuality in another context - one that is just as susceptible to the inner drive discussion Jeffrey Weeks (2003) points out that "the real problem does not lie in whether homosexuality is inborn or learned. It lies instead in the question: what are the meanings this particular culture gives to homosexual behaviour, however, it may be caused, and what are the effects of those meanings on the ways in which individuals organise their sexual lives" (Weeks, 2003,p. 34). This is an excellent way of thinking about the broader field of sexualities itself.

2) WHO ARE LGBTIQ+ PEOPLE?

LGBTIQ+ is an acronym that expands into lesbian, gay, bisexual, transgender, intersex and queer people. The +sign at the end provide space to expand the existing acronym and include more variations in sexual identities as they emerge.

Below are brief definitions to better understand these identities.

- Lesbians are women who are physically, romantically and emotionally attracted to, and have relationships with other women.
- Gay persons are men who are physically, romantically and emotionally attracted to, and have relationships with other men.

- Lesbians and gay men are also referred to as homosexuals. The word is derived from the greek word "hora" which means "same."
- Bisexual are individuals that are physically, romantically and emotionally attracted to men and women and have relationships with either of both these genders.
- Pansexual are persons who are physically, romantically and emotionally attracted to all genders. This identification, unlike the term bisexual, takes into account the fact that there are more than two genders in society.
- Transgender are individuals that are assigned a certain gender at birth but who identify strongly with a different gender. For example, a child who is identified as male at birth and raised as a boy but asserts their gender as female and self-identifies as a transgender woman. Similarly, a child who is identified as female at birth and raised as a girl may assert their gender as male and self-identify as a transgender man. Transgender persons may self-identify as heterosexual, lesbian gay or queer depending on who they are attracted to. In India, the local terms to refer to transgender people are hijras, kinnars, aravanis, mangalamukhis etc.
- Non binary persons are those who believe they don't fit into just one gender or that they have elements of both masculine and feminine gender traits within them. The binary refers to the two prominent genders in society male and female. Many, though not all, non-binary persons identify as transgender.
- Intersex persons are those whose chromosomes (XX females or XY males), internal sex organs, external sex organs and hormones either singly or in a combination do not fall neatly into the male or female binary. Such mismatch shows up at either at birth or at puberty. Persons with intersex variations often live their entire lives not being aware of that fact. Intersex persons may self-identify as heterosexual, lesbian, gay or queer depending on who they are attracted to
- Queer is self-identification term used by LGBT+ who believe that they are outside the cisgender heterosexual norm. The word was historically used derogatively against those who were "different in terms of sexuality but has since been reclaimed as a term of pride by some sections of the LGBTQI communities

3.MAJOR SOCIAL ISSUES FACED BY LGBTQI+ PEOPLE

HOMOPHOBIA AND TRANSPHOBIA

Homophobia is intolerance, fear, hatred or bias against those who are homo sexual or queer. Homophobia and transphobia have a serious impact on the LGBTQI+ communities because it translates into socially discriminative behaviours and practices against those outside the cisgender heterosexual norm. Some of the social challenges LGBTQI-communities face are:

- 1) The predominant social norm of heterosexual marriage and reproduction forces LGBTQI individuals in closets. They hesitate to speak openly about their identities or sexual desires and lead a life that is not true to how they feel. Many are forced into heterosexual marriages and live unhappy lives as a result of it.
- 2) LGBTQI+ persons face discrimination in employment and education.
As the sexuality of transgender and intersex persons becomes visible as they grow up they are often bullied in schools and many of them drop out. Lack of access to education affects their employment prospects forcing them to lead difficult lives. Those from poor, lowered caste backgrounds who don't have access to other support networks can often be seen begging at traffic signals. Even those who are from different class backgrounds and manage to get an education are hindered because of discrimination in the hiring practices of employers. They often face difficulty to change their names and gender in school certificates and degrees which makes it almost impossible to find formal employment.
- 1) Many LGBTQ+ persons face discrimination in access to health care at hospitals and clinics. In case of transgender persons, since most hospitals have only male and female wards, it is difficult for them to get admitted in hospitals. The health care necessary for surgeries, hormones treatments etc. that is crucial for transgender people to live as their chosen gender is not widely available in India at affordable costs. Unethical practices like fixing the gender of intersex babies and performing "corrective surgeries" at birth are also common which lead to lifelong issues for the

individual. Access to public toilets is a major issue for transgender communities as most public places have toilets only for male and female.

