

## **SAME-SEX UNIONS, LEGALITY AND ACCEPTANCE IN THE SOCIETY**

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### **ABSTRACT**

Many people deem homosexuality to be a sin or a crime and also believe that homosexuality is a mental illness or an outrageous practice. The law of the nation holds a prominent position in the daily lives of lesbian, gay, bisexual, and transgender (LGBT) people. LGBT communities in the world still lack social equality, denied most of the fundamental rights, and face discrimination. Homosexuality is outlawed in 71 countries and even punished by death in 13 countries around the world. Recently, the Honorable Supreme Court of India decriminalized homosexuality and also regarded that homosexuality is not an unnatural offense. After the verdict, the awareness and social acceptance of LGBT communities in India have improved compared to the past. But the legalization and recognition of same-sex unions or marriages in India still stand as a question. This paper examines the meaning of homosexuality and gives shreds of evidence about homosexuality in the past. Many people suspect the history of homosexuality and the description of Vedas about homosexuality. This paper will surely clear that doubt and gives evidence of homosexuality in ancient society through religious texts and literature. The authors have addressed the legality of homosexuality in India and other countries and have presented some cases which made the path to legalize homosexuality in India. This paper reflects the perspective of the United Nations Organization on homosexuality and same-sex unions and talks about homosexuality under the range of UDHR, ICCPR, and Right to Privacy. The authors have expressed their own opinion about the acceptance of LGBT

communities and Same-sex unions in Indian society. Finally, the authors have given some suggestions to improve the rights of LGBT communities and same-sex unions. Thus, the authors hope that the paper will help the readers to learn about LGBT communities and the legality of same-sex unions.

## **HOMOSEXUALITY MEANING**

Oxford Dictionary defines Homosexuality as “the state of being sexually attracted to people of the same sex.”<sup>i</sup> Homosexuality is referred to as Gay in men and Lesbian in Women. In many cultures and countries, the practice of homosexuality is sinful and agreeable to some. Many religions view homosexuality and sexual orientation other than heterosexual as immoral, but some groups or sects within them admit LGBTQ (Lesbian, Gay, Bisexual, Transgender, and Queer) rights. In recent days several countries have accepted homosexuality as the event of Gay rights campaign and struggles of activists. The foremost advocates of Homosexuality are Human rights activists, scientific groups, and civil rights organizations, and the opposing people are Religious and cultural people, fundamentalists, and conservative groups. Till now, more than 27 countries have granted homosexuality legal, and many countries are settling on the issue.

## **MARRIAGE**

The word same-sex marriage has been acknowledged and admitted by renowned dictionaries. The Black's dictionary attached the word Same-sex marriage into the definition of marriage in the 2004 edition and Webster's dictionary also incorporated it in 2003. Black's Law dictionary defines same-sex marriages as "*The ceremonial union of two people of the same sex; a marriage or marriage-like relationship between two women or two men*".<sup>ii</sup>

Most countries preferred not to address homosexuality, and they are traditionally against such practices. Some countries criminalized the practice and have penal provisions to punish the persons associated. The countries that are against the practice of homosexuality view it to be a mental or psychiatric illness and don't recognize their marriages.

## HISTORY

In ancient Greece, a habit of love between an adult male and a young boy lived and was called *Paidierastia* (*Pederasty*), which means love of boys.<sup>iii</sup> In Pederasty, two roles are prevalent, *erastês* and *erômenos*, which come following the God of Love, Eros. Plato has written *Paidersatia* in his work *Symposium* but later advocated for its prohibition. Aristotle rejects Plato's assertion of the ban of homosexuality in his work *Politics*. The Woman poet Sappho also records homosexuality in women in her poetry. She is from the island of Lesbos, and thus came the word Lesbian from the island where Sappho lived. In ancient Egypt, the paintings of Nyankh-Khnum and Khnum-Hotep<sup>iv</sup> from circa 2494 BC talks about homosexuality, and we get proof of homosexuality in the story of Horus and Seth from Kahun Papyri. R.B. Parkinson says there is no indication in the Egyptian documents to determine, homosexual practices were guilty at that time.<sup>v</sup> In Rome, love between two girls Iphis and Lanthe is recorded in the *Metamorphoses*<sup>vi</sup>, by Publius Ovidius Naso in 8 AD. Homosexuality is a sin in Abrahamic religions, and their classical texts offer proof for the punishments awarded to persons indulging in same-sex practices. The Mosaic Law condemns men having sex with men in Leviticus 18<sup>vii</sup>, and executes the death penalty<sup>viii</sup>. Bible registers two cities of Sodom and Gomorrah in Genesis, where homosexuality was in practice. In Japan, researchers assert that emperors had homosexual relations, and in the Heian Dynasty literature, there are shreds of evidence of homosexuality practiced. Thus, it is visible that the practice of homosexuality existed in the ancient era and was punishable in some cultures.

