



## **SAME-SEX MARRIAGES- A RIGHT!**

By Pranjal Pagaria

From Symbiosis Law School, Nagpur

### ❖ **ABSTRACT-**

*Homosexuality and sodomy have been a part of Indian culture from a very long time but still in India, it took us a long time to decriminalize them and even after decriminalization we have a long way to go for same-sex marriage laws. Being a former-British colony, this criminalization was a gift from our colonizers, studies prove that out of 71 countries which criminalize homosexuality 50% are former British-colonies. Homosexuality is still seen as a taboo in our country, though the perspective is changing, few years back it was impossible for us to talk about it but today we are easily talking and writing about it. But still there are various factors which are holding our society back and the most important being the procreation, homosexual's inability to procreate tags them as unnatural, some religions and customs treat them as demons or as an abnormality which should be treated. The first thing we should work towards is changing the mindset of people that homosexuality is normal, it is not a disease which a pill can cure.*

**KEYWORDS-** Homosexuality, Sodomy laws, Homophobia, Same-sex marriage, society.

### ❖ **INTRODUCTION-**

- Marriage is the most talked about institution, especially in India where it is an auspicious ceremony for a man and woman who start their new journey with the blessings of the Almighty and their elders. It is a ceremony

full of fun, frolic, feasts, songs and dances. Indian marriages last for almost 3-5 days and include lots of ceremonies like Sangeet, reception, etc. Marriage is a heterosexual affair, but what if two homosexual people want to get married? Will the fun and frolic be same as in a heterosexual ceremony? Should homosexual marriages be allowed? And the most important question, is same-sex marriage, right? According to Ashok Raw-Kavi, a homosexual activist, there are over 50 million homosexuals in our country and majority of them live with their wives!

- Imagine one day your son comes home with a boy and expresses his love for him and desire to marry him! As a parent and member of a society you will be taken aback, you won't be able to believe what your son just said. In those fraction of seconds, millions of thoughts will cross your mind- what will society think? What will happen to my progeny? How I will tell my relatives that my son wants to marry a boy and many more. At that point a father and mother have two options either to choose their son's happiness or to go according to social norms and unfortunately many parents choose the latter option and willingly sacrifice their son's/daughter's happiness.
- In India same-sex marriage is still a taboo people think about their future progeny and forget about their own existing son/daughter, society plays such a big role that people forget about the interests of their own blood! India decriminalized homosexuality in a recent judgment of Navtej Singh Johar V. Union of India in 2018 by reading down a clause of section 377 of IPC which criminalizes consensual carnal sexual intercourse. Even after a Judicial pronouncement, homosexuals are



stigmatized and prejudiced because of their sexual orientation.

All Indians (2011 census)	Percentage estimate	Population 1,210,854,977
All females		586,469,294
Bisexual	2.2	12,902,324
Lesbian	1.1	6,451,162
All males		623,724,568
Bisexual	1.4	8,732,144
Gay	2.2	13,721,941
Transgender	0.3	3,632,565
Total (all LGBT)	3.8	45,440,136

LGBT – Lesbian, gay, bisexual, and transgender

\*Indian Journal of Psychiatry

- I truly believe that everyone has an equal right to live the way he/she wants to and has a right over his body and sexual orientation. It is naturally accepted that a man and a woman would marry in the same way homosexual marriages should be naturally accepted. There are many things which are holding the society back, and in this article, we would be discussing about each factor and why homosexual marriages should not be stigmatized.

❖ **HISTORY:**

- We tend to forget the fact that homosexuality is not something new, it was there in ancient and medieval periods too! The coming of British colonial rule made homosexual marriage a punishable offence.
- There are various ancient texts like Kamasutra which talk about homosexuality and have different notions. This book also

mentions about lesbians as ‘swarinis’ and also mentions that they were readily accepted as the third gender<sup>1</sup>. Hinduism (the largest religion in India) has talked about homosexuality in various ways through themes including drama with homosexual characters from being neutral to antagonistic. Rigveda one of the four canonical sacred texts of Hinduism says *Vikriti Evam Prakriti* (Sanskrit: विकृतिः एवम् प्रकृति, meaning what seems unnatural is also natural), which some scholars believe recognises homosexual/transsexual dimensions of human life, like all forms of universal diversities<sup>2</sup>.

