CHAPTER-1
INTRODUCTION

1.1. Background

Let this Ph.D. Thesis be started with some confusions which create questions relating to those individuals who are identified as lesbian, gay, bisexual, transgender (LGBT) and known as ‘Sexual Minorities’. The broader research topic highlights on sexual minorities but researcher has just undertaken the study related to Lesbian, Gay, Bisexual and Transgender (LGBT) and the term hereinafter ‘Sexual Minorities’ is used for LGBT in this Ph.D. thesis writing. The questions are as; who am I?, what is my identity?, why am I different?, who will take care of me?, and am I wrong anyhow?. It is a matter of curious feeling in starting of writing this Ph.D. thesis for which the subject of problem taken is presently controversial not only at national level but also at international level. Although, the subject is controversial yet there is lack of comprehensive discussion and debate on the same.

Before discussing about the issue and exact topic of research study, let us come to know one personal narration which could enable to understand a relation to inspire the researcher towards the issue taken of this research study. It was the time after completing graduation study; Delhi was frequently and regularly visited by the researcher for attending classes of a course. It was an incident of a rail compartment in which passengers including researcher were travelling. One member of sexual minorities i.e. Hijra came into the rail compartment and started demanding the money i.e. Badhai for Diwali festival. It was not for the first time but hijras generally remain engage in such type of activities in their ordinary course of business. Some passengers voluntarily gave money on demanding by hijra but some were hesitating and opposing with using abusive language. At the same time, some hot talks took place between that hijra and some passengers, out of which some passengers started misbehaving and inhuman treatment with that hijra. That hijra was also threatening to remove clothes in opposition of behavioural treatment of those passengers. The matter was turned so serious when some passengers started beating that hijra in a brutal manner. Flowing of some blood from the face of that hijra was proving serious injuries as a result of such beatings in brutal manner.
That incidence was observed by researcher as an eye witness. During this, so many questions were coming in researcher’s mind. Like, whether hijras are not human or person? What was the fault of that hijra? Who had given those persons the right of beating to that hijra? Why did anyone not raise his or her voice against that merciless beating? How the hijras can be protected? That incident stroked a lot of questions in researcher’s mind and made an impact to think about the status of hijras in the society and law. Generally, hijras do not have a respectable identity in the eyes of society even after having a pre-existing culture. After that incident, some changes were felt in researcher’s thinking for hijras. For researcher the word ‘homo’ was not new because during the study of biology and science at Xth standard, the word ‘homo’, homogeneity, homogeneous was studied. ‘Homo’ refers ‘of same type’ or ‘equal’. During the study of law, section 377 of IPC again placed researcher to think that this section is related to homosexuals, their relationship and other activities specifically sexual intercourse centric. During the study of LL.M., the issue of homosexuality was not taken for dissertation but the study was near to that i.e. the issue of gender discrimination in political context related to women in particular (Women Political Participation).

On 26th June, 2011, the case of ‘Indore Intersex Babies Case’ was also reported in an Indian national daily claimed that in the city of Indore, hundreds of female babies were being surgically turned into boys to fulfil the preference of their parents for sons. There was immediate and widespread outrage from feminist groups as well as government agencies, and finally an investigative report in another newspaper clarified the situation (Jebaraj 2011). The report quoted doctors as stating that it medically impossible to change a female child into a male, and that what had been carried out in Indore was a legitimate medical procedure called ‘genitoplasty’ for male infants ‘born with abnormal genitalia’. This highlighted the issue of naturally inborn sexual problems with the human body.

Ultimately, after getting admission in Ph.D. program course, a curiosity to do some work for the persons, who are discriminated on the basis of their sex, sexual identity, gender, gender identity, sexual orientation, sexual behaviour was again activated in researcher’s mind. The hijras are having a historical existence in Indian society and remained a social taboo with so many disparities. Some other persons like
hijras are also available in the society and seeking equality in terms of social, economic, political and legal status. The group of such persons including hijras is known as ‘sexual minorities’ and are identified as lesbians, gays, bisexuals, transgender, intersex, asexual, hijras, kothis, queer, etc. They take birth as a person but not ever had been treated as person. Certain rights (human rights) are provided in international and national instruments of laws for all persons without any discrimination but remained inaccessible to these. Although, many categories are also be included in the sexual minorities group but this research study particularly focuses on lesbians, gays, bisexuals and transgender only. Except this, the study only covers the socio-legal aspects of sexual minority identified persons. Without covering the in-depth explanation of the subject, it focuses on the social and legal concerns with reference to Indian criminal justice system in human rights perspective. This area was a new experience as there is not much work done till now. This subject is full of various complexities and issues relating to religion, culture, morality, naturalness, sexuality, gender, law and human rights.