## HOMOSEXUALITY IN ANCIENT INDIA

In India, images of homosexuality can be viewed in the Khajuraho temple (950AD-1050AD), Ajanta (2nd to 4th century BCE), and Ellora caves (600-1000CE) as sculptures. Similar artwork is seen in Konark Temple (1250 CE) and pillar caves of Karle (2nd century BCE).

The *Naradasmṛiti* and *Sushruta Samhita*, two important scriptures from ancient India relating to dharma and medicine, respectively, declare homosexuality to be unchangeable and forbid homosexuals from marrying a partner of the opposite sex. The *Naradasmṛiti* lists fourteen types of *panda* (men who are impotent with women); the *mukhebhaga* (men who have oral sex with voyeur who watches other men engaging in sex). The old Indian text *Kamasutra*<sup>ix</sup> converses

about same-sex relations and attractions. Kama sutra uses the terms *Tritiya-Prakriti* to define men with homosexual desires, Svarini to define women with homosexual desires and *Kami* or *Paksha* for bisexuals.

Lord Shiva is often represented as '*Ardhanarishvara*', with a dual male and female nature. Hindus will also worship the transgender such as Ardhanarishvara, Aravan (a hero whom Lord Krishna married after becoming a woman) and Lord Ayyappa (a god born from the union of Lord Shiva and Mohini - the female incarnation of Lord Vishnu).

## **SAME-SEX MARRIAGES**

The legalization of same-sex unions in the contemporary era began in 1970. The first country to authorize the same-sex relationship as a registered partnership was Denmark (1989), but no right was proffered relating to the adoption of a child. Later in 2012, Denmark declared same-sex marriages legal. The Netherlands became the first country to legalize same-sex marriages in 2001 after the parliament passed the bill for the before-mentioned marriages. After that, many as more than 25 countries including, the United States of America, the United Kingdom, France, Germany, Australia, Canada, Spain, and Mexico. Some Asian countries such as Israel, India, China, Taiwan, Nepal, Philippines, Japan, Hong Kong, and South Korea are welcoming to LGBT rights, while some like Afghanistan, Saudi Arabia, Iran, and Brunei punish same-sex relationships with the death sentence.

## **UNITED NATIONS AND SAME-SEX MARRIAGES**

The United Nations held that the law restricting sexual relationships with same-sex men violates the International Human rights law in the case of *Toonen v Australia (1994)*.<sup>x</sup>

Nicholas Toonen is an LGBT rights activist. He argued that the provisions in the Tasmanian Criminal Code which criminalize same-sex relationship in private and contend that it violated the human rights and was bound for causing discrimination towards the LGBT communities in

Australia. The Human Rights Committee endured that the consensual sex between men falls under the concept of privacy under Article 17 of the International Covenant on Civil and Political Rights<sup>xi</sup> and held that the Tasmanian Criminal code violates the right to privacy. It resulted in the repealing of such laws, and Australia passed Human Rights (Sexual Conduct) Act<sup>xii</sup>, legalizing sexual relationships between adults with consent.

The United Nations also clarify that Article 16 of the Universal Declaration of Human Rights<sup>xiii</sup>, Right to Marry and to found a family includes same-sex unions. The other Articles of the Covenant have “everyone and all”, but Article 16 specifically states “men and women”. It can’t be interpreted as particular to the marriage of Heterosexual marriage but for Homosexual marriages also.<sup>xiv</sup>

In 1994, the United Nations lifted homosexuality from the International Classification of Diseases<sup>xv</sup>, explaining that it was not a mental or psychiatric illness. Following that, the United Nations has been involved in resolving the problem of LGBT communities through ILO, UNDP, UNESCO, UNICEF, OHCHR, UNFA, and UNAIDS. In 2011, the United Nations Human rights council passed its first resolution on sexual orientation and gender identity, supporting LGBT communities<sup>xvi</sup>. In 2013, the ILO issued research on the discrimination faced based on sexual orientation and gender identity<sup>xvii</sup>. The UNDP published a research paper on Transgender health and human rights.<sup>xviii</sup> OHCHR has put works into building a campaign “free and equal” (UNFE)<sup>xix</sup> for LGBT communities and solve their hindrances.