- Many other ancient texts like Baudhayana Dharmasutra and Arthshastra talk about position of homosexuals in that time and how they were punished. Devdutt Patnaik summarizes the position of homosexuals in Hindu culture as, “*Though not part of the mainstream, its existence was acknowledged but not approved.*”
- It is with the coming of British colonial era in India which criminalized homosexuality and sodomy. The legal clause which criminalised homosexuality was section 377 of India Penal Code of 1860, a colonial law. According to International LGBTI association, founded in 1978, out of 71 countries which criminalize homosexuality more than 50% are former British colonies<sup>3</sup>. This brings no surprise because our Penal law which is again a British era law is homophobic. So, the claims that it is because of westernization that homosexuals are in

<sup>1</sup> <https://www.thequint.com/voices/opinion/homosexuality-rss-ancient-indian-culture-section-377>

<sup>2</sup> <https://www.washingtonpost.com/national/religion/in>

[dias-debate-can-hinduism-and-homosexuality-coexist/2015/07/08/3e124270-25a5-11e5-b621-b55e495e9b78\\_story.html](https://www.dias-debate-can-hinduism-and-homosexuality-coexist/2015/07/08/3e124270-25a5-11e5-b621-b55e495e9b78_story.html)

<sup>3</sup> <https://edition.cnn.com/2018/09/11/asia/british-empire-lgbt-rights-section-377-intl/index.html>



India is flawed. Homophobes who proudly consider themselves patriot are the ones who are following the footpaths of our colonizers. Indian culture always had homosexuality and to an extent they were accepted by people. Approximately 49, former British colonies continue to criminalize homosexuality and out these 31 still have the same laws of the British era. Enze Han, author of "British Colonialism and the Criminalization of Homosexuality," analyses that such anti-homosexual laws were a result of strict Victorian model where it was believed any sexual activity which is not capable of procreation is a taboo and the second reason was the theory of sin and conjugal laws. Robert Aldrich in his book 'Colonialism and Homosexuality' explores the impact of colonial policies and laws in criminalising sodomy and homosexuality.

#### ❖ CASES:

- History proves that homosexuality has always been a part of our Indian society but because of the colonizers the mentality changed but to break the chains of colonial impact the Supreme Court has come up with 2 most landmark cases which are break the stigmas related to gender and sexual orientation. The NALSA v. UOI<sup>4</sup> case of 2014 gave the transgender community a legitimate status in our country. A historic moment in Indian history because first time other than female and male a 'third gender' was made legitimate in the country. This case also emphasises on the importance of psychological sex rather than biological sex, by psychological sex we mean the sexual

orientation of the person irrespective of the biological genitals they have. It focuses on the sexual inclination of a person. One more landmark decision was of Navtej Singh Johar v. UOI<sup>5</sup> case of 2018 which legitimized homosexuality in India. The case read down section 377 of the Indian Penal Code which criminalized carnal sexual intercourse and gave it the tag of being unnatural. But the problem arises here, the Supreme court in its latter adjudication declared homosexuals as legitimate in India which means that they can live their lives with full dignity, integrity and respect but all this applies in their private domain. Moreover, this decriminalization does not directly translate to the right to marry. Thus, homosexuals are legal but same-sex marriages are not!