2) LGBTQ+ communities lack legal protections against bullying, sexual harassment, public violence, employment discrimination, etc. as most of the laws especially around sexual violence in our country are gender specific and protect (at least on paper) only cisgender women.

4.MAJOR LEGAL ISSUES FACED BY LGBTQI+ PEOPLE

- 1) Difficulties in changing legal gender markers on identity cards and educational certificates. The process of legally changing gender markers is not standardised across government departments and state authorities. It leaves trans persons at the mercy of officers who may or may not be knowledgeable about trans issues.
- 2) There is no legal recognition for partnerships or marriage of LGBTQI+ persons. It leaves the community bereft of spousal benefits of opening joint bank accounts, naming nominees in assets and properties, adoption rights, right to be named as next of kin in case of medical emergencies etc. Many persons hide their relationships and feel shame and are generally unable to live fulfilled lives.
- 3) LGBTQI people face mental, physical and sexual violence from their families, partners, society and law enforcement officials. There are no protective laws and anti-discrimination policies in educational and workplace settings leaving the community without access to the constitutionally guaranteed fundamental rights. Additionally, law enforcement officials use laws to harass LGBTQI persons for causing "public nuisance and refuse to register cases when they are subject to violence.

5. CRIMINAL LAWS USED AGAINST LGTBQI+ PERSONS IN INDIA

1. Kidnapping-Cases of kidnapping are routinely made by the parents against queer or trans persons who run away from their homes with their partners/lovers after reaching the age of 18.
2. Extortion and anti-beggary laws Charges of extortion are used against trans women, particularly who work the streets to beg under the anti-begging laws Bombay Prevention of Begging Act, 1959 that exists in 22 states and some union territories.
3. Many trans and queer people who don't have access to formal employment often engage in sex work and are routinely harassed under the Immoral Traffic (Prevention) Act, 1956. The acts punishable under this law that are used against queer/trans persons are brothel keeping, living on earnings of sex work, and prostitution in areas notified by Police & near public places.
4. Sec 320 on Grievous hurt in the criminal code is used against trans woman who voluntarily goes for a gender affirming procedure (gender re-assignment surgery) in any set up other than a hospital. The section states, "Whoever voluntarily causes emasculation, permanent privation of the sight of any of the eyes, permanent privation of the hearing of any of the ears, privation of any member or joint, destroying or permanently impairing the powers of any member or joint, permanently disfiguring the head or face, fracture or dislocation of a bone or tooth, and any hurt which either endangers life or which causes the victim to be in severe bodily pain during the space of twenty days, or unable to follow his ordinary pursuits,"
5. Section 268 on Public Nuisance in The Indian Penal Code is used to harass trans persons because their very presence in public places, it is claimed. creates annoyance to public. The section states,

A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right."

6. POSITIVE LEGAL DEVELOPMENTS

NALSA judgment The Supreme Court judgment delivered by Justice KS Radhakrishnan Panicker and Justice AK Sikri on April 15, 2014 following Public Interest Litigation filed by the National Legal Services Authority, was widely celebrated as a landmark judgment.

- Upheld the right of trans people to self-identify their gender as male, female or third gender irrespective of gender affirming surgeries or hormonal therapy
- Socially and educationally declared trans people as backward classes and reservations to be extended in employment and education.
- Centre and State Governments were directed to operate separate HIV Sero-surveillance centres since Hijras Transgender face several sexual health issues.
- Centre and State Governments asked to take proper measures to provide medical care to TGs in the hospitals and also provide them separate public toilets and other facilities.
- Directions for Social welfare schemes to integrate them
- Directions for public awareness programme to dispel prejudices against trans people was made.
- NAVTEJ SINGH JOHAR & ORS. Petitioner(s) VERSUS UNION OF INDIA SUPREME COURT JUDGMENT, 2018

Section 377 of IPC introduced by the British in 1861 states "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, Explanation-Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

LGHTQI+ people were routinely harassed and criminalised under this section So many decades After a series of legal challenges to as: 377 on the basis of constitutional quality prisople, je s Supreme court of India decnmunalised all consensual sex adults, including allematve sexualities that were the tarf this section of the IPC.