In 2015, ILO, OHCHR, UNHCR, UNWOMEN, UNAIDS, and other UN organizations delivered an official statement inviting for the states to respond to end the violence, discrimination, and bigotry against the LGBT community, minors, and children.<sup>xx</sup>

## **LGBT RIGHTS IN OTHER COUNTRIES<sup>xxi</sup>**

### ***Countries which has improved the rights of LGBT***

In 2012, the Argentina government passed the Gender Identity Law to allow the change of gender on birth certificates for transgender people. In 2010, they legalized same-sex marriage,

and also transgender people have the right to adopt children. Followed by Argentina, Uruguay, Mexico, and Colombia also legalized same-sex marriage and adoption by transgender people. Recently, in Vietnam, a rally was conducted by the LGBTs people, and it is reported that Vietnam's Ministry of Justice has backed plans to legalize same-sex marriage.

Vincent Wijesingha had become Singapore's first openly gay politician. In 2012, Joyce Banda, the President of Malawi had announced that criminalizing homosexuality would be repealed. Prime Ministers of Trinidad, Tobago, and Jamaica also expressed their wishes to repeal the laws that ban homosexuality.

England and Wales passed the Marriage (Same-Sex Couples) Act to legalize same-sex marriage. The Supreme Court of the US struck down the Defense of Marriage Act, which prevented same-sex marriage. Denmark, Brazil, France, and New Zealand have also legalized same-sex marriage. Northern Cyprus is the only country in Europe where homosexuality is still illegal.

### ***Countries which have worsening rights of LGBT***

In Iran, homosexuality is punishable by death and people who support LGBT communities' rights are also harassed by others. Nigeria's anti-gay laws are becoming ever more draconian. In Nigeria, same sex relationships are punished with a 14 years' imprisonment. In Uganda, homosexuals are being punished with the death penalty. If any person is found guilty of being gay, he will be punished with life imprisonment. Any person who suspects someone as gay will also be punished if they do not report them. Homosexuality is illegal in 38 African countries.

## **LEGALITY OF LGBT RIGHTS IN INDIA**

In 1861, the British in India introduced the Indian Penal Code. In the code, section 377 defines homosexuality and unusual sexual practices as a crime and declares it to be against the order of nature. This sort of Britisher's view towards homosexuality and some sexual practices were prevalent due to their faith in Christianity. Several public interest litigations have been filed against section 377 to make it unconstitutional. The important PIL which succeeded in decriminalizing section 377 is **Naz Foundation v. Union of India**<sup>xxii</sup>. In this case, the Naz

Foundation and NGO filed a Public Interest Litigation (PIL) at the Delhi High court to demand that Section 377 of the Indian Penal Code be unconstitutional. In 2009, the Delhi Judicature held that Section 377 of the Indian Penal Code violates Article 14, 15, and 16, and therefore it was declared to be unconstitutional.

But, in 2013, the Supreme Court passed **Suresh Kumar Koushal vs. Union of India**<sup>xxiii</sup>, where homosexuality was re-criminalized. Ban ki-Moon, then UN Secretary-General stated on his visit to India that he confronts the idea of criminalization of same-sex practices based on colonial law. In 2017, the Supreme Court of India held that Article 21 of the constitution, which confers the Right to Life and Personal Liberty, includes the Right to Privacy. The judgment held that discrimination and hatred based on sexual orientation are very vile, and it is against the honor and self-worth of the person. It held that the Right to Privacy includes sexual orientation. The right to Privacy and sexual orientation is assured, under Article 14, 15, and 21. In 2018, in **Navtej Singh Johar vs. Union of India**<sup>xxiv</sup>, multiple Public Interest Litigations were filed by the LGBT community to decriminalize Section 377 of the IPC. The court held that Section 377 of the IPC violates, Article 14, 15, 16, and 19(1) (a) and decided to strike down the provision. The court decided that consensual sex between two adults cannot be regarded as a criminal offence and declared the old law criminalizing it to be irrational. This judgment is one of the landmark judgments on the way for LGBT rights in India.

## LEGALITY OF SAME SEX MARRIAGES IN INDIA

Same-sex unions are not recognized in India presently. There are several marriage laws in India for different religions, as India is a very diverse country. The marriage tradition and customs differ from communities and religions in India. The laws of marriage in India are

- Hindu Marriage Act, 1955
- Muslim Personal Law
- Indian Christian Marriage Act, 1862
- The Parsi Marriage and Divorce Act, 1936
- The Special Marriage Act, 1954
- The Foreign Marriage Act, 1969

These marriage laws have a hetero-normative approach to marriage and have no specific provision acknowledging same-sex unions. The only state in India to have a Uniform Civil Code for marriage is Goa, but that too addresses the marriage between opposite sexes and not homosexual persons. In 2018, in the case of **Shakthi Vahini v Union of India**<sup>xxv</sup>, the Supreme Court held that the Right to marry a person based on their choice is a fundamental right. *It* held that the approval of the family, society, community, gentlefolk, or any other third party is not required. Based on the judgments of **Shakthi Vahini v Union of India** and **Navtej Singh Johar vs. Union of India**, it could be interpreted, that same-sex marriage can be legalized in India. It can be done, under the Special Marriages act as it is the secular law on marriages in India.