- Homosexual marriage is not something which the court can adjudicate on it comes under the jurisdiction of the Legislature either to give them the right to marriage under Special Marriage Act of 1954 or by bringing up any other legislation which gives homosexuals the equal right, liberty and opportunity to strengthen the footing of their companionship by taking it a step forward through marriage. In a recent statement the centre government indicates disapproval on having same sex laws contending that homosexual marriages, since companionship and marriage are two different things, thus they are not a part of Indian culture and cannot be accommodated through a statute<sup>6</sup>. Another obstacle is the provisions of the Special Marriage Act, 1954 does not recognize the marriage between homosexual

<sup>4</sup> *National Legal Services Authority Versus Union of India and Others* [2014] 3 MLJ 595

<sup>5</sup> *Navtej Singh Johar and Others Versus Union of India, Thr. Secretary Ministry of Law and Justice* [2018] 4 MLJ (CRL) 306

<sup>6</sup> <https://www.hindustantimes.com/india-news/centre-opposes-petitions-for-same-sex-marriage-101614301498359.html>



couple. Recently a gay couple moved the Kerala High court<sup>7</sup>, after being in a relationship for two months they wanted to solemnize marriage but the problem arose when the religious authorities denied, they turned to Special Marriages Act but unfortunately even the act does not recognise homosexual marriages. A similar petition has been filed in Delhi High Court. All these things prove that just bringing about a change is not enough but proper actions should be taken to make the change applicable. Recently the Delhi High Court issued notice to centre seeking a direction to the government to recognize same sex marriages under Hindu Marriage Act and Special Marriage Act<sup>8</sup>. If we talk about legal stand of the homosexuals in the country the *lex loci*, in none of its laws and statutes, mentions that the homosexuals are excluded!

#### ❖ RELIGION:

- With diverse religions comes diverse beliefs and customs. Religion plays such an important role that people talk about homosexuals as they talk about demons and devils. They are treated as outcast and are topics of gossip for aunties! Marriage is religious ceremony and people believe that unnatural things cannot be granted the protection of religion. But when a child is born people call bisexuals to get their blessings for the baby, on one hand you call them for blessings and on other hand you deny them their right to live the way they want!

<sup>7</sup> <https://www.indiatoday.in/india/story/gay-couple-moves-kerala-hc-to-strike-down-provisions-of-special-marriage-act-1640863-2020-01-28>

<sup>8</sup> <https://www.thehindu.com/news/national/hc-asks-centre-to-respond-to-plea-to-recognise-same-sex-marriages-under-law/article33130651.ece>

- One simple reasoning which everyone should apply is that we all call ourselves as the children of God, it is He who made all of us different and He made those people homosexuals then why to treat them differently? They are a part of our society and should have the equal right to decide their life partner. In Navtej Singh Johar case Supreme Court also talks about the right to choose life partner. Religious beliefs are respected and should be respected because they cater our heritage and culture but when these religious beliefs take the shape of superstitious beliefs and lead to curtailment of rights, this is where all the problems start. We saw in Sabarimala case<sup>9</sup> how a superstitious belief curtailed the rights of women to enter the *sanctum sanctorum*. Religion should always be interpreted in a way that it becomes inclusive, as we saw in Shayara Bano<sup>10</sup> case how a religious practice undermined the natural inherited rights of humans.

#### ❖ LIBERTY:

- We claim that people are free to take their own decisions, Freedom of Speech and Expression entitle us to speak our heart out but are we really open to unpopular opinions? Do we accept dissenting opinions? If we think that we are open to all opinions then we need to reflect on our definition of openness. Openness is where we accept what we don't accept, we agree to disagree, do we really hear a homosexual? No, we don't listen to them and we cannot bear their gay colors, their expression through gay color. NALSA

<sup>9</sup> *INDIAN YOUNG LAWYERS ASSOCIATION AND OTHERS VERSUS THE STATE OF KERALA AND OTHERS LNIND 2018 SC 492*

<sup>10</sup> *SHAYARA BANO VERSUS UNION OF INDIA AND OTHERS LNIND 2017 SC 415*



foundation case advocates the expression of the third gender through gay colors and also talks about the difference between biological sex and psychological sex and argued that it is the psychological sex which should be our focus. Psychological sex is basically the sexual orientation of a person- to which sexuality he/she orients him/herself. Equality should be given in terms of psychological sex it should not matter whether I look like a girl or boy but to which sex I orient myself.