7. WHAT IS CONSENT?

Consent is the explicit communication of willingness to engage in sexual and/or romantic relationships. It is important because anything that is outside of consensual sexual or romantic relationships is violence and an offence under different sections of the IPC. Moreover, the importance of consensual romantic and sexual relationships cannot be stressed enough to convey respect to the dignity and bodily autonomy of others besides being a crucial foundation for healthy relationships.

Under Section 90 in The Indian Penal Code, what is not considered as consent is defined 90. Consent known to be given under fear or misconception-A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception, or Consent of insane person if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent or Consent of child-unless the contrary appears from the context. if the consent is given by a person who is under twelve years of age.

Explanation 2 attached to section 375 of the Indian Penal Code defines consent as "un unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act

Although see 375 (rape laws) in the IPC are gender specific and define consent of a woman, it can be expanded to understand that all adults irrespective of gender, must comply with standards of consent in relationships.

8. INTERSEX PEOPLE AND GENDER TESTING IN SPORTS

Intersex persons and the challenges they face are highlighted in the experience of some athletes and sportspersons. Since the 1936 Olympics, many athletes who competed in the smalls category, have been questioned about being "male imposters and subjected to physical examinations. In fact, anxieties about the "real gender" of athletes in sports reached such a

peak during the Cold War period that by the mid 1940's. "femininity certificates" were sought to verify the sex of athletes competing in female categories. By the 1960s it was decided that individual nations could not be trusted to certify their own athletes and a mandatory genital check was introduced by international sporting authorities. This was replaced by a chromosomal test in the late 60s. Throughout the decades, sporting authorities have attempted to fix a foolproof test for gender and failed. This failure supports the fact that there are too many people who lie outside the narrow biologically defined norms of male-female. Most people who are outside these chromosomal or hormonal normatec, are often not aware of the fact unless it comes up in special circumstances like gender testing in sports. There is no conclusive evidence that a higher level of natural testosterone (which is different from synthetic testosterone used in doping in sports) without receptors can provide any advantage.in sports over those who don't have the same.

An athlete from Tamil Nadu, SanthiSoundarajan faced humiliating gender tests and disqualification after finishing second in the 800 metres at the 2006 Asion Games in Doha, Despite being raised in a poor dalit family with hardly any access to nutrition, equipment and training for sports, Shanthi continued to win many medals in the national and international arena However she laced a series of violent setbacks after being disqualified and brood from participating in sports following the diagnosis of androgen insensitivity syndrome Shanthi, who was not allowed to compete as a woman, we paid lower wages at the brick kiln she later worked at (due to women being paid less than men. She fought many legal and political campaigns to be appointed as a coach including a Scheduled Caste und Scheduled Tribes (Prevention of Atrocities) case against her colleagues at the Sports Development Authority of Tamil Nadu

Intersectionality is a term coined by scholar Kimberley Crenshaw to highlight the compounded discrimination people face along multiple axis of oppression is caste, class, race, gender, religion, sexual orientations etc. She introduced the idea because the law only recognised discrimination on single ground and not compounded ones. For example, in De Giraffenreid V General Motors case in 1976, five Black women challenged the seniority policy of the company. According to the policy all those who were hired after 1970 lost their jobs in a seniority based lay off. However, black women were not hired by the company before 1964. hence the policy targeted them for not having seniority in a company that didn't hire them. The legal system however, refused to recognise their discrimination as a

compounded one i.e of race and gender. Instead, the court argued that since (white) women were hired by the company before 1954, the black women suing the company could not claim gender discrimination and had to argue solely on the basis of race discrimination, If you were to apply the analytical frame of intersectionality to Shant Soundarajan's experience, the discrimination she faced was compounded by her caste, class AND gender.

9. LET US SUM UP

In this unit sexual orientation and the main identities that come under the LGBTQI+ umbrella are discussed. Also addressed are the norms in society and the pressures this generates on all those whose desires and lives fall outside the norm. The major social and legal issues faced by LGBTQI people and the issue of consent in legal and social terms have also been addressed. This research paper concludes with a focused discussion on a much neglected section of the LGBTQI umbrella- people with intersex variations and the issues of gender testing in sports from a historical and current perspective.

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