In **Arun Kumar vs. Inspector General of Registration**<sup>xxvi</sup>, the Madras High Court held that the word woman covers transgender also. The Hindu Marriage Act says that the word marriage includes only marriage between men and women. This judgment allowed Transgender to marry under the Hindu Marriage Act, and further, the court held that transgender people can identify themselves as women and brides as well.

### **WILL INDIAN SOCIETY ACCEPT HOMOSEXUALITY?**

Section 377 of the Indian Penal Code is decriminalized, by the Honorable Supreme Court, and consensual sex among adults of the same gender is allowed, but it is a billion-dollar question, will the Indian society accept homosexuality? However more countries and their societies accept homosexuality, it is hard for society in many parts of India, to even accept inter-caste and interfaith marriages. Some parents even today, perceive love relationships even between an adult boy and a girl to be a sin or a forbidden act. If people marry or love different caste people, these parents are even unhesitant to kill their son or daughter in the name of honor. In this kind of society, it is hard for parents to accept same-sex relationships and marriages. LGBTs mostly are not accepted, by their family members, and some are expelled from their homes. Many people of LGBT communities commit suicide because of the rejection of society and loneliness. Some are forcefully married to the opposite genders without their consent. There are instances of gay men dragged to brothels by their own family to develop a sexual desire for the opposite sex. It is worse for, in the case of Lesbians, they just get forcefully



wedded to men. Conversion therapy is widely practiced, to replace the sexual orientation of the individual, but scientists assert it to be a pseudoscientific approach<sup>xxvii</sup>, and it doesn't work. It only leaves an incurable wound and pain in the minds and hearts of the individual. The Supreme Court's verdict striking down the criminalization of homosexual practices flags the way for the acceptance of homosexuality in India. Mainly the persons who are against homosexual behavior argue that it is an anti-cultural or mental illness or a hormone problem. It is to be made clear that the law of a country is not completely based on cultures but based on justice, reason, and rationality. Although Sati (where the widow is forced into or throws herself into the funeral fire of her husband), child marriage, not allowing widows to remarry were also a part of our culture, we struck down it because it was unreasonable and was against the principle of justice. Scientists, doctors, and psychologists say homosexuality to be human nature. Sigmund Freud, the father of psychoanalytical treatment, says that homosexuality is not an illness, and it is nothing to worried or degraded<sup>xxviii</sup>. So, the people who are against homosexuality should understand the problems faced by them, accept them in society and stop violence and discrimination against them. We positively hope the society one day accepts LGBT communities and ensures social security for them.

## **FOLLOWINGS ARE RECOMMENDED TO EFFECTIVE THE LGBTs' RIGHTS**

1. Enacting special legislation for LGBT welfare and to legalize Same-sex Marriages
2. Presenting opportunities in social and economic activities
3. Need to protect LGBTs rights and establish a separate commission to safeguard them.
4. To make awareness about their rights and benefits
5. Improving society's approach and thought towards the LGBT people
6. Allow LGBT couples to adopt children and allow surrogacy.

7. Providing counselling and awareness to the parents and other persons about Homosexuality, that it is not a mental disorder
8. Develop penal provisions to punish, who force persons to take conversion therapy.
9. Free health facilities should be provided by the states to them
10. Give educational and psychological support to LGBT communities

## CONCLUSION

Homosexuality is a component of human sexuality and had existed throughout history. The LGBT communities are also humans, and they have the right to life, dignity, and the right against discrimination. Many countries permit consensual sex between adults, irrespective of their sex and gender, and some legalize same-sex unions. The Constitution of India guarantees equality of laws and equal protection to every man, woman, and it includes the members of the LGBT community too. Every person should be treated equally to other persons, and nobody is superior or inferior to anyone. Proper education, support, and safety should be granted to the LGBTs, and the government should take measures to generate awareness about LGBT rights. The engagement of society is also required to build awareness and to make people accept homosexuality and LGBT communities, and people's involvement is essential to end discrimination and prejudice against them. Same-sex marriages are legal in over 25 countries.

## ENDNOTES

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