The study of human sexuality has a comprehensive list of various perspectives and includes historical, biological, psychological, anatomical, anthropological, medical and socio-cultural, legal and human rights. But inside the human sexuality study, the issue of homosexuality has not been widely taken. This area of study does not include much works earlier because of considering it as taboo and stigmatised by the society as well as State. Although, there are issues involved with homosexuality but it is evident that such practice was available in history of Indian culture. There are evidences from Khajoraho Temples, Ajanta-Alora Caves and also the texts of Vedas, Ramayan, Mahabhartta, Bhupen Kakkar paintings, Ismat Chughtai writings and other divine stories.

Looking into the study of Human Rights, Law and Jurisprudence, we do not find any specific theory or legal theory on the homosexuality existence, prevalence, execution. During the pilot study, the books on sexuality, gender, newspaper, Case-Laws helped for understanding the problem relating with the study of human sexuality, gender in general and homosexuality, sec 377 of IPC in particular.

After the case of Naz Foundation, striking down section 377 of Indian Penal Code (Hereinafter IPC) as unconstitutional by Delhi High Court, the voices raised in
favour of legalising homosexuality, same-sex-relationship and equal status for sexual minority persons in India. Consequently, a huge challenge for policy makers, executives, judicial and other social institutions like family, marriage, religion, etc. has come out and becomes more important because of multi-dimensional structure of Indian society. With the help of research supervisor and other experienced persons, this research study titled “Socio-Legal Study of Sexual Minorities with Reference to Indian Criminal Justice System in Human Rights Perspective” has been taken for understanding the socio-legal problems of sexual minority persons and also trying to provide some solutions for this complicated problem under the light of human rights. There are many issues available under this broader research problem but the focus is on socio-legal status of sexual minority persons under Indian criminal justice system in human rights perspective. Through the co-relational approach, this study has been forwarded.

1.2. Statement of Research Problem

India is a democratic country of different diversities, in which people belong to several culture, religion, caste, sex, language, etc. Indian society is a progressive society still it follows customs and traditions in its very ancient and contemporary forms with a conservative nature. In India, not only the persons with heterosexual identity are living but also a number of persons different from heterosexual identity are living.

The total population of sexual minority in India is untraced but the Centre government had informed the Hon’ble Supreme Court of India during the hearing of case of decriminalization of homosexuality (Appeal against the decision of Delhi High Court in Naz Foundation case) that there are estimated 25 lakh gay population in India. But the population of other groups such as lesbians, bisexuals and transgender, etc. is not available.

There are 78 countries (presently 79 countries) where individuals of sexual minority may still face criminal sanctions on the basis of their sexual orientation or gender identity according to United Nations’ High Commissioner for Human Rights Chief Navi Pillay. “It can never be acceptable”, she told to High Level Panel in Geneva on ending violence and criminal sanctions on the basis of sexual orientation
and gender identity “to deprive certain individuals of their rights, indeed to impose criminal sanctions on those individuals, not because they have inflicted harm on others or pose a threat to the well-being of others, but simply for being who they are, for being born with a particular sexual orientation or gender identity”. The above given statement of Navi Pillai, clearly indicates the seriousness of issues related to human rights of sexual minorities.

The incidents, related to sexual minorities, in which they faced discrimination, stigma, inhuman treatment and violation in the society, are very heart-rending. The sexual minorities, not only face such discrimination, stigma, inhuman treatment and violation in the society but also in their own families. These incidences reveal the real and dangerous face of the society and reality of human rights status of sexual minorities. Every citizen of the country has a right to life with dignity, right to self-expression under the Constitution of the country as well as International Human Rights laws. Why the sexual minorities are deprived from the same rights?