- Michel Foucault, a French thinker, wrote a book 'History of Sexuality' where he critically describes the role of medical knowledge in terms of 'correcting' the third gender. He himself was a homosexual, was on anti-depressants and attempted suicides because he was forced to suppress his sexuality and his sexual orientation<sup>11</sup>. This suppression leads to various mental problems, imagine how can a person suppress who he is without being mentally drained?
- Imagine you force your homosexual son to marry a girl whom you chose for him, respecting you and your choice he agrees to marry but do you think he would be happy in that marriage? Would he be able to keep his wife happy when he does not love her? A simple answer, he will not be happy with his life and partner and he would be ruining his partner's life too, then why not give him the liberty to marry someone he loves, no matter a boy, with whom he will relish his life.

#### ❖ EDUCATION:

- Education is the seed of every human intellect and when education is stigmatized and prejudiced towards the third gender the

generation comes out with same mental structure. Often in books we find that gender is bifurcated in two binaries MAN and WOMAN there is no scope for the third gender to be discussed. Talking about LGBTQ+ community is such a taboo that even the education system does not talk about it.

- With the new National Education Policy, 2020 it is expected that the stark gap between the education and third gender will shorten and will get enlightened. At the elementary level if a child is acquainted with the diversity that the world and nature have to offer, it would help him to be open minded and receptive. Paragraph 2.5 of the policy mentions about the inclusion of trained volunteers so from different social backgrounds, this means that gender activists from various backgrounds will get the opportunity to highlight the difference between the biological sex and psychological sex and we should be more concerned with the psychological sex- a person's sexual orientation.<sup>12</sup>

#### ❖ SOCIETY:

- Human being is a social being and it is impossible for a human to live in isolation, moving in the society is the primary activity of a person and same-sex marriage is a very fragile and sensitive topic. For society everything works on the defined norms and principles and anything which goes against the demarcated norms is abnormal, this is the reason why homosexual marriages are looked down in our society. The basic question which should arise in our minds is why to consider the homosexuals as aliens? They are

<sup>11</sup>

<https://www.redalyc.org/journal/851/85147561005/html/>

<sup>12</sup>

<https://theguardian.com/new-education-policy-gender-its-time-to-have-the-talk/>



very much a part of our society and social system, the first reaction society gives after hearing a homosexual marriage is, “They should see a doctor or a psychologist”, why? Homosexuality is neither abnormal nor a disease, it is not something which a pill can correct and why to correct them, they are right in their own ways and we cannot correct something which is not wrong!

- We tend to forget the fact that homosexuality is not something new, it was there in ancient and medieval periods too! The coming of British colonial rule made homosexual marriage a punishable offence. Ancient Indian text of ‘Kamasutra’ by Vatsyayana dedicates a complete chapter on homosexuality. But in India still homophobia is prevalent, homophobia is where people have negative attitude towards the third gender- hatred, aversion, prejudice, etc., In a country like India where sexuality is not openly discussed, the acceptance of homosexual marriage has miles to go!
- One thing which Indian society worries about a lot is ‘Progeny’, a child, procreation which would ensure the continuation of species. Not every human being on this planet is a man, not every human being is a woman in the same way not every human being is a homosexual. Let’s divide the society in two groups, 1<sup>st</sup> group of straight couples (man and woman) who have the capacity to give birth and 2<sup>nd</sup> group of homosexual couples who cannot bear a child, in this covid pandemic we saw many children become orphans because they lost their parents to covid, studies prove that majority of homosexual couples go for adoption, now tell me isn’t it a balance- homosexuals are adopting the

orphan children who have lost their parents? It is a balance and moreover, it is a social work, orphans would get a good household and a better life! It is proven that homosexual couples love their child as much as a straight couple would love.

#### ❖ FAMILY:

- Family is the first and foremost institution which affects the thought-processing, if in a family all social issues are openly discussed it would help the family members to have a broad-minded thinking. If a child is told about all these factors, it is more likely that he/she would have a more liberal thinking.
- Moreover, I believe, equality is more in homosexual families because of the fact that two people of same sex are living together and thus there is no superiority or inferiority of sex in marriage- both earn, spend and live the way they want. In straight couples because of the different sex, the disparity increases and one sex dominates over the other sex.