Several cases related to sexual orientation and gender identity are stating with crying that sexual minorities are facing gross violations of human rights from abusive language to death in several parts of India. In several cases, sexual minorities have committed suicide under social pressure and in several cases they are compelled to leave their own houses. In some of the cases they were killed in the name of “Honor Killing”. The sexual minorities face discrimination at every level and remain deprived from their basic human rights.

Indian criminal justice system is also not helpful in protecting and promoting the human rights of sexual minorities because there are no specific laws available in India concerning with these. They have no right to dignity, right to marry, right to adopt children, right to property on the basis of sexual orientation and gender identity like other citizens of India. At present, the problems related to rights of sexual minorities are huge but the solutions are less or silent.

In the case of inhuman behaviour, stigma and violence, not only the sexual minorities are targeted but those, who are working for protection and promotion of their human rights, are also targeted. This can clearly be understood by the example of the workers of Bharosa Trust in Lucknow, an NGO worked on sexual health, were
locked up by the police under section 377 IPC in July 2001. After this incident, many voluntary groups, funding agencies, women's groups, lawyers, human rights activists and civil society persons from India, joined hands collectively to protest against the State for their rescue. Although, India is known as a developing country still there are so many challenges to overcome the unsolved problems before whole society as well as law particularly related to human rights of sexual minority persons. Some cases related to sexual minorities are given here for the briefing of statement of the problem.

A lesbian couple have burnt themselves to death in the city of Chennai, capital of Tamil Nadu under social pressures to separate the two, they committed suicide. The police recovered the charred bodies of the women, named Christy Jayanthi Malar (38) and Rukmani (40), who were found dead hugging each other, from the residence of one of the women in the Chennai city. This incident shows that the sexual behaviour of the couple was never been acceptable by the society and this attitude of society resulted the end of the life of couple untimely.

Three transgender took their lives in Kerala and Karnataka. One 18 year old Sujata (name changed), a female to male transgender, wanted to go back to her family. But when her family rejected her on account of her gender, she drank poison. A few days later, unable to cope with society’s humiliation, Kamesh (name changed) a male to female transgender committed suicide. One Deepu, a working class female to male transgender, killed himself on the rail tracks in Trichur. This is not the fault of all sexual minorities but a failure of the government and society. Hence, government, judiciary and society are morally responsible for this, says Akkai Padmashali, an activist, working with rights organization Sangama in Banglore.

In a case of two lesbian couple, named Savita, 25 year old and Veena, 20 year old, faced social objection related to their basic human right of marriage. The family and society showed a dangerous attitude against them. With the familial and societal dangerous attitude, they had to approach to go to take help of the court. After considering the facts and circumstances of the case and international human rights laws, court provided them police protection and allowed their marriage without having the relevant Indian laws in this context and as India's first married lesbian
couple has been given police protection and moved to a safe house amid fears the two women would be targeted in an “Honour Killing”.

In a case of hate and prejudice against sexual minority became the headlines of electronic and print media in the country. In this case, Court said that both the Centre and State governments had no objection to the sex re-assignment surgery as there is no law which prohibits it. “A petitioner Swati/Bhidan is 21 years old and a major individual hence can take his own decision for himself.” A division bench of S. J. Vajifdar and A. R. Joshi at Maharashtra High Court noted Swati/Bhidan, who went on record stating that he believed, he was a female trapped in a man’s body, had approached the High Court seeking his parents be restrained from stopping to sex re-assignment surgery. The parents were set against this and saying threatening him. In this case petitioner Swati/Bidhan Barua, an Assamee student was biologically male but he did not feel comfortable with his original male identity and wanted to change his sexual identity through undergoing sex reassignment surgery. The family of Swati/Bidhan was against this surgery.

The human rights violation incidences related to sexual minorities are not limited up to these cases only but the real number of incidences cannot be easily measured. These cases are only few which became the headlines of electronic and print media during recent years. The cases of incidence clearly indicates some issues related to sexual minorities such as violence, exclusion, identity crisis, no definition of gender community, insecurity, marriage, property, non-availability of specific law and violation of basic human rights etc. All the above cases clearly indicate about the reality of problem of sexual minorities in a wider aspect. The severity of the problem is not only related up to the invisible and inhuman treatment with sexual minority persons but also their untimely death.

Basic research problem under this research study is relating to the understanding of meaning and definitions of homosexuality, same-sex relationship, Sec. 377 of Indian Penal Code and socio-legal implications with sexual minorities. The research study focuses on the socio-legal understanding of homosexuality, same-sex relationship, Sec. 377 of IPC, etc. Under the present research study, it has also been tried to find out the answers of some research questions such as:
Q.1. How to understand the concept of homosexuality?

Q2. What is the understanding of nature?

Q.3. What types of sexual acts qualify as against the order of nature?

Q.4. How the legal enforcement of morality can be understood?

Q.5. What is the central debate relating to sexual minorities’ rights?

Q.6. Is the meaning of Sec. 377 confined only to anal, oral or other types of sex except penile-vagina sex?

Q.7. Is the criminal prosecution under Sec. 377 of the IPC, 1860 confined to certain sexual acts or homosexuality in general?

Q.8. How the society was adversely affected by decriminalization of Sec. 377?

Q.9. Whether any case under Sec. 377 with reference to same-sex consensual partners was filed during research?

Q.10. How the sexual minorities were affected with de-criminalization and re-criminalization under Sec. 377 of IPC?

Q.11. How the homosexuality is related with HIV/AIDS disease?

Q.12. What is the social and legal reaction towards homosexuality?

Q.13. What is relationship between sexual minorities rights and human rights?

Q.14. How can we better understand the concepts of homosexuality, Sec. 377 IPC, same-sex friendship, same-sex relationship, same-sex marriage?

Under statement of problem, the data from news, magazines, journals and websites etc. have been used and this statement is basically general in nature but it is not so that the problems of sexual minorities persons are limited up to one place. Such sexual minority persons and their problems are available in whole India. The research area under study is Delhi and keeping in view such general statement of problem the socio-legal problem of sexual minority persons based in Delhi has been undertaken and explored for study.
This research study includes major objectives to achieve and refers as:

1.3. Objectives of Research Study

Although, the subject includes various minor objectives within theoretical as well as empirical understanding and findings but some objectives of this research study have been taken.

The objectives of this research study include-

1. To find out the socio-legal problems faced by sexual minorities with reference to Indian Criminal Justice System in human rights perspective.

2. To analyse the role of Indian Criminal Justice System with reference to socio-legal problems faced by sexual minorities.

3. To explore and suggests the socio-legal solutions of problems faced by sexual minorities with reference to Indian criminal justice system.

1.4. Aim of Research Study

The aim of this research study is to provide a comprehensive knowledge about sexual minority persons. Because of having inadequate knowledge about sexual minorities, not only sexual minorities suffer lots of problems but also it makes adverse impact on the families, relatives and the persons believe in love, peace, humanity, welfare, equality, justice, law and human rights at large. For a country to be developed, inclusive approach is a necessary requirement. The major aim of this study is to educate, aware and sensitize the society and Indian criminal justice system about sexual minority persons’ sufferings and problems through investigating personally observed experiences with sexual minorities and responses of other persons particularly with Indian criminal justice system.

1.5. Research Hypotheses

Although many hypotheses could be framed in respect of sexual minorities study but keeping in view the objectives of this research study, the legal and human rights based hypotheses have been framed as follows:
1. Sexual Orientation/Gender Identity is directly related to the violation and denial of human rights of sexual minorities.

2. The problems of sexual minorities may be solved by enacting a new specific legislation.

1.6. Research Methodology

Due to not defining the population and because of not having the exact number of sexual minorities and researcher’s unknown-ness about the research respondents, the selection of any sample was a difficult task. Under the research methodology used, this research study includes the doctrinal as well as empirical method of research. While using the doctrinal method, secondary data was used. This secondary data was including mix approaches like historical, descriptive, qualitative, analytical, correlational and inferential. Except this, the research study was mainly based on empirical method. The first hand study was conducted for collection of data from the research respondents. This included the use of questionnaire schedule and participatory observation method as a tool although it has never been considered as an appropriate method. In this case, the observation to interpretation remains the process of doing research.