#### ❖ INTERNATIONAL PERSPECTIVE-

- There is a phrase in academic literature which is often used in the context of homosexuality, that is, ‘Gay Brain Drain’<sup>13</sup>, brain drain is when the Indian human resource migrates to other developed countries for better economic opportunities. But in the context of homosexuality this migration is not for monetary purposes but for the liberty to live a life of their choice. Many people of queer community have migrated to countries which give them the freedom to choose partner based on their sexual orientation than the societal norms and most importantly without any prejudices and stigmas. Homophobes

<sup>13</sup> <https://www.thequint.com/neon/gender/gay-brain-drain-same-sex-marriage-petition#read-more>



who feel that their stigmas are no harmful are unaware of the fact that India loses 1.3 percent of GDP because of suicides, brain drain and anxiety among queer community- a World Bank study. As Charlie Radcliffe, Chief, Global Issues, OHCHR New York, says- *“Gay and lesbian youth are four times more likely to contemplate or attempt suicide. Trans youth are ten times more likely to do so.”*<sup>14</sup>

- Discriminatory practices cost us more than we can ever imagine- lower outputs because of because of lower efficiency as a result of discrimination and exclusion at work place, lower investments in human capital because of discriminations at schools and educational settings<sup>15</sup>. There are 69 countries which still criminalize homosexuality, in some former colonies of the Great Britain death penalty is prescribed for homosexuality- in Yemen, Iran, Saudi Arabia and many northern states of Nigeria.<sup>16</sup>
- ✓ If we look into the history of United States, they decriminalized the homosexual conduct law, which criminalized sodomy, way back in 2003 in the case of Lawrence v. Texas. This landmark decision also changed the 1986 decision in Bowers v. Hardwick where the Supreme court upheld Georgia’s anti-sodomy laws. In 2004 the first legal same sex marriage takes place in Massachusetts. In

2005 California became the first to pass a bill allowing same-sex marriages.<sup>17</sup>

- In June 2015, the US Supreme court granted same sex couples the right to marry in ‘*OBERGEFELL v. HODGES*’, legalizing same sex marriages in 13 states where it was banned, breaking the restrictions of a statute applied in 1996- Defense of Marriage Act<sup>18</sup>. This act even discouraged the practice of adoption because this act saw opposite sex marriage as an only legitimate manner of procreating<sup>19</sup>.
- ✓ Australia decriminalized same sex marriages in 2017 on 9<sup>th</sup> December by passing a legislation “**The Marriage Amendment (Definition and Religious Freedoms) Act 2017**”, passed the Australian Parliament on 7 December 2017 and received royal assent from the Governor-General the following day<sup>20</sup>. This Act amended the ‘Marriage Act’ of 1961 which limited marriages as a union between a man and woman and redefines marriage as *“A union of 2 people, to the exclusion of all others, voluntarily entered into for life”*<sup>21</sup>
- Let us take a look at the statistics around the world which will give us the glimpse of the stand taken by people to include same-sex marriages.

<sup>14</sup> <https://www.weforum.org/agenda/2016/01/the-real-cost-of-lgbt-discrimination/>

<sup>15</sup>

<https://openknowledge.worldbank.org/handle/10986/21515>

<sup>16</sup> <https://www.bbc.com/news/world-43822234>

<sup>17</sup> <https://edition.cnn.com/2015/06/19/us/lgbt-rights-milestones-fast-facts/index.html>

<sup>18</sup> <https://www.cfr.org/backgrounder/marriage-equality-global-comparisons>

<sup>19</sup> <https://www.britannica.com/topic/Defense-of-Marriage-Act>

<sup>20</sup>[https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BriefingBook44p/Marriage](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook44p/Marriage)

<sup>21</sup>[https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22legislation/ems/s1099\\_em\\_s\\_cd9d80d5-a58a-438f-86a4-5500c0990b00%22;rec=0](https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22legislation/ems/s1099_em_s_cd9d80d5-a58a-438f-86a4-5500c0990b00%22;rec=0)



- There are 29 countries in the world which have legitimized same-sex marriages. Out of these 29 countries, 20 have legalized through legislations, 7 countries legalized through court decisions and 2 countries legalized through legislation after court directives<sup>22</sup>.