The questionnaire schedule was e-mailed to many organizations, activists and research respondents. Open-ended questions were used in developing the research questionnaire. The specific method of participatory observation has truly helped researcher in collection of data and for this, researcher applied the snow-ball approach. Through the snow-ball approach, NGOs and organizations, based in Delhi, working for sexual minorities’ rights were contacted and after contacting to these various other NGOs and organizations were approached. This was resulted to have contacts with research respondents. This research study includes the published literature, books, case laws, newspapers, magazines, articles, electronic resources, NGOs data and first hand data based on questionnaire, in-depth case study under qualitative method and participatory observation method. In the participatory observation method, various lectures, conferences and seminars, panel discussions, panel discussions,

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events, programs, pride parades, rallies, film festivals, screening of documentaries were attended and participated. Internet and social media for networking with research respondents were also helpful in completing of this research study.

1.7. Research Field/Area

As the general statement of problem discusses about the problems related with sexual minority persons which is indicative that the problems of sexual minority are available in almost everywhere wherever these sexual minority persons are available. Keeping in view such general statement of problem, Delhi has been selected as research area. It is because of deciding and pending of some legal proceedings in the cases related with sexual minority persons. Secondly, this study looks into the social and legal aspects of problems related with sexual minority persons in Delhi. being a metro city and availability of various working groups and NGOs, this place is selected as research field/area.

1.8. Need of this Research Study

The problems faced by sexual minority persons in India are well known. Not only government but also sexual minorities and society are looking to have solutions for these problems. The Indian judiciary has been trying to provide solutions for this but the situation is still complicated after judgment of different Courts.

1.9. Scope of this Research Study

This research study has a wider scope in its generalisation because the problem under study can easily be generalised as the characteristics of research respondents are same on the basis of qualitative nature. Once some facts have been observed, these may provide a guidance to solve a highly debated, controversial and complicated problem. For the purpose of geographical scope of research study, this study has a scope up to Delhi only. It is also important that at social, academic, legal and political front this study has a great scope by way of including completely new subject under study. This study also puts a new direction for future researchers.
1.10. Limitations of this Research Study

This research study has a limitation of three folds i.e. one from the point of view of orientation and identities as the lesbian, gay, bisexual and transgender (LGBT) persons are taken, second from the point of view of research area i.e. Delhi has been taken for the said purpose and third is relating to the aspect of socio-legal keeping in view the human rights as necessary perspective. This study includes only social and legal aspects and goes to find the socio-legal implications relating to sexual minority persons in Delhi.

1.11. Significance of this Research Study

The most important significance of this research study is related to the formation of society as inclusive one. Out of this research study, various facts related to contribution of sexual minority persons have been explored. The high qualification of sexual minority persons in various fields has a capacity to lead on different points of time. Due to hiddenness or unrecognition of sexual minority persons in mainstream, their identity and skills also remain hidden and silent. Their contribution to society remains unconsolidated. This research study has tried to explore the skill and contributions of sexual minority persons as a person first after that technically and professionally sounds persons as second. The use of these skills may be utilised for whole social welfare, benefits and development.

1.12. Difficulties in Research

During this research study, researcher met with various hurdles came at different points of time. Out of these, one is related to lack of literature or study material as far as the doctrinal method of research is concerned. This particular aspect has been taken very carefully and an empirical study is chosen however, in writing the chapters, a relational and co-relational approach has been taken. From the perspective of various hurdles in carrying this research study, first is related to finding the research respondents i.e. sexual minority persons, second is related to limited interaction, third is related to the fear of disclosing identities and maintaining confidentiality of such sexual minority persons while interacting and mentioning about them in written text, fourth is related to the conservative nature of society and
the complications of law. Keeping in view the above all hurdles and difficulties, the researcher has taken lot of care about these and for maintaining all values and ethics in producing this Ph.D. thesis, only such name, place and related material which can be referred with proper citation are used here, except this, the Ph.D. thesis does not include any specific name, photo, private or personal fact that could harm the identity, privacy and confidentiality of any respondent in any manner. During the research study, the questions were asked and putted to researcher with reference to sexual orientation and gender identity. During the discussion in various paper presentations, lots of hot debates were also up fronted before the researcher.