❖ **CONCLUSION-**

- There is changing notion of same-sex marriages around the world. Even abolition of Sati came as a huge challenge to us but through proper legal provisions the mindset of the people changed. In the same way a small step was taken by decriminalizing homosexuality but a law which gives same sex couples the same legal standing as a straight couple would be a leap in the ambit of Equality.
- Even after existing for so many years now, homosexuals still find it too difficult to have societal approval for their acts. They are still looked at with hatred and repulsion. Why, we still have to fight for the basic human rights? Let's forget about other rights-which include various criterions like being a citizen or being a man or woman, can we just give them the basic inherited human rights for which there is only criterion-to be born as a human!
- In India, according to demographics of 2012 submitted by Government of India to Supreme Court, approximately 2.5 million gay people are there<sup>23</sup>. This number only caters those people who have declared to the Ministry of Health. People are not open about it because society is not acceptable and friendly enough to accommodate their special needs, requirements and desires. They are still a subject of mockery for many of us, we call them names, we call people lesbians and

gays as if these names are equivalent to abuses or expletives! This is where we should start our learning, being a homosexual is not a choice neither it is an immoral thing, they are born humans and have a right to lead a healthy, respectful, dignified and loved life like any other man or woman and thus, should be given the equal right to marry according to their desires!

- Few years and till now also, we had and have fights for equal rights of man and woman, now the demand for equal rights for homosexuals is similar to that. Like any straight couple has a right to have religious and legal sanction for their relationship by marrying in the same way homosexuals have the right to legitimize their relation by marrying. Every relationship is based on love and respect and even the homosexuals have the right to overtly express their love for their partners.
- Everyone wants to live a normal and happy life, even if they are not considered to be normal, all couples want to marry, have children and dream to grow old together and we are no one to snatch away their dreams based on our stigmas and prejudices and just because we do not feel them to be normal. For me I am normal and thus I have a right to lead a good life with the one whom I love! People with different sexual orientations lead a very difficult and discriminated lives, this is the least we as a society can do for them as they are the part of our society.
- Homosexual couples live a very normal life-they work together, live together and share every burden- per se their lives do not have any problems, the problems are we, we as

<sup>22</sup> <https://www.hrc.org/resources/marriage-equality-around-the-world>

<sup>23</sup> <https://www.bbc.com/news/world-asia-india-17363200>



society pose problems to them and make their lives troublesome, in each aspect they are differently treated- for filing income tax they need to have more documentations with them to prove their relationship, same for loans and financial aids. The worst part of all is this that even the parents do not support their child, in very rare cases the parents accept the reality and still treat their child normally, there are various examples where parents of one partner do not agree. They live in a constant fear of discrimination and disrespect.

justice, this same equality (equity) is what we need for homosexuals even. When all people of the society are doing what they want to or what their basic human rights permit them to do, then only we can proudly hail 'Unity in Diversity'.

THANK YOU

\*\*\*\*\*

- Worldwide there is an awareness regarding the rights of homosexuals, from 1981 there is an increase in awareness and acceptance for homosexuals globally, according to Global Acceptance Index, data collected from 174 countries 75% have experienced an increase in acceptance.
- ✓ 131 countries have experienced change in social attitude and awareness towards homosexuals. Brazil, USA, Canada, Great Britain and Japan have experienced a positive change in LGBTQ rights and liberties where US and Brazil had a very steady growth.
- ✓ 16 countries have shown a decline and 27 countries showed no change.
- ✓ India has shown increased acceptance from mid 2000s and then had a slight decline but showed a surge from 2010.<sup>24</sup>
- For the healthy existence of society, it is important to give equal rights to all and to recognize the needs of everyone be it homosexual. In India, we talk about Substantive Equality, where we keep in mind the social, economic and historical backgrounds of the classes while imparting

<sup>24</sup>

<https://globalphilanthropyproject.org/2018/06/13/new-global-acceptance-index-gai-reports/>