But, after all these hurdles, many persons were so much supportive because of their understanding the importance of research in general and the issue undertaken in particular. For understanding the need of a specific legislation, it is needful to have a socio-legal study. It is mentioned in the book of Dr. S. R. Myani, that ‘the need for a new law cannot be studied in a better manner without a sociological inquiry’³.

1.13. Important Presentations Relating to Research

Although, the researcher was very keen to attend and present papers in different academic activities like seminar, conference, workshop, lecture, etc. but most of the time, it was passionately vibrant and debating. The discussions were very curious too. During this, the researcher got the opportunities to attend various national and international platforms. Out of many, Mumbai, Thammasat University, Bangkok, Thailand and another at Hotel Palace, Dubrovnik, Croatia (Eastern Europe) were highly most important and of great learning experience for the researcher.

1.14. Chapters’ Scheme

This study has been divided into seven chapters out of which, first chapter consists of the introduction of whole research study produced in all the chapters. The most significant part of this chapter is concerned with fundamental reasons of taking this problem as a research problem and necessary relation between this problem and other socio-legal aspects under human rights perspective. The statement of problem,

objectives, methodology, hypotheses of research, aim, scope, limitation, significance, etc. have been included.

Taking the fundamental knowledge of sexual minorities, sexual orientation and gender identity, second chapter provides the difference between sex and gender with using different theories and further try to understand sexuality in general and homosexuality in particular. Third Chapter refers those organisations, NGO’s and working groups, particularly based in Delhi and are functioning for the protection of rights of sexual minority persons and their related issues. This is in the name of movement for sexual minorities’ rights.

The international human rights framework is discussed as a guide for providing the human rights of all human persons including sexual minorities in fourth chapter. Some specific provisions and principals of international and regional authorities and bodies helped to provide the thinking of equal treatment of sexual minorities at international, regional and national level. This chapter helps to provide the basic nexus to understand all the individuals including sexual minorities as equal and claimant for all basic human rights.

The changing scenario after the case of Naz Foundation had already started thinking for the protection and promotion of sexual minority rights. This reflects the need to fulfil the duties of policymakers, executives and judicial institutions in protecting and promoting the rights of sexual minority persons under the available framework of human rights and through constructing of new policies and laws. Fifth chapter covers those provisions which are already available for protection of basic human rights under Constitution and other statutory laws in India. Sixth chapter is based on the major findings out of empirical data collected from the research respondents. The empirical data is mainly based on the responses of sexual minority persons; sexual minority rights activists, judicial persons, police personals and for strengthening solution some other persons under different institutions like social, legal religion, political etc. For this personal experiences and socio-legal observations through participant observation has been included. This research study was finally turned as case study for that questionnaire and participant observation was best suited.
With having all the information related to research study, the researcher has come to various inferences which are discussed in last i.e. seventh chapter including some concrete suggestions. This chapter does not conclude the further insights of research in particular subject but put certain other issues which will require the prompt need to do future research on the same with having different dimensions and perspectives. This chapter deals with conclusion, suggestions and scope for future research with a suggestive model of legislative bill for the protection and promotion of rights of sexual minority persons.

It was truly a new experience for researcher, when different orientations and identities of a person in terms of sexual minorities came before the researcher. However, because of having a natural approach and a responsible citizen, researcher has putted a best solution for the problem always remained untouched under study, discussion, inclusion and solution. Although, this study has lots of inputs of empirical study but the importance of work done of some persons in the field of sexual minorities’ rights has been included for a general understanding about sexual minority persons. This research study has relationally explored sexual minority persons in general theories and some incidental responses in particular of Indian criminal justice system keeping in view the human rights framework. This research study includes the vast experiences from field study and observations made. Out of many issues involved in the subject, utmost care has been taken and no sexual minority persons’ name is included for protecting right to privacy, right to dignity and right to respect etc. Only such names are referred which are already available in the reference study material. The others’ work has been included with proper citation and reference. With lots of factual realities from the society, sexual minority community and the Indian criminal justice system, this research study is presented